

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
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| of | : | |
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| VICTORY BAGEL TIME, INC. | : | ORDER |
| | : | DTA NO. 824556 |
| 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, 2005 | : | |
| through November 30, 2009. | : | |

Petitioner, Victory Bagel Time, Inc., 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, 2005 through November 30, 2009.

On September 20, 2011, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On October 3, 2011, petitioner, appearing by DeSantis, Kiefer, Shall & Sarcone, LLP (John M. Shall, CPA), submitted a letter in opposition to dismissal. On October 13, 2011, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) submitted a letter, together with an affidavit and accompanying documents in support, agreeing with the proposed dismissal of the petition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced October 13, 2011. After due consideration of the documents and arguments submitted, and all pleadings filed, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition for a hearing before the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Victory Bagel Time, Inc., at its Staten Island, New York, address, a Notice of Determination, numbered L-033506187 and dated April 12, 2010, assessing additional sales and use taxes due in the amount of \$122,600.12 for the period June 1, 2005 through November 30, 2009. By its request for a conciliation conference, dated April 28, 2010, petitioner protested the notice.

2. The Division's Bureau of Conciliation and Mediation Services (BCMS) issued to petitioner a Conciliation Order (CMS No. 239185), dated April 8, 2011, denying petitioner's request and sustaining the Notice of Determination. Petitioner challenged this order by filing a petition with the Division of Tax Appeals. The petition is dated as signed on July 18, 2011. The envelope in which the petition was mailed bears a machine metered postage stamp dated August 15, 2011 and it, as well as the petition, is date stamped as received by the Division of Tax Appeals on August 18, 2011.

3. On September 20, 2011, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, advising the parties that the Conciliation Order appeared to have been issued on April 8, 2011, the petition was not filed thereafter until August 15, 2011, or some 129 days later, and therefore was untimely and subject to dismissal. The parties were afforded 30 days within which to submit comments on the proposed dismissal of the petition.

4. To show proof of proper mailing of the Conciliation Order on April 8, 2011, the Division provided the following: (i) an affidavit, dated October 11, 2011, of John E. Matthews, Esq.; (ii) an affidavit, dated October 7, 2011, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's Registry Unit; (iii) an affidavit, dated October 6, 2011, of Robert Farrelly, the assistant supervisor of the BCMS; (iv) an affidavit, dated October 7, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel; (v) the "Certified Record for Presort Manual Mail - BCMS Cert. Letter" (CMR); and (vi) a copy of petitioner's Request for Conciliation Conference and the Conciliation Order in response thereto.

5. The steps undertaken in the generation and issuance of conciliation orders, during the period here in question, started when the BCMS Data Processing Services Unit prepared and forwarded the conciliation orders, together with the accompanying cover letters, to the particular conciliation conferee for signature. The conciliation conferee, in turn, would sign and forward the order and cover letter to the BCMS clerk assigned to process conciliation orders.

6. 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 (AFP) Unit, which in turn assigns a certified control number and produces a cover sheet indicating the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code for each order. The AFP Unit generates a CMR listing those taxpayers and representatives to whom conciliation orders are being sent on a particular day. The certified control numbers are recorded on the CMR under the heading "CERTIFIED NO," and the BCMS numbers are recorded under the heading "Reference No." Each Reference No. is preceded by three zeroes. The AFP Unit assigns the CMR and cover sheet

data to a printer located in BCMS and these documents are printed there and delivered to the BCMS clerk assigned to process conciliation orders.

7. The BCMS clerk's regular duties included associating each cover sheet, conciliation order and covering letter, and verifying the names and addresses of taxpayers and their representatives, per BCMS records, 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 such that the BCMS return address, the certified control number, the bar code and the name and address of the taxpayer appear. The "Total Pieces and Amounts" is indicated on the last page of the CMR. The BCMS clerk is to stamp the bottom left corner of the last page "MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT", and to stamp the bottom right corner of the last page "POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas." The clerk then inserts by handwriting on the top of each page of the CMR the date that the conciliation orders were mailed.

8. In this instance, certified control number 7104 1002 9730 0550 1980 was assigned to the conciliation order to be mailed to petitioner, Victory Bagel Time, Inc., and certified control number 7104 1002 9730 0550 1935 was assigned to the conciliation order to be mailed to petitioner's representative, John M. Shall, CPA. The CMS reference number is, in each instance, 000239185. This information appears on page four, with respect to Mr. Shall, and on page five, with respect to petitioner, of the eight-page CMR pertaining to these mailings. The address 1675 Richmond Road, Staten Island, NY 10304 appears with respect to Mr. Shall, and the address

3579 Victory Boulevard, Staten Island, NY 10314-6734 appears with respect to petitioner. The date “4-8-11” is handwritten in the upper right corner of each of the eight pages of the CMR.

9. A piece of mail may be “pulled” from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of conciliation orders being mailed, so as to allow for correction or issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

10. Under the Division’s standard mailing procedures, the conciliation orders and accompanying CMR are picked up in BCMS by an employee of the Division’s Mail Processing Center (Center) and deposited in the “Outgoing Certified Mail” basket in the Center. A member of the staff, in turn, weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. In turn, a member of the Center staff delivers the sealed, stamped envelopes to a branch of the USPS in Albany, New York for mailing. A postal employee then affixes a postmark and his or her initials or signature to the CMR to indicate receipt by the post office. 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 Center, each CMR would be picked up at the post office by a staff member of the Center on the following day after its initial delivery and then delivered back to the originating office, in this case BCMS. Each CMR is then maintained by BCMS in the regular course of its business.

11. Review of the CMR in this case reveals that four pieces of mail were pulled, and a line is drawn through the information for each of those pieces of mail as appearing on pages four and five of the CMR. There is no such line on or near the listing information for the pieces of mail relating to petitioner and petitioner's representative. The preprinted total pieces of mail listed on page eight of the CMR is 78. This number has been crossed out and the handwritten number 76 has been inserted after the listing for "total pieces received at post office." This same number, 76, appears again on page eight, handwritten and accompanied by the initials "EB," and both are circled. While the CMR indicates that four pieces of mail were pulled, the adjustment number reflects only two pieces of mail as being pulled. The Division offers no explanation for the apparent discrepancy other than "clerical error." In similar manner, and although set forth by affidavit, page eight of the CMR does not in fact include the stamped legend instructing "POST OFFICE Hand write total # of pieces and initial/Do Not stamp over written areas" (*see* Finding of Fact 7). Each page of the CMR reflects the postmark of the Stuyvesant Plaza branch office of the USPS, dated April 8, 2011.

12. The facts set forth above in Findings of Fact 5 through 11 were established through the affidavits of Robert Farrelly and Bruce Peltier, in conjunction with review of the CMR and other documents submitted therewith. Mr. Farrelly was employed as the Assistant Supervisor of Tax Conferences for BCMS, his duties included supervising the preparation and mailing of conciliation orders, and he is fully familiar with the procedures involved therewith. Mr. Peltier was employed as a Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, his duties included supervising Mail Processing Center staff in

delivering outgoing mail to branch offices of the USPS, and he is fully familiar with such procedures.

13. The record on this motion includes a copy of the conciliation order, bearing CMS No. 239185, allegedly mailed by certified mail to petitioner, Victory Bagel Time, Inc., as well as to petitioner's representative, on April 8, 2011. The record also includes a copy of petitioner's Request for Conciliation Conference, dated April 28, 2010, which lists the same address for petitioner and for petitioner's representative as are set forth above.

14. The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for two items: one item mailed by the Division under certified number 7104 1002 9730 0550 1980 on April 8, 2011 from the Stuyvesant Plaza branch office of the USPS to petitioner at its Staten Island address listed above, and one item mailed under certified number 7104 1002 9730 0550 1935 to petitioner's representative at his Staten Island address listed above. In response, the USPS confirmed delivery of each of these certified mail items at the noted addresses, specifically to petitioner's address on April 11, 2011 at 2:04 P.M. and petitioner's representative's address on April 11, 2011 at 12:08 P.M.

15. In response to the Notice of Intent, petitioner furnished a time line of events concerning this matter. Petitioner alleges, with respect to the timeliness issue presented herein, that the conciliation order was first received by facsimile on July 11, 2011, and that neither

petitioner nor its representative has a record of receiving the order allegedly mailed by the Division on April 8, 2011.

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 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. There is a 90-day statutory time limit, measured from the issuance of the conciliation order, for filing a petition for a hearing with the Division of Tax Appeals (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond such 90-day statutory time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the conciliation order by mailing the same, by certified or registered mail, to petitioner's last known address (Tax Law § 1138[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A conciliation order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the

particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

C. In this case there are flaws in the CMR concerning confirmation of the actual number of pieces of mail received by the USPS for mailing, as noted and described in Finding of Fact 11. The consequence of these flaws presents a question as to the claim that the standard mailing practices described in the Division's affidavits were followed in this instance. Nonetheless, confirmation that a piece of certified mail was in fact delivered to its intended recipient can serve to overcome such flaws (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011). Here, the Division has established, via the Corina affidavit and accompanying USPS forms 3811-A, that the conciliation order tied to the CMR by the certified control and reference numbers appearing thereon and set forth in the Division's description of its standard procedures for mailing conciliation orders (*see* Finding of Fact 8) was in fact delivered to petitioner and to petitioner's representative on April 11, 2011 (*see* Finding of Fact 14). This proof of delivery of the order confirms the fact of mailing of the order by certified mail and overcomes the noted flaws in the CMR. Under such circumstances, the latest date from which the 90-day period for challenging the assessment sustained by the conciliation order commenced to run on the date of petitioner's actual receipt of the conciliation order, i.e., April 11, 2011, and petitioner was required to file a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *rev'd* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). In turn, 90 days after such April 11, 2011 date of actual receipt of the conciliation order was July 10, 2011. July 10, 2011 was a Sunday. Consequently, in order to be considered timely, petitioner's protest had to have been filed on or

before Monday, July 11, 2011. However, the petition, bearing a machine-metered postage mark was not filed until received by the Division of Tax Appeals on August 18, 2011, a date which falls beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

D. The petition of Victory Time Bagels, Inc. is hereby dismissed.

DATED:Troy, New York
December 29, 2011

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE