

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HEMANK DHARIA : ORDER
 : DTA NO. 822826
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 December 1, 2004 through February 28, 2007. :

Petitioner, Hemank Dharia, 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 December 1, 2004 through February 28, 2007.

On March 18, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On April 16, 2009, petitioner, appearing pro se, submitted documentation in opposition to dismissal. On April 30, 2009, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), having been granted an extension of time, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced April 30, 2009. After due consideration of the documents submitted, Timothy J. Alston, 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. On January 28, 2008, petitioner, Hemank Dharia, filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of a Notice of Determination dated September 6, 2007 and bearing assessment identification number L-029139992-2. Petitioner's signature on the request is dated November 29, 2007. The envelope in which the request was delivered to BCMS bears a United States Postal Service (USPS) postmark dated January 28, 2008. Petitioner's address as printed on his request is 171 Gerard Ave., New Hyde Park, NY 11040-1735.

2. In response to petitioner's request, BCMS issued to petitioner a Conciliation Order Dismissing Request dated February 15, 2008 in respect of notice number L02913992 and CMS number 222287. In dismissing petitioner's request, the order states that "since the notice(s) was issued on September 6, 2007, but the request was not mailed until January 28, 2008, or in excess of 90 days, the request is late filed."

3. On January 22, 2009, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order Dismissing Request dated February 15, 2008. The envelope in which the petition was delivered to the Division of Tax Appeals bears a USPS postmark dated January 22, 2009.

4. On March 18, 2009, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the Conciliation Order Dismissing Request appeared to have been issued on February 15, 2008 and the petition appeared to have been filed on January 22, 2009, or 340 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS' receipt of a postmarked copy of the CMR.

6. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, to the conciliation conferee for signature, who in turn, forwards 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 are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates 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 produces a computer-generated certified mail record (CMR) entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The CMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

9. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering letter. The clerk verifies the names and addresses of taxpayers 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 where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

10. On each page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

11. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "2/15/08" is written in the upper right corner of each page of the CMR.

12. The CMR, along with the cover sheets, covering letters, and conciliation orders are picked up, in BCMS, by an employee of the Division's Mail Processing Center.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the four-page CMR relevant to this matter which contains a list of the conciliation orders issued by the Division on February 15, 2008. This CMR lists 35 computer-printed certified control numbers. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the four pages of the CMR. Specifically, corresponding to each listed certified control number is a CMS number, the name and address of the addressee, and postage and fee amounts.

14. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0598 4080 is CMS number 222287, along with petitioner's name and address as set forth on

petitioner's Request for Conciliation Conference dated November 29, 2007 and filed January 28, 2008 (*see* Finding of Fact 1).

15. The Division also submitted the affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attests 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 is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

16. In this particular instance, the postal employee affixed a postmark dated February 15, 2008 to each page of the four-page CMR. On page four, the postal employee also wrote his or her signature and wrote and circled the number "35" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

17. Mr. VanDerZee states that 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 Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. VanDerZee's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

18. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on February 15, 2008, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner to a branch of the USPS in Albany, New York in a sealed envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on February 15, 2008 for the records of BCMS. Mr. VanDerZee asserts that the procedures described in his affidavit are 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 on February 15, 2008.

19. The covering letter which accompanied the conciliation order at issue in this matter advised petitioner that if he wished to contest the timeliness of his request for conference, he could file a petition with the Division of Tax Appeals within 90 days of the date of the order.

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) the conciliation order in this case would be binding upon 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, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry 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.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject conciliation orders were mailed as addressed to petitioner on February 15, 2008. Specifically, this document lists certified control numbers with corresponding names and addresses and bears U.S. Postal Service postmarks dated February 15, 2008. Additionally, a postal employee wrote “35” next to the total pieces received heading and initialed or signed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. In light of Conclusions of Law D and E, the Division has established that it properly mailed the Conciliation Order Dismissing Request to petitioner on February 15, 2008 as claimed.

G. In his papers filed in response to the notice of intent to dismiss, petitioner asserted that he filed a timely Request for Conciliation Conference in November 2007 in response to the September 6, 2007 Notice of Determination. He also asserted that he was not liable for the taxes assessed against him in that notice. Petitioner made no assertion and offered no evidence, however, to show that his petition to the Division of Tax Appeals was timely. Unfortunately for petitioner, without a timely-filed petition the Division of Tax Appeals has no jurisdiction to consider the timeliness of his conciliation request, much less the underlying merits of his protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007). Obviously, since his petition was filed on January 22, 2009, it was untimely by a wide margin.

H. Petitioner may not be without some remedy, for he may pay the tax and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).

I. The petition of Hemank Dharia is hereby dismissed.

DATED:Troy, New York
June 25, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE