

In the Matter of the Petition
of
CT 157-162 LLC, et al.

Bunning, ACALJ:

Petitioner is represented by Ellen S. Brody, Esq., Roberts & Holland, LLP. Respondent was initially represented by Christopher J. Long, and then by Joshua H. Sivin, both Assistant Corporation Counsel, City Law Department.

¹ Petitioners are CT 157-162 LLC and WH Uptown LLC, the grantee and grantor, respectively, with respect to a transfer of a 100% interest in 75 Fort Washington LLC, which owned real property located at 75 Fort Washington Avenue, New York, New York (the Transfer).

Petitioners filed a response to the motion on or about October 14, 2021. Respondent filed a reply memorandum of law dated October 28, 2021. Petitioners filed the Affirmation of Ellen S. Brody on October 29, 2021. Respondent submitted a letter dated November 5, 2021 in further response.

A telephone conference was held on March 10, 2022 at which the parties agreed to convert the motion to dismiss to a motion for summary determination. Oral argument was held on April 6, 2022.

Respondent filed the Supplemental Affidavit of Noel Woodburn on or about May 5, 2022. Petitioner filed a reply on or about May 24, 2022.

ISSUE

Whether the Petitions are untimely and must be dismissed pursuant to Tribunal Rules §1-05(i), (ii), (vi), and (vii).

STATEMENT OF FACTS

The Petitions were filed on or about April 20, 2021, seeking a redetermination of a deficiency of City Real Property Transfer Tax (RPTT) in the amount of \$72,632.70, and interest of \$17,373.86, for a total of \$90,006.56. The Petitions allege² that Petitioners each received a Financial Statement of Account

² The allegations contained in the Petitions are set forth here without again identifying each as an allegation.

(Statement and collectively, Statements) dated October 1, 2019, regarding RPTT liability arising from the Transfer. The Statements were addressed to the Petitioners at P.O. Box 155, Lawrence, New York, 11559-0155.

On October 24, 2019, Petitioners' representative wrote to the Department's address on the Statement, questioning the assessments. On November 20, 2019, a Department representative responded by telephone and requested a copy of the Recording and Endorsement Cover page showing the amount of RPTT paid in connection with the Transfer. Petitioners' representative sent the cover page by email on November 20. On December 26, a Department representative allegedly stated that the audit determination would stand and that the Petitioners could request a conciliation conference or file a petition with the Tribunal. He also stated that the audit department claimed to have mailed requests for information and several notices, including notices of determination, to the Petitioners. Petitioners allege that they did not receive any of these documents.

On December 26, 2019, a Department representative sent copies of the notices of determination in this case (Notices) to the Petitioners' representative. The Notices are dated June 10, 2019, and were mailed to 85 Delancey Street, New York, New York, 10002, a different address than the address to which the Statements were sent.

On January 8, 2020, Petitioners each requested a conciliation conference with the Department's Conciliation Bureau. The following day, the requests were denied as untimely. Petitioners' representative contacted the Conciliation Bureau and stated that the Notices had not been

properly mailed. On February 21, 2021, a representative of the Conciliation Bureau sent proof of mailing to the Petitioners' representative.

The Petition for CT 157-162 LLC alleges that the U.S. Postal Service (USPS) tracking history shows that delivery to that Petitioner was not successful. Both Petitions allege that the address at 85 Delancey Street included several offices, including a "We Work" type of facility. The Petition in CT 157-162 LLC alleges that the Notice in that case was delivered to the wrong recipient at 85 Delancey Street, who rejected it. Then, on June 26, 2019, it was allegedly "Delivered to Agent" at zip code 10038. Petitioner had no office within this zip code. However, the Department is located within this zip code "so we assume that the Notice was returned to sender and never delivered to Taxpayer at the address shown on the Notice of Determination at zip code 10002." (Petition in CT 157-162 LLC at ¶21.) The Petition alleges that the Department was then on notice that the Notices were not delivered.

The Petition in WH Uptown alleges that this Petitioner did not receive the Notice.

Petitioners allege that their federal and state income tax returns and at least two City unincorporated business tax returns were filed using their accountant's address in Lawrence, New York, after the transfer tax filing and before the issuance of the Notices. This is the address to which the Department mailed the Statements.

Respondent's motion relies on the affirmation of Christopher J. Long and the affidavit of Noel Woodburn.

The affirmation of Christopher Long states the following. The RPTT return at issue listed 85 Delancey Street as Petitioners' address. It further states that the Department has a procedure for returned mail; there is no indication that the Notices were returned to the Department. The requests for the conciliation conference and the Petitions were filed more than 90 days after the Notices were sent and hence are untimely. A copy of the RPTT return is attached. It shows the addresses for both Petitioners as "85 Delancey Street, New York, New York 10002."

The Affidavit of Noel Woodburn (Woodburn Affidavit) recounts the procedures for mailing notices by the Department's Review and Quality Control Group (RQC)³. It states that completed audits are forwarded for review and mailing of the applicable notice. Once the review is completed, the physical and electronic case files are transferred to the RQC supervisor with the notice of determination dated and ready for mailing. After the supervisor's review, the notice of determination is placed in a designated cabinet for notices ready for mailing. The Assistant Director of the RQC gives the notice of determination to a Clerical Support Staff member for mailing on a day before the date indicated on the notice of determination. The Clerical Support Staff member prepares a "Daily Transmittal List" listing all mailings for that day and makes copies of the notices for the Department's files.

³ Mr. Woodburn's affidavit addresses the procedures relating to the Notice in 157-162 LLC but attaches documentation for both cases. From this, it is understood that his statements apply to both Notices, which were mailed on the same day.

The Woodburn Affidavit avers that in addition to the Daily Transmittal List, the Clerical Support Staff member prepares a USPS Form 3800 (Receipt for Certified Mail) for each notice of determination to be mailed. On the Form 3800, the Clerical Support Staff member entered the staff member's name and the source of the form, i.e., 375 Pearl Street 29th Floor - RQC. Once the USPS Form 3800 is prepared, the Clerical Support Staff member examines it to ensure that the name and address of the taxpayer are present, legible, and identical in all places.

The Woodburn Affidavit further states that the Clerical Support Staff member places each notice, a power of attorney, and a Request for Conciliation Conference with a Notice of Taxpayer Rights and Petition for Hearing form in a windowed envelope ensuring that the name and address are legible and visible. The envelope is sealed, and the USPS Form 3800 is affixed to the appropriate location on the front of the envelope. The envelopes, together with the Daily Transmittal List, are placed in the RQC's outgoing mailbox on the 29th floor of 375 Pearl Street, New York, New York, 10038.

The Woodburn Affidavit further avers that once a day, all envelopes prepared for mailing, including certified mail envelopes prepared by the Clerical Support Staff of the RQC, are picked up from the RQC's outgoing mailbox on the 29th floor of 375 Pearl Street. The Employee Services personnel responsible for picking up the mail signs the Daily Transmittal List after ensuring that all the related pieces of mail are included. The Daily Transmittal List contains a notation at the lower left which states "Clerks [sic] Initials" without any initials.

The Supplemental Affidavit of Noel Woodburn (Supplemental Affidavit) states that the "reference to 'Clerk's Initials' on the Daily Transmittal Sheet is not for the purpose of having a USPS employee initial the sheet," because the Daily Transmittal Sheet "is an internal DOF document that is not provided to the USPS for stamping." It continues: "During the time period when the NOD [Notice of Determination] was issued in this matter, it was not the DOF's practice to have a DOF clerk initial the transmittal sheet." On this subject, it concludes,

"DOF no longer follows the mailing procedures that were in place in March 1992 referenced in the *Matter of [Samuel] Heyman*⁴ case cited at the Oral Argument. Rather a DOF staff member brings only the certified mail receipt (Form USPS 3800) to the USPS to be postmarked. Similarly, DOF does not utilize the same mailing procedures used by the State referenced in the *Matter of Khayer Kayumi*⁵ case cited at the Oral Argument."

The Woodburn Affidavit states that the mail is brought to the mail room on the 26th floor of 375 Pearl Street, New York, NY, and picked up by a mail courier who transports it to 66 John Street, New York, NY, for further processing and mailing. Customarily, on the day after the mailing, the mail room returns the USPS Form 3800 to the RQC. After the Receipt has been returned, it is placed in the file folder dedicated to the filing of these USPS forms.

Copies of the certified mail receipts (Forms 3800) to Petitioners at the address listed on the RPTT return date-stamped June 11, 2019, were submitted. The receipt for each

⁴ TAT(E)93-1577(RP) (City Tax App. Trib., 2001)

⁵ DTA No. 825953 (NYS Tax App. Trib., 2019)

mailing states the name of the Clerical Support Staff member ("J Walia") and the source "375 Pearl Street 29th Floor - RQC." Mr. Woodburn states that these receipts indicate that the envelopes were taken to the USPS Office located at 66 John Street where a USPS clerk acknowledged receipt of each envelope by stamping it with a postmark of June 11, 2019. The Woodburn Affidavit attached Forms 3800 which appeared to lack postmarks; the Supplemental Affidavit attached copies with legible postmarks and a Zip Code of 10038, which is the Zip Code for the Post Office at 66 John Street. The Supplemental Affidavit states that the receipts were returned to the RQC and filed in the folder in accordance with standard procedures.

The Woodburn Affidavit also avers that after the mail has been picked up from the outgoing mailbox on the 26th floor of 375 Pearl Street, a copy of the Daily Transmittal list is made available to the RQC supervisor who updates the electronic case to the appropriate case status and responsible owner in the Business Tax System and the file is sent to Audit Operations Clerical Support Staff for filing.

The Woodburn Affidavit concludes that if the USPS returns an envelope because it was not delivered, the Employee Services personnel on the 26th floor of 375 Pearl Street receives the envelope and places it in the incoming mailbox on the 29th floor of 375 Pearl Street. The Clerical Support Staff personnel responsible for distributing the mail hand-delivers the returned envelope to the Assistant Director of the RQC. There is no indication that the envelopes at issue in these case were returned to the Assistant Director of the RQC.

Copies of the Forms 3800, the Notices, and a redacted copy of the Daily Transmittal List are attached to the affidavit. Both the certified mail receipt and the Daily Transmittal list include in the address for WH Uptown LLC "c/o CREFA Corp." The Forms 3800 otherwise replicate the addresses provided on the RPTT return.

The Affirmation of Ellen S. Brody (Brody Affirmation), filed in opposition to the motion, attaches USPS tracking documentation received from Petitioner's managing member, which is no longer available through the USPS tracking system.

POSITIONS OF THE PARTIES

Respondent argues that City Administrative Code (Admin. Code) §11-2107 required Petitioners to file and serve petitions or request a conciliation conference within 90 days of the date on the Notices. Since the Petitions were filed almost two years after the date of the Notices, they are untimely and the Tribunal lacks subject matter jurisdiction. Respondent further argues that the Department mailed the Notices to the proper address. Admin. Code §11-2116(a) required the Department to mail the notice of determination to the taxpayer "at the address given in the last return filed by him or her pursuant to the provisions of this chapter [Chapter 21: Real Property Transfer Tax]." It was mailed to 85 Delancey Street, the address shown on the RPTT return. This satisfied the statutory requirements because the RPTT return was the last return filed by the Petitioners under Chapter 21: RPTT.

Petitioners respond that although the motion is made pursuant to several provisions of the Tribunal Rules, Respondent fundamentally relies on Tribunal Rules §1.05(b)(1)(vii), that the Petitions were not timely filed. Petitioners argue that Respondent's position is premised on a misconstruction of Admin. Code §11-2116(a), which changes "presumptive evidence" to mean "conclusive evidence."

Petitioners note that Admin. Code §11-2107 provides that notice of determination of tax is to be given to the person liable for the tax. Petitioners argue that that did not happen here. Instead, the Commissioner caused a notice of determination to be mailed to the address shown on the RPTT return. There were other taxpayers and offices at this address. The USPS tracking history for the Notice shows that it was "Delivered to Agent" at zip code 10038. The Department's office is located there; the taxpayers do not have offices there.

The statute, as noted by Petitioners, states that the mailing of the notice shall be presumptive evidence of the receipt of the same by the person to whom it is addressed. That presumptive evidence is rebuttable, Petitioners argue, as it must be, to give any meaning to the word "presumptive." The USPS tracking information indicates that the notices were "delivered" to zip code 10038. Presumably they were returned to 375 Pearl Street. Petitioners contend that although Respondent has a procedure to deal with returned mail, no returned mail was identified in this case. Whether there was a failure of Respondent's protocol for handling returned mail at the Pearl Street facility or a failure of the USPS in delivering the Notices to another address in the zip code of 10038, the evidence shows that the government has not done what the statute

presumed it would do.

Respondent counters that the mailing evidence which the tax authority must produce in order to prove proper mailing is two-fold: (1) there must be proof of a standard mailing procedure used by the tax authority provided by one with knowledge and (2) there must be proof that that standard procedure was followed in the instance. Respondent contends that Petitioners offer no evidence, documents, or tracking data to rebut the presumption; they merely cite to statements in their petitions, which are not supported by documentary evidence.

Respondent replies to the Brody Affirmation, which provides what purports to be USPS tracking information for the Notices, with a November 5, 2021 letter arguing that in order to rebut the presumption, Petitioners were required to submit evidence, consisting of more than a mere denial of receipt, establishing that they never received the Notices. Petitioners have submitted the Brody affirmation in order to fall within the facts of *Matter of Ruggerite, Inc. v State Tax Comm'n*, 97 AD2d 634 (3rd Dept 1983). The tracking information submitted is deficient because it does not show that it came from the USPS or provide a tracking number. Moreover, even if these infirmities did not exist, it shows that the USPS attempted to deliver the Notice at least three times, and on the last occasion it was "refused." This is distinguishable from *Ruggerite*, where the taxpayer provided "uncontroverted proof" that it did not receive the notice and evidence that the USPS failed to comply with its own procedures. Petitioners have failed to rebut the presumption of receipt, and in the absence of subject matter jurisdiction the Tribunal has no authority to proceed and must dismiss the Petitions.

Petitioners reply that Respondent does not follow its prior procedures as outlined in *Matter of Samuel Heyman*, and does not follow the State's procedures as described in *Matter of Khayer Kayumi*, or as set forth in its Statement of Audit Procedure PP-2008-06. There is no published source to indicate that the procedure Respondent followed here is standard. The fact that the "Clerk's Initials" portion of the Daily Transmittal Sheet is not filled in indicates a change in procedure without the issuance of guidance or reconsideration of the forms used. Apparently Respondent believes that the mailing procedures can be changed at any time, without notice, and still result in a strong presumption of delivery. This leaves "standard procedure" to be whatever Respondent determines it to be in a particular case.

CONCLUSIONS OF LAW

Respondent's motion is ultimately one to dismiss the Petitions as late-filed, therefore depriving the Tribunal of subject matter jurisdiction pursuant to Tribunal Rules §1-05(b)(1)(ii) and (vii).

Tribunal Rules §1-05(b)(2)(ii) provides that on a motion to dismiss, the administrative law judge may "treat the motion as a motion for summary determination and, on notice to the parties, proceed pursuant to subdivision (d) of this section" Notice was provided to the parties at the status conference on March 10, 2022, and the parties consented to treat this motion as one for summary determination.

Section 1.05(d)(1) of the Tribunal Rules provides that 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."

It further provides that,

"The motion shall be denied if any party shows sufficient basis to require a hearing of any issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion."

This section of the Tribunal Rules is based on CPLR 3212(b). In interpreting this provision, courts have held that the movant must "establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor . . . and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] (internal quotation marks and citations omitted); *Matter of Jonis Realty/E. 29th Street LLC*, TAT [E] 09-9 [RP] [City Tax Appeals Tribunal, Appeals Division, 2011]).

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 from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make this showing requires that the motion be denied, regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853).

If the movant makes this showing, the burden shifts to the opposing party to present facts sufficient to require a trial of any issue of fact, by producing evidentiary proof in admissible form, or by demonstrating acceptable excuse for the failure to meet the strict requirement of tender in admissible form (*Zuckerman*, 49 NY2d at 562).

The timely filing and service of a petition is a jurisdictional prerequisite to the Tribunal's review of a taxpayer's petition seeking redetermination of a tax deficiency asserted by Respondent in a notice of determination (City Charter §170[a]; *Matter of 1456-69-71 Bushwick Ave. LLC*, TAT [E]14-14 [RP] [City Tax App. Trib., Appeals Division, 2016]; *Matter of TBY Four Seasons Fruit & Vegetable Market Inc.*, TAT [E] 93-12 [GCT] [City Tax App. Trib., Appeals Division, 1993].)

The petition must be filed and served within 90 days after the notice is issued. (City Charter §170[a]; Admin. Code §11-2107). "The tribunal shall not extend the time limitations for commencing a proceeding for any petitioner failing to comply with such time limitations." (City Charter §170[a].)

Any notice, including this notice of determination, must be sent to the taxpayer's last known address. Admin. Code §11-2116(a) provides that:

"Any notice authorized or required under the provisions of this chapter [23] may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him or her pursuant to the provisions of this chapter in any application made by him or her, or in any deed or instrument which is the subject of the notice, or, if

no return has been filed or application made or address stated in the deed or instrument, 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. Any period of time which is determined according to the provisions of this chapter by the giving of notice shall commence to run from the date of mailing of such notice."

"When the timeliness of a petition is at issue, 'the Department has the burden of proving proper addressing and mailing of the notice being protested.'" *Matter of Assoc. Bus. Tel. Sys. Corp.*, TAT(E)99-65 and 99-66(UT) (City Tax App. Trib., Appeals Div., 2007), quoting from *Matter of 2981 Third Avenue, Inc.*, TAT(E)93-2092(RP) (City Tax App. Trib., Appeals Div., 2007).

A notice is deemed to be mailed when it is delivered to the custody of the USPS for mailing; actual receipt is not required. *Matter of Assoc. Bus. Tel. Systems Corp.* and cases cited therein. However, the presumption of delivery does not arise "unless and until sufficient evidence of mailing has been proffered." *Id.*, quoting *Matter of William and Gloria Katz*, DTA No. 805768 (NY State Tax App. Trib., 1991)⁶. Respondent must establish that the Notices were mailed by offering proof (1) of a standard procedure used in the issuance of notices by one who has knowledge of the relevant procedure and (2) that the standard procedure was followed in this case. *Matter of Assoc. Bus. Tel. Sys. Corp.*, citing *2981 Third Avenue*.

In the mailing cases considered by the Tribunal, a document

⁶ "The tribunal shall follow as precedent the prior precedential decisions of . . . the New York State Tax Appeals Tribunal . . . insofar as those decisions pertain to any substantive legal issues currently before the tribunal." City Charter § 170.d.

called a mail manifold, USPS Form 3877, was used to prove mailing. It lists each article that was delivered to the custody of the U.S. Postal Service, and is postmarked and initialed and signed by a USPS employee, after verifying the number of pieces of mail received. *Matter of Assoc. Bus. Tel. Sys. Corp.*; 2981 Third Avenue; *Matter of Samuel Heyman*. In this last case, the mail manifold was incomplete because the USPS employee's initials and number of pieces of mail were not indicated and thus the presumption of official regularity was not applicable; however, "it may nevertheless form part of the evidence needed to prove mailing"

The New York State Department of Taxation and Finance uses a similar procedure, which was described in *Matter of Khayer Kayumi*, although the terminology used is "certified mail record" (CMR), without reference to a USPS form number. In that case a 28-page CMR was found to be defective and thus did not prove mailing where it had stamped instructions that the USPS employee was to hand-write or circle the number of pieces of mail but this was not done. However a second CMR, referring to one item of mail, was found to be properly completed and thus to prove mailing where these stamped instructions were omitted.

As set forth in the Supplemental Affidavit, at some point Respondent ceased using the procedures outlined in the earlier cases and instead began relying on USPS Form 3800, which is the standard certified mail document used for a single article of mail.⁷ The instructions to the USPS Form 3877 state in part:

⁷ The change may have been prompted by the failure of USPS employees to complete the sections of the Form 3877 indicating total pieces of mail received and the name of the employee. *Matter of Samuel Heyman*. That failure led to the conclusion that the mailing was defective in *Khayer Kayumi*.

"For three or more pieces with extra services [including certified mail, which is one of the options for use] presented for mailing at one time, the mailer may use PS Form 3877 (firm sheet) or private printed firm sheets in lieu of the receipt portion of the individual form."

A properly completed and postmarked Form 3800 is direct documentary evidence of the date and the fact of mailing. *Matter of Novar TV and Air Conditioner Sales and Serv.*, DTA No. 806675 (NYS Tax App. Trib., 1991) (rejecting a Form 3800 where it had not been postmarked); *Matter of Bryant Tool & Supply, Inc., et al.*, DTA No. 808417, 808496, and 808535 (NYS Tax App. Trib., 1992) (Division of Taxation's postage meter marking on Form 3800 was inadequate to prove delivery to USPS; a USPS postmark was required.)

USPS Form 3800 is the functional equivalent of USPS Form 3877, and the CMR discussed in the State tax taxes. In each instance, there is direct documentary evidence that demonstrates that the article was delivered to the USPS. This may take the form of a postmark, or a postal employee's indicating the number of pieces of mail or signing the document.

In this case, the procedure used was not a lesser standard than use of Form 3877; Forms 3800 and 3877 are different but functionally equivalent forms designed to prove delivery to the USPS. *Matter of Novar TV and Air Conditioner Sales and Serv.*; *Matter of Bryant Tool & Supply, Inc., et al.* The only difference is that the Form 3800 is used for an individual item of mail and the Form 3877 can be used for three or more items.

The fact that Respondent added the words "c/o CREFA Corp."

to the address for WH Uptown is of no moment because the addressee and address are correct. Finally, the Tribunal cannot consider what purports to be USPS tracking information submitted by Petitioners because it contains nothing to tie it to these certified mail numbers and is not authenticated.

Based on the undisputed facts submitted, Respondent has met its burden on the motion for summary determination and the two affidavits submitted prove proper mailing of the notices of determination.

For these reasons, Respondent's motion is granted, the Petitions are dismissed as untimely, and the Notices are sustained.

DATED: August 9, 2022
New York, New York

/s/
David Bunning
Acting Chief
Administrative Law Judge