

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KENNEDY DELI RESTAURANT CORPORATION	:	DECISION
	:	DTA NO. 826902
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period Ending September 27, 2014.	:	

Petitioner, Kennedy Deli Restaurant Corporation, filed an exception to the supplemental determination of the Administrative Law Judge issued on September 1, 2016. Petitioner appeared by its Vice President, Mohd A. Abdalla. The Division of Taxation appeared by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested. By decision dated June 30, 2016, this matter was remanded to the Supervising Administrative Law Judge for the issuance of a supplemental determination, based on the existing factual record, with relevant findings of fact and conclusions of law addressing the issue of whether the Division of Taxation met its burden to prove mailing of the statutory notice at issue.

The Tax Appeals Tribunal retained jurisdiction over petitioner's original exception during this process. The parties were granted until October 2, 2016 to make additional filings in response to the supplemental determination. Petitioner filed an additional brief in support of its exception. The Division of Taxation filed a letter in opposition. Petitioner filed a letter brief in

response. The six-month period for issuance of this decision began on November 16, 2016, the date that the reply letter brief was received.

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

ISSUE

Whether the petition should be dismissed because it was not timely filed following the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge in the supplemental determination, except findings of fact 5, 8 and 10, which we have modified to more accurately reflect the record. The findings of fact and modified findings of fact are set forth below:

1. On April 10, 2015, petitioner, Kennedy Deli Restaurant Corporation, filed a petition with the Division of Tax Appeals in protest of notice of determination number L-042231196. A copy of the notice was attached to the petition.
2. Notice of determination number L-042231196 was dated November 25, 2014 and addressed to petitioner at “302 W 231st St., Bronx NY 10463-3805.” The notice assessed a penalty totaling \$20,000.00 to petitioner under Article 20 of the Tax Law for failure to possess a valid New York State registration for retail sales of cigarettes or tobacco products upon an inspection held on September 27, 2014.
3. Petitioner filed its New York state and local annual sales and use tax return for the period June 1, 2014 through August 31, 2014. This return was dated September 18, 2014 and was the last return filed by petitioner with the Division of Taxation (Division) prior to November

25, 2014. On it, petitioner listed its address as “302 W. 231st Street, Bronx, NY 10463.”

4. On July 17, 2015, Daniel J. Ranalli, then-Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition stated that pursuant to Tax Law § 2006 (4), a petition must be filed within 90 days from the date a statutory notice was issued. The notice of intent to dismiss petition indicated that the subject petition was filed in protest of notice of determination number L-042231196, issued to petitioner on November 25, 2014, and that the petition was not filed until April 10, 2015, or some 136 days later. Petitioner and the Division were provided 30 days to submit written comments on the proposed dismissal.¹

5. In response to the issuance of the notice of intent to dismiss petition and to prove mailing of notice of determination number L-042231196, the Division provided the following: (i) an affidavit, dated September 21, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (ii) a one-page “Certified Record for Non-Presort Manual Mail - Assessments Receivable” (CMR), legibly postmarked November 25, 2014; (iii) an affidavit, dated September 21, 2015, of Bruce Peltier, Principal Mail and Supply Clerk and supervisor in the Division’s mail room; (iv) an affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel; (v) a copy of the November 25, 2014 notice of determination with the associated mailing cover sheet; and (vi) a copy of petitioner’s form ST-101, New York state and local annual sales and use tax return, for the period June 1, 2014 through August 31, 2014, described in finding of fact 3.

6. The affidavit of Ms. Nagengast sets forth the Division’s general practice and procedure

¹ This period was extended to October 1, 2015 at the request of the Division.

for processing statutory notices. Ms. Nagengast receives from the Division's Case and Resource Tracking System the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first and last pages of the CMR, in the present case "11/25/14." 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 Ms. Nagengast. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

7. 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 P.O. Address."

8. The CMR relevant to notice of determination L-042231196 consists of one page and lists eight certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast notes that portions of the CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not

involved in this proceeding. A USPS employee wrote his or her initials and affixed a USPS postmark dated November 25, 2014 on the CMR.

9. The CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0329 7397 and assessment number L-042231196, was mailed to petitioner at the Bronx, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, Principal Mail and Supply Clerk and mail room supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room 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 or initials on the CMR, indicating receipt by the post office. Here, the one-page of the CMR contains such a postmark and initials. The mail room further requests that the USPS either circle the total number of pieces received by writing the number on the last page of the CMR. Here, the USPS employee did not comply with this request. There is no entry next to the line reading total pieces received at the post office nor is the number of pieces accompanying the CMR, in this case eight, circled.

11. According to the affidavits of Ms. Nagengast and Mr. Peltier, a copy of notice of determination number L-042231196 was mailed to petitioner on November 25, 2014, as claimed.

12. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of PS form 3811-A (request for delivery information/return receipt after mailing) with regard to the notice of determination. Filing PS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. Ms. Corina filed PS form 3811-A seeking information for one item mailed by the Division under certified number 7104 1002 9730 0329 7397 on November 25, 2014 from the USPS General Mail Facility to petitioner at its Bronx, New York, address listed above. The USPS response to the request indicates that the article was delivered to the above address in Bronx, New York, on November 29, 2014. Attached to the Corina affidavit as exhibit "A" is the Division's "Request for Delivery Information" for article number 7104 1002 9730 0329 7397. Exhibit "B" attached to the Corina affidavit is the USPS response to the Division's request. The response for this article number indicates delivery of the same article to 302 W. 231st Street in Bronx, New York, and bears the signature of the recipient.

13. Petitioner did not respond to the notice of intent to dismiss petition.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his supplemental determination by noting that the standard of review this Tribunal applies in reviewing a notice of intent to dismiss petition is the same as that used in reviewing a motion for summary determination, explaining that such a motion should be granted if the Administrative Law Judge finds that no material and triable issue of fact is presented. He also described the 90-day limitation period for a petitioner to file a petition following the issuance of a notice of determination in order for the Division of Tax

Appeals to hear the merits of the case.

Next, the Administrative Law Judge stated that where timeliness of filing of a petition is in issue, the burden of proof is allocated to the Division to show the date and fact of issuance of the relevant notice of determination. According to the Administrative Law Judge, this burden can be met by establishing the use of a standard mailing procedure for issuing statutory notices and that such a procedure was followed in the instant case.

Based on his review of the record, the Administrative Law Judge found that the Division met its burden of proof of a standard mailing procedure through the affidavits of Division employees possessing knowledge of the process of generating and issuing notices of determination. He determined, however, that the Division failed to show that such a procedure was followed in this case because the CMR does not bear an entry indicating how many pieces of mail were received at the USPS. The Administrative Law Judge stated that this flaw can be corrected by introducing other evidence of mailing of the statutory notice in question. He found that the Division had introduced such evidence in the form of the Corina affidavit and the accompanying USPS delivery information demonstrating that the subject statutory notice was in fact delivered to petitioner's last known address on November 29, 2014.

The Administrative Law Judge stated that the 90-day period for filing a petition in this matter commenced with the receipt of the notice of determination on November 29, 2014.² He concluded that petitioner filed its protest of the notice of determination after the end of the 90-day period for filing a petition, on April 10, 2015. He also noted that petitioner did not respond

² The supplemental determination recites a date of "November 29, 2015" at conclusion of law H. However, in the context of the discussion of the Corina affidavit and its exhibits, we find that the Administrative Law Judge meant November 29, 2014, the date that the USPS confirmed delivery of the statutory notice.

to the notice of intent to dismiss petition and therefore conceded that no issue of fact requiring a hearing existed. The Administrative Law Judge then dismissed petitioner's petition due to the Division of Tax Appeals' lack of jurisdiction to hear the merits.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner asks that this Tribunal consider the merits of its protest of the notice of determination due to petitioner's vice president's absence from the country around the time it was issued and its belief that the issue had already been resolved.

The Division argues that the Administrative Law Judge correctly concluded that petitioner's filing of its petition was untimely. It relies on the record already established in this matter and states that petitioner's petition should be dismissed because it was not filed within the period permitted under the statute.³

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). As correctly noted by the Administrative Law Judge in his supplemental determination, the standard of review for a notice of intent to dismiss petition is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

Our rules provide that 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

³ The Division refers to its response to the notice of intent to dismiss petition as a motion for summary judgment. We deem the affidavits and supporting papers it submitted regarding the fact and date of mailing of the notice of determination, collectively, to be a response to the Supervising Administrative Law Judge's notice of intent to dismiss petition (*see* 20 NYCRR 3000.9 [a] [4]).

sufficiently that no material and triable issue of fact is presented” (20 NYCRR 3000.9 [b] [1]).

As we previously noted in *Matter of United Water New York*:

“Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is ‘arguable’” (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v Johnson*, 147 AD2d 312 [1989]).” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

Where the timeliness of a taxpayer’s protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Where the CMR does not establish the fact of mailing of the subject statutory notice, other evidence of mailing of that notice may be introduced to overcome a flaw in proof of mailing (*Matter of New York City Billionaires Constr. Corp.*; *Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008).

We agree with the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

We also find that although the CMR has not been properly completed, the Corina affidavit and its attached exhibit demonstrating USPS delivery provides the necessary additional evidence to prove mailing of the statutory notice in this case. Specifically, the Corina affidavit and accompanying USPS delivery information clearly and convincingly show that a copy of the notice of determination, addressed to petitioner at its last known address, was delivered to petitioner at its Bronx, New York, address on November 29, 2014. The 90-day period within which petitioner had to file a petition protesting the subject notice of determination commenced on the day of receipt, November 29, 2014 (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011).

A petition must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the 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). As the petition herein was not filed until April 10, 2015, which was beyond the 90-day period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

We note that statutory deadlines for filing petitions are strictly enforced (*see Matter of Liaquat Ali, Inc.*, Tax Appeals Tribunal, January 22, 2015). Hence, we may not consider petitioner's excuse for its failure to timely file the petition and, as noted, we may not consider the merits of the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Kennedy Deli Restaurant Corporation is denied;
2. The supplemental determination of the Administrative Law Judge is affirmed; and
3. The petition of Kennedy Deli Restaurant Corporation is dismissed with prejudice.

DATED: Albany, New York
May 11, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner