

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
ABSOLUTE AUTO LEASING, LLC
for Revision of a Determination or for Refund of Sales and
Use Taxes under Articles 28 and 29 of the Tax Law for the
Period December 1, 2013 through November 30, 2017.

DETERMINATION
DTA NO. 830341

Petitioner, Absolute Auto Leasing, LLC, filed a petition for revision of a determination or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2013 through November 30, 2017.

On March 16, 2022, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), brought a motion, dated March 15, 2022, seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Isaac Sternheim & Co. (Isaac Sternheim, CPA) did not respond to the motion. The 90-day period for issuance of this determination commenced on April 15, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of notice of determination L-050457171.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of a request for conciliation conference (request) filed with the Division's Bureau of Conciliation and Mediation Services (BCMS) by petitioner, Absolute Auto Leasing, LLC, in protest of a notice of determination, dated August 27, 2019, and bearing assessment ID number L-050457171 (notice). This notice is addressed to "ABSOLUTE AUTO LEASING LLC" at 295 Avenue O, Brooklyn, NY 11230-6320. The mailing cover sheet of this notice contains certified control number 7104 1002 9730 0002 4811.

2. Petitioner filed a request with BCMS in protest of the notice. The request was signed by petitioner's representative, Isaac Sternheim, and was dated January 11, 2021. A review of the request indicates that it was filed in protest of notice number L-050457171, dated "12/27/2020." In the request, petitioner's representative claimed that "[t]he petitioner never received the original assessments [sic]. We obtained a copy from the Tax Department." The request bears a BCMS dated stamp of January 14, 2021.¹

3. On February 5, 2021, BCMS issued a Conciliation Order Dismissing Request (conciliation order) (CMS No. 000326686) to petitioner. The conciliation order determined that petitioner's protest of the subject notice was untimely and stated in part:

¹ Attached to the Division's motion papers is a copy of an envelope addressed to BCMS that bears a United States Postal Service (USPS) certified mail postage paid label dated January 12, 2021, and a BCMS date stamp of January 14, 2021. The return address of a third-party individual located in Mexico, New York, also appears on this envelope.

“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 August 27, 2019, but the request was not mailed until January 12, 2021, 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 on March 10, 2021. The petition was date stamped received by the Division of Tax Appeals on March 16, 2021. In its petition, petitioner asserts that it “never received the original assessment,” and it “obtained a copy from the Tax Department.”

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated March 15, 2022, of Mary R. Humphrey, Esq., the Division’s representative; (ii) an affidavit, dated October 15, 2021, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record For Presort Mail – Assessments Receivable” (CMR) postmarked August 27, 2019; (iv) an affidavit, dated October 22, 2021, of Susan Saccocio, a manager in the Division’s mail room; (v) a copy of the notice with the associated mailing cover sheet; (vi) a copy of petitioner’s request for conciliation conference, date stamped received on January 14, 2021; (vii) a copy of the conciliation order issued to petitioner on February 5, 2021 (CMS No. 000326686); and (viii) a copy of petitioner’s New York State partnership, limited liability company and limited liability partnership filing fee payment form (form IT-204-LL) for tax year 2018 (LLC filing fee payment form for tax year 2018), electronically filed on March 14, 2019, which lists the same Brooklyn, New York, address for petitioner as that listed on the notice, the request for conciliation conference and the petition, except that petitioner’s address on the notice includes an additional four zip code digits to petitioner’s five-digit zip code. According to the affirmation of Ms. Humphrey, the LLC

filing fee payment form for tax year 2018 was the last document filed with the Division by petitioner before the notice was issued.

6. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20192321700." Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to "8/27." 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.

7. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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 PO Address.”

8. The CMR in the present matter consists of 29 pages and lists 314 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 29 which contains 6 entries. Ms. Picard notes that the copy of the CMR 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 employee affixed a postmark, dated August 27, 2019, to each page of the CMR, wrote the number “314” on page 29 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed or signed the last page of the CMR.

9. Page 13 of the CMR indicates that a notice with certified control number 7104 1002 9730 0002 4811, and reference number L-050457171 was mailed to petitioner, “ABSOLUTE AUTO LEASING LLC” at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom 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 receives 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 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 also places his or her 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

11. Each of the 29 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of August 27, 2019. On page 29, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 314 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "314," indicating 314 pieces of mail were received by the USPS. There is a set of initials or signature on page 29.

12. According to both the Picard and Saccocio affidavits, a copy of the notice was properly mailed to petitioner on August 27, 2019, 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, petitioner is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *John William Costello Assocs. v Std. Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984] *appeal dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Picard and Saccocio affidavits or the affirmation of Ms. Humphrey; consequently, those facts are deemed admitted (*Kuehne & Nagel v Baiden*, at 544; *Whelan v GTE Sylvania*).

E. Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalties due under articles 28 and 29 of the Tax Law. 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 the date of mailing of such notice (*see* Tax Law § 1138 [a] [1]). 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 in question, 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 (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 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. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and its representative, if any) at its last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v State Tax Commn*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

H. Here, the Division introduced proof sufficient to establish the mailing of the notice to petitioner's last known address on August 27, 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). Further, the address on the mailing cover sheet and CMR conform with the address listed on petitioner's electronically filed LLC

filing fee payment form for tax year 2018, which was the last document filed by petitioner before the notice was mailed, and thus satisfies the “last known address” requirement. While it is noted that the Division added four additional zip code digits to petitioner’s zip code as reflected on petitioner’s electronically filed LLC filing fee payment form for tax year 2018, such difference is deemed inconsequential (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2011). It is thus concluded that the Division properly mailed the notice to petitioner on August 27, 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 (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

I. Since the Division has demonstrated proper mailing of the notice, such a showing gives rise to a presumption of receipt of the notice by the person to whom it is addressed (*see* Tax Law § 1147 [a] [1]). Here, petitioner did not contest that the Division properly mailed the notice to its address, but rather, petitioner merely asserted in its petition that it did not receive it. Mere denial of receipt of the notice without more is not sufficient to overcome the statutory presumption of receipt (*see Matter of T.J. Gulf v New York State Tax Commn.*, 124 AD2d 314, 315 [3d Dept 1986] *Matter of Rosenbaum*, Tax Appeals Tribunal, November 5, 2018).

J. Petitioner’s request for conciliation conference was filed on January 14, 2021. This date falls well after the 90-day period of limitations for the filing of such a request. Consequently, the request was untimely filed (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]) and, thus, was properly dismissed by the February 5, 2021 conciliation order issued by BCMS. Petitioner has offered no claim or evidence to meet its burden to prove that any timely protest was filed before the 90-day period of limitations for challenging the notice expired and the

