

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CAPITAL THAI, LLC : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 825574
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2009 through May 31, 2012. :

Petitioner, Capital Thai, 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 June 1, 2009 through May 31, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated September 13, 2013 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 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Wayne A. Smith, Jr., Esq., filed a response to the Division of Taxation's motion on October 15, 2013. The 90-day period for the issuance of this order thus began on October 15, 2013. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. On November 20, 2012, petitioner, Capital Thai, LLC, filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The request was filed in protest of a Notice of Determination dated August 21, 2012 and bearing assessment number L-038482993. The request was hand-delivered to the BCMS offices in Albany, New York.

2. On December 28, 2012, BCMS issued a Conciliation Order Dismissing Request to petitioner. Referencing notice number L038482993, the order determined that petitioner's protest was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on August 21, 2012, but the request was not received until November 20, 2012, or 91 days, the request is late filed.

3. In support of its motion and to prove mailing of the Notice of Determination under protest, the Division submitted, among other documents, the following: (i) an affidavit, dated August 1, 2013, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) an affidavit, dated August 6, 2013, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked August 21, 2012; and (iv) a copy of petitioner's sales and use tax return (Form ST-100) for the period March 1, 2012 through May 31, 2012, the last return filed by petitioner before the August 21, 2013 Notice of Determination, reporting the same Albany, New York, address for petitioner as that listed on said notice.

4. The affidavit of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units since January 2010, sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR, using the year, the numeric ordinal day of the year and military time of day. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "8/21/12." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

5. 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 "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."

6. The CMR relevant to the Notice of Determination under protest consists of 26 pages and lists 284 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve the

confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated August 21, 2012 to each page of the CMR and also wrote his or her initials on each page thereof.

7. Page 23 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1279 9608 and assessment number L-038482993, was mailed to petitioner at the Albany, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

8. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." The 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. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR 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 signature or initials on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contains such postmarks and initials. The Center 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 last page of the CMR. Here, the USPS employee complied with this request by both writing and

circling the number “284” on the last page next to the heading “Total Pieces Received at Post Office.”

9. According to the Peltier affidavit, a copy of the subject Notice of Determination was mailed to petitioner on August 21, 2012, as claimed.

10. Included among the attachments to the petition is a letter dated August 30, 2012 from a Division auditor to an attorney (not petitioner’s current representative). The letter was sent in reference to the audit of petitioner that resulted in the issuance of the Notice of Determination at issue. More specifically, the August 30, 2012 letter indicates that it was sent in response to a letter dated August 9, 2012 from the attorney to the Division concerning the audit. The August 30, 2012 letter discusses the audit in some detail and expresses disagreement with an assertion made in the attorney’s August 9 letter regarding petitioner’s sales tax liability for the audit period. The letter closes by inviting the attorney to contact the auditor if he has any questions.

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 (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). As the petition in this matter was timely filed, 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 order shall address the instant motion as such. Given the timely petition, the Division’s motion to dismiss under section 3000.9(a) of the Rules is improperly brought.

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 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 [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*). In order to decide whether any such issues of fact exist, a discussion of the relevant law is necessary.

D. 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 (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation services “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 merits of the protest (*see* Tax Law § 1138[a][1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 1138[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

F. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., August 21, 2012, to petitioner’s last known address. 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 conforms with the address listed on petitioner's sales and use tax return (Form ST-100) for the period March 1, 2012 through May 31, 2012, which satisfies the "last known address" requirement in Tax Law § 1138(a)(1). The notice was thus properly mailed to petitioner on August 21, 2012.

G. Although not mandated by statute, case law has established that the 90-day period for filing a petition or a request for a conciliation conference is tolled if the taxpayer's representative is not also served with a copy of the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). It is this requirement that raises an issue of material fact in the present matter and compels the denial of the Division's motion.

Specifically, the August 30, 2012 letter (*see* Finding of Fact 10) suggests that petitioner was represented at the time of issuance of the statutory notice and that the Division was aware of such representation. Although the date of the letter is later than the date of the statutory notice, it refers to the attorney's letter dated August 9, 2012 (that is, before the issuance of the notice) and the body of the letter is clearly characteristic of communication between the Division and a taxpayer's representative during the course of an audit. The letter thus raises material factual issues as to whether petitioner was represented at the time of issuance of the statutory notice, whether the Division was aware of such representation, and ultimately, whether the Division improperly failed to issue a copy of the statutory notice to such representative.

H. The Division's motion for summary determination is denied without prejudice and this matter shall proceed to a hearing in due course on the jurisdictional issue of the timeliness of petitioner's request for a conciliation conference.

DATED: Albany, New York
January 9, 2014

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE