

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VILLA ISABELLA RESTAURANT CORP. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 823760
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period March 1, 2006 :
through November 30, 2008. :
:

Petitioner, Villa Isabella Restaurant Corp., 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 March 1, 2006 through November 30, 2008.

On March 14, 2011, the Division of Taxation filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion to dismiss, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by Eileen Gentile, Esq., did not respond to the motion. After due consideration of the documents submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for conciliation conference following the issuance of a notice of determination.

FINDINGS OF FACT

1. Petitioner, Villa Isabella Restaurant Corp., was issued Notice of Determination L-032432811-7 dated August 24, 2009 by the Division of Taxation (Division).

2. In protest of the Notice of Determination, petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was dated May 25, 2010.

3. Following this request, BCMS issued a Conciliation Order Dismissing Request, CMS No. 239868, on June 24, 2010, denying petitioner's request for a conciliation conference since the request was filed in excess of 90 days from when the Notice of Determination was issued to petitioner.

4. Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination at issue. The petition was date stamped received on July 26, 2010.

5. Petitioner's last known address was 103-19 Metropolitan Avenue, Forest Hills, NY 11375, for purposes of issuing the Notice of Determination at issue on August 24, 2009. The Division provided a copy of petitioner's latest New York State and Local Quarterly Sales and Use Tax Return (form ST-100), which confirmed the address.

6. The Division provided the affidavit of Patricia Finn Sears, Tax Processing Specialist 2 and Supervisor of the Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit of the Division. CARTS refers to the Division's computer system for generating documents, including notices of determination issued to taxpayers. The computer-generated statutory notices are predated with the anticipated

date of mailing and each is assigned a certified control number.

7. Each batch of statutory notices is accompanied by a computer printout entitled “CERTIFIED RECORD FOR PRESORT MAIL-ASSESSMENTS RECEIVABLE.” It lists each notice in the order the notice was generated, and each notice’s certified control number appears under the first heading, “CERTIFIED NO.” The assessment numbers are listed under the second heading, “REFERENCE NO.” and the names and addresses of the taxpayers are listed under the third heading, “NAME OF ADDRESSEE, STREET AND PO ADDRESS,” while the remaining heading lists postage and fees.

8. On page six of the certified mail record (CMR), Notice of Determination L-032432811 is indicated as being sent to Villa Isabella Restaurant Corp., 103 19 Metropolitan Avenue, Forest Hills, NY 11375-6733, by certified mail using control number 7104 1002 9730 1508 8334.

9. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of determination is placed in the “Outgoing Certified Mail” area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A CMR is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random check of up to 30 pieces of the certified mail listed.

10. Following this review, a member of the MPC staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself.

11. The CMR for the notice issued on August 24, 2009 to petitioner consisted of 13 pages. A review of the CMR confirms that a USPS employee initialed all 13 pages of the CMR and affixed a postmark to each page of the CMR. Page 13 of the CMR indicated 141 total pieces of mail were received at the post office. There are 141 certified control numbers contained in the CMR and there were no deletions.

12. Mr. Peltier attested that, on August 24, 2009, an employee of the MPC delivered one piece of certified mail addressed to petitioner at 103 19 Metropolitan Avenue, Forest Hills, NY 11375-6733, to the USPS in the Albany, New York, area in a sealed postpaid windowed envelope for delivery by certified mail.

13. The Division also submitted the affidavit of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in preparing USPS Form 3811-A to request return receipts after mailing certified mail. Ms. Corina attested to the request she made to the Postal Service for delivery information on the certified mail sent to petitioner. Specifically, the Form 3811-A detailed that certified mail no. 7104 1002 9730 1508 8334 was delivered on August 26, 2009 at 11:27 A.M. to petitioner's Forest Hills address. It also shows the scanned signature image of the recipient, which appears as "Carlo Isabella" with "103 19 Metropolitan Avenue" written as well.

CONCLUSIONS OF LAW

A. 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 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. Tax Law § 1138(a)(1) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of determination of tax due. As an alternative to filing a petition, the taxpayer “may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services” (20 NYCRR former 4000.3[a][1]).

C. Tax Law § 170(3-a) provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed.

The filing of a timely written request, and one conformed copy, with BCMS “suspends the running of the period of limitations for the filing of a petition for hearing” (20 NYCRR 4000.3[c]).

Pursuant to these provisions, petitioner had 90 days from the date the assessment was issued, or until November 22, 2009, to either request a conciliation conference or file a petition for a hearing, but failed to do either within the allowable time requirement.

D. 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).

E. Where 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).

F. 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).

G. Tax Law § 1147(a)(1) provides "[a]ny notice . . . may be given by mailing the same to the person for whom it is intended . . . at the address given in the last return filed."

H. In this case, the Division has introduced adequate evidence of its standard mailing procedures through the affidavits of Patricia Finn Sears and Bruce Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

I. The production of the CMR by the Division constitutes sufficient documentary

evidence to establish the subject Notice of Determination was mailed as addressed to petitioner on August 24, 2009. The CMR listed: (1) name and address, (2) a corresponding certified control number, (3) USPS postmarks dated August 24, 2009, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. Consequently, the CMR was properly completed, therefore, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

J. Additionally, the Division provided adequate proof that the notice was sent to petitioner's last known address, by providing petitioner's latest form ST-100 quarterly sales tax return. Thus, the notice was sent to petitioner's last known address. Further, documentation from the USPS establishes that the notice was received at petitioner's last known address on August 26, 2009. It follows that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information and the USPS response that the notice was delivered to petitioner's last known address.

K. Therefore, based upon the facts of this case and the provisions and cases cited, petitioner had 90 days from the issuance of the Notice of Determination to either file for a conciliation conference with BCMS or file a petition with the Division of Tax Appeals, yet it failed to do either.

L. The Division's motion for summary determination is granted, and the petition of Villa Isabella Restaurant Corp. is hereby dismissed.

DATED: Troy, New York
June 23, 2011

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE