

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
CARMEN R. ALTAMIRANO
for Revision of Determinations or for Refund of Sales and
Use Taxes under Articles 28 and 29 of the Tax Law for the
Periods December 1, 2016 through February 28, 2017 and
March 1, 2018 through May 31, 2020.

DETERMINATION
DTA NO. 830591

Petitioner, Carmen R. Altamirano, filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the periods December 1, 2016 through February 28, 2017 and March 1, 2018 through May 31, 2020.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel), brought a motion, dated March 23, 2022, 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 pro se, did not respond to the motion. The 90-day period for issuance of this determination commenced on April 22, 2022. 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 10 statutory notices.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Carmen R. Altamirano, at a “3607 STEINWAY ST APT 1C LONG ISLAND CITY, NY 11101-1531,” address, a series of statutory notices, each dated February 17, 2021, as follows:

a. notice of estimated determination L-052899109 that assessed sales and use taxes for the period March 1, 2020 through May 31, 2020;

b. notice of estimated determination L-052899110 that assessed sales and use taxes for the period December 1, 2019 through February 29, 2020;

c. notice of estimated determination L-052899111 that assessed sales and use taxes for the period September 1, 2019 through November 30, 2019;

d. notice of determination L-052899112 that assessed sales and use taxes for the period June 1, 2019 through August 31, 2019;

e. notice of determination L-052899113 that assessed sales and use taxes for the period March 1, 2019 through May 31, 2019;

f. notice of determination L-052899114 that assessed sales and use taxes for the period December 1, 2018 through February 28, 2019;

g. notice of determination L-052899115 that assessed sales and use taxes for the period December 1, 2016 through February 28, 2017;

h. notice of determination L-052899116 that assessed sales and use taxes for the period September 1, 2018 through November 30, 2018;

i. notice of determination L-052899117 that assessed sales and use taxes for the period June 1, 2018 through August 31, 2018; and

j. notice of determination L-052899118 that assessed sales and use taxes for the period March 1, 2018 through May 31, 2018.

Each of the three notices of estimated determination was issued because petitioner was determined to be an officer or responsible person of Embers Steakhouse Inc. (Embers Steakhouse) and advised that an estimated assessment had been issued because a required tax return was not filed by Embers Steakhouse. The seven notices of determination were also issued because petitioner was determined to be an officer or responsible person of Embers Steakhouse.

2. Petitioner filed a request for conciliation conference (request) with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices L-052899118, L-052899117, L-052899116, L-052899115, L-052899114, L-052899113, L-052899112, L-052899111, L-052899110, and L-052899109. Petitioner's address on the request was listed as "36-07 Steinway Street Apt. 1C, Long Island City, N.Y. 11101." The undated signature of petitioner appears on both the request and the accompanying explanation letter. The request was faxed to and received by BCMS on June 14, 2021.

3. On July 16, 2021, BCMS issued a Conciliation Order Dismissing Request (conciliation order) (CMS No. 000330572) to petitioner. The order determined that petitioner's protest of the 10 statutory notices, i.e. notice numbers L-052899118; L-052899117; L-052899116; L-052899115; L-052899114; L-052899113; L-052899112; L-052899111; L-052899110; and L-052899109, 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 February 17, 2021, but the request was not faxed until June 14, 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 August 5, 2021. The petition was date stamped received by the Division of

Tax Appeals on August 9, 2021. In her petition, petitioner listed her address as “36-07 Steinway St. apt. 1C L.I.C. NY 11101.” Petitioner, in her petition, asserted that she sent a request to protest and disagree with the 10 assessments when she first got them. She further asserted that on February 26, 2021, she called an unidentified number in Albany and some unidentified individuals told her to fill out a DTF-95 and send it with a letter explaining why she should not be paying these assessments. Petitioner also claims that those unidentified individuals gave her “Agent Center’s contact” information, and she “kept asking Agent Center for an in-person meeting” that would include herself and a named third party who used her name and information but actually “owes this money.” In her petition, petitioner also claimed that Agent Center “said that there will be no meeting because of the pandemic.” She further claimed that the named third party “has a contact with the NY taxes and is slowly paying the money but bills keep coming back” to her. The only attachment to the petition was a copy of the conciliation order dated July 16, 2021.

5. To show proof of proper mailing of the 10 statutory notices, the Division provided the following with its motion papers: (i) the affirmation, dated March 23, 2022, of Eric R. Gee, Esq., the Division’s representative; (ii) an affidavit, dated March 3, 2022, 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 February 17, 2021; (iv) an affidavit, dated March 17, 2022, of Susan Ramundo, a manager in the Division’s mail room; (v) copies of notices of estimated determination L-052899109, L-052899110, and L-052899111, and their respective associated mailing cover sheets; (vi) copies of notices of determination L-052899112, L-052899113, L-052899114, L-052899115, L-052899116, L-052899117, and L-052899118, and

their respective associated mailing cover sheets; (vii) a copy of petitioner's request for conciliation conference and the fax cover sheet dated June 14, 2021 that confirmed transmittal of three pages to fax number (518) 435-8554 on June 14, 2021 at 5:20 p.m.; (viii) a copy of the conciliation order issued to petitioner on July 16, 2021; and (ix) a copy of petitioner's New York State resident income tax return (form IT-201) for the year 2017 (2017 tax return), electronically filed on April 13, 2018.

6. Eric R. Gee, an attorney in the Office of Counsel of the Division, avers in his affirmation that petitioner's 2017 tax return was electronically filed on April 13, 2018, and that this was the last return filed before the Division issued the notices. Mr. Gee affirms that the address appearing on the return corresponds to the address appearing on the notice, except that the notice was addressed to "3607 Steinway St Apt 1C." He asserts that

“[i]n the borough of Queens, the significance of the dash within the address is that it divides the adjoining avenue (here '36th') with the house number (here '07') on the block. As such, no other address with 3607 or only 36 Steinway Street, Long Island City exists.”

Mr. Gee also asserts that when using the United States Postal Service (USPS) website to look up a zip code by address for 36-07 Steinway St., Apt. 1C, Long Island City, NY 11101, the result defaults to "3607 Steinway St., Apt. 1C, Long Island City, NY 11101-1531.”

7. A printout of the USPS Zip Code™ Lookup page on the USPS website is attached to Mr. Gee's affirmation. A review of the USPS Zip Code™ Lookup for "36-07 Steinway St., Apt. 1C, Long Island City, NY 11101" confirms that the address defaults to "3607 Steinway St., Apt. 1C, Long Island City, NY 11101-1531.”

8. 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 "20210401700." 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 "2-17." 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.

9. 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."

10. The CMR in the present matter consists of 18 pages and lists 197 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 18 which contains 10 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 February 17, 2021, to each page of the CMR, wrote the number “197” on page 18 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed or signed the last page.

11. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9730 0283 4197 and reference number L-052899109 was mailed to petitioner, “ALTAMIRANO-CARMEN R” at “3607 STEINWAY ST APT 1C LONG ISLAND CITY NY 11101-1531.” 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.

12. Page 6 of the CMR indicates that notices with certified control numbers 7104 1002 9730 0283 4203, 7104 1002 9730 0283 4210, 7104 1002 9730 0283 4227, 7104 1002 9730 0283 4234, 7104 1002 9730 0283 4241, 7104 1002 9730 0283 4258, 7104 1002 9730 0283 4265, 7104 1002 9730 0283 4272, and 7104 1002 9730 0283 4289 and reference numbers L-052899110, L-052899111, L-052899112, L-052899113, L-052899114, L-052899115, L-052899116, L-052899117 and L-052899118, respectively, were mailed to petitioner, “ALTAMIRANO-CARMEN R” at “3607 STEINWAY ST APT 1C LONG ISLAND CITY NY 11101-1531.” The corresponding mailing cover sheets, attached to the Picard affidavit as part of exhibit “B,” bear these certified control numbers and petitioner’s name and address as noted.

13. The affidavit of Susan Ramundo, a manager in the Division's mail room, describes the mail room's general operations and procedures. Ms. Ramundo 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. Ramundo 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.

14. Each of the 18 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of February 17, 2021. On page 18, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 197 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "197," indicating 197 pieces of mail were received by the USPS. There is a set of initials or signature on page 18.

15. According to both the Picard and Ramundo affidavits, copies of these notices were properly mailed to petitioner on February 17, 2021, 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, she 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 Ramundo affidavits or the affirmation of Mr. Gee; 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 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. In this case, the Division has offered proof sufficient to establish the mailing of the 10 statutory notices to petitioner's last known address on February 17, 2021. 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, 2011). 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 e.g. Matter of Western Aries Construction*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Although there were two variations, the address on the 10 mailing cover sheets and the CMR sufficiently conform with the address listed on petitioner's electronically filed 2017 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 those digits does not invalidate the notice at issue (*see Matter of Perk*, Tax Appeals Tribunal, December 13, 2011). Next, the Division removed the hyphen from street number of the address provided on petitioner's electronically filed 2017 tax return. The removal of the hyphen from the street number is 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 10 notices were mailed to as compared to the address provided on the 2017 tax return petitioner filed are inconsequential.

H. It is therefore concluded that the Division properly mailed the 10 notices on February 17, 2021, and the 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]). Petitioner's request for conciliation conference was filed on June 14, 2021. This date falls after the 90-day period for the filing of such a request. Consequently, the request was untimely (*see* Tax Law §§ 170 [3-a] [b]; 1138 [a] [1]) and the same was properly dismissed by the July 16, 2021 conciliation order issued by BCMS. Petitioner has offered no evidence to meet her burden to prove any timely protest was filed before the 90-day period of limitations for challenging the 10 notices expired.

I. The Division of Taxation's motion for summary determination is hereby granted, the petition of Carmen R. Altamirano is denied, and the July 16, 2021 conciliation order dismissing petitioner's request is sustained.

DATED: Albany, New York
July 21, 2022

 /s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE