

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CLINTON GOURMET CORP. : DECISION
for Revision of a Determination or for Refund of : DTA NO. 828590
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period August 1, 2009 through :
August 31, 2013. :

Petitioner, Clinton Gourmet Corp., filed an exception to the determination of the Administrative Law Judge issued on January 10, 2019. Petitioner appeared by Israrul Hasan, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on April 30, 2019, the due date for petitioner's reply brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts appear below.

1. Petitioner, Clinton Gourmet Corp., filed a petition that was received by the Division of Tax Appeals on February 12, 2018. The envelope containing the petition bears a United States Postal Service (USPS) priority mail label, indicating that the petition was mailed on February 8, 2018.

2. The petition included a copy of a notice of determination bearing audit case number X-685865875, dated as issued to petitioner on June 2, 2017.

3. The petition challenges only the foregoing notice of determination, and there were no other statutory notices attached to the petition.

4. On July 31, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition (notice of intent). The notice of intent stated, in sum, that as the petition had been filed in excess of 90 days after issuance of the notice of determination, the petition was not timely filed.

5. In response to the issuance of the notice of intent, the Division of Taxation (Division) provided the following: (i) an affirmation, dated October 12, 2018, of Justine Clarke Caplan, an attorney employed by the Office of Counsel of the Division; (ii) a copy of the petition; (iii) a copy of the notice of intent, dated July 31, 2018; (iv) a copy of the June 2, 2017 notice of determination with the associated mailing cover sheet addressed to petitioner; (v) an affidavit, dated September 17, 2018, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS); (vi) a

“Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked June 2, 2017; (vii) an affidavit, dated September 18, 2018, of Fred Ramundo, a supervisor of the Division’s mail room; (viii) a copy of a conciliation order issued by the Division’s Bureau of Conciliation and Mediation Services (BCMS) on February 23, 2018 (CMS No. 000301491); (ix) a copy of petitioner’s request for conciliation conference, filed with BCMS via facsimile on February 8, 2018; and (x) a copy of petitioner’s quarterly ST-100 New York State and local sales and use tax web filed return, for the filing period of 12/01/16 - 02/28/17, filed on March 17, 2017, bearing stamp number SW1705806221. This tax return lists the same address for petitioner as that listed on the notice of determination and the petition, and was the last tax return filed with Division before the notice of determination was issued.

6. In response to the issuance of the notice of intent, petitioner’s representative submitted a letter, dated October 2, 2018, claiming that petitioner did not receive the notice of determination, and that the petition was filed timely following the issuance of the conciliation order.¹ Petitioner’s representative also submitted a letter from the Bulk Sale Unit at the Department of Taxation and Finance, dated April 10, 2017, and a copy of a conciliation order dated February 23, 2018 (CMS No. 000301491).

7. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Picard is the

¹ Petitioner checked the box on the petition indicating that a conciliation conference was not requested. Unknown to the Division of Tax Appeals, petitioner filed a simultaneous request for conciliation conference with BCMS on February 8, 2018. BCMS issued a conciliation order (CMS No. 000301491) on February 23, 2018, dismissing petitioner’s request for conciliation conference on the grounds that the request was untimely. The petition in this case was filed prior to BCMS issuing the conciliation order. Petitioner has not filed a petition challenging the conciliation order.

Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS), and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of their mailing. The CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing.

Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "6/2/17." The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

8. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Address, Street, and PO Address."

9. The June 2, 2017 CMR consists of 19 pages and lists 199 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 19, which contains 1 entry. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated June 2, 2017 to each page of the CMR, wrote the

number “199” next to the heading “Total Pieces Received at Post Office” on page 19, and initialed or signed each page of the CMR.

10. Page 4 of the CMR indicates that a notice with a certified control number 7104 1002 9730 0134 0484 and reference number X-685865875 was mailed to petitioner at the New York, New York, address listed on that notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. The affidavit of Fred Ramundo describes the general operations and procedures within the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope, so that the address and certified number from the mailing cover sheet shows through the window. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room employee further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number of the CMR. As noted, the CMR attached

to the Picard affidavit as exhibit “A” contains a USPS postmark dated June 2, 2017. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials indicates that all 199 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on June 2, 2017.

12. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner on June 2, 2017, as claimed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the standard of review in the present matter is the same as that of a summary determination motion. The Administrative Law Judge pointed out that such a motion may be granted where no disputed material issue of fact exists.

The Administrative Law Judge observed that there is a 90-day statutory time limit to file a petition following the issuance of the notice of determination. The Administrative Law Judge also observed that the Division bears the burden of establishing that it mailed the notice to the taxpayer’s last known address using certified or registered mail. According to the Administrative Law Judge, the Division must establish its standard mailing procedure and that such procedure was followed in this specific case to meet this burden.

The Administrative Law Judge concluded that the Division met its burden and established that the subject notice of determination was properly mailed to petitioner on June 2, 2017. Specifically, the Administrative Law Judge found that the submitted affidavits and the CMR establish both the Division’s general mailing procedure and that such procedure was followed in the present case. The Administrative Law Judge also found that the address to which the notice of determination was mailed was petitioner’s last known address. Finally, the Administrative

Law Judge concluded that petitioner's claim that it never received the notice was insufficient to rebut the presumption of receipt that attaches with proof of proper mailing. The Administrative Law Judge thus concluded that the petition in the present matter was filed beyond the 90-day limitations period. Accordingly, he dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner continues to assert that it never received a copy of the June 2, 2017 notice of determination. Petitioner also contends that a "revised" petition, to which a copy of the February 23, 2018 conciliation order dismissing request was attached, "was mailed/faxed" to the Division of Tax Appeals on May 10, 2018. As a copy of such revised petition was provided to the Division within 90 days of the date of the conciliation order, petitioner contends that the revised petition was timely filed.

To support its claim regarding a revised petition, petitioner submitted documents on exception that were not part of the record before the Administrative Law Judge. Specifically, petitioner submitted a copy of a petition dated May 10, 2018, indicating that a conciliation conference had been requested and that a conciliation order was issued on February 23, 2018. Petitioner also submitted a fax log sheet indicating a fax transmission from petitioner's representative to the offices of the Division of Tax Appeals on May 10, 2018.

The Division contends that the evidence submitted in response to the notice of intent establishes proper mailing of the notice of determination to petitioner's last known address on June 2, 2017 and that the petition filed on February 8, 2018 was untimely. The Division also contends that there is no evidence in the record to show that petitioner filed a petition protesting the conciliation order dismissing request dated February 23, 2018. Accordingly, the Division

asserts that the Administrative Law Judge correctly dismissed the petition.

OPINION

The Administrative Law Judge’s dismissal of the petition was made following the Supervising Administrative Law Judge’s issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). Such a motion “shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

“The proponent of a summary judgment [or determination] motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (citations omitted)” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The opponent of such a motion “must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1992] *citing Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice, with certain exceptions not relevant here (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of

Conciliation and Mediation services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). Absent such a timely filed protest, a notice of determination becomes an assessment subject to collection (Tax Law § 1138 [a] [1]). The 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of Am. Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [protest filed one day late is untimely]). A petition or request for a conciliation conference must be timely filed for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see e.g. Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of Papaye Restaurant, Inc.*, Tax Appeals Tribunal, May 12, 2016).

Where, as here, the timeliness of a taxpayer’s petition is in question, we must first examine whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by “producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)” (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

The Division has met its burden. The affidavits of Ms. Picard and Mr. Ramundo establish the Division’s standard mailing procedures. The CMR has been properly completed and thus shows that the Division’s standard mailing procedure was followed in this instance (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Furthermore, the address on the notice of

determination and the mailing cover sheet matches petitioner's address as reported on the last sales tax return filed by petitioner prior to the mailing of the notice. The notice was thus properly addressed (*see* Tax Law §§ 1138 [a] [1], 1147 [a] [1]). Accordingly, we agree with the Administrative Law Judge's conclusion that the Division's evidence proves that the notice of determination was properly mailed to petitioner on June 2, 2017, as claimed.

Petitioner does not contend that it filed a petition within 90 days of issuance of the notice of determination. Rather, petitioner concedes that its petition was filed on February 8, 2018, well beyond the 90-day limitations period. While petitioner claims that it did not receive the notice of determination, it offered no evidence in support of this claim. As the Administrative Law noted, such a "mere denial" is insufficient to rebut the presumption of receipt that attaches to a properly mailed notice of determination (*see Matter of Ahmed* quoting *Matter of T. J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3rd Dept 1986]).

Accordingly, we agree with the Administrative Law Judge's conclusion that the petition filed on February 8, 2018 is untimely and that the Division of Tax Appeals and this Tribunal are without jurisdiction to consider its merits (*see Matter of Ahmed*).

Although petitioner asserts that it filed a revised petition on May 10, 2018 in protest of the February 23, 2018 conciliation order, there is no such revised petition in the record. Petitioner did not submit a copy of any such petition in response to the notice of intent to dismiss (*see* footnote 1). Petitioner did submit a copy of such a revised petition on exception. However, consistent with our commitment to providing a fair and efficient administrative hearing process and our longstanding policy, we do not consider documents on exception that were not part of the record before the Administrative Law Judge (*see e.g. Matter of Shi Ying Tan*, Tax Appeals

Tribunal, October 16, 2014).

Even if we did consider the May 10, 2018 revised petition, the end result for petitioner would be the same. That is, although such a petition would be a timely protest of the conciliation order, petitioner's underlying protest of the notice of determination via the request for conciliation conference would remain untimely. Hence, the Division of Tax Appeals and this Tribunal would remain without authority to consider the merits of the protest (*see Matter of Papaye Restaurant, Inc.*).

We find, therefore, that the Administrative Law Judge properly dismissed the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Clinton Gourmet Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Clinton Gourmet Corp. is dismissed.

DATED: Albany, New York
September 19, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner