

NEW YORK CITY TAX APPEALS TRIBUNAL
ADMINISTRATIVE LAW JUDGE DIVISION

In the Matter of the Petition : DETERMINATION
: :
of : TAT(H) 22-13 (GC)
: :
CCB HOLDCO INC. : :
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: :

Kalish, A.L.J.:

On November 14, 2022, Petitioner, CCB HOLDCO INC., filed a petition for a redetermination of a deficiency (Petition) of New York City (City) General Corporation Tax (GCT) under Title 11, Chapter 6, of the City Administrative Code (Administrative Code), for its tax year ended December 31, 2018. The deficiency was asserted in a Notice of Determination issued by the Commissioner of the City Department of Finance (Department), dated March 21, 2022 (NOD).

On April 14, 2023, Respondent, the Department, filed a motion to dismiss the Petition. Respondent filed the motion pursuant to the Rules of Practice and Procedure of the City Tax Appeals Tribunal (Tribunal), (20 RCNY) (Tribunal Rules) § 1-05(b)(1)(ii) and (vii), on the grounds that the Petition was not timely filed, and, therefore, the Tribunal lacks subject matter jurisdiction. In support of the motion, Respondent submitted an affirmation of Respondent's attorney, an affidavit of Noel Woodburn, Assistant Director of the Review and Quality Control Group (RQCG) of the Department (Woodburn Affidavit) and a memorandum of law. Petitioner opposed the motion by filing an answering brief on August 10, 2023 (Answering Brief). Respondent filed a reply brief in further support of the motion on September 14, 2023.

Upon notice to the parties on October 18, 2023, the undersigned converted the motion to dismiss to a motion for summary determination. Such notice was memorialized in writing by the undersigned via a letter, dated October 25, 2023, that was mailed to both parties. Petitioner and Respondent each affirmatively consented to the conversion of the motion via separate email messages dated October 28, 2023, and October 30, 2023, respectively. A deadline of November 10, 2023 was set for additional submissions in response to the conversion. Neither party filed an additional submission.

Petitioner was represented by Michael G. Kaplan, CPA, and Nicholas Sanchez, Esq., each of Miller Kaplan Arase LLP. Respondent was represented by Daniel Joy, Esq., Senior Counsel, New York City Law Department.

ISSUES

1. Whether the Petition was filed within 90 days of the mailing of the NOD, as required under § 170[a] of the City Charter and § 11-680.2 of the Administrative Code.

2. Whether the principle of equitable tolling is applicable to the deadline for a taxpayer to file a petition for a hearing before this Tribunal.

STATEMENT OF FACTS

Petitioner mailed the Petition via United States Postal Service (USPS) on November 14, 2022. A copy of the NOD was attached to the Petition. Additionally, a separate copy of the NOD was attached as Exhibit A to the Woodburn Affidavit.

The Woodburn Affidavit describes the standard procedures for mailing notices by the Department's RQCG. In addition to the NOD, several other exhibits were attached to the Woodburn Affidavit for the purpose of evidencing that such standard procedures were followed in the present case.

According to the Woodburn Affidavit, 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 RQCG 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 RQCG provides the notice of determination to a Clerical Support Staff member for "mailing/processing" on a day before the date indicated on the notice of determination. In addition to creating copies of the notices for the Department's records, the Clerical Support Staff member prepares a "Daily Transmittal List," which includes all mailings for that day and makes copies of the notices for the Department's files.

The Woodburn Affidavit states that, in addition to the Daily Transmittal List, the Clerical Support Staff member prepares a USPS Form 3800 Receipt for Certified Mail (Form 3800)

for each notice of determination to be mailed. On the Form 3800, the Clerical Support Staff member enters the staff member's name and the source of the form. The Clerical Support Staff member then examines the form to ensure that the name and address of the taxpayer are present, legible and identical on all pieces.

A copy of the relevant Form 3800, which was addressed to Petitioner at the address listed on Petitioner's relevant 2018 Form NYC - 3L General Corporation Tax Return (GCT return) and date-stamped March 21, 2022, was attached to the Woodburn Affidavit as Exhibit B. The attached Form 3800 includes both the name of the Clerical Support Staff member, which is "J-Walia," and the source of the form, which was "375 Pearl Street 29th Floor - RQC." A print-out copy of the first page of the electronically filed GCT Return was separately attached as Exhibit D to the Woodburn Affidavit. The GCT Return was Petitioner's tax return for the specific tax type and period in controversy. The address listed for Petitioner in the print-out copy of the GCT Return is substantially identical to that which was included on the Form 3800.

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

The Woodburn Affidavit further states that once a day, all envelopes prepared for mailing, including certified mail envelopes prepared by the Clerical Support Staff of the RQCG, are picked up from the RQCG'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 and ensures that all related pieces of mail are included. The Daily Transmittal List for the instant case was attached to the Woodburn Affidavit as Exhibit C and contains an address for Petitioner that is substantially identical to the address listed on the GCT Return.

The Woodburn Affidavit also states that the mail is brought to the mail room on the 26th floor of 375 Pearl Street, New York, NY. Then, the mail is transported by a mail courier to 66 John Street, New York, NY, for further processing and mailing. The Woodburn Affidavit states that the attached Form 3800 indicates that the envelope was taken to the USPS office located at 66 John Street where a USPS clerk acknowledged receipt of the envelope by stamping it with a postmark of March 21, 2022.

The Woodburn Affidavit further states that customarily, on the day after the mailing, the mail room returns the Form 3800 to the RQCG. After the Form 3800 is returned, it is placed in the file folder dedicated to the filing of such forms. The Woodburn Affidavit states that, in the present case, the Form 3800 was returned to the RQCG and filed in the folder in accordance with standard procedures.

The Woodburn Affidavit also states that after the mail is picked up from the outgoing mailbox on the 29th floor of 375

Pearl Street, a copy of the Daily Transmittal List is "made available" to the RQCG supervisor. The RQCG supervisor then updates the electronic case file with 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 with the following statement from Mr. Woodburn: "[b]ased upon my personal knowledge and review of [the Department's] documents, the procedures described above were followed in this matter."

Attached as Exhibit E to the Woodburn Affidavit is a copy of the USPS tracking history from the USPS website, which indicates that the NOD was delivered to the address listed on the Form 3800.

Petitioner's Answering Brief does not seek to refute the accuracy of either the statements included in the Woodburn Affidavit, or the exhibits attached thereto.

POSITIONS OF THE PARTIES

Respondent asserts that the Petition should be dismissed because it was not filed within 90 days of the mailing of the NOD, as required under the City Charter and Administrative Code. To buttress their position, Respondent relies on a presumption of delivery of the NOD.

Petitioner does not assert that the Petition was timely filed, and thus, does not seek to rebut the presumption of delivery. Instead, Petitioner asserts in their Answering Brief

that the filing deadline should be equitably tolled and “the Tribunal should deny Respondent’s motion for dismissal because Petitioner detrimentally relied on Respondent’s representation that it would investigate [an outstanding issue] before issuing the Notice of Determination.”

CONCLUSIONS OF LAW

Respondent’s motion to dismiss is made on two grounds: (1) that the Petition was not timely filed, pursuant to Tribunal Rule § 1-05(b)(1)(vii), and (2) that the Tribunal lacks subject matter jurisdiction to hear the Petition, pursuant to Tribunal Rule § 1-05(b)(1)(ii). However, the assertion that the Tribunal lacks subject matter jurisdiction stems from the claim that the Petition was not timely filed. Therefore, Respondent’s motion is ultimately one to dismiss the Petition as not timely filed.

Tribunal Rule § 1-05(b)(2)(ii) provides that on a motion to dismiss, the ALJ may “treat the motion as a motion for summary determination and, on notice to the parties, proceed pursuant to subdivision (d) of this section” As discussed above, such notice was provided to the parties at the status conference on October 18, 2023.

Tribunal Rule § 1.05(d)(1) 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. The motion shall be denied if any party shows sufficient

basis to require a hea[r]ing of any issue of fact.”

Thus, “[t]he proponent of a summary [determination] 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” (*Matter of CT 157-162 LLC, et al.*, TAT (E) 21-5 (RP) and 21-6 (RP) [NYC Tax Appeals Tribunal, Appeals Division, 2023]), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] and citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).¹ Failure to make this showing requires that the motion be denied, regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853). Therefore, despite the fact that Petitioner does not assert that the Petition was filed in a timely manner, a review and discussion of the relevant evidence offered by Respondent is warranted.

In cases where the last known address of the taxpayer is within the United States, a petition for redetermination of a GCT deficiency must be filed and served within 90 days after the applicable notice of determination is mailed to the taxpayer (City Charter § 170[a] and Administrative Code § 11-680.2).

Administrative Code § 11-672.1, which relates to the GCT, provides, in part, that a notice of determination “shall be mailed by certified or registered mail to the taxpayer, at its last known address in or out of the city.”

¹Tribunal Rule § 1.05(d)(1) is based on the Civil Practice Law & Rules of New York (CPLR) § 3212(b), which governs summary judgment, the functional equivalent under the CPLR of summary determination. Each of *Winegrad* and *Zuckerman* interpret CPLR § 3212(b).

When, as in this matter, "a petition has been filed, but its timeliness is at issue, the Department has the burden of proving proper addressing and mailing of the notice being protested" (*Matter of 2981 Third Avenue, Inc.*, TAT (E) 93-2092 (RP) [NYC Tax Appeals Tribunal, Appeals Division, 1999], citing *Matter of Novar TV & Air Conditioner Sales & Service, Inc.*, TSB-D-91(42)S [NYS Tax Appeals Tribunal, 1991] and *Matter of William and Gloria Katz*, DTA No. 805768 [NYS Tax Appeals Tribunal, 1991]).

A notice of determination is deemed mailed when it is delivered to the custody of the USPS for mailing (*Matter of Third Avenue*, citing *Matter of Novar*). Administrative Code § 11-672.1 does not require actual receipt of the notice by the taxpayer (*See Matter of CHARLA BIKMAN*, TAT(E)98-73(UB) [NYC Tax Appeals Tribunal, Appeals Division, 2001], interpreting Administrative Code § 11-521(a), which relates to the unincorporated business tax, the relevant provision of which is substantially identical to that of Administrative Code § 11-680.2 of the GCT). "A notice sent by certified or registered mail to the taxpayer's last known address is properly mailed regardless of whether it is actually received by the taxpayer" (*Id.*, citing *Kenning v State Tax Comm.*, 72 Misc 2d 929 [Supreme Court Albany County, 1972], *affd*, 43 AD2d 815 ([3rd Dept 1973], *lv denied*, 34 NY2d 653 [1974])).

As explained in *BIKMAN*,

"[o]nce the notice is deemed to be properly mailed, the statute places the 'risk of nondelivery' on the taxpayer; i.e., a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. The presumption of delivery, however, does not arise unless and until sufficient

evidence of mailing has been proffered. Thus[,] Respondent must establish when the notice was mailed by: (1) offering proof of a standard procedure used for the issuance of notices by one who has knowledge of the relevant procedure; and (2) offering proof that the standard procedure was followed in the case at issue." [Internal quotation marks, brackets and citations omitted].

Petitioner acknowledges in its Answering Brief that the NOD was mailed on March 21, 2022 to the last known address of the taxpayer, which, in this case, is the address of the taxpayer's representatives that was listed on the GCT Return. The Form 3800 also indicates that the NOD was addressed to the last known address of the taxpayer and was mailed via certified mail, in compliance with Administrative Code § 11-672.1, on March 21, 2022.

Petitioner also does not deny that the NOD was delivered to the last known address of the taxpayer. While Petitioner acknowledges that the certified mail receipt for the NOD was signed upon receipt, Petitioner asserts in its Answering Brief that the specific "accountants who were managing [the] matter" did not receive the NOD "because Petitioner's accountants had skeletal staff at the office due to COVID."

Therefore, there is no dispute between the parties that the NOD was mailed in compliance with the Administrative Code on March 21, 2022, and delivered to the last known address of the taxpayer.

Respondent has also provided sufficient evidence to be entitled to the presumption of delivery. The Woodburn Affidavit includes (i) proof of the standard procedures used for the

issuance of notices by one who has knowledge of the relevant procedures; and (ii) proof that the standard procedures were followed in the case at issue.

The Woodburn Affidavit is an attestation by Mr. Woodburn, the Assistant Director of the RQCG, of the standard procedures for the issuance of notices of determination by the Department. Mr. Woodburn attests in the Woodburn Affidavit that he has personal knowledge of the relevant procedures and Mr. Woodburn describes the procedures in detail. Therefore, Respondent has offered sufficient proof of the standard procedures used for the issuance of notices by an individual who has knowledge of the relevant procedures. Respondent also provided several documents to prove that the standard procedures were followed in the instant case, including the relevant Form 3800, Notice of Determination and Daily Transmittal List. Therefore, Respondent has established that both requirements for the presumption of delivery are satisfied (*See Matter of CT 157-162 LLC*, discussing sufficient proof under similar circumstances).

The evidence submitted by Respondent, including a copy of the stamped Form 3800, also indicates that the NOD was mailed on March 21, 2022. As the Petition was not filed until November 14, 2022, more than seven months after the mailing of the NOD, which exceeds the 90-day limitation imposed by City Charter § 170[a] and Administrative Code § 11-680.2, Respondent has made a prima facie showing of entitlement to judgment as a matter of law.

While Petitioner does not seek to either rebut the presumption of delivery or claim that the Petition was timely filed, Petitioner asks this Tribunal to deny Respondent's motion by applying the principle of equitable tolling. However,

as explained by the United States Supreme Court, “[j]urisdictional requirements cannot be waived or forfeited . . . and do not allow for equitable exceptions” (*Boechler v Commissioner*, 596 US 199, 203 [2022], citing *Henderson v Shinseki*, 562 US 428, 434-435 [2011] and *Sebelius v Auburn Regional Medical Center*, 568 US 145, 154 [2013])). “A procedural requirement [is] jurisdictional only if [the relevant legislative body] clearly states that it is” (*Boechler* at 203) [Internal quotation marks and citations omitted]. There are no specific words that must be included in a jurisdictional requirement to interpret the requirement as such, but the “traditional tools of statutory construction must plainly show . . . a procedural bar with jurisdictional consequences” (*Boechler* at 203, quoting *United States v Kwai Fun Wong*, 575 US 402, 410 [2015])).

City Charter § 170[a] states that to commence a proceeding before this Tribunal, “a taxpayer must, within ninety days after being issued the [applicable notice of determination or other applicable document] . . . file the petition with the tribunal” (emphasis added). Thus, the City Charter plainly conditions the right to a hearing before this Tribunal on the timely filing of a petition. Moreover, the same section of the City Charter goes on to state that “[t]he tribunal shall not extend the time limitations for commencing a proceeding for any petitioner failing to comply with such time limitations.” Such express denial of authority to extend the time limitations is a clear procedural bar with jurisdictional consequences.

Thus, as concluded by the Appeals Division of the Tribunal in numerous prior cases, “[t]he timely filing and service of a petition is a jurisdictional prerequisite to the Tribunal’s

review of a taxpayer's petition" (*Matter of CT 157-162 LLC*, citing City Charter § 170[a] and *Matter of 1456-69-71 Bushwick Ave. LLC*, TAT [E] 14-14 [RP] [NYC Tax Appeals Tribunal, Appeals Division, 2016]; See also *Matter of TBY Four Seasons Fruit & Vegetable Market Inc.*, TAT [E] 93-12 [GCT] [NYC Tax Appeals Tribunal, Appeals Division, 1993]).

As the timely filing of a petition is a jurisdictional prerequisite for a hearing before this Tribunal, equitable tolling is inapplicable to City Charter § 170[a] deadline for a taxpayer to file such petition.

Based on the undisputed facts submitted, Respondent has met its burden on the motion for summary determination. The Petition was not timely filed, the principle of equitable tolling is inapplicable to the deadline for filing a petition, and, consequently, this forum lacks jurisdiction to hear the merits of this case.

ACCORDINGLY, Respondent's motion is granted, the Petition is dismissed as untimely, and the NOD is sustained.

DATED: May 22, 2024
 New York, New York

 /s/
Jarrett S. Kalish
Administrative Law Judge