

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DIANA BORTNIKOVA	:	DECISION
for Revision of Determinations or for Refund of	:	DTA NO. 829559
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the period March 1, 2017 through	:	
February 28, 2018.	:	

Petitioner, Diana Bortnikova, filed an exception to the determination of the Administrative Law Judge issued on June 4, 2020. Petitioner appeared by her spouse, Aleksei Koutin, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for issuance of this decision began on August 28, 2020, the date that petitioner's letter brief in reply was received.

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

ISSUE

Whether petitioner filed timely requests for conciliation conferences with the Bureau of Conciliation and Mediation Services following the issuance of notices of determination assessment ID numbers L-048088315 and L-048088317, and notices of estimated determination assessment ID numbers L-048088316 and L-048088318.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These findings of fact are set forth below.

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protests of the following two notices of determination and two notices of estimated determination (notices):

Notice #	Type of Notice	Period Ending	Notice date
L-048088318	Notice of Estimated Determination	05/31/17	05/15/18
L-048088317	Notice of Determination	11/30/17	05/15/18
L-048088316	Notice of Estimated Determination	08/31/17	05/15/18
L-048088315	Notice of Determination	02/28/18	05/15/18

2. All of the notices were addressed to petitioner at a Woodridge Run Dr., Tampa, Florida, address.

3. Petitioner filed two requests for conciliation conferences with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices (requests). The first request was filed in protest of notices L-048088315, L-048088316 and L-048088317; the second request was filed in protest of notice L-048088318. Both requests were postmarked August 14, 2019 and marked as received by BCMS on August 19, 2019.

4. On September 13, 2019, BCMS issued to petitioner conciliation order CMS No. 000314092 dismissing petitioner's protest of notice L-048088318 and conciliation order CMS No. 000314094 dismissing petitioner's protest of notices L-048088315, L-048088316 and L-048088317 (conciliation orders).

5. The conciliation orders indicated that BCMS had determined that petitioner's protests of the notices were untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on May 15, 2018, but the request was not mailed until August 14, 2019, or in excess of 90 days, the request is late filed.”

6. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation orders on September 24, 2019.

7. To show proof of proper mailing of the four notices at issue herein, the Division provided the following: (i) an affidavit of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS), dated January 8, 2020; (ii) an affidavit of Fred Ramundo, a supervisor in the Division's mail room, dated January 14, 2020; (iii) a “CERTIFIED RECORD FOR PRESORT MAIL” (CMR) postmarked May 15, 2018; (iv) an affirmation of the Division's attorney, Anita K. Luckina, dated February 4, 2020; (v) a copy of each of the four notices with the associated mailing cover sheets addressed to petitioner; and, (vi) a copy of a printout from the Division's e-MPIRE database reflecting that petitioner's mailing address was the Woodridge Run Dr., Tampa, Florida, address.

8. According to the affirmation filed by the Division's attorney, Anita K. Luckina, petitioner's Woodridge Run Dr., Tampa, Florida, address reflected in the Division's e-MPIRE database was supplied by the United States Postal Service (USPS) national change of address database and was the last known address the Division had for petitioner prior to issuance of the notices. Petitioner's Woodridge Run Dr., Tampa, Florida, address, as reflected in the Division's e-MPIRE database, is the same address as provided by petitioner on her requests for conciliation

conferences and the petition, except that the Division's e-MPIRE database address for petitioner includes an additional four zip code digits to petitioner's five digit zip code as provided on her requests for conciliation conferences and the petition. A review of the USPS's website indicates that the additional four zip code digits found in the Division's e-MPIRE database for petitioner's address are in fact the correct additional four zip code digits for that address. Petitioner's address, as reflected in the Division's e-MPIRE database, is the same address for petitioner as provided on the notices.

9. The affidavits of Deena Picard, who has been in her current position since May 2017, and a Data Processing Fiscal Systems Auditor 3 since February 2006, set forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS), which generates statutory notices prior to mailing. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Picard is familiar with 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 mailing. Each page of 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 is manually changed on the first and last page of the CMR to the actual date of mailing. In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. 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.

10. 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 Division's return address on the front, and 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 ADDRESSEE, STREET, AND P.O. ADDRESS."

11. The May 15, 2018 CMR consists of 55 pages and lists 595 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 55, which contains one entry. Ms. Picard notes that the copy of the CMR 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 May 15, 2018, to each page of the CMR, wrote the number "595" on page 55 next to the heading "TOTAL PIECES RECEIVED AT POST OFFICE," and initialed page 55.

12. Page 52 of the May 15, 2018 CMR indicates that the four notices, with their respective certified control numbers, were mailed to "BORTNIKOVA-DIANA" at the Woodridge Run Dr., Tampa, FL address listed on the notices:

Notice #	Certified Control #
L-048088315	7104 1002 9730 0250 7817
L-048088316	7104 1002 9730 0250 7824
L-048088317	7104 1002 9730 0250 7831

L-048088318	7104 1002 9730 0250 7848
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The corresponding mailing cover sheets bear these certified control numbers and petitioner's name and address as noted.

13. The affidavit of Fred Ramundo describes the general operations and procedures of the Division's mail room. Mr. Ramundo has been a supervisor in the mail room since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. 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. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. The USPS employee initialed the last page of the respective CMR and affixed a postmark to each page of the respective CMR. The mail room 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 on the CMR. A review of the May 15, 2018 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the last page of the CMR.

14. According to the affidavits and the affirmation submitted, copies of the respective

notices were properly mailed to petitioner at her Woodridge Run Dr., Tampa, FL address on the dates indicated as claimed by the Division.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by noting that the Division had brought a motion for summary determination pursuant to our Rules of Practice and Procedure (Rules). Because petitioner had filed her petition within 90 days of the BCMS conciliation order, the Administrative Law Judge concluded that the Division of Tax Appeals had jurisdiction over the petition and a motion for summary determination would be the proper procedure for considering the timeliness of petitioner's requests for BCMS conferences.

The Administrative Law Judge then set forth the standard for granting a motion for summary determination under our Rules, noting that such a motion shall be granted if it has been shown sufficiently that no material and triable issue of fact is presented.

Next, the Administrative Law Judge addressed the statute of limitations for protesting a notice of determination, noting that a petition must be filed within 90 days from the mailing of such notice. Alternatively, according to the Administrative Law Judge, a taxpayer may contest a notice of determination by a filing a request for a conciliation conference if the time period for filing a petition has not yet elapsed. The Administrative Law Judge noted that the statutory time limit for filing a petition or requesting a conciliation conference is strictly enforced, because without a timely protest of a notice of determination, such notice becomes a fixed and final deficiency. The Division of Tax Appeals lacks jurisdiction to consider the merits of the protest in such a case.

The Administrative Law Judge then described the proof required of the Division in order for it to demonstrate the fact and date of mailing of the statutory notice at issue to petitioner's last known address; in order to meet its burden, the Division must show proof of a standard procedure for mailing such notices and that those procedures were followed in this particular instance. The Administrative Law Judge noted that petitioner did not respond to the Division's motion for summary determination, and thus is deemed to have conceded that no question of fact exists that would require a hearing. Because petitioner did not contest the facts alleged in the motion for summary determination, the Administrative Law Judge concluded that those facts were deemed admitted.

The Administrative Law Judge found that the Division's properly completed CMR constituted highly probative evidence of the date and fact of mailing. The affidavits and affirmation were found to adequately describe the Division's mailing procedure and CMR and thus, according to the Administrative Law Judge, established that the mailing procedure was followed in this case. The Administrative Law Judge also found that the address for petitioner matched what was available from the USPS and was the last known address the Division had for petitioner and thus satisfied the last known address requirement for mailing of a statutory notice. Finding that the Division demonstrated proper mailing of the notices on May 15, 2018, the Administrative Law Judge concluded that petitioner's conciliation conference requests were untimely filed and consequently the Division of Tax Appeals lacked jurisdiction to provide a hearing on the merits of the protest. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination, denying the petition and sustaining the conciliation orders dismissing petitioner's requests for conciliation conferences.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge erred in granting the Division's motion and denying her petition, stating that she had presented material and triable issues of fact that would require a hearing on the merits. Petitioner argues that she is not responsible for the collection and payment of sales tax that is the subject of the notices here at issue. Petitioner concedes that evidence in support thereof was not made part of the record of this proceeding but was presented to the Division prior to its initiation. Petitioner asks that the documents she submitted with her exception be considered in rendering a decision in this case.

The Division maintains that the Administrative Law Judge properly concluded that petitioner failed to timely request a conciliation conference with BCMS and thus the Division of Tax Appeals lacks jurisdiction to consider the merits of the matter. The Division argues that it has met its burden of proving the fact and date of mailing of the notices to the taxpayer's last known address, namely through the submission of a properly completed CMR and affidavits in support of its motion. The Division also argues that petitioner's failure to respond to the motion should be deemed a concession that no material issue of fact exists as to whether the conciliation conference requests were filed after the expiration of the statutory deadline. Finally, the Division states that considering evidence after the closing of the record is not allowed by our Rules and prior decisions.

OPINION

We begin our decision in this matter by noting that the Division brought a motion for summary determination pursuant to section 3000.9 of our Rules. As the petition in this matter was filed with the Division of Tax Appeals within 90 days of the issuance of the conciliation

orders dismissing petitioner’s request for a conciliation conference, we concur with the Administrative Law Judge that the Division of Tax Appeals has jurisdiction over the petition (*see* Tax Law §§ 170 [3-a] [a], [e] and 2006 [4]; *see also Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991).

A motion for summary determination “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]). Such a motion is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212 (20 NYCRR 3000.9 [c]). “The proponent of a summary judgment 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” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is arguable (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v Inglese*, 11 AD2d 381 [2nd Dept 1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim . . .’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992] quoting *Zuckerman*, at 562).

Tax Law § 1138 (a) (1) authorizes the Division to mail notices of determination to a person

or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (*see also* Tax Law § 1147 [a] [1]). The mailing of a notice of determination is presumptive evidence of the receipt of that notice by the person to whom it is addressed (*id.*). With certain exceptions not relevant here, such notice shall be an assessment of the amount due, plus interest and penalties, unless the person files a petition with the Division of Tax Appeals within 90 days from the date of the mailing of the notice (Tax Law § 1138 [a] [1]). A person also has the option of commencing an administrative challenge to such notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The statutory time limit for the filing of a petition or a conciliation conference request is strictly enforced (*see e.g. Matter of Am. Woodcraft*, Tax Appeals Tribunal, May 15, 2003 [petition filed one day late dismissed]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a late-filed protest (*see e.g. Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017).

Where, as here, the timeliness of a taxpayer’s request for a conciliation conference is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date 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). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and 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; *Matter of Katz*). The Division may meet its burden by

producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Balan*, Tax Appeals Tribunal, October 27, 2016; *Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011).

We agree with the Administrative Law Judge's conclusion that the Division's proof establishes that the notices here at issue were mailed to petitioner's last known address on May 15, 2018. We find that the Division has met its burden of showing its standard mailing procedure through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the periods at issue. We also agree with the Administrative Law Judge's determination that the CMR was properly completed and, together with proof of the Division's standard mailing procedure, constitutes highly probative evidence of both the fact and date of mailing of the subject notices (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015; *Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division thus properly mailed the notices at issue to petitioner on May 15, 2018 and the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). Accordingly, any request for conciliation conference or petition to the Division of Tax Appeals was required to be filed by August 13, 2018. Petitioner's requests for conciliation conferences, postmarked and thus deemed filed on August 14, 2019 (*see* 20 NYCRR 4000.7 [a] [1] [ii]), were therefore untimely and properly dismissed by BCMS.

Having found that the Administrative Law Judge correctly determined that the Division bore its burden of demonstrating proper mailing of the notices, we note that such a showing gives rise

to a presumption of receipt of the notices by the person to whom they are addressed (*see* Tax Law § 1147 [a] [1]). Here, petitioner does not contest that the Division properly mailed the notices to her address; instead, she argues that she was not a person responsible for collection and paying over of sales tax. However, given petitioner's untimely protest, we are precluded from considering petitioner's argument that she is not liable for the tax due because she was not a responsible person pursuant to Tax Law § 1131 (1) (*see also Matter of Garitta*).

Petitioner also presented documents with her exception that were not a part of the proceeding below. We observe that those documents do not pertain to the issue of the timeliness of petitioner's request for conciliation conference. Consistent with "our longstanding policy against considering evidence that was not made part of the record below," we do not accept into the record the documents submitted by petitioner and have not considered them in the rendering of this decision (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014, citing *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Diana Bortnikova is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Diana Bortnikova is denied; and
4. The conciliation orders dismissing petitioner's requests are sustained.

DATED: Albany, New York
March 1, 2021

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner