

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
	:	
VICTORY BAGEL TIME, INC.	:	DECISION
	:	DTA NO. 824556
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 June 1, 2005	:	
through November 30, 2009.	:	

Petitioner, Victory Bagel Time, Inc., filed an exception to the order of the Administrative Law Judge issued on December 29, 2011. Petitioner appeared by DeSantis, Kiefer, Shall & Sarcone, LLP (John M. Shall, CPA) and Maynard, O'Connor, Smith & Catalinotta, LLP (Aaron F. Carbone, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the follow decision.

ISSUE

Whether petitioner filed a timely petition for a hearing before the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of

fact “11,” which has been modified. The Administrative Law Judge’s findings of fact and the modified finding of fact are set forth below.

The Division of Taxation (Division) issued to petitioner, Victory Bagel Time, Inc., at its Staten Island, New York, address, a Notice of Determination, numbered L-033506187 and dated April 12, 2010, assessing additional sales and use taxes due in the amount of \$122,600.12 for the period June 1, 2005 through November 30, 2009. By its request for a conciliation conference, dated April 28, 2010, petitioner protested the Notice.

The Division’s Bureau of Conciliation and Mediation Services (BCMS) issued to petitioner a Conciliation Order (CMS No. 239185), dated April 8, 2011, denying petitioner’s request and sustaining the Notice of Determination. Petitioner challenged this order by filing a petition with the Division of Tax Appeals. The petition is dated as signed on July 18, 2011. The envelope in which the petition was mailed bears a machine metered postage stamp dated August 15, 2011 and it, as well as the petition, is date stamped as received by the Division of Tax Appeals on August 18, 2011.

On September 20, 2011, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, advising the parties that the Conciliation Order appeared to have been issued on April 8, 2011, the petition was not filed thereafter until August 15, 2011, or some 129 days later, and therefore was untimely and subject to dismissal. The parties were afforded 30 days within which to submit comments on the proposed dismissal of the petition.

To show proof of proper mailing of the Conciliation Order on April 8, 2011, the Division provided the following: (i) an affidavit, dated October 11, 2011, of John E. Matthews, Esq.; (ii) an affidavit, dated October 7, 2011, of Bruce Peltier, the mail and supply supervisor of the staff

of the Division's Registry Unit; (iii) an affidavit, dated October 6, 2011, of Robert Farrelly, the assistant supervisor of the BCMS; (iv) an affidavit, dated October 7, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel; (v) the "Certified Record for Presort Manual Mail - BCMS Cert. Letter" (CMR); and (vi) a copy of petitioner's Request for Conciliation Conference and the Conciliation Order in response thereto.

The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS Data Processing Services Unit prepared and forwarded the conciliation orders, together with the accompanying cover letters, to the particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward the order and cover letter to the BCMS clerk assigned to process conciliation orders.

The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing (AFP) Unit, which in turn assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code for each order. The AFP Unit generates a CMR listing those taxpayers and representatives to whom conciliation orders are being sent on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO," and the BCMS numbers are recorded under the heading "Reference No." Each Reference No. is preceded by three zeroes. The AFP Unit assigns the CMR and cover sheet data to a printer located in BCMS and these documents are printed there and delivered to the BCMS clerk assigned to process conciliation orders.

The BCMS clerk's regular duties included associating each cover sheet, conciliation

order and covering letter, and verifying the names and addresses of taxpayers and their representatives, per BCMS records, with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, covering letter and conciliation order into a three-windowed envelope such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear. The “Total Pieces and Amounts” is indicated on the last page of the CMR. The BCMS clerk is to stamp the bottom left corner of the last page “MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT”, and to stamp the bottom right corner of the last page “POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas.” The clerk then inserts by handwriting on the top of each page of the CMR the date that the conciliation orders were mailed.

In this instance, certified control number 7104 1002 9730 0550 1980 was assigned to the Conciliation Order to be mailed to petitioner, Victory Bagel Time, Inc., and certified control number 7104 1002 9730 0550 1935 was assigned to the Conciliation Order to be mailed to petitioner’s representative, John M. Shall, CPA. The CMS reference number is, in each instance, 000239185. This information appears on page four, with respect to Mr. Shall, and on page five, with respect to petitioner, of the eight-page CMR pertaining to these mailings. The address 1675 Richmond Road, Staten Island, NY 10304 appears with respect to Mr. Shall, and the address 3579 Victory Boulevard, Staten Island, NY 10314-6734 appears with respect to petitioner. The date “4-8-11” is handwritten in the upper right corner of each of the eight pages of the CMR.

A piece of mail may be “pulled” from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is

segregated from the remaining group of conciliation orders being mailed, so as to allow for correction or issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

Under the Division's standard mailing procedures, the conciliation orders and accompanying CMR are picked up in BCMS by an employee of the Division's Mail Processing Center (Center) and deposited in the "Outgoing Certified Mail" basket in the Center. A member of the staff, in turn, weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. In turn, a member of the Center staff delivers the sealed, stamped envelopes to a branch of the United States Postal Service (USPS) in Albany, New York for mailing. A postal employee then affixes a postmark and his or her initials or signature to the CMR to indicate receipt by the post office. The CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Center, each CMR would be picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

We have modified finding of fact "11" of the Administrative Law Judge's determination to read as follows:

Review of the CMR in this case reveals that four pieces of mail were pulled, and a line was drawn through the information for each of those pieces of mail as appearing on pages four and five of the CMR. The preprinted total pieces of mail listed on page eight of the CMR is 78. This number has been crossed out

and the handwritten number 76 has been inserted after the listing for “total pieces received at post office.” This same number, 76, appears again on page eight, handwritten and accompanied by the initials “EB,” and both are circled. While the CMR indicates that four pieces of mail were pulled, the adjustment number reflects only two pieces of mail as being pulled. The Division offers no explanation for the apparent discrepancy other than “clerical error.” In similar manner, and although set forth by affidavit, page eight of the CMR does not in fact include the stamped legend instructing “POST OFFICE Hand write total # of pieces and initial/Do Not stamp over written areas.” Each page of the CMR reflects the postmark of the Stuyvesant Plaza branch office of the USPS, dated April 8, 2011.¹

The facts set forth above were established through the affidavits of Robert Farrelly and Bruce Peltier, in conjunction with review of the CMR and other documents submitted therewith. Mr. Farrelly was employed as the Assistant Supervisor of Tax Conferences for BCMS. His duties included supervising the preparation and mailing of conciliation orders, and he is fully familiar with the procedures involved therewith. Mr. Peltier was employed as a Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center. His duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS, and he is fully familiar with such procedures.

The record on this motion includes a copy of the Conciliation Order, bearing CMS No. 239185, allegedly mailed by certified mail to petitioner, Victory Bagel Time, Inc., as well as to petitioner’s representative, on April 8, 2011. The record also includes a copy of petitioner’s Request for Conciliation Conference, dated April 28, 2010, which lists the same address for petitioner and for petitioner’s representative as are set forth above.

The affidavit of Heidi Corina, a legal assistant in the Division’s office of counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After

¹ We have modified this fact to more accurately reflect the record.

Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for two items: one item mailed by the Division under certified number 7104 1002 9730 0550 1980 on April 8, 2011 from the Stuyvesant Plaza branch office of the USPS to petitioner at its Staten Island address listed above, and one item mailed under certified number 7104 1002 9730 0550 1935 to petitioner's representative at his Staten Island address listed above. In response, the USPS confirmed delivery of each of these certified mail items at the noted addresses, specifically to petitioner's address on April 11, 2011 at 2:04 P.M. and petitioner's representative's address on April 11, 2011 at 12:08 P.M.

In response to the Notice of Intent to Dismiss Petition, petitioner furnished a time line of events concerning this matter. Petitioner alleged, with respect to the timeliness issue presented herein, that the Conciliation Order was first received by facsimile on July 11, 2011, and that neither petitioner nor its representative has a record of receiving the order allegedly mailed by the Division on April 8, 2011.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed the standards regarding summary judgment motions and the timeliness of petitions. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the Conciliation Order by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing standards. The Administrative Law Judge held that petitioner failed to timely file its petition and, consequently, that the Division of Tax Appeals lacked jurisdiction to consider this matter. Accordingly, the Administrative Law Judge dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge erroneously dismissed the petition. It contends that the record does not support the Administrative Law Judge's conclusion that the Division established both the standard mailing procedure and that it was followed in this case. Petitioner also argues that the Conciliation Order was never received by petitioner's representative until such was facsimiled to it on July 11, 2011. As such, petitioner argues that the determination of the Administrative Law Judge should be reversed and the matter remanded to the Division of Tax Appeals for a hearing on the merits.

The Division issued no brief in support of its position but, instead, relies upon the determination.

OPINION

The standard for reviewing a Notice of Intent To Dismiss Petition is the same as reviewing a motion for summary determination. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide 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 . . .” (20 NYCRR 3000.9 [b] [1]).

Section 3000.9 (c) of the Rules 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 [1980]).

The issue in this matter is whether petitioner filed a timely petition with the Division of Tax Appeals. The filing of a timely petition is a jurisdictional requirement to obtain review by the Division of Tax Appeals (Tax Law § 170 [3-a] [e]). In order for the Division of Tax Appeals to have jurisdiction over the matter, a taxpayer must file a petition within 90 days from the issuance of a conciliation order (*id.*). A conciliation order is considered issued at the time when it is properly mailed to the taxpayer (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). Therefore, in this matter, the Division must establish proper mailing of the Conciliation Order (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the Conciliation Order, 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 notice 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*, Tax Appeals Tribunal, April 1, 2004).

Upon successfully establishing a presumption of receipt, the burden then shifts to the taxpayer, who must then rebut that presumption by introducing evidence of actual non-receipt (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

We sustain the order of the Administrative Law Judge.

Herein, the Farrelly affidavit establishes the standard mailing procedures for mailing such Conciliation Order, and attests that the record indicates that the procedures were followed in this case. However, as noted by the Administrative Law Judge, the record reveals that there was some discrepancy between the CMR and the number of mailings received by the USPS. We note that flaws in the CMR need not be fatal if the Division establishes that the procedure was followed with respect to the subject mailing and that the taxpayer actually received said mailing. As provided by the Court of Appeals, “[W]here . . . the respondent Commissioner of Taxation and Finance offers evidentiary proof of both mailing and actual receipt, the notices of tax deficiency are valid” (*Matter of Agosto v Tax Commn. of State of N.Y.*, 68 NY2d 891, 893 [1986] [typographical error in address held not fatal upon a showing of actual delivery to last known address]; *Matter of Billionaires Constr.*, Tax Appeals Tribunal, October 20, 2011).

We find that the Division has met the foregoing standards. To prove mailing to the proper address, the Division introduced the Corina affidavit and the accompanying USPS Forms 3811-A. These submissions clearly and convincingly establish that the Division did follow its procedures with regard to the subject mailing and that the pieces of mail were actually transferred into the custody of the USPS. We conclude that the Division introduced sufficient evidence to establish actual delivery to the proper address. Turning to the record, we further find that petitioner introduced no evidence to support its arguments of non-receipt. We conclude that its arguments on exception are unpersuasive.

As such, we find that, in order to have been considered timely, petitioner’s protest had to have been filed on or before July 7, 2011. However, the petition was not filed with the Division of Tax Appeals until August 15, 2011, i.e., the date indicated by the machine-metered postage

mark. This date falls beyond the statutory period to file a timely protest and, as a matter of law, the Division of Tax Appeals lacks jurisdiction over this matter (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Accordingly, we conclude that the Administrative Law Judge properly dismissed the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Victory Bagel Time, Inc. is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Victory Bagel Time, Inc. is dismissed with prejudice.

DATED: Albany, NY
September 13, 2012

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner