

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OSMAN OSMANNURI	:	ORDER
		DTA NO. 822984
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, 2004 through November 30, 2006.	:	

Petitioner, Osman Osmannuri,¹ 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, 2004 through November 30, 2006.

On May 12, 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 June 10, 2009, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) submitted its response, including affidavits and other documents, in support of dismissal. On June 11, 2009, petitioner, appearing by Robinson & Associates, PC (Kenneth L. Robinson, Esq., of counsel), submitted the affidavit of Kenneth L. Robinson and attached documentation in opposition to dismissal, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

¹ Petitioner's last name appears on the petition as Osmannouri. This appears to be a typographical error in that his last name is spelled Osmannuri on all other documents in the record.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the merits of the issue raised in the petition.

FINDINGS OF FACT

1. Setauket Food Mart, Inc. (Setauket Food Mart) filed a request for a conciliation conference dated August 8, 2007 with the Bureau of Conciliation and Mediation Services (BCMS) in protest of a Notice of Determination asserting additional sales and use taxes due for the period June 1, 2004 through November 30, 2006. After Setauket Food Mart's request was received by BCMS, petitioner, Osman Osmannuri, was brought into the proceeding and the corporate request was deemed a request for a conciliation conference by petitioner in protest of Notice of Determination L028582878, the related assessment issued to petitioner pertaining to additional sales and use taxes due for the period June 1, 2004 through November 30, 2006.

2. BCMS subsequently issued to petitioner a Conciliation Order (CMS number 220486), dated February 22, 2008, which denied petitioner's request for a revision of the Notice of Determination and sustained the statutory notice in its entirety.

3. On April 9, 2009, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated February 22, 2008. The envelope in which the petition was delivered to the Division of Tax Appeals bears a machine metered (Pitney Bowes) postmark of April 9, 2009. It does not include a United States Postal Service (USPS) postmark.

4. On May 12, 2009, the Petition Intake, Review and Exception 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 appeared to have been issued on February 22, 2008 and the petition appeared to have been filed on April 9, 2009, or over 400 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the affidavits of James Steven VanDerZee and Robert Farrelly, both employees of the Division. The Division also submitted a copy of petitioner's petition and the envelope in which it was sent to the Division of Tax Appeals, a copy of Setauket Food Mart's Request for Conciliation Conference, the BCMS Associated Assessment Case Entry Worksheet for petitioner, a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on February 22, 2008, a copy of the Conciliation Order, a copy of the cover letter accompanying the Conciliation Order, and a copy of the joint New York State personal income tax return (form IT-201) filed by petitioner and Serpil Osman for the year 2006.

6. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of orders by the USPS, via certified mail, and confirmation of the mailing through receipt by BCMS of a postmarked copy of the CMR.

7. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

8. 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 Unit (AFP Unit). 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.

9. The AFP Unit also produces a computer-generated 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 and the BCMS numbers are recorded on the CMR. The AFP Unit prints the CMR and cover sheets and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

10. The clerk, as part of her regular duties, associates each cover sheet, Conciliation Order, and cover 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 places the cover sheet, cover letter and Conciliation Order into a three-windowed envelope.

11. 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."

12. 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 "2/22/08" is written in the upper right corner of each page of the CMR.

13. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center which is responsible for delivering the CMR along with the envelopes containing the cover sheets, covering letters and conciliation orders to the USPS.

14. Mr. Farrelly attested to the truth and accuracy of the copy of the six-page CMR which contains a list of the conciliation orders issued by the Division on February 22, 2008. This CMR lists 62 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 six pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number and the name and address of the addressee.

15. Information regarding the Conciliation Order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0612 9251 is CMS number 220486, along with petitioner's name and address in South Setauket, New York.

16. The affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, 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 letters. A clerk then counts the envelopes and verifies the name 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.

17. In this particular instance, the postal employee affixed a postmark dated February 22, 2008 to each page of the six-page CMR. On page six, the postal employee also wrote his or her

signature and wrote and circled the number “62” near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

18. 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.

19. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, 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 22, 2008.

20. The record includes a copy of the joint 2006 New York State personal income tax return signed and dated by petitioner and his wife on April 9, 2007, which listed petitioner’s address in South Setauket, New York, the same address which appears on the cover letter accompanying the Conciliation Order and CMR.

21. In response to the issuance of the Notice of Intent to Dismiss petition, petitioner submitted the affidavit of Kenneth L. Robinson, petitioner’s representative, and attached documents, which affidavit addressed the merits of the petition.

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), the Conciliation Order in this case and the underlying assessment would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Cato; Matter of DeWeese*).

B. Where, as here, the timeliness of a taxpayer’s protest against a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed 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.*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945 [1983], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders 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.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the subject Conciliation Order to petitioner at his last known address (*see e.g. Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Robert Farrelly and James Steven VanDerZee, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by certified mail on February 22, 2008, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing orders and, in addition, attest to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Farrelly and VanDerZee affidavits were followed with respect to the order issued to petitioner.

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on February 22, 2008, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the February 22, 2008 date of mailing was May 22, 2008, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Petitioner's protest was not filed until it was mailed on April 9, 2009, or 412 days late. As a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. In support of petitioner's opposition to the Notice of Intent to Dismiss Petition, he submitted his representative's affidavit. In his affidavit, Mr. Robinson asserts that this petition should not be dismissed on timeliness grounds because petitioner seeks a refund of penalties which were paid to the Division of Taxation on or about January 6, 2009 pursuant to a Tax Warrant. Mr. Robinson further asserts that the "only procedure apparently available" to petitioner to request a refund of the penalties was through the filing of the subject petition with the Division of Tax Appeals. Contrary to Mr. Robinson's assertions, Tax Law § 1139 sets forth the procedure for applying for a refund or credit of any sales or use tax, penalty or interest. Specifically, an application (claim) for refund or credit shall be filed with the commissioner of taxation and finance (Tax Law § 1139[a]) within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires later (Tax Law § 1139[c]). Tax Law § 1139(b) provides in relevant part that:

the commissioner of taxation and finance shall grant or deny such application in whole or in part within six months of receipt of the application in a form which is able to be processed and shall notify such applicant by mail accordingly. Such determination shall be final and irrevocable unless such applicant shall, within ninety days after the mailing of notice of such determination, petition the division of tax appeals for a hearing.

If the disputed tax has been paid as Mr. Robinson alleges in his affidavit, petitioner may apply for a refund with the Division of Taxation in accordance with Tax Law § 1139(c). If his request is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 1138[a][1]; § 170[3-a][a]; *cf. Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

F. The petition of Osman Osmannuri is dismissed.

DATED: Troy, New York
September 3, 2009

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE