

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROSALIND SANCHEZ	:	ORDER
	:	DTA NO. 823870
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods September 1, 2006 through November 30, 2008 and December 1, 2008 through May 31, 2009.	:	

Petitioner, Rosalind Sanchez, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 2006 through November 30, 2008 and December 1, 2008 through May 31, 2009.

On November 19, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On December 15, 2010, petitioner, appearing by Leonard L. Fein, CPA, submitted a letter in opposition to dismissal. On January 10, 2011, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), having been granted a 30-day extension to do so, submitted documents in support of dismissal. On January 20, 2011, Mr. Fein submitted a letter and documents in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced January 20, 2011. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. On September 20, 2010, petitioner, Rosalind Sanchez, filed a petition with the Division of Tax Appeals. The petition indicates a protest of assessment identification numbers L-032515103 and L-032481911. Assessment L-032515103 is the subject of a Conciliation Default Order dated June 17, 2010 and bearing CMS number 236179. Assessment L-032481911 is the subject of a Notice of Determination dated September 8, 2009. Petitioner personally signed the petition.

2. On November 19, 2010, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. In reference to L-032515103, the Notice of Intent indicates that the relevant conciliation order was apparently issued on June 17, 2010, but that the petition was not filed until September 20, 2010, or 95 days later. In reference to L-032481911, the Notice of Intent indicates that the relevant Notice of Determination was apparently issued on September 8, 2009, and that the petition was filed 377 days later, on September 20, 2010.

3. On November 28, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting assessment L-032515103. The unsigned request lists Leonard Fein as petitioner's representative.

4. By letter dated December 10, 2009 and addressed to Mr. Fein, BCMS acknowledged receipt of the request for conciliation conference. The letter further notes that a power of attorney authorizing Mr. Fein to represent the requester, Rosalind Sanchez, was not included

with the request. The letter noted that, in order for Mr. Fein “to be kept informed,” a properly executed power of attorney must be provided to BCMS.

5. On June 17, 2010, BCMS issued a Conciliation Default Order to petitioner. The order references CMS number 236179 and assessment number L-032515103 and indicates that petitioner failed to appear, either personally or by a representative, at a scheduled conference. Accordingly, the order sustained the statutory notice.

6. In response to the issuance of the Notice of Intent to Dismiss Petition with respect to assessment number L-032515103, 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 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).

7. 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, and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation order.

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). 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 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 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 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.

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

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 “06/17/10” 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.

14. 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 June 17, 2010. 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.

15. 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 0044 2936 is CMS number 236179, along with petitioner's name and a Jersey City, New Jersey, address, which is identical to that listed on the request for conciliation conference.

16. 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 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.

17. In this particular instance, the postal employee affixed a postmark dated June 17, 2010 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.

18. Mr. Peltier 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. Peltier'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. Peltier states that on June 17, 2010, 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 June 17, 2010 for the records of BCMS. Mr. Peltier 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 piece of certified mail to petitioner on June 17, 2010.

20. BCMS did not mail a copy of the June 17, 2010 Conciliation Default Order to Mr. Fein.

21. The Division did not submit any evidence to prove mailing of the Notice of Determination bearing assessment identification number L-032481911.

22. Along with the petition, petitioner's representative, Mr. Fein submitted a properly completed power of attorney form dated January 5, 2010 appointing him as petitioner's representative with respect to assessment number L-032481911.

23. In opposition to the notice of intent, Mr. Fein submitted a properly completed power of attorney dated June 29, 2009 appointing him as petitioner's representative with respect to assessment identification numbers L-032481911 and L-032472587.

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 she 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 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).

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 CMR, along with the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and

issuing conciliation orders, 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 June 17, 2010.

E. The petition in this matter was filed on September 20, 2010, or 95 days following the issuance of the Conciliation Order. It is well established that the deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). Accordingly, since the petition was filed beyond the 90-day limitations period, 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).

F. In papers submitted in opposition to the notice of intent, petitioner denied timely receipt of the Conciliation Default Order. The proper mailing of a statutory notice, as in the present matter, however, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). Petitioner's mere denial of timely receipt is insufficient to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

G. Petitioner also asserted that BCMS improperly failed to mail a copy of the conciliation default order to Mr. Fein. Although not mandated by statute, case law has established that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with a copy of the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). Petitioner has not shown, however, that a power of attorney appointing Mr. Fein as petitioner's representative with respect to Assessment L-032515103 was ever filed with BCMS.

The record indicates that no such power was filed with the request for conference (*see* Finding of Fact 4) and neither of the powers in the record authorize Mr. Fein to represent petitioner with respect to L-032515103 (*see* Findings of Fact 22 and 23). The filing of a proper power of attorney is required under BCMS regulations (*see* 20 NYCRR 4000.2[b]). Accordingly, Mr. Fein was not authorized to represent petitioner in BCMS with respect to L-032515103 and BCMS properly declined to mail a copy of the subject order to Mr. Fein.

H. The Division submitted no mailing evidence with respect to Assessment L-032481911. The Division has thus not met its burden of demonstrating the fact and date of mailing with respect to this statutory notice.

I. The petition of Rosalind Sanchez is dismissed with respect to Assessment L-032515103 and CMS number 236179. With respect to Assessment L-032481911, the Notice of Intent to Dismiss Petition dated November 19, 2010 is withdrawn.

DATED: Troy, New York
March 31, 2011

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE