

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DANIEL INGOGLIA : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 823385
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2001 through November 30, 2002. :

Petitioner, Daniel Ingoglia, 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 September 1, 2001 through November 30, 2002.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated November 16, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on December 16, 2010, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

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 subject of the motion of the Division of Taxation (Division) is the timeliness of a petition filed in the Division of Tax Appeals following the issuance of a Conciliation Order to petitioner, Daniel Ingoglia. The Conciliation Order is dated February 17, 2006, and references notice number L024753543 and CMS number 207748. The order notes that the requester, i.e., petitioner herein, did not appear at the scheduled conciliation conference and sustains the statutory notice that was the subject of the request.

2. On December 2, 2009, petitioner filed a petition with the Division of Tax Appeals for redetermination of notice number L024753543.¹

3. In support of its motion and to show proof of proper mailing of the February 17, 2006 Conciliation Order, the Division submitted, among other documents, the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services (BCMS), setting forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the certified mail record (CMR).

4. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order 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 order.

¹ The petition also sought redetermination of a second assessment, L028167462. By stipulation of the parties, that protest was referred to BCMS for a conciliation conference.

5. 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). 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.

6. 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 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 and delivers these documents to the BCMS clerk assigned to process conciliation orders.

7. 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 folds and places the cover sheet, cover 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.

8. 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."

9. 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 "2/17/06" is written in the upper right corner of each page of the CMR.

10. 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.

11. Mr. Farrelly attested to the truth and accuracy of the copy of the five-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on February 17, 2006. This CMR lists 46 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 five 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.

12. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1148 9890 is CMS number 207748, along with petitioner's name and a Massapequa, New York, address.

13. 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.

14. In this particular instance, the postal employee affixed a postmark dated February 17, 2006 to each page of the five-page CMR. On page five, the postal employee also wrote his or her initials and wrote and circled the number "46" near the heading "Total Pieces Received at Post Office" as well as near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

15. 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.

16. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerZee states that on February 17, 2006, 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 17, 2006 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 17, 2006.

17. The Massapequa, New York, address for petitioner as listed on the CMR is identical to the address reported on petitioner's 2004 New York resident income tax return, dated February 7,

2005, which was the last return filed by petitioner prior to February 17, 2006, the claimed mailing date of the subject Conciliation Order.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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]).

B. Petitioner did not respond to the Division's motion. Accordingly, he is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Farrelly and VanDerZee affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

C. 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).

D. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal,

November 14, 1991). 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).

E. 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).

F. In this case, the affidavits of Mr. Farrelly and Mr. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, along with the CMR, establish the Division's standard mailing procedure. Additionally, the CMR has 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). The Division has thus established that the Conciliation Order at issue was mailed as addressed to petitioner on February 17, 2006.

G. The petition in this matter was filed on December 2, 2009 and thus was untimely by a wide margin. Accordingly, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

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 Daniel Ingoglia is hereby dismissed.

DATED:Troy, New York
March 3, 2011

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE