

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
BABU WINE AND LIQUOR, INC. : DECISION :
 : DTA NO. 830277 :
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, 2015 through May 31, 2018. :
:

Petitioner, Babu Wine and Liquor, Inc., filed an exception to the determination of the Administrative Law Judge issued on November 10, 2022. Petitioner appeared by its employee, Kuldip Madan. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard on September 28, 2023, in New York, New York, which date began the six-month period for issuance of this decision.

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

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except finding of fact 1, which we have modified to reflect the record more completely. We also add new findings of

fact 16 and 17 for clarity. Former finding of fact 16 by the Administrative Law Judge is renumbered as finding of fact 18. The modified finding of fact and the additional findings, together with the facts as found by the Administrative Law Judge, are set forth below.

1. The Division of Taxation (Division) brought a motion, dated July 18, 2022, contesting the timeliness of petitioner, Babu Wine and Liquor, Inc.'s, protest of a notice of determination, dated January 27, 2020, and bearing assessment ID number L-051179494 (notice).¹ The notice is addressed to "BABU WINE & LIQUOR, INC." at a Freeport, New York address. The mailing cover sheet of this notice bore certified control number 7104 1002 9730 0078 6962.

2. A copy of the notice was also sent to petitioner's then-representative, Falgun Patel, at a Glen Oaks, New York address. The mailing cover sheet of this notice bore certified control number 7104 1002 9730 0078 6924.

3. The Division subsequently issued a notice and demand for payment of taxes due, dated May 13, 2020 (notice and demand), to petitioner for payment of the tax due related to the notice.

4. In its petition, petitioner asserts that the Division erroneously determined total taxable sales because certain records were not made available to the Division during the audit because of COVID-19. The petition included a copy of the notice and demand but did not include a copy of the notice.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated July 18, 2022, of Brian Evans, Esq., the Division's representative; (ii) an affidavit, dated May 12, 2021, of Deena Picard, a Data

¹ The determination of the Administrative Law Judge incorrectly identified the assessment number in the first paragraph of its findings. The correct number, L-051179494, is properly noted in the record below and here in findings of fact 10 and 11.

Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record For Presort Mail – Assessments Receivable" (CMR) postmarked January 27, 2020; (iv) an affidavit, dated May 17, 2021, of Susan Saccocio, a manager in the Division's mail room; (v) copies of the notice mailed to petitioner and its then-representative with the associated mailing cover sheets; (vi) a copy of petitioner's New York State and local sales and use tax web-filed return (form ST-810) for the period of September 1, 2019 through November 30, 2019; and (vii) a copy of petitioner's New York State and New York City power of attorney (form POA-1) dated April 18, 2019, appointing Falgun Patel, as petitioner's then-representative. Petitioner's Freeport, New York address reflected on the form ST-810 is the same address reflected on the notice sent to petitioner. On the power of attorney form, Falgun Patel's Glen Oaks, New York address is the same address as reflected on the notice sent to the representative.

6. Brian Evans, an attorney in the Office of Counsel of the Division, avers in his affirmation that petitioner's New York State and local sales and use tax web-filed return for the period of September 1, 2019 through November 30, 2019, was filed on December 20, 2019, and was the last return filed by petitioner before the Division issued the notice. Mr. Evans also affirms that petitioner's Freeport, New York address appearing on the last return filed, corresponds to the address appearing on the notice issued to petitioner and that such is the last known address the Division had for petitioner at the time the notice was issued. Mr. Evans affirms that petitioner's then-representative's Glen Oak, New York address appearing on the power of attorney form provided with the motion corresponds to the address appearing on the notice issued to the representative and was the last known address the Division had for petitioner's representative at the time the notice was issued.

7. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case, "20200171700." Following the Division's general practice, this date was manually changed on the first and last pages of the CMR in the present case to "1/27/20." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

8. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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.”

9. The CMR in the present matter consists of 8 pages and lists 85 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a postmark, dated January 27, 2020, to each page of the CMR, wrote the number “85” on page 8 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed the last page of the CMR.

10. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9730 0078 6962, and reference number L-051179494 was mailed to petitioner, “BABU WINE & LIQUOR, INC.” at the Freeport, New York address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9730 0078 6924, and reference number L-051179494 was mailed to petitioner’s then-representative, “FALGUN PATEL” at the Glen Oaks, New York address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s representative’s name and address as noted.

12. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since

2017 and has been employed there since 2012 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives 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 first and last pieces of mail 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 listed 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room 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 CMR. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division’s record of receipt by the USPS for the pieces of certified mail listed thereon.

13. Each of the 8 pages of the CMR attached to the Picard affidavit as exhibit “A” contains a USPS postmark of January 27, 2020. On page 8, corresponding to “TOTAL PIECES AND AMOUNTS” is the preprinted number 85 and next to “TOTAL PIECES RECEIVED AT POST OFFICE” is the handwritten entry “85,” indicating 85 pieces of mail were received by the USPS. There is a set of initials on page 8.

14. According to both the Picard and Saccocio affidavits, a copy of the notice was properly mailed to petitioner and petitioner’s representative on January 27, 2020, as claimed.

15. Petitioner filed a petition with the Division of Tax Appeals in protest of the notice on November 30, 2020. A copy of petitioner's USPS date stamped envelope with that date, used for the mailing of the petition, was included with the Division's motion papers. The petition was date stamped as received by the Division of Tax Appeals on December 3, 2020.

16. Petitioner noted in Section V ("Notice/Assessment Number(s)") of the petition that it was protesting "CMS No 00314401 NOTICE NUMBER L-050144798-5." In Section VII ("Tax Determination"), petitioner stated "The amount of tax determined was "106,000 + 303,945 = 409,945.00 UNTIL 11/30/2020. The amount contested is L-050141457-6 AND L-051179494-3." Petitioner further referred, in Section IX ("Conciliation Conference with the Bureau of Conciliation and Mediation Services"), to a conciliation order of "OCTOBER 30, 2020."

Attached to the petition was a copy of a letter from the Bureau of Conciliation and Mediation Services (BCMS), referencing CMS No. 000314401 and addressed to Sukhwinder Singh; a Field Notice Civil Enforcement Division issued to Babu Wine & Liquor Inc., dated February 26, 2021; a Notice and Demand for Payment of Tax Due and Consolidated Statement of Tax Liabilities issued to Singh-Shukhwinder, regarding Assessment ID: L-051187793-6 and dated May 13, 2020; a Conciliation Order regarding CMS No. 000314401, In the Matter of the Request of Sukhwinder Singh, dated October 30, 2020, which stated that "the request is denied and the statutory notice(s) is sustained;" and a Notice and Demand for Payment of Tax Due was issued to Babu Wine & Liquor, Inc. regarding Assessment ID# L-051179494-3 and dated June 3, 2020.

17. The petition described above listed both petitioner herein and Sukhwinder Singh as petitioners. Mr. Singh is a responsible officer of petitioner Babu Wine and Liquor, Inc. For administrative purposes, the Division of Tax Appeals treated the protest of Babu Wine and Liquor, Inc. as separate from the responsible officer's protest, essentially deeming a single

petition form as two separate petitions. The responsible officer's protest resulted in an Administrative Law Judge determination that denied Mr. Singh's petition and sustained a notice of determination numbered L-050144798² (*see Matter of Singh*, Division of Tax Appeals, October 19, 2023 [DTA No. 830167]). An exception in that matter is pending.

18. Petitioner filed a response, dated August 8, 2022, to the Division's motion. Petitioner's response asserts that the initial problem was the result of petitioner's malfunctioning point of sale system and that the Division has already admitted to having received the petition timely. Petitioner offers no relevant proof of its assertion regarding the mailing of the petition other than a copy of a USPS return receipt (USPS form 3811) indicating that the Division of Tax Appeals received a document from petitioner on December 3, 2020. The response did not include a copy of the notice.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Upon the motion of the Division, the Administrative Law Judge considered whether to dismiss the petition pursuant to section 3000.9 (a) of the Tax Appeals Tribunal Rules of Practice and Procedure (Rules) or, alternatively, whether to grant a motion by the Division for summary determination under section 3000.9 (b) of the Rules.

The Administrative Law Judge determined that the Division properly mailed the notice of determination bearing assessment ID number L-051179494 to petitioner when it was delivered into the custody of the USPS on January 27, 2020. Once established that the notice was properly mailed, the Administrative Law Judge stated that it was incumbent upon petitioner to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter. The determination further stated that petitioner did not file a request

² Notice of determination L-050144798 is the subject of conciliation order CMS No. 000314401, which, as noted, was attached to the petition (*see* finding of fact 16).

for conciliation conference but instead opted to file a petition for a hearing before the Division of Tax Appeals. As that petition was not filed until November 30, 2020, more than seven months after the expiration of the 90-day period, the Administrative Law Judge determined that the Division of Tax Appeals lacks jurisdiction to consider the merits of the petition in this matter.

The Administrative Law Judge also noted that petitioner claimed, but did not support with any evidence, that the Division admitted that the petition was timely filed and concluded that unsubstantiated assertions are insufficient to raise an issue of fact. Finally, the Administrative Law Judge determined that the Division of Tax Appeals is without the jurisdiction to provide a hearing on a notice and demand subsequently issued to petitioner on May 13, 2020. As the Administrative Law Judge dismissed the petition because the Division of Tax Appeals lacked jurisdiction, the motion for summary determination was not considered.

ARGUMENTS ON EXCEPTION

Petitioner argues that the petition was timely filed within 90 days of a conciliation order. Petitioner further argues that at the time the audit was conducted, records were unavailable due to COVID-19 related illnesses of both petitioner's officer and accountant and that the "POS" system was unavailable at the time of audit and subsequent conferences. In support of its argument of timeliness, petitioner attached a letter from BCMS, regarding a separate, but possibly related matter concerning Sukhwinder Singh, who is the principal officer of petitioner here.³ Petitioner asserted that the petition was timely as it was filed within 90 days of the issuance of the conciliation order.

³ The letter from BCMS Conferee Robert Heller and the conciliation order attached by petitioner with its petition is addressed to Sukhwinder Singh and references CMS No. 000314401 and number L-050144798-5. On exception, petitioner offers the same letter from Conferee Heller but attaches a conciliation order referencing "In the Matter of the Request of Babu Wine & Liquor, Inc.," CMS No. 000314400 and indicates Tax Article No. 28 & 29 for the period 09/01/2015 – 05/31/2018, the petitioner, tax and period that is the subject of this petition and exception. However, the number on that order is L-050141457-6. Both the BCMS letter and conciliation order are dated October 30, 2020.

The Division argues that the determination of the Administrative Law Judge is correct and that the correspondence related to the conciliation conference is immaterial as not pertaining to the notice at issue in the present case, is not part of the record below and should not be considered on exception.

In its reply, petitioner restates that the petition was filed within 90 days from the date of the conciliation order and again attached the copy of the same letter from BCMS, now including hand-written notations indicating the Division of Tax Appeals number in the present matter and a further hand-written notation “EIN-23-1911813.”

OPINION

We start with the issuance of a notice for sales and use taxes due from petitioner, Babu Wine & Liquor, Inc. by the Division. That the notice was issued on January 27, 2020 is not disputed by either party. The Division has an affirmative obligation to establish the proper mailing of statutory notices (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Ahmed Nagi Ahmed*, Tax Appeals Tribunal, June 29, 2017). Proof that it was properly mailed on that day has been admitted into the record below in the form of affidavits by Division employees and a properly completed CMR (*see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004). Additionally, like the issuance of the notice, proper mailing or service upon petitioner, has not been disputed. We thus agree with the Administrative Law Judge that the Division met its obligation to show proper mailing of notice of determination L-051179494. The issuance of that notice starts the 90-day period for the filing of a timely protest to the proposed assessment (Tax Law § 1138 [a] [1]).

That leaves the question of whether petitioner either requested a conciliation conference or duly filed a petition with the Division of Tax Appeals within the 90-day period prescribed by statute and upon which the Division of Tax Appeals may obtain jurisdiction (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). Petitioner does not assert that it filed a petition within 90 days of January 27, 2020. Indeed, the petition before us is dated November 30, 2020 and was received by the Division of Tax Appeals on December 3, 2020. Ninety days from the issuance of the notice was April 26, 2020. The petition was not filed until more than seven months after that date. Accordingly, the Administrative Law Judge properly determined that the Division of Tax Appeals lacked jurisdiction to consider the merits and dismissed the petition with respect to notice of determination L-051179494.

On exception, petitioner asks this Tribunal to consider factors that it believes distinguish or overcome the conclusion of the Administrative Law Judge, including certain assertions made below and rejected. Specifically, it claims that the petition was filed within 90 days of a conciliation order and that, therefore, the petition was dismissed in error. In support of that claim, petitioner points to the aforementioned order (CMS No. 000314401) by BCMS Conferee Robert Heller, dated October 30, 2020. As noted, this document was attached to the petition filed in this matter. That conciliation order, however, was issued to Mr. Singh as the requester and pertains to a notice of determination issued to Mr. Singh individually (that is, L-050544798). Accordingly, that conciliation order may not serve as the basis of conferring jurisdiction in this matter. There is no conciliation order in the record related to notice of determination L-051179494. Again, we note our agreement with the Administrative Law Judge that the proper determination of whether the Division of Tax Appeals has jurisdiction is measured from the issuance of the notice (20 NYCRR 3000.9 [b] [1]; Tax Law § 1138 [a] [1]). As noted,

petitioner's protest of notice of determination L-051179494 was filed more than seven months late, and is therefore properly dismissed.

We now turn to petitioner's protest as it relates to notice number L-050141457-6. As noted in finding of fact 16, the petition did reference notice number L-050141457-6. Unfortunately, the record and determination are bereft of any analysis or ruling regarding this notice. We must conclude, therefore, that petitioner's protest of notice number L-050141457-6 has not been adjudicated by the Division of Tax Appeals, contrary to Tax Law § 2010 (4). Accordingly, we must remand this matter to the Administrative Law Judge for a supplemental determination addressing petitioner's protest of notice number L-050141457-6. If it is determined that the petition was timely filed with respect to notice number L-050141457-6, the supplemental determination should address the merits of the protest.

We note that petitioner did not attach to the petition a copy of the statutory notice related to its protest of L-050141457-6 as required under our Rules (20 NYCRR 3000.3 [b]). In such a circumstance, our Rules provide certain procedures by which such a defective petition may be corrected, or, if not corrected, dismissed (20 NYCRR 3000.3 [d]). It does not appear that such procedures were followed here.

We note, too, that petitioner offered, with its exception, a conciliation order dated October 30, 2020. That order purports to relate to notice L-050141457 and thus would appear to confer jurisdiction upon the Division of Tax Appeals with respect to that notice. We do not consider that document here, however, because it was not submitted as part of the record below (*Matter of Richardson*, Tax Appeals Tribunal, November 17, 2022).

Finally, we note that the supplemental determination should not address any issues related to notice L-051179494, as petitioner's protest of that notice number has been found to be untimely.

We will retain jurisdiction over this matter based upon the exception already timely filed by petitioner. After the issuance of a supplemental determination, petitioner will be allowed to add to its existing exception and briefs, so long as it does so within 30 days of the issuance of the supplemental determination or requests an extension of time within the 30-day period. The Division will be given an opportunity to respond to any additional material submitted by petitioner. If the Division wishes to except to any portion of the supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED that the matter is remanded to the Administrative Law Judge for further proceedings consistent herewith related to petitioner's protest of notice number L-050141457-6.

DATED: Albany, New York
March 14, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner