

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
UNITED GROCERY & DELI CORP. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 850335
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Periods of June 1, 2018, :
through February 28, 2021. :
:

Petitioner, United Grocery & Deli Corp., 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 periods June 1, 2018, through February 28, 2021.

On March 21, 2023, the Division of Taxation, appearing by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), filed a motion pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The motion seeks an order that dismisses the petition or, in the alternative, grants summary determination in its favor.

The Division of Taxation submitted documents supporting its motion. Petitioner, appearing by the Law Offices of Jonathan Koren, Esq. (Jonathan Koren, Esq.), submitted documents opposing the motion. The 90-day period for issuance of this determination commenced on April 21, 2023. Based upon all the submitted documents, Alexander F. Chu-Fong, Administrative Law Judge, renders the following determination.

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

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 the instant motion. To show proper mailing of the notice, 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 approximately 10 days in advance of the anticipated date of mailing. The Division's general practice is to manually change on the first and last pages of the CMR to the actual mailing date in the upper right corner of such pages. 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 attached 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 3 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 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 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.

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, that 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 also argues that the elements of the Division's submission are inadmissible as hearsay.

SUMMARY OF THE PARTIES' POSITIONS

11. The Division argues that the submission establishes proper mailing and, therefore, is sufficient to raise the presumption of receipt. It contends that the 90-day period to challenge the notice began on the mailing date of February 28, 2022. The Division submits that petitioner's June 23, 2022, request to BCMS was beyond the statutory protest period, and, therefore, the assessment is fixed and final. As such, it argues that this forum lacks jurisdiction to address the underlying merits. The Division requests that judgment be granted in its favor and the petition be denied.

12. Petitioner opposes the motion. It argues that the Division failed to comply with section 3000.5 of the Tribunal Rules, and that the CMR must be excluded under the business records rule (CPLR 4518 [a]). Petitioner concedes to having received the notice, not by certified mail, but by regular mail on June 21, 2022. It argues that the protest period should run from that date. Petitioner argues, in the alternative, that the delay between the expiration of the 90-day period, as calculated by the Division, and the filing of its protest constitutes an excusable delay. It asks that the Division's motion be denied, and relief be provided in the form of granting a conciliation conference.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss this petition under section 3000.9 (a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Tribunal Rules) or, in the alternative, a motion for summary determination under section 3000.9 (b). The Division of Tax Appeals has jurisdiction over the petition because it was filed within 90 days of the conciliation order (*see* finding of fact 4). Therefore, summary determination serves as the proper vehicle for considering the timeliness of petitioner's underlying protest. This determination addresses the instant motion accordingly. The standard for granting summary determination is as follows:

“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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]; *see Matter of United Water New York*, Tax Appeals Tribunal, April 1, 2004).

B. To reach the underlying merits, petitioner's initial request for conciliation conference must have been timely filed (Tax Law § 170 [3-a] [a]). If the protest was not filed within the statutory protest period, then the notice has become fixed and final and this forum lacks

jurisdiction to consider the substance of the notice (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

C. When the receipt of a notice and timeliness of a taxpayer's protest are in question, the initial inquiry focuses on the Division's mailing. A properly mailed notice creates the rebuttable presumption that the document was delivered in the normal course (*see* Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002).

To raise this presumption, the Division must demonstrate proper mailing. This has two evidentiary requirements: first, proof of a standard procedure used for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, proof that the Division followed its standard procedures in this instance (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). These requirements may be satisfied by providing evidence of the standard procedures, corroborated by testimony or documentary proof of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

D. In this case, the Division offered affidavits and documents to prove that it properly mailed the subject notice. The Denier and Ramundo affidavits adequately describe the Division's standard mailing procedure, and that the procedure was followed in this case.

The CMR serves as documentary proof that the Division mailed the notice. The USPS received the provided 157 pieces of mail. The legibility of the manually corrected date notwithstanding, each CMR page bears a USPS stamped date of February 28, 2022. The addresses on the mailing cover sheets, notice, and CMR, conform with the addresses of petitioner and former representative, as listed on petitioner's last filed form ST-100. This

satisfies the “last known address” requirement (Tax Law § 1138 [a] [1]). Taken together, the submissions constitute highly probative evidence of both the date and fact of mailing (*see e.g. Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Therefore, the Division has established that it properly mailed notice L-055405602 to petitioner’s last known address on February 28, 2022, which raises the presumption of receipt (*see* Tax Law § 1147 [a]; *Matter of Ruggerite, Inc. v State Tax Com’n*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]; *Matter of Kayumi*, Tax Appeals Tribunal, June 27, 2019).

E. The presumption of receipt, however, is not unassailable:

“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. Testimony that amounts to no more than a mere denial of receipt is insufficient to rebut the presumption of receipt. Further, unsubstantiated allegations or assertions are insufficient to raise an issue of fact in response to a motion for summary determination” (internal quotations and citations omitted) (*Matter of Tilton*, Tax Appeals Tribunal, January 25, 2021).

Petitioner’s opposition to the motion makes no specific allegations regarding the mailing procedures. Rather, it states that it did not receive the notice through certified mail, but regular mail, and on a date far beyond February 28, 2022. Apart from the affidavit of Mr. Rana, this allegation lacks evidentiary support and, as such, it neither rebuts the presumption, nor creates a triable issue (*see Matter of Ahmed*, Tax Appeals Tribunal, April 10, 2018; *Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995); *Cf. Matter of Tilton* [USPS tracking data used to show that the notices were not delivered]; *see also Kaelbel v Commissioner*, 113 TCM 1162 [2017]) Therefore, petitioner has failed to overcome the presumption of receipt.

F. Petitioner’s argument based on Tribunal Rules 3000.5 must be rejected because the attorney affirmation attached to the Division’s motion papers satisfies the form requirement.

G. Petitioner’s assertion that the CMR should be excluded based upon the business records rule lacks merit. Found in CPLR 4518 (a), this rule creates a hearsay exception for the introduction of certain evidence if the offering party establishes that it was generated in the regular course of business (*see e.g. People v Kennedy*, 68 NY2d 569 [1986]; *Bank of NY Mellon v Gordon*, 171 AD3d 197 [2d Dept 2019]). However, this rule does not apply in this forum.

The Tribunal Rules provide that, “[t]echnical rules of evidence will be disregarded to the extent permitted by the decisions of the courts of this State, provided the evidence offered appears to be relevant and material to the issues” (20 NYCRR 3000.15 [d] [1]). The New York courts have consistently held that “[h]earsay evidence is admissible in administrative proceedings and if sufficiently relevant and probative may serve as the basis for an administrative determination” (internal quotations and citations omitted) (*Andresen v State Dept of Motor Vehicles*, 227 AD2d 617, 618 [2d Dept 1996]; *see also Matter of Brownell v New York State Justice Ctr. for the Protection of People With Special Needs*, 212 AD3d 998 [3d Dept 2023]; State Administrative Procedures Act § 306 [1]). As such, petitioner’s argument based upon the CPLR business records rule must be rejected.

H. In sum, the statutory period began to run on February 28, 2022. By the time petitioner filed its request for conciliation conference on June 23, 2022, the notice was fixed and final. Therefore, the Division of Tax Appeals lacks the jurisdiction to address the underlying merits of the petition.

I. The Division of Taxation's motion for summary determination is granted. The petition of United Grocery & Deli Corp. is denied. The notice of determination, dated February 28, 2022, is sustained.

DATED: Albany, New York
July 13, 2023

/s/ Alexander F. Chu-Fong
ADMINISTRATIVE LAW JUDGE