

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ZAHEER AHMAD : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 829614
Cigarette Tax under Article 20 of the Tax Law for the :
Period of March 20, 2018. :

Petitioner, Zaheer Ahmad, filed a petition for revision of a determination or for refund of New York State cigarette tax under article 20 of the Tax Law for the period of March 20, 2018.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), brought a motion that was postmarked May 28, 2020, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Nasir Faizi, CPA, did not respond to the Division of Taxation’s motion. The 90-day period for issuance of this determination commenced on June 29, 2020. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a notice of determination dated March 5, 2019 and bearing assessment identification number L-049513327 (notice). The notice was addressed to petitioner, Zaheer Ahmad, at an address in Staten Island, New York.

2. Petitioner filed a request for conciliation conference (request) with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was executed by petitioner's representative on July 18, 2019 and was deemed received by BCMS on July 24, 2019.

3. On August 16, 2019, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was 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 March 5, 2019, but the request was not received until July 24, 2019, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order which was received on October 8, 2019.

5. To show proof of proper mailing of the notice, 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 April 7, 2020; (ii) a certified mail record titled “CERTIFIED RECORD FOR PRESORT MAIL – ASSESSMENTS RECEIVABLE” (CMR) postmarked March 5, 2019; (iii) an affidavit of Susan Saccocio, a manager in the Division's mail room, dated March 16, 2020; (iv) a copy of the notice

with the associated mailing cover sheet addressed to petitioner; (v) an affidavit of the Division's attorney, Elizabeth Lyons, dated May 28, 2020; (vi) a copy of the power of attorney form (POA-1) appointing petitioner's representative which was executed on July 8, 2019; and, (vii) a copy of petitioner's e-filed New York State personal income tax return (form IT-201) for the year 2018. According to the affidavit of Elizabeth Lyons, the 2018 income tax return was the last return filed with the Division by petitioner before the notice was issued. Petitioner's address on the notice conforms to the address reflected on his 2018 income tax return, except that petitioner's address on the notice includes an additional four zip code digits to petitioner's five-digit zip code, and the word "Avenue" on the return is abbreviated to "Ave" on the notice. Petitioner's address listed on his request for conciliation conference, petition and the power of attorney form are the same address as listed on petitioner's 2018 income tax return except that the word "Avenue" used on the return is abbreviated as "Ave" on the other documents. Accordingly, the notice's use of the abbreviation of "Ave" conforms with petitioner's use of the abbreviation for his address as reflected on his request, petition and power of attorney forms.

6. The affidavit of Deena Picard, who has been in her current position since May 2017, and a Data Processing Fiscal Systems Auditor 3 since February 2006, sets 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 of “3/5”. In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (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.

7. 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 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.”

8. The March 5, 2019 CMR consists of 15 pages and lists 163 certified control numbers along with corresponding assessment numbers, names and addresses. 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 March 5, 2019 to each page of the CMR, initialed and wrote the number “163” on the last page next to the heading “TOTAL PIECES AND AMOUNTS.”

9. Page 4 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0350 9780 and assessment ID number L-049513327 was mailed to petitioner at the Brooklyn, New York, address listed on the 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.

10. The affidavit of Susan Saccocio describes the general operations and procedures of the Division’s mail room. Ms. Saccocio has been a manager in the mail room since 2017 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. Ms. Saccocio 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 each page of the CMR and affixed a postmark to each page of the 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 March 5, 2019 CMR indicates that the USPS employee complied with this request by writing the number of pieces received on the CMR.

11. According to all of the affidavits submitted, a copy of the notice was properly mailed to petitioner at his Staten Island, New York, address on the date indicated as claimed.

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). As the petition in this matter was filed within 90 days of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under section 3000.9 (b) of the Rules is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination shall address the instant motion as such.

B. 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]).

C. Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "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, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v Vil. 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’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Zuckerman*).

D. Petitioner did not respond to the Division's motion. Accordingly, they are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Picard, Saccocio or Lyons affidavits; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

E. 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 (*see* Tax Law § 478). Alternatively, a taxpayer may contest a 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]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. Where, as here, the timeliness of a request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner's last known address on March 5, 2019. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Although there were two variations, the address on the mailing cover sheet and CMR sufficiently conform with the address listed on petitioner's 2018 personal income tax return which satisfies the "last known address" requirement. First, the Division added an additional four digits to petitioner's five-digit zip code. However, the addition of these digits does not invalidate the notice at issue (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2001). Next, the Division abbreviated the word "Avenue" as found on the 2018 return to "Ave. However, the abbreviation brought the address utilized by the Division on the notice to mirror the abbreviation utilized by petitioner on his own BCMS conciliation conference request form, the petition itself, and petitioner's power of attorney form

submitted. This leads to the conclusion that abbreviation used was of little or no consequence to the accuracy of the mailing. The abbreviation of the word “Avenue” was also an inconsequential deviation (*see Matter of Rubinos*, Tax Appeals Tribunal, April 3, 2017). The United States Tax Court has held that a deviation in the address used in mailing a notice “is inconsequential where the error is so minor that it would not prevent delivery of the notice (citations omitted)” (*see Lee v C.I.R.*, T.C. Memo 2011-129 [2011]). The deviations between the address the notice was mailed to as compared to the address provided on the 2018 tax return petitioner filed were inconsequential.

H. It is thus concluded that the Division properly mailed the notice on March 5, 2019, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (*see Tax Law §§ 170 [3-a] [a]; 478*). Since the request was not filed until July 24, 2019, or well in excess of 90 days from the issuance of the March 5, 2019 notice, the request is untimely, and the Division of Tax Appeals is without jurisdiction to provide a hearing to address the merits of the notice.

I. The Division's motion for summary determination is hereby granted, the petition of Zaheer Ahmad is denied and the August 16, 2019 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
September 24, 2020

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE