

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

UNITED GROCERY & DELI CORP. :

DECISION
DTA NO. 850335

for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Periods June 1, 2018 through :
February 28, 2021. :

Petitioner, United Grocery & Deli Corp., filed an exception to the determination of the Administrative Law Judge issued on July 13, 2023. Petitioner appeared by Jonathan Koren, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on December 29, 2023, the date that petitioner's reply brief was due.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Kaiman took no part in the consideration of this matter.

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we have

modified findings of fact 5 and 6 to reflect the record more clearly. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. This petition involves a February 28, 2022, notice of determination, assessment identification number L-055405602 (notice), issued by the Division of Taxation (Division). The notice bears petitioner's name, United Grocery & Deli Corp., and a New York, New York, address.

2. Petitioner protested the notice by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). This document, signed by petitioner's representative and dated June 23, 2022, was transmitted to BCMS via facsimile and United States Postal Service (USPS). BCMS acknowledged the request as received on June 23, 2022.

3. On August 19, 2022, BCMS issued a conciliation order dismissing request (CMS 000342830) (conciliation order) to petitioner. In the order, it determined that petitioner's protest was untimely, stating:

“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 2/28/2022, but the request was not received until 6/23/2022, or in excess of 90 days, the request is late filed.”

4. Petitioner protested the conciliation order by filing a petition with the Division of Tax Appeals on November 15, 2022. The petition challenges the denial of the conciliation conference.

5. The Division then filed a motion for dismissal of the petition, or alternatively, summary determination in its favor or on the ground that petitioner's protest was untimely. To show proper mailing of the notice of determination, its motion papers included the following:

(i) an affirmation of Elizabeth Lyon, Esq., dated March 21, 2023;

- (ii) an affidavit, dated January 24, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS);
- (iii) a document entitled, in part, "Certified Record for Presort Mail – Assessments Receivable" (CMR), postmarked February 28, 2022;
- (iv) an affidavit, dated January 26, 2023, of Susan Ramundo, a manager in the Division's mail room;
- (v) a copy of the February 28, 2022, notice with the associated mailing cover sheet addressed to petitioner at the same New York, New York address listed on the petition;
- (vi) a copy of the February 28, 2022, notice with the associated mailing cover sheet addressed to petitioner's former representative, Anil Paulose of Reliance Accounting Corp., at an Astoria, New York address;
- (vii) a copy of petitioner's request for conciliation conference and facsimile cover sheet;
- (viii) a copy of petitioner's New York State and local quarterly sales and use tax return (form ST-100) for the sales tax quarterly period spanning September 1, 2021, through November 30, 2021, which lists the same New York, New York, address for petitioner as that listed on the notice and the same Astoria, New York, address for its former representative;
- (ix) a copy of a power of attorney form for petitioner, last updated April 30, 2021, that grants authority to Anil Paulose of Reliance Accounting Corp, and lists the same Astoria, New York, address for petitioner's representative as listed on the notice.

6. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier began working at the Division in February 1986, and currently serves as the Director of MAPS. MAPS is responsible for the receipt and storage of CMRs.

From her years of experience, Ms. Denier possesses familiarity with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures regarding statutory notices. CARTS generates the CMR. Each page of the CMR lists an initial date ("run date") in the upper left corner that is the date and time that the entire CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of

mailing of the particular statutory notices in order to ensure sufficient lead time for the notices to be manually reviewed and processed for postage by personnel in the Division's mail room. The Division's general practice is to manually add the actual mailing date in the upper right corner on the first and last pages of the CMR. In addition, as described by Ms. Denier, the Division bands all pages of the CMR together when delivered into the possession of the USPS, and they remain so when returned. 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.

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. 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 heading "Reference No" lists the respective assessment number(s). The "Name of Addressee, Street, and PO Address" heading lists the names and addresses of the recipients. Ms. Denier notes that the copy of the CMR has been redacted to preserve the confidentiality of unrelated taxpayers' information.

7. In the present matter, as explained by Ms. Denier, the CMR consists of 15 pages and lists 157 certified control numbers, along with corresponding assessment numbers, names, and addresses. Each page includes 11 entries, except for page 15, which has three entries. As identified in the Denier affidavit, the first and last pages of the CMR bear a manually corrected date of "2/28." The affidavit states that these markings refer to February 28, 2022, i.e., the date that the Division supplied the notices to the USPS. A USPS representative affixed a USPS postmark, dated February 28, 2022, to each page of the CMR, handwrote the number "157" on

page 15, to the right of the heading “Total Pieces Received at Post Office,” and initialed or signed each page of the CMR, including page 15. Ms. Denier states that the Division followed proper practices and procedures regarding the mailing of the notice.

Page 2 of the CMR displays a notice with certified control number 7104 1002 9730 0555 4563 and reference number L-055405602, addressed to petitioner at a New York, New York, address. Likewise, page 8 of the CMR indicates that a notice with certified control number 7104 1002 9730 0555 4993 and reference number L-055405602 was mailed to petitioner’s former representative at his Astoria, New York, address. The Denier affidavit includes corresponding mailing cover sheets and the included notices bear the same certified control numbers, names, and addresses for petitioner and its former representative.

8. The affidavit of Susan Ramundo describes the general operations and procedures within the Division’s mail room. Ms. Ramundo has served as a manager in the Division’s mail room since 2017, has worked in the mail room since 2012, and, as a result, has familiarity with the practices of the mail room regarding statutory notices.

The affidavit explains the standard practices of mailing a notice. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. A staff member retrieves the notices and mailing cover sheets, then operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members weigh, seal, and place postage on each envelope. A clerk checks the first and last pieces of mail against the CMR information. The clerk performs a random review of up to 30 pieces by checking those envelopes against the CMR information. A staff member then delivers the envelopes and the CMR to one of the USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places their initials or signature on the CMR, indicating receipt by the post office. 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.

9. In the present matter, Ms. Ramundo states that the Division followed the general operations and procedures. The affixation of the USPS postmark on each page of the CMR and the USPS employee's handwritten number "157" on the last page of the CMR, together with the employee's initialing of that page, indicate that the USPS received all 157 articles of mail listed on the CMR, including the articles addressed to petitioner and its former representative, for mailing on February 28, 2022.

10. Petitioner's opposing papers include the affidavit of Muhammad Rana, petitioner's president. Mr. Rana states that petitioner first received the notice on June 21, 2022, by regular mail, not through certified mail as the Division claims. He also states that in conversations with Mr. Paulose, petitioner's former representative, that he, too, did not receive the notice through certified mail. Mr. Rana also claims that, insofar as the Division states that the notice was based on a field audit of petitioner's business, no such in-person audit took place. He also states that petitioner possesses documentary evidence that demonstrates true and accurate sales during the period at issue. Mr. Rana further argues that the elements of the Division's submission are inadmissible as hearsay.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that the Division of Tax Appeals had jurisdiction over the petition and that a motion for summary determination was the proper procedure for relief under the present circumstances. He then noted the legal standard for granting such a motion and observed that where the timeliness of a taxpayer's request for a conciliation conference is in question, the Division must first demonstrate proper mailing of the

statutory notice. He found that the Division had met its burden by introducing proof of a standard mailing procedure through the affidavits of Division employees who were familiar with the procedure for issuing statutory notices. He also found that those affidavits, along with the properly completed CMR, showed that standard procedures were followed in this case. The Administrative Law Judge concluded that the Division's submissions constitute highly probative evidence of both the date and fact of mailing of the statutory notice to petitioner's last known address on February 28, 2022.

The Administrative Law Judge observed that a properly mailed notice is presumptive evidence of receipt. He noted that although a taxpayer has the right to rebut the presumption, any such rebuttal must consist of more than a mere denial of receipt. The Administrative Law Judge found that petitioner made no specific allegations regarding the mailing procedures and that the allegation that the notice was not received until after the expiration of the statutory protest period lacked evidentiary support and was thus insufficient to rebut the presumption of receipt and create a triable issue of fact.

Next, the Administrative Law Judge rejected petitioner's argument that the Division's notice of motion fails to comply with the Tribunal's Rules of Practice and Procedure (Rules) regarding the contents of a notice of motion. He also rejected petitioner's argument that the CMR should be excluded from evidence as hearsay. The Administrative Law Judge determined that the Division's notice was fixed and final when petitioner filed its request for a conciliation conference on June 23, 2022, and that the Division of Tax Appeals lacked jurisdiction to address the substance of the notice. He granted the Division's motion for summary determination and denied the petition.

ARGUMENTS ON EXCEPTION

Petitioner argues for the first time on exception that the Division's evidence submitted to establish proper mailing of the subject notice is defective because the CMR was created ten days before the mailing of the notice. Petitioner contends that this was a deviation from the Division's standard practice and that because the CMR was not created contemporaneously with or shortly after the mailing, it cannot establish a presumption that the mailing actually occurred. According to petitioner, the fact that petitioner's owner did not receive the notice until after the expiration of the statutory protest period casts further doubt on the mailing and raises a triable issue of fact.

Petitioner asserts that the Tribunal has the authority to disregard a minor delay in filing as nonprejudicial error if a substantial right of a party is not prejudiced. It contends that the Division has not shown any prejudice by petitioner's late filing and, conversely, that petitioner would be significantly prejudiced if its request for a conciliation conference is denied. Petitioner further argues that the Tribunal may exercise discretionary authority to grant petitioner's request for a conciliation conference in the interest of justice.

The Division argues that the notice of determination was properly mailed and, as such, there is a statutory presumption of receipt. It asserts that petitioner's allegation that it did not receive the notice within the time period to file a protest is unsupported and insufficient to overcome the presumption. The Division contends that petitioner's allegation that the printing of the CMR in advance of the mailing was a deviation from its standard mailing procedure and, therefore, casts doubt on the actual date of the mailing is unsupported by the law. The Division argues that the printing of the CMR beforehand serves an important function by providing lead time for the Division to manually check statutory notices to ensure compliance with its mailing procedures.

The Division asserts that absent a timely protest, a notice of determination becomes a fixed and final assessment, and the Tribunal is without jurisdiction to consider the substance of such an assessment. It argues that no legal or factual justification exists to grant petitioner's request to extend or excuse the statutory deadline to file a protest to a properly issued notice.

OPINION

We begin by noting that the Division of Tax Appeals has jurisdiction over the petition, as it was filed within 90 days of the issuance of the BCMS conciliation order (*see* Tax Law §§ 170 [3-a], 2006 [4]; *Matter of Novar TV & Air Conditioner Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991). Thus, we agree with the Administrative Law Judge's conclusion that a motion for summary determination was the proper procedure for an accelerated determination in this matter (*see* 20 NYCRR 3000.9).

A summary determination 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]). Such a motion is subject to the same rules as a summary judgment motion under 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, 441 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). "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, 382 [2d 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

The Division issues a notice of determination of sales and compensating use taxes to the person or persons liable for the collection or payment of tax at his or her last known address using certified or registered mail (*see* Tax Law §§ 1138 [a] [1]; 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.*). The Division may rely on the address listed on the last return filed with the Division as the last known address (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Garitta*, Tax Appeals Tribunal, February 21, 2017). 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 (Tax Law § 1138 [a] [1]; *Matter of Garitta*).

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., LLC*, Tax Appeals Tribunal, March 3, 2011).

We find that the Division has met its burden of showing its standard mailing procedure through the affidavits of Marianna Denier and Susan Ramundo, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the period at issue. We also find that the CMR serves as documentary proof that the Division mailed the notice 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 notice to petitioner (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015; *Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Specifically, the 15-page CMR lists the certified mail control number corresponding to each notice's cover sheet, petitioner's name and address, an assessment ID corresponding to each notice, a dated postmark and the initials of the postal employee accepting the articles of mail listed on the CMR. According to the CMR, there was a

total of 157 items delivered into the possession of the USPS on February 28, 2022, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote “157” on the last page and initialed the page. Additionally, the address listed for petitioner on the mailing cover sheet and CMR entry is the same as the address listed on petitioner’s last filed quarterly sales and use tax return (ST-100) filed on December 16, 2021. This was the last return filed by petitioner before the issuance of the subject notice and, thus, satisfies the last known address requirement in Tax Law § 1138 (a) (1).

In addition, the address listed for petitioner’s former representative on the mailing cover sheet and on page 8 of the CMR is the last known address as listed on the power of attorney that petitioner filed with the Division of Tax Appeals. This adequately demonstrates that petitioner’s authorized representative was also served with a copy of the notice (*see Matter of Brager, citing Matter of Bianca v Frank*, 43 NY2d 168 [1977] [90-day period to challenge a notice is tolled if the taxpayer’s representative is not served with the notice]).

Based on the foregoing evidence, we agree with the determination of the Administrative Law Judge that the Division has, through its moving papers, demonstrated proper mailing of the notice to petitioner and petitioner’s representative on February 28, 2022, which absent contrary evidence, raises a presumption of receipt by petitioner (*see* Tax Law § 1147 [a] [1]; *Matter of Ruggerite, Inc. v State Tax Commn., Dept. of Taxation & Fin., of State of N.Y.*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]; *Matter of Kayumi*, Tax Appeals Tribunal, June 27, 2019). Petitioner is entitled to rebut that presumption by demonstrating that the standard mailing procedure was not followed or that the procedure was performed so carelessly that it would be unreasonable to assume that the notice was mailed (*see Matter of T.J. Gulf, Inc. v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986]). Testimony that amounts to no more

than a mere denial of receipt is insufficient to rebut the presumption of receipt (*id.*). Further, unsubstantiated allegations or assertions are insufficient to raise an issue of fact in response to a motion for summary determination (*see Zuckerman v City of New York*, citing *Alvord v Swift & Muller Constr. Co.*, 46 NY2d 276, 281-282 [1978]; *American Cars 'R' Us, Inc. v Chu*, 147 AD2d 797, 799 [3d Dept 1989]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011).

In response to the Division's motion, petitioner submitted the affidavit of its president, who acknowledged that he received the notice, but not until after the deadline to file a protest had expired and that it was received by "regular mail" as opposed to certified mail. Petitioner's president stated in the affidavit that his former representative also received the notice by regular mail as opposed to certified mail. In support of its exception, petitioner argues that the Division's standard mailing procedure was not followed in that the CMR was created ten days before the mailing of the notice. According to petitioner, this was a deviation from the Division's standard practice and that a CMR created before the date of mailing cannot establish a presumption that the mailing actually occurred.

Contrary to petitioner's allegation, the affidavit of Marianna Denier demonstrates that the printing of the CMR approximately 10 days before the anticipated date of mailing is a standard procedure created to allow sufficient time to manually review the statutory notices prior to mailing (*see* finding of fact 6). As indicated in her affidavit and as noted above, the dates on the first and last pages of the CMR are added by personnel in the Division's mail room to reflect the date when the notices are actually mailed. Further, the affidavit describes the fact that the USPS employee who received the statutory notices placed a postmark on each page of the CMR indicating the date the statutory notices were received and their initials or signature and the total number of notices received on February 28, 2022, on the last page. As determined above, the

Division's standard mailing procedure was properly followed in this matter and petitioner's denial of receipt of the notice in time to protest it, without supporting evidence, is insufficient to rebut the presumption of receipt and defeat the Division's motion for summary determination (*see Matter of T.J. Gulf, Inc.; Zuckerman v City of New York*).

Lastly, we have considered and find no merit to petitioner's unsupported legal arguments that the Tax Appeals Tribunal, as an administrative agency of the state of New York, has the legal authority to disregard the late filing of a protest to a statutory notice issued by the Division and that the Tribunal has the discretionary authority to grant petitioner's request for a conciliation conference in the interest of justice. This Tribunal lacks any such authority (*see e.g. Matter of Townley*, Tax Appeals Tribunal, January 25, 2018).

The subject notice was mailed to petitioner and its representative on February 28, 2022, and petitioner's request for conciliation conference was filed on June 23, 2022. As such, the request was untimely and properly dismissed by BCMS.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of United Grocery & Deli Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of United Grocery & Deli Corp. is denied; and
4. The conciliation order dismissing request, dated August 19, 2022, is sustained.

DATED: Albany, New York
June 13, 2024

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner