

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANGEL RAMOS : ORDER
DTA NO. 830773
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 2017 through May 31, 2018. :

Petitioner, Angel Ramos, 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 period December 1, 2017, through May 31, 2018.

On November 29, 2023, the Division of Taxation, appearing by Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel), brought a motion seeking an order dismissing the petition or, in the alternative, summary determination in its favor pursuant to sections 3000.5 and 3000.9 (a) (1) (i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, did not submit a response by December 29, 2023, which date began the 90-day period for the issuance of this determination. After due consideration of the documents submitted in connection with this matter, Alexander Chu-Fong, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of determination.

FINDINGS OF FACT

1. On January 9, 2019, the Division of Taxation (Division) issued to petitioner, Angel Ramos, notices of determination, bearing assessment numbers L-049349443 and L-049349446, for the periods March 1, 2018, through May 31, 2018, and December 1, 2017, through February 28, 2018, respectively (notices). The notices were issued to petitioner at an address in Elmont, New York.

2. On November 17, 2021, petitioner filed a petition with the Division of Tax Appeals protesting the notices.

3. In support of its motion, the Division submitted the following: (i) an affirmation, dated November 29, 2023, of Eric R. Gee, Esq., an attorney in the Division's Office of Counsel; (ii) an affidavit, dated November 7, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated November 7, 2023, of Susan Ramundo, a manager in the Division's mail room; (iv) a "Certified Record for Presort Mail – Assessments Receivable" (CMR), postmarked January 9, 2019; (v) copies of the notices of determination, dated January 9, 2019, together with the associated mailing cover sheets; and, (vi) a copy of petitioner's electronically filed form IT-201, New York State resident income tax return for the tax year 2017 (2017 tax return), filed on October 16, 2018.

4. The Elmont, New York, address on the 2017 tax return matches the address listed on the notices, and the petition.

5. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier was the Supervisor of Administrative Analysis from July 2019 through August 2022 and has been the Principal Administrative Analyst

since August 2022, and Director of MAPS since July 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier 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. CARTS generates the CMR. 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 and last page of the CMR in the present case to the actual mailing date of "1/9." 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.

6. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. 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 the 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."

7. The CMR, dated January 9, 2019, consists of 46 pages and lists 497 certified control numbers along with corresponding assessment numbers, names, and addresses. Ms. Denier notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A United State Postal Service (USPS) representative affixed a postmark, dated January 9, 2019, to

each page of the CMR. In addition to this postmark, page 3 of the CMR bears a postmark, dated January 11, 2019, which was crossed out and bears an illegible signature or initial. A USPS representative wrote the number "497" on page 46, and initialed or signed the last page of the CMR.

8. Page 16 of the CMR indicates that notices with reference numbers L 049349443 and L 049349446 and certified control numbers 7104 1002 9730 0322 3990 and 7104 1002 9730 0322 4027, respectively, were mailed to petitioner at the Elmont, New York, address. The corresponding mailing cover sheets, attached to the Denier affidavit, bear these certified control numbers, respectively, and petitioner's name and address as noted.

9. The affidavit of Susan Ramundo, a manager in the Division's mail room since 2017 and currently an Associate Administrative Analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room regarding statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 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 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. As noted, each page of the CMR attached to the Denier affidavit contains a USPS postmark dated January 9, 2019. In addition, Ms. Ramundo attests that the USPS employee's initials or signature appear on the last page of the CMR. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicate that all 497 articles of mail listed on the CMR, including the articles addressed to petitioner, were received by the USPS for mailing on January 9, 2019.

10. According to the Denier and Ramundo affidavits, the notices were mailed to petitioner on January 9, 2019, as claimed.

11. Petitioner did not respond to the Division's motion.

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). A motion to dismiss a petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [ii]). A motion for summary determination may 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. Section 3000.9 (c) of the Tax Appeals Tribunal's Rules of Practice and Procedure provides that a motion to dismiss is subject to the same provisions as motions filed pursuant to CPLR 3211, and a motion for summary determination is subject to the same provisions as a

motion for summary judgment pursuant to CPLR 3212. Thus, the movant “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 the Tribunal noted in *Matter of United Water New York, Inc.*:

“Inasmuch 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]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381, 382 [2d Dept 1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312, 317 [2d Dept 1989])” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

C. To prevail against a proponent of a motion to dismiss or 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’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], quoting *Zuckerman v City of New York*, 49 NY2d at 562).

D. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law § 1138 [a] [1]). Pursuant to Tax Law § 1138 (a) (1), the notices in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. 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 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 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).

E. Where, as here, the timeliness of a petition is at issue, 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 (*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 instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing, and issuing statutory notices.

G. However, the Division has not offered proof sufficient to establish that the standard procedure was followed in this case. The affidavits of Ms. Denier and Ms. Ramundo allege that the CMR is documentary evidence demonstrating that the Division followed its standard procedure here. They point to the fact that the certified control numbers assigned to the certified mail articles containing the notices and addressed to petitioner are found on page 16 of the CMR and that all 497 certified articles covered by the CMR were delivered into the possession of the

USPS on January 9, 2019, as evidenced by the fact that the postal employee who received the CMR and associated certified articles handwrote “497” on that last page and initialed the page.

While the postal employee’s initialing or signing of the last page of the CMR and noting the number of articles received indicates the total number of certified mail articles that were delivered to the USPS, whether any particular certified mail article on the CMR was actually delivered to the USPS depends on the Division’s business practice of generating the CMR and the certified mail articles covered by that CMR at the same time and keeping the CMR and the covered certified mail articles together until their delivery to the USPS. The conflict in the postmarks appearing in the CMR bears on this procedure (*see* finding of fact 7).

Upon receiving the CMR and the accompanying certified mail articles, the postal employee is to postmark each page of the CMR (*see* USPS Domestic Mail Manual § 503 [5.1.1]). Here, however, as discussed above, page 3 of the CMR bears a postmark that varies from the postmark on the other pages of the CMR by showing a date two days after the CMR was to be received by the USPS. The presence of a postmark with a date of January 11, 2019, raises a question of fact as to when page 3 of the CMR was delivered to USPS. This issue suggests the Division may not have followed its standard procedure of keeping the CMR and the certified mailing together until delivered into the possession of the USPS (*see* finding of fact 5). The fact that the date and the consecutive numbering on the pages before and after page three as well as on page three itself are consistent with the rest of the CMR is some proof that the Division handled all the pages of the CMR as a single unit. However, the explanation given by the Division is not sufficient to explain the conflict in the postmark, leaving a material question of fact as to whether the certified mail articles covered by the CMR were all listed on and accompanied the CMR as delivered to the USPS on January 9, 2019, including the certified mail

articles containing the notices issued to petitioner.

Ms. Ramundo, a manager in the Division's mailroom, avers that when an error occurs by using the wrong postmark in the normal course of business, a USPS employee may catch the mistake, or a member of the mail room staff may catch the error and request that the mail log be corrected to reflect the proper date of mailing. She does not then explain how the wrong postmark came to be on page 3 of the CMR in this case, or whether it was a USPS employee or employee in the mail room that discovered the mistake. Additionally, it is not clear how she has knowledge about how an error in the normal course of business at the USPS is handled as her position is as the manager of the mail room for the Division and she does not appear to have specific knowledge of the procedures that take place at the USPS (*see Matter of Madoff*, Tax Appeals Tribunal, April 19, 2012 [determination granting summary determination reversed in part because the affiants lacked personal knowledge regarding the information to which they attested]). Ms. Denier also asserts that the postmark of January 11, 2019, was incorrectly applied to page 3 of the CMR. She does not, however, explain how she knows that this was the incorrect postmark (*see id.*). Notably absent from the Division's motion is an affidavit from an employee of the USPS that may clarify this issue.

H. The Division of Taxation's motion to dismiss is denied without prejudice, and the petition of Angel Ramos shall proceed in due course.

DATED: Albany, New York
March 28, 2024

/s/ Alexander Chu-Fong
ADMINISTRATIVE LAW JUDGE