

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NELSON JIMENEZ	:	DETERMINATION DTA NO. 825874
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 2004 through August 31, 2008 and March 1, 2009 through August 17, 2011.	:	

Petitioner, Nelson Jimenez, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 2004 through August 31, 2008 and March 1, 2009 through August 17, 2011.

On January 15, 2014, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. On March 17, 2014, the Division of Taxation, by Amanda Hiller, Esq. (David Gannon, Esq., of counsel), having been granted an extension of time to do so, submitted an affidavit and documents in support of dismissal. Petitioner, appearing pro se, filed a letter on March 29, 2014, stating that he would not be responding to the notice of intent to dismiss. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced March 29, 2014. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of the conciliation order.

FINDINGS OF FACT

1. Petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was in response to notices of determination issued by the Division of Taxation (Division) assessing additional sales and use taxes due against petitioner for the periods December 1, 2004 through August 31, 2008 and March 1, 2009 through August 17, 2011.

2. BCMS issued to petitioner a Conciliation Order (CMS No. 252924), dated April 19, 2013, denying petitioner's request and sustaining the notices of determination.

3. On September 4, 2013, petitioner filed a petition with the Division of Tax Appeals in this matter.

4. As outlined above, on January 15, 2014, the Petition Intake Unit of the Division of Tax Appeals issued petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petition, on the basis that the petition had not been timely filed.

5. The Division submitted the affidavits of Bruce Peltier and Robert Farrelly, employees of the Division, sworn to on March 10, 2014. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

6. The BCMS Data Management Services Unit prepared and forwarded the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

7. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

8. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

9. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

10. It was the general office practice that the BCMS clerk stamps on the bottom left corner "Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR.

11. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “4-19-13” was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division’s Mail Processing Center.

13. Mr. Farrelly attested to the truth and accuracy of the copy of the 5-page CMR, which contained a list of the 46 conciliation orders issued by the Division on April 19, 2013. The CMR also listed 46 certified control numbers. Each such certified control number was assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

14. Information regarding the conciliation order issued to petitioner and petitioner’s representative was contained on page three of the CMR.

Corresponding to certified control number 7104 1002 9730 1536 0140 was reference number 000252924, along with the name and address of petitioner, Nelson Jimenez, Brooklyn, New York. This is the address used by petitioner in his request for conciliation conference and is his last known address. Moreover, petitioner does not argue that this is an incorrect address.

Corresponding to certified control number 7104 1002 9730 1536 0201 was a reference to number 000252924, along with the name and address of petitioner’s representative, Carlos Bustamante, of Flushing New York.

15. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

16. Here, the postal employee affixed a postmark date of April 19, 2013 to each page of the five-page CMR. The postal employee also wrote his or her initials on each page of the CMR and circled the number "46" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page five of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR, indicating that 46 pieces of mail were actually received.

17. Mr. Peltier stated that 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 Division's Mail Processing Center, the CMR was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

18. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on April 19, 2013, an employee of the Mail

Processing Center delivered pieces of certified mail addressed to Nelson Jimenez, in Brooklyn, New York and Carlos Bustamante, in Flushing, New York, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on April 19, 2013 for the records of BCMS. He asserted that the procedures described in his affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner on April 19, 2013.

CONCLUSIONS OF LAW

A. There is a 90-day statutory limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[c]; 4000.5[e]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(1), the conciliation order and underlying assessments in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. 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 petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*Matter of*

Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to the taxpayer's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders 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.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Bruce Peltier and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by certified mail on April 19, 2013, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copies of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the conciliation order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date

stamp of April 19, 2013. There are 46 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number “46” on the line stating “total pieces received at post office,” that the post office received 46 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on April 19, 2013 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Additionally, the Division has established that it mailed a copy of the order to petitioner’s representative by certified mail on April 19, 2013.

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on April 19, 2013, and it is this date which commenced the 90-day period within which a protest had to have been filed. Petitioner’s protest was not filed until September 4, 2013, or 138 days later. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner’s protest (*Matter of Sak Smoke Shop*).

E. This determination, made pursuant to the notice of intent to dismiss petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, 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.”

Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Moreover, petitioner has failed to challenge the Division's proof of mailing of the conciliation order with any evidence. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

F. Without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition. Therefore, it must be concluded that petitioner has failed to meet his burden of proof.

G. The petition of Nelson Jimenez is dismissed.

DATED: Albany, New York
June 5, 2014

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE