

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DOMINICAN DELI GROCERY CORP.	:	ORDER
		DTA NO. 824739
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 2006 through May 31, 2009.	:	

Petitioner, Dominican Deli Grocery 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 September 1, 2006 through May 31, 2009.

On December 8, 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 January 7, 2012, petitioner, appearing by Stephen D. Ryan III, Esq., submitted a letter dated January 6, 2012, in opposition to dismissal. On February 24, 2012, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), having been granted an extension of time to do so, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced February 24, 2012.

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 November 18, 2011, petitioner, Dominican Deli Grocery Corp., filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a Notice of Determination dated March 1, 2010 and bearing assessment identification number L-033386275.

2. On December 8, 2011, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant Notice of Determination was issued on March 1, 2010, but that the petition was not filed until November 18, 2011, or 627 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the following: (i) an affidavit, dated January 14, 2012, of Daniel A. Maney, manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 1, 2010; (iii) an affidavit, dated February 15, 2012, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; and (iv) a copy of petitioner's quarterly sales and use tax return (Form ST-100) for the period ended February 28, 2010, dated March 3, 2010. Petitioner's address as reported on this return is the same as that listed on the subject Notice of Determination.

4. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date

was manually changed on the first page of the CMR in the present case to the actual mailing date of “3/1/10.” It is also the Division’s general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

5. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street and PO Address.”

6. The CMR relevant to the present matter consists of 26 pages and lists 285 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated March 1, 2010 to each page of the CMR and also wrote his or her initials on each page thereof.

7. Page 4 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1783 6377 and assessment number L-033386275, was mailed to petitioner at the New York, New York, address listed thereon. The corresponding mailing cover

sheet, submitted with the Division's motion papers, bears this certified control number and petitioner's name and address as noted.

8. Page 11 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1783 7114 and assessment number L-033386275, was mailed to Alfred Davila at the Carmel, New York, address listed thereon. Mr. Davila was petitioner's representative of record as of March 1, 2010. The mailing cover sheet associated with the mailing to Mr. Davila, which was submitted with the Division's motion papers, bears this certified control number and Mr. Davila's name and address as noted.

9. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. Here, as noted, each page of the CMR contains such postmarks and initials. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS complied with this request by handwriting and circling "285" on the last page of the CMR.

10. According to both the Maney and Peltier affidavits, copies of the subject Notice of Determination were mailed to both petitioner and petitioner's representative on March 1, 2010, as claimed.

11. In opposition to dismissal of the petition, petitioner's representative submitted a letter dated January 6, 2012 seeking a waiver of the statutory filing period for petitions in the Division of Tax Appeals, conceding that "the statutory formalities have not been observed by [petitioner]." As the basis for such a waiver, petitioner's representative cited flaws in the audit underlying the statutory notice and petitioner's good faith in addressing its sales tax obligations.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a Notice of Determination (Tax Law § 1138[a][1]). 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 statutory notice 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 (*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. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination, 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 copies of the Notice of Determination at issue were mailed as addressed to petitioner and petitioner's former representative on March 1, 2010.

E. The petition in this matter was filed on November 18, 2011, well beyond the 90-day limitations period. 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 [petition filed one day late dismissed]). Furthermore, and in response to petitioner's request (*see* Finding of Fact 11), as the 90-day period is statutorily imposed, the Division of Tax Appeals has no authority to waive the filing period in particular cases. Accordingly, since the petition was untimely filed, 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. The petition of Dominican Deli Grocery Corp. is dismissed.

DATED: Albany, New York
April 5, 2012

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE