

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SUSAN WINGET : ORDER
 : DTA NO. 826100
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, 2007 :
through November 30, 2009. :
:

Petitioner, Susan Winget, 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, 2007 through September 30, 2009.

On September 23, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Casey Callanan, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affidavit of Casey Callanan, dated September 19, 2014, and annexed exhibits. Petitioner, appearing by Nardone & Hoffman Inc. (Ting Han, CPA), did not respond to the motion. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for conciliation conference or petition following the issuance of a notice of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated February 25, 2008 and bearing assessment identification number L-029745821-3 (subject notice). The subject notice is addressed to petitioner, Susan Winget, at "443 Broadway 2A, New York, NY 10013-2573."

2. Included with the Division's motion is the affidavit of its representative, Casey Callanan. Attached to Mr. Callanan's affidavit is a copy of petitioner's Request for Conciliation Conference, filed with the Division's Bureau of Conciliation and Mediation Services (BCMS), dated December 12, 2013 and stamped as received by BCMS on December 17, 2013 (Request for Conference). The Request for Conference sought redetermination of notice number E-025039721, which was a warrant seeking to satisfy the claim in assessment number L-035503786-4. An explanatory letter attached to the Request for Conference references the subject notice. In addition, attached to the Request for Conference was a consolidated statement of tax liabilities dated June 2, 2011 referencing the subject notice, notices of determination numbered L-030171193, L-029745821, and L-033127167 through L-033127174. The consolidated statement of tax liabilities also referenced Notice of Deficiency number L-033127166.

3. The record does not contain any other request for conciliation conference by petitioner.

4. On January 10, 2014, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice, as well as notices of determination numbered L-033127167 through L-033127174 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 March 9, 2011, but the request was not mailed until December 12, 2013 or in excess of 90 days, the request is late filed.

5. Petitioner filed a petition with the Division of Tax Appeals dated February 12, 2014 that was stamped as received on February 24, 2014. The petition challenges the subject notice, and notices numbered L-033127167 through L-033127174 . It also identifies that a request for conciliation conference was filed on December 12, 2013 and dismissed on January 10, 2014.

6. The instant motion solely addresses the timeliness of petitioner's challenge to the subject notice. According to the Mr. Callanan's affidavit, the Division does not have sufficient documentation to demonstrate petitioner's failure to timely protest notices numbered L-033127167 through L-033127174.

7. To show proof of proper mailing of the subject notice, the Division provided the following with its motion papers: (i) an affidavit, dated September 12, 2014, of Mary Ellen Nagengast, the Director of the Division's Management Analysis and Project Services Bureau (MAPS) since October 2005; (ii) a 1,214-page "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page of which is legibly postmarked February 25, 2008; (iii) an affidavit, dated September 17, 2014, of James Steven VanDerZee, a mail room supervisor in the Division's Mail Processing Center since September 2004; (iv) a copy of the subject notice with the associated mailing cover sheet; and (v) a copy of petitioner's New York State Resident Income Tax Return (Form IT-201) for the tax year 2004, dated September 15, 2006, which lists the same address for petitioner as that listed on the subject notice. This return was the last one filed by petitioner with the Division before the statutory notice was issued.

8. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. In her affidavit, Ms. Nagengast avers that in her role as Director of MAPS, she has assumed responsibility for the receipt and storage of CMRs, and has reviewed and become familiar with past and present procedures as they relate to the Division's issuance of statutory notices. In particular, Ms. Nagengast is familiar with the Division's Case and Resource Tracking System (CARTS) and its procedures for generating statutory notices prior to mailing.

9. CARTS generates the computer-generated CMR and the corresponding notices. The notices are 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 "2/25/08." In addition, according to Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless ordered otherwise. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

10. 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 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 P.O. Address.”

11. According to Ms. Nagengast, the CMR in the present matter consists of 1,214 pages. Ms. Nagengast notes that the entire CMR is attached to her affidavit as Exhibit A, and that portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR, wrote “13,346” on page 1,214, and initialed or signed the same page. She adds that the total number of statutory notices mailed pursuant to the CMR was 13,346.

12. Attached to Ms. Nagengast’s affidavit, as Exhibit A, is a copy of all 1,214 pages of the CMR.

13. Page 86 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0599 6656 and assessment ID number L-029745821 was mailed to petitioner at the New York, New York, address listed on the subject notice. The corresponding mailing cover sheet, also attached to the Ms. Nagengast’s affidavit, bears this certified control number and petitioner’s name and address as noted.

14. The affidavit of James Steven VanDerZee describes the Division’s Mail Processing Center’s (Center) general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Mr. VanDerZee confirms that a 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. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against 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 on the CMR, indicating receipt by the post office. 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 CMR.

15. Each page of the CMR in exhibit "A" of Ms. Nagengast's affidavit contains a USPS postmark of February 25, 2008. On page 1,214, corresponding to "Total Pieces and Amounts," is the preprinted number 13,346. On the same page, next to the line reading "Total Pieces Received At Post Office" is the hand-written entry "13,346," along with a set of initials or a signature.

16. According to Ms. Nagengast's and Mr. VanDerZee's affidavits, the affixation of the postmarks and the Postal Service employee's initials indicate that 13,346 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on February 25, 2008.

17. According to both the affidavits of Ms. Nagengast and Mr. VanDerZee, the procedures described and followed with respect to the mailing of the subject notice were the normal and regular procedures of the Department on February 25, 2008.

CONCLUSIONS OF LAW

A. 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 filed within 90 days of the conciliation order (*see* Findings of Fact 4 and 5), 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.

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 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]).

B. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient. . . .” This section further provides that such a notice “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 in or out of this state.”

C. A taxpayer may file a request for conciliation conference with the BCMS seeking revision of the determination within 90 days of the mailing of a notice of determination (*see* Tax Law §§ 170[3-a][b]; 1138[a][1]).

D. Where, as here, the timeliness of a Request for Conciliation Conference is at issue, the Division must carry its burden of demonstrating the fact and date of the mailing of the notice at issue to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 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).

E. In the instant case, the affidavits of Ms. Nagengast and Mr. VanDerZee establish the Division's standard mailing procedure. Additionally, the production of the CMR by the Division, along with the aforementioned affidavits, constitutes sufficient documentary evidence to establish the subject notice was mailed as addressed to petitioner on February 25, 2008. The CMR listed: (1) the correct name and address, (2) a corresponding certified control number, (3) USPS postmarks dated February 25, 2008, and (4) a postal employee's handwritten initials and documentation of the total number of pieces received. Consequently, the CMR was properly completed, therefore constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Petitioner's address on the subject notice, corresponding mail cover sheet, and CMR all conform with the address reported on petitioner's New York State Resident Income Tax Return for the year 2004, which was dated September 15, 2006 and was the last document filed by her before the notice was issued. This satisfies the "last known address" requirement in Tax Law § 1138(a)(1).

G. Finally, as noted above, petitioner failed to file a response to the instant motion; therefore she is deemed to have conceded that no question of fact concerning the timing of her response to the subject notice exists and, thus, a hearing on that issue is unnecessary (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Division's affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

H. The Division has satisfactorily demonstrated mailing of the subject notice on February 25, 2008. Petitioner had 90 days from the issuance of the subject notice to either file for a conciliation conference with BCMS or file a petition with the Division of Tax Appeals. The record lacks any suggestion, much less evidence, that she did either. Her request for conciliation conference dated December 12, 2013 appears to have been intended to challenge the subject notice, but is untimely. Moreover, her petition was dated February 24, 2013, which was also more than 90 days from the Division's issuance of the subject notice. Thus, based on the evidence in this record, it is also untimely.

I. The Division's motion for summary determination with regard to Notice of Determination number L-029745821 is granted. A hearing with regard to the remainder of the petition, i.e., notices of determination numbers L-033127167 through L-033127174, will be scheduled in due course.

DATED: Albany, New York
December 31, 2014

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE