

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NICHOLAS BARTOLOTTI : ORDER
 : DTA NO. 819659
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, 1995 through February 29, :
2000. :

Petitioner, Nicholas Bartolotti, 5624 Trastevere Road, Clay, New York 13041, 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 June 1, 1995 through February 29, 2000.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) brought a motion, filed February 10, 2004, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). On March 3, 2004, petitioner, appearing by his representative, Daniel J. Arno, Esq., submitted three affidavits in opposition to the Division's motion, beginning the 90-day period for issuance of this determination. After due consideration of the pleadings, documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Nicholas P. Bartolotti, a Notice of Determination, dated June 15, 2001, assessment identification number L-021280827, and asserted a total amount of sales and use taxes due of \$132,283.00, plus penalty and interest. The Division of Taxation assessed petitioner as a person responsible for the collection and payment of taxes on behalf of KLN Enterprises, Inc.

2. On or about August 7, 2001, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the Notice of Determination.¹ The request was filed by Daniel J. Arno, Esq., along with a power of attorney appointing him petitioner’s representative in this matter.

3. A conciliation conference was held on October 21, 2002. BCMS issued a Conciliation Order, dated January 24, 2003, which denied petitioner’s request and sustained the notice of determination. The order recited that petitioner appeared at the conference by Mr. Arno.

4. With its motion herein, the Division of Taxation submitted the affidavits of Bruce Peltier and Carl Decesare, employees of the Division. Attached to Mr. Decesare’s affidavit was a copy of the certified mail record (“CMR”) containing a list of the conciliation orders allegedly issued by the Division on January 24, 2003.

5. The affidavit of Carl Decesare, Assistant Director of BCMS, set forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (“USPS”) by certified mail and confirmation of the mailing through receipt by BCMS of a postmarked copy of the CMR.

¹By letter, dated July 12, 2002, BCMS informed petitioner that his protest was considered to have been filed at the same time as KLN Enterprises, Inc. on August 10, 2001.

6. The BCMS Data Management Services Unit prepared the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, and submitted them to the conciliation conferee for signature, who in turn forwarded the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

7. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division of Taxation's Advanced Function Printing Unit ("AFP"). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code.

8. The AFP Unit also produced a computer-generated CMR entitled "Assessments Receivable, Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The BCMS numbers were recorded on the CMR under the heading "Reference No." and were preceded by three zeros. The AFP Unit printed the CMR and cover sheets via a printer located in BCMS and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

9. The clerk, as part of her regular duties, associated each cover sheet, conciliation order and covering letter. The clerk verified the names and addresses of taxpayers with the information on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, covering letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code and name and address of the taxpayer appeared.

10. On the last page of the CMR, the BCMS clerk stamped “Post Office Hand write total # of pieces and initial. Do not stamp over written areas” and also stamped “Mailroom: Return Listing to: BCMS Bldg 9 Rm 180 Att: Conference Unit.”

11. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “1/24/03” was written in the upper right hand corner of each page of the CMR except the first page, where it appears in both the upper right and left hand corners.

12. The CMR, along with the cover sheets, covering letters, and conciliation orders were picked up in BCMS by an employee of the Division’s Mail Processing Center, which was responsible for delivering these documents to the post office.

13. The CMR for the conciliation orders mailed on January 24, 2003 consisted of four pages, and the order mailed to petitioner and the copy of the order mailed to his representative, Mr. Arno, were listed on page four of the mail log. The reference number was 000192655. The certified control number associated with the mailing to Mr. Bartolotti was 7104 1002 9739 0153 0961 and set forth the name and address of petitioner as: Nicholas P. Bartolotti, 56 Trastevere Road, Clay, NY 13041-8956. This address was the same one used by petitioner on his New York State resident income tax returns in 1999, 2000, 2001 and 2002 and also on his petition to the Division of Tax Appeals, dated August 27, 2003. The certified control number associated with the mailing to Mr. Arno was 7104 1002 9739 0153 0978 and set forth his name and address as: Daniel J. Arno, P.O. Box 277, Syracuse, NY 13212.

14. Subsequently, the Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed to each page of the four pages of the CMR indicating the date of mailing, to wit: January 24, 2003. The CMR was then retained by BCMS as a permanent record.

15. The affidavit of Bruce Peltier, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and placed postage and fee amounts on the envelopes. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the sealed, stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and/or his or her initials or signature to the CMR indicative of receipt by the USPS.

16. In this particular instance, the postal employee affixed a postmark dated January 24, 2003 to each of the four pages of the CMR, initialed each page, wrote the number "41" next to the stamp affixed by BCMS requesting that the post office handwrite the total number of pieces and initial and circled the typewritten number "41."

17. The USPS postmark was considered by Mr. Peltier to be the official acknowledgment for the pieces of mail recorded on the CMR and that the written and circled "41" indicated that the pieces were received at the post office since the Mail Processing Center had specifically requested that this be done.

18. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR was retrieved from the post office the following day and delivered to the originating office by a member of his staff. The CMR was then retained by BCMS in the regular course of business.

19. Based on his review of Mr. Decesare's affidavit and the attached exhibits, Mr. Peltier concluded that, on January 24, 2003, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Nicholas Bartolotti, 5624 Trastevere Road, Clay, NY 13041-8956 and a piece of certified mail addressed to Daniel J. Arno, P.O. Box 277, Syracuse, NY 13212, to a branch of the USPS in Albany, NY in sealed, postpaid envelopes for delivery by certified mail.

20. From an inspection of the CMR, Mr. Peltier stated that he determined a member of his staff obtained a copy of the CMR with the postmarks for the records of BCMS, which had been delivered to and accepted by the post office on January 24, 2003.

21. Mr. Peltier averred that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner and his representative, Mr. Arno, on January 24, 2003.

22. Peggy S. McCarthy, an employee of Bertrand, Arno, Welch & Putzer, petitioner's representative's law firm, which is located in North Syracuse, New York, stated in her affidavit that she was responsible for picking up the firm's mail from its post office box, sorting and opening it, stamping it with a date, logging it in, and printing out a list for each attorney. Ms. McCarthy was employed by the firm during 2003. She averred that she reviewed the daily mail log-in sheets from January 24, 2003 through the end of March, 2003 and found no reference to a conciliation order's being received.

23. Petitioner averred in his affidavit, dated February 27, 2004, that he never received a conciliation order or signed a "green card" indicating receipt of same.

CONCLUSIONS OF LAW

A.. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(1)(b) the conciliation order in this case and the underlying Notice of Determination would be binding on petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial query is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*; *see, Matter of Novar TV & Air Conditioner Sales & Service, Inc.*, Tax Appeals Tribunal, May 23, 1991.)

Pursuant to Tax Law § 1147(a)(1), BCMS is required to mail the conciliation order to petitioner at his last known address (*see, Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989.) It is clear from the evidence submitted that the Division issued the order on January 24, 2003, mailing petitioner the conciliation order at the address listed on his New York State resident tax returns for the years 1999, 2000, 2001 and 2002 and also on his petition to the Division of Tax Appeals dated August 27, 2003. This raised the presumption that the order was received by petitioner and his mere denial of receipt is not sufficient to rebut the presumption.

(*See, Ruggerite Inc. v. State Tax Commn.*, 64 NY2d 688, 485 NYS2d 517; *Matter of American Cars 'R' Us, Inc. v. Chu*, 537 NYS2d 672.)

C. Although the Division has demonstrated proper mailing of the conciliation order to petitioner, it has not demonstrated that the conciliation order was properly mailed to Mr. Arno, who was appointed under a power of attorney to be petitioner's representative herein. If petitioner's properly appointed representative is not served with the conciliation order, the 90-day period for filing a petition is tolled (*Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29, 31).

D. In *Price v. Commissioner* (76 TC 389 [where the issue was whether an erroneous zip code rendered an otherwise correct address improper for purposes of IRC §§ 6213(a) and 7502]), the Court utilized the USPS Domestic Mail Manual to determine the required elements of an address. The Court concluded, after analyzing the Manual, that the use of zip codes was for the convenience of the Postal Service and was not required as a prerequisite to the delivery of mail. The current USPS Domestic Mail Manual, A010, Standard Addressing Formats, indicates that "all mail . . . must bear a delivery address that contains at least . . . [five] elements" These elements are the recipient's name, the private mailbox designator, the street and number, the *city* and state and the zip code. (*See*, USPS Domestic Mail Manual, A010, section 1.2.)

As indicated by the CMR and the Affidavit of Bruce Peltier, the address on the conciliation order mailed to Mr. Arno, petitioner's duly appointed representative, contained the incorrect city (Syracuse not North Syracuse). It is determined that this error in an essential element of the address is not harmless but consequential (*see, Matter of Combemale*, Tax Appeals Tribunal, March 31, 1994). This conclusion is further supported by the affidavits of Mr. Arno and Ms. McCarthy, which explained how the internal mail processing at the law office

logged in all mail received and that, in this case, there was no record or recollection of receiving the conciliation order.

That being said, because of the Division's error, proper mailing has not been established and there is no presumption of delivery to Mr. Arno. In addition, there is no evidence of actual delivery or a specific date of receipt of the conciliation order by Mr. Arno (*cf.*, *Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d891, 508 NYS2d934; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447; *Matter of Karolight*, Tax Appeals Tribunal, July 30, 1992). Accordingly, there is insufficient evidence in the record to support a dismissal of the petition as untimely pursuant to 20 NYCRR 3000.9(a) or (b).

E. The Division of Taxation's motion for summary determination or dismissal is denied.

DATED: Troy, New York
April 29, 2004

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE