

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CLAM BAR RESTAURANT, INC. : ORDER
for Revision of a Determination or for Refund of Sales : DTA NO. 826040
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 2009 through May 31, 2012. :

Petitioner, Clam Bar Restaurant, Inc., 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 September 1, 2009 through May 31, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michael Hall), brought a motion filed on February 18, 2015, seeking an order of dismissal or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Michael Hall, dated February 18, 2015 and attached exhibits. Petitioner, appearing by Richard M. Gabor, Esq., did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this order began on March 20, 2015, the due date for petitioner's response. Based upon the motion papers, affidavit and exhibits submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

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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. The Division of Taxation (Division) issued to petitioner, Clam Bar Restaurant, Inc., a Notice of Determination number L-040009317-8, dated August 21, 2013, assessing sales and use taxes due in the amount of \$115,806.30, plus penalty and interest, for a total amount due of \$206,030.15 for the period September 1, 2009 through May 31, 2012. The notice is addressed to petitioner, Clam Bar Restaurant, Inc., Dock's Clam Bar, 240 Page Ave., Staten Island, New York 10307-1170. The mailing cover sheet of the Notice of Determination contains the certified control number 7104 1002 9730 0052 2072.

2. On December 6, 2013, the Division issued to petitioner a Notice and Demand for Payment of Tax Due (Notice and Demand) (assessment identification number L-040009317-8) assessing sales and use tax due in the amount of \$115,806.30, plus penalty and interest, for the period September 1, 2009 through May 31, 2012. This Notice and Demand bore the Page Avenue, Staten Island, New York, address. Included with the Notice and Demand was a form DTF-974 that stated, in pertinent part, as follows:

“Our records indicate that a power of attorney is on file for tax matters at issue in the enclosed document. Therefore, we have forwarded a copy of the document to your legal representative:

Doreen A. Catanio, CPA
182 Prospect Avenue
North Arlington, NJ 07031.”

Also included with the Notice and Demand was a Form DTF-966FC that provided information about various methods to respond to the Notice and Demand, and had an “Internal

Use” reference to “Tax Art 28/29 Audit ID X186451978” printed at the bottom of the page.

3. Petitioner filed a Request for Conciliation Conference (Request) with the Bureau of Conciliation and Mediation Services (BCMS), dated December 11, 2013, in protest of the December 6, 2013 Notice and Demand. The United States Postal Service (USPS) Express Mail envelope in which the Request was mailed bears the USPS metered stamp dated December 11, 2013. The basis for the Request was “[f]inal Assessment Package with Appeal Notice Never Received.” The Request lists petitioner’s address as the Page Avenue, Staten Island, New York, address and its representative as Doreen A. Catanio, CPA, whose address was listed as the Prospect Avenue, North Arlington, New Jersey, address. Included with the Request was a copy of the December 6, 2013 Notice and Demand. A cover letter enclosed with petitioner’s Request indicates that a total of three requests for conciliation conference, i.e., one for petitioner, one for Kim Wisniewski, and one for Trisha Vollaro, were enclosed in the USPS Express Mail envelope.

4. On December 27, 2013, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Bearing CMS No. 260049 and referencing notice number L-040009317, 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, 2013, but the request was not mailed until December 11, 2013, or in excess of 90 days, the request is late filed.”

5. Petitioner challenged this dismissal by filing a petition with the Division of Tax Appeals. The petition is dated as signed by petitioner’s president, Kim Wisniewski, on December 27, 2013, and the United States Postal Service (USPS) Express Mail envelope in which the petition was mailed bears the USPS metered stamp dated January 6, 2014. The envelope and petition are date stamped as received by the Division of Tax Appeals on January

10, 2014. There is no dispute that the petition was filed within 90 days after the December 27, 2013 issuance of the Order, and constitutes a timely challenge thereto. The petition listed petitioner's address as the Page Avenue, Staten Island, New York, address, and its representative as Ms. Catanio. Included with the petition was a power of attorney, executed by petitioner's president on February 4, 2013, appointing Ms. Catanio as its representative in connection with the sales tax matter for the years 2009 through 2012, Audit ID number "X186451978."¹

The cover letter enclosed with this petition indicates that a total of three petitions were included in the USPS Express Mail envelope, i.e., one to resolve petitioner's controversy (Assessment L-040009317), one to resolve Kim Wisniewski's controversy (Assessment L-040026170), and one to resolve Trisha Leo Vollaro's controversy (Assessment L-040026169).²

6. In support of the motion and to prove proper and timely mailing of the Notice of Determination under protest, the Division submitted the following: (i) an affidavit, dated September 2, 2014 of Mary Ellen Nagengast, a Tax Auditor Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated August 21, 2013; (iii) an affidavit, dated September 3, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a copy of petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the tax period March 1, 2013 through May 31, 2013 filed on June 20, 2013; and (v) a copy of petitioner's New York State and Local Sales and Use

¹ Although Ms. Catanio received special permission from Jean A. McDonnell, Esq., Secretary to the Tax Appeals Tribunal, to represent petitioner in matters before the Division of Tax Appeals and the Tax Appeals Tribunal, her power of attorney was revoked on February 27, 2014.

² The Division of Tax Appeals assigned DTA Nos. 826041 and 826042 to matters of Kim Leo Wisniewski, and Trisha Leo Vollaro, respectively. On February 18, 2015, the Division of Taxation filed separate motions seeking an order of dismissal or, in the alternative, summary determination pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure (Rules) for DTA Nos. 826041 and 826042.

Tax Web Filed Return (Quarterly ST-100) for the tax period June 1, 2013 through August 31, 2013 filed on September 20, 2013.

7. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and 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. Statutory notices are generated from CARTS and 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 was manually changed on the first page of the CMR in the present case to the actual mailing date of "8/21/13." It is also the Division's general practice that 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 its office. 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.

8. 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."

9. The CMR relevant to the Notice of Determination under protest consists of 17 pages and lists 180 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 16, which contains 9 such entries (2 of the original such certified control numbers and the assessment numbers, names and addresses corresponding thereto, have been crossed out), and page 17, which contains 2 such entries (2 of the original such certified control numbers and the assessment numbers, names and addresses, corresponding thereto, have been crossed out). Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee affixed a postmark dated August 21, 2013 of the Colonie Center branch of the USPS to each page of the CMR and also initialed each page of the CMR.

10. Page 4 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0052 2072 and assessment number L-040009317, was mailed to "CLAM BAR RESTAURANT INC." at the Page Avenue, Staten Island, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

11. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently 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." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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 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. Here, as noted, the USPS employee affixed a postmark dated August 21, 2013 to each page of the CMR and initialed each page of the CMR as well. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by crossing out the preprinted number "180," as appearing next to the heading "TOTAL PIECES AND AMOUNTS" and thereafter both hand writing and circling the number "176" on the last page beneath the heading "TOTAL PIECES RECEIVED AT POST OFFICE." This change was made to reflect that two pieces of mail identified but crossed out on page 16 and two such pieces of mail identified but crossed out on page 17 of the CMR (*see* Finding of Fact 9) had been "pulled" from the particular run. A piece of mail may be pulled for any number of reasons including, but not limited to, a discrepancy in a name or address. Any piece of mail so pulled is segregated from the remaining group of statutory notices for correction and issuance at another time. The affixation of the postmarks, the postal service employee's initials, and the handwriting and circling of the number 176 indicating that all such pieces were received, confirm that the Notice of Determination dated August 21, 2013 was received by the USPS on that date.

12. Petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the period March 1, 2013 through May 31, 2013 filed on June 20, 2013,

reported petitioner's address as Staten Island, New York 10307-1170. This was the last return filed by petitioner prior to the issuance of the August 21, 2013 Notice of Determination.

Petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the period June 1, 2013 through August 31, 2013 filed on September 20, 2013, reported petitioner's address as Staten Island, New York 10307-1170. This was the next return filed by petitioner after the issuance of the August 21, 2013 Notice of Determination.

13. The Division did not submit any documentation proving mailing of the Notice of Determination to petitioner's former representative, Ms. Catanio.

CONCLUSIONS OF LAW

A. The Division brings this motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, 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 will address the instant motion as such.

B. A motion for summary determination shall be granted:

“if, upon all 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]).

C. Section 3000.9(c) of the Rules of Practice and Procedure 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 determination 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 a 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 determination, 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. Therefore, petitioner is deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544 [1975]; *Whelan v. GTE Sylvania*). However, in determining a motion for summary determination, the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*; *see also Weiss v Garfield*, 21 AD2d 156 [1964]).

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 (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such 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 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 § 1147[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 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 notices 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*).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

H. The 17-page CMR provides sufficient documentary proof to establish that the Notice of

Determination dated August 21, 2013 was mailed by certified mail to petitioner at its last known address on August 21, 2013. Specifically, each page of this 17-page document lists certified control numbers with corresponding notice numbers, names and addresses and bears a U.S. Postal Service postmark dated August 21, 2013. A postal service employee handwrote and circled the number “176” beneath the “TOTAL PIECES RECEIVED AT POST OFFICE” heading and initialed the last page, thereby indicating that all 176 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 176 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the day and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

I. Tax Law § 1138(a)(1) provides that a notice of determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. . . . The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

J. Here, the record shows that petitioner’s address listed on its sales and use tax web filed return for the period March 1, 2013 through May 31, 2013, filed on June 20, 2013, was in Staten Island, New York. Thus petitioner’s last known address prior to the issuance of the Notice of Determination on August 21, 2013 was that stated on the sales and use tax web filed return for the period March 1, 2013 through May 31, 2013.

Accordingly, the Division has shown that it properly mailed the Notice of Determination

dated August 21, 2013 to petitioner at its last known address consistent with Tax Law §§ 1138(a)(1) and 1147(a)(1). It is concluded that the notice was properly mailed and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on August 21, 2013 (Tax Law §§ 170[3-a][b]; 1138[a][1]).

K. In order to timely protest the Notice of Determination issued on August 21, 2013, petitioner was required to file a petition or request for a conciliation conference within 90 days of August 21, 2013, i.e., on or before November 19, 2013. Petitioner's Request for Conciliation Conference was filed on December 11, 2013, a date beyond the statutory period within which a timely protest had to have been filed.

L. The record includes a power of attorney signed by petitioner's president on February 4, 2013 appointing Ms. Catanio as its representative in connection with the audit for the period at issue in this matter. Ms. Catanio's date of appointment was prior to the issuance of the Notice of Determination at issue in this matter. The record does not establish that the Notice of Determination was served on petitioner's former representative. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988 *citing Matter of Bianca v Frank*, 43 NY2d 168 [1977]). In *Bianca*, the Court of Appeals held that once a representative appears in a matter, a statute of limitations cannot begin to run unless that representative is served with the

determination or notice sought to be reviewed.

Since the Division did not establish that it sent the Notice of Determination to Ms. Catanio, the statute of limitations did not begin to run on August 21, 2013, and the Request for Conciliation Conference filed by petitioner on December 11, 2013 must be considered timely filed.

M. The Division of Taxation's motion for summary determination is denied. A hearing will be scheduled in due course.

DATED: Albany, New York
June 18, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE