

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JACOB LEIBOWITZ : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 826112
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2011 through November 30, 2011. :

Petitioner, Jacob Leibowitz, 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, 2011 through November 30, 2011.

On March 20, 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 May 30, 2014, petitioner, appearing by Simon Leibowitz, having been granted an extension of time, submitted a letter in opposition to dismissal. On June 2, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), also having been granted an extension of time, submitted affidavits and other documents in support of dismissal, which date commenced the 90-day period for issuance of this determination pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4). After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. On February 6, 2014, petitioner, Jacob Leibowitz, mailed a petition via United States Postal Service Priority and Certified Mail to the Division of Tax Appeals. It was received on February 10, 2014. The petition sought an administrative hearing to review a Notice of Determination (assessment number L-040313653), which was attached to the petition.

2. The subject Notice of Determination, dated November 7, 2013, was addressed to petitioner at a Monsey, New York, address.

3. On March 20, 2014, Daniel J. Ranalli, 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 indicated that the subject petition was filed in protest of the Notice of Determination issued to petitioner on November 7, 2013 and that the petition was not filed until February 6, 2014.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Determination under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated May 21, 2014, of Daniel A. Maney, a Taxpayer Services Specialist 4 and Manager of the 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 November 7, 2013; (iii) an affidavit, dated May 21, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; and (iv) a copy of petitioner’s New York State personal income tax return

(form IT-201) for the year 2012 dated March 8, 2013, which was the last filing from petitioner prior to the issuance of the Notice of Determination.

5. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney averred that he held his current position with the Division since January 2010 and is fully knowledgeable of past and present procedures for processing notices, which have not changed since 1992.

6. Mr. Maney receives from CARTS 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, using the year, the numeric ordinal day of the year and military time of day. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "11/7/13."¹ It is also the Division's general practice that 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 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.

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

¹ In his affidavit, Mr. Maney states that "[i]n the upper left hand corner of Page 1 of the certified mail record, the date the notices were mailed was handwritten by personnel in the Department's mail room." In fact, the handwritten date of mailing appears in the upper *right* corner of the pages attached to the Maney affidavit.

heading "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 the Notice of Determination under protest consists of 49 pages and lists 531 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 49, which contains 3 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated November 7, 2013 of the Colonie Center branch of the USPS to each page of the CMR and also wrote his or her initials on each such page.

9. Page 12 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0097 2747 and assessment number L-040313653, was to be mailed to "Leibowitz-Jacob" at the Monsey, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and the name, "Leibowitz-Jacob," and the Monsey, New York, address.

10. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information

contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against 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 also places his or her signature or initials on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated November 7, 2013 and his or her initials to each page of the CMR. The mail room further requested 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 employee complied with this request by circling the number "531" on the last page next to the heading "TOTAL PIECES AND AMOUNTS."

11. Based upon his review of the affidavit of Daniel A. Maney and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on November 7, 2013, an employee of the mail room delivered a piece of certified mail addressed to petitioner in Monsey, New York, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope 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 November 7, 2013 for the records of the Division's CARTS Control Unit. He asserted that the procedures described in his affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the piece of certified mail to petitioner on November 7, 2013.

12. Petitioner's 2012 New York resident income tax return, dated March 8, 2013, reported petitioner's address as Monsey, New York 10952. This was the last return filed by petitioner

prior to the issuance of the subject Notice of Determination. This address corresponds with the address on the CMR and the Notice of Determination that was sent to petitioner.

SUMMARY OF PETITIONER'S POSITION

13. In his petition, petitioner claimed that he sold the business on August 4, 2011. He also asserted that he had two hip surgeries since September 2013 and was in extended rehabilitation during that time period. As a result of that rehabilitation, he was unaware of the Notice of Determination issued during that time frame. He further asserted that he was unable to mail the petition by the deadline of February 5, 2014 because of the occurrence of a major snowstorm on that date.

14. In opposition to the dismissal of the petition, petitioner's representative, his son, submitted a letter dated May 28, 2014. He asserted that his father, who is 83 years old, was in a rehabilitation facility on November 7, 2013, the date on the Notice of Determination, and "first became aware of it on or about November 28, 2014." He further asserted that the business was sold in August 2011 and that petitioner had no communication with the Division prior to the date on the Notice of Determination. As such, petitioner's representative submits that the Notice of Determination was not timely mailed to his father. In addition, as his father is elderly, single and infirm, petitioner's representative requested that consideration be given to the circumstances surrounding his attempt to timely mail the petition. Petitioner's representative claimed that upon receipt of the Notice of Determination, his father attempted to get in touch with the current owners, who were responsible for the taxes due, and waited to file the petition in the hopes that they would take responsibility. Petitioner's representative further claimed that on the day the petition was attempted to be mailed, there was a major snowstorm which prevented access to the

post office. For these reasons, petitioner's representative respectfully requested that the petition be allowed to go forward.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition 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). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a Notice of Intent to Dismiss Petition was issued pursuant to 20 NYCRR 3000.9(a)(4).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or 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 is 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).

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 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.*).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

E. The Division has also presented sufficient documentary proof in the form of the CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on November 7, 2013. The CMR listed certified control numbers with corresponding names and addresses and bore USPS postmarks on each page, dated November 7, 2013. Additionally, a postal employee circled “531” on the last page of the CMR with his or her initials to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Tax Law § 1138(a)(1) provides that a notice of determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. . . . The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

G. Here, the record shows that petitioner’s address as listed on his 2012 personal income tax return was in Monsey, New York. The 2012 return was filed on March 8, 2013. Thus his

last known address prior to the issuance of the Notice of Determination on November 7, 2013 was that stated on the 2012 tax return.

Accordingly, the Division has shown that it properly mailed the subject Notice of Determination to petitioner at his last known address consistent with Tax Law § 1138(a)(1) and § 1147(a)(1). It is concluded that the notice was properly mailed and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on November 7, 2013 (Tax Law § 170[3-a][b]; § 1138[a][1]).

H. The documents show that the Notice of Determination was mailed to petitioner on November 7, 2013, but the petition was not mailed until February 6, 2014, which is one day beyond the 90-day period. Even one day late precludes petitioner from having his petition heard since deadlines for filing petitions are strictly enforced (*see Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). Petitioner, who is 83 years old, claimed that he was unable to mail the petition on the 90th day, i.e., February 5, 2014, due to a major snowstorm that occurred on such date. Absent an announcement by the Commissioner of Taxation and Finance officially postponing tax filing and payment deadlines for taxpayers directly affected by such storm conditions (*see e.g.* Announcement Regarding the Ice Storm, N-08-17), such explanation, which may have contributed to the late filing of one day, does not remedy a jurisdictional defect. The Division of Tax Appeals simply lacks subject matter jurisdiction over a late-filed petition. Personal tragedy, ill health or extenuating circumstances do not provide a basis to excuse the late filing of a petition (*see Matter of Perillo*, Tax Appeals Tribunal, August 2, 1990; *Matter of Rathgaber*, Tax Appeals Tribunal, April 5, 1990). Unfortunately, since the petition was

untimely filed, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Jacob Leibowitz is dismissed.²

DATED: Albany, New York
August 28, 2014

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

² Petitioner is not entirely without recourse. That is, petitioner may pay the tax assessment and file a claim for refund (Tax Law § 1139[c]). If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).