

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PAPAYE RESTAURANT, INC. : DECISION
for Revision of a Determination or for Refund of : DTA NO. 826418
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period March 1, 2010 through :
February 29, 2012. :

Petitioner, Papaye Restaurant, Inc., filed an exception to the determination of the Administrative Law Judge issued on June 25, 2015. Petitioner appeared by its president, Osei Bonsu. The Division of Taxation appeared by Amanda Hiller, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on November 19, 2015, the date that petitioner's reply brief was due.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. The Division of Taxation (Division) brought a motion seeking an order dismissing the petition or, in the alternative, granting summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of determination dated December 20, 2012 with the assessment number L-0388925999-8. The notice is addressed to petitioner, Papaye Restaurant, Inc., at "1191 Anderson Ave Apt 4B, Bronx, New York 10452-3823." It assesses sales and use taxes for the years 2010 through 2012 in the amount of \$75,441.14, plus interest and penalty. The notice explains that petitioner must file a request for a conciliation conference or a petition for a Tax Appeals hearing by March 20, 2013.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice. The request was postmarked July 1, 2014 and received by BCMS on July 2, 2014.

3. On July 18, 2014, BCMS issued a conciliation order dismissing request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, in part:

"The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 20, 2012, but the request was not mailed until July 1, 2014, or in excess of 90 days, the request is late filed."

4. Petitioner filed a petition challenging the dismissal on July 30, 2014. In it, petitioner stated, "[t]he assessed sales tax for the period in dispute has no basis because my sales for those periods [are] not a fraction close to the assessed amounts."

5. In support of its motion and to prove mailing of the notice of determination under protest, the Division submitted, among other documents, the following: (i) the petition of Papaye Restaurant, Inc., dated July 30, 2014; (ii) an affidavit, dated November 17, 2014, of Mary Ellen Nagengast, Director of the Management Analysis and Project Services Bureau (MAPS); (iii) a

“Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked December 20, 2012; (iv) an affidavit, dated November 19, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (v) a copy of petitioner’s application to renew its sales tax certificate of authority (form DTF-17-R).

6. The affidavit of Mary Ellen Nagengast sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast 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 is printed 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 upper right corner, to the actual mailing date of “12/20/12.” In addition, the pages of the CMR are banded together when the documents are delivered to the U.S. Postal Service (USPS) and stay banded unless ordered otherwise. The page numbers of the CMR run consecutively, beginning with “PAGE: 1,” and are noted in the upper right corner of each page.

7. Each notice is assigned a certified control number that appears on a separate one-page mailing cover sheet. The mailing cover sheet also bears a bar code, the taxpayer’s mailing address, the Division’s return address on the front and the taxpayer assistance information on the back. In addition, the certified control number is listed on the CMR under the heading “Certified No.” The assessment numbers are listed under the heading “Reference No,” while the names and addresses of the recipients are listed under “Name of Addressee, Street and P.O. Address.”

8. The CMR contains 17 pages and lists 180 certified control numbers. The entire CMR is attached to Ms. Nagengast’s affidavit, and portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A

USPS representative affixed a postmark to each page of the CMR and either signed or initialed the last page.

9. Page 3 of the CMR indicates a notice of determination with a certified control number 7104 1002 9730 1431 5271 and assessment number L-038925999 was sent to “Papa Ye Restaurant, Inc., 1191 Anderson Ave Apt 4B, Bronx, NY 10452-3823.” The corresponding mailing cover sheet bears the same certified control number and petitioner’s name and address.

10. The affidavit of Bruce Peltier describes the Division’s Mail Processing Center’s (Center) general operations and procedures. The Center receives the notices in an area designated for “Outgoing Certified Mail.” A staff member operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Then the staff members weigh, seal and place postage on each envelope. The first and last pieces are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR by checking those envelopes against the information contained on 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 places his or her signature or initials on the CMR, indicating receipt by the post office. The Center 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 CMR. Here, each page of the CMR contains a USPS postmark of December 20, 2012 and on page 17, the USPS employee circled and initialed underneath the preprinted number 180.

11. According to both the Nagengast and Peltier affidavits, a copy of the subject notice was mailed to petitioner on December 20, 2012 as claimed.

12. The application to renew sales tax certificate of authority, bearing the same address

shown on the notice and the CMR, appears to have been filed on October 20, 2009.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first determined that, as the petition in this matter was timely filed, the Division of Tax Appeals has jurisdiction over the petition, and, accordingly, a motion for summary determination under section 3000.9 (b) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) was the proper vehicle to consider the timeliness of petitioner's request for conciliation conference.

Next, the Administrative Law Judge discussed the evidentiary standard for granting a motion for summary determination. He noted that, pursuant to our Rules, such a motion "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" (20 NYCRR 3000.9 [b] [1]). He also noted that petitioner did not respond to the Division's motion and therefore was deemed to have conceded that no question of fact requiring a hearing exists (*see Kkuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]).

The Administrative Law Judge then reviewed the law related to the timely protest of a notice of determination. He noted that a taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 1138 [a] [1]). He also noted that, alternatively, a taxpayer may contest a notice by filing a request for conciliation conference with BCMS "if it is filed within the 90-day statutory time limit" (Tax Law § 170 [3-a] [a]). He then stated that, absent a timely petition or request for conciliation conference, the Division of Tax Appeals lacks jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8,

2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

The Administrative Law Judge noted the rule that where, as in the present matter, 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 mailing by certified or registered mail to petitioner's last known address (Tax Law § 1147 [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). The Administrative Law Judge also noted that the Division may meet this burden by showing proof of a standard procedure and proof that such procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

Turning to the proof submitted by the Division in the present matter, the Administrative Law Judge found that the CMR was properly completed and therefore constituted highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). He also determined that the affidavits submitted by the Division adequately described the Division's general mailing procedure as well as the relevant CMR and thereby established that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). In addition, he noted that the address on the mailing cover sheet and the CMR conformed with the address listed on petitioner's application to renew its sales tax certificate of authority, which satisfied the "last know address" requirement.

Accordingly, the Administrative Law Judge concluded that the Division proved that it properly mailed the notice of determination at issue to petitioner on December 20, 2012 and that the 90-day statutory limit to either file a request for conciliation conference with BCMS or file a

petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a], 1138 [a] [1]). As petitioner's request for conciliation conference was filed on July 1, 2014, the Administrative Law Judge determined that such request was untimely and that the Division of Tax Appeals is without jurisdiction to hear the merits (*see Matter of Rotondi Indus.*, Tax Appeals Tribunal, July 6, 2006). He thus granted the Division's motion for summary determination.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner continues to argue that its sales tax liability, as estimated by the Division for the period at issue, was not an accurate reflection of the actual sales made by the restaurant. It makes no argument regarding the jurisdictional issue of the timeliness of its request for conciliation conference.

The Division argues that petitioner failed to timely file the petition following the issuance of the notice of determination, that BCMS correctly dismissed the request for conciliation conference, and that the Division of Tax Appeals lacks jurisdiction to hear the merits of the petitioner's claim.

OPINION

Upon review of the record, we see no basis for modifying the determination of the Administrative Law Judge in any respect. We thus affirm the determination of the Administrative Law Judge for the reasons stated therein.

In response to petitioner's contention, made in his exception, regarding the substantive merits of his protest, we note, as did the Administrative Law Judge, that we lack jurisdiction to consider the merits of an untimely protest (*see Matter of Lukacs; Matter of Sak Smoke Shop*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Papaye Restaurant, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Papaye Restaurant, Inc. is denied; and
4. The July 18, 2014 conciliation order dismissing petitioner's request for conciliation conference is sustained.

DATED: Albany, New York
May 12, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner