

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DENISE NWANKPA : DETERMINATION
 : DTA NO. 826643
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 March 1, 2012 through May 31, 2012, and for :
Revision of Determinations or for Refund of Cigarette :
Tax under Article 20 of the Tax Law for the Periods :
February 24, 2011 and December 7, 2012.

Petitioner, Denise Nwankpa, 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 March 1, 2012 through May 31, 2012, and for revision of determinations or for refund of cigarette tax under Article 20 of the Tax Law for the periods February 24, 2011 and December 7, 2012.

On October 1, 2015, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel), filed a motion seeking summary determination pursuant to Tax Law § 170(3-a)(e), 20 NYCRR 3000.5, 20 NYCRR 3000.9(a)(1)(ii) and (vi), and 3000.9(b) upon the grounds that the Division of Tax Appeals does not have jurisdiction of the subject matter of the petition and that the petition does not state a cause for relief. Accompanying the motion was the affirmation of Frank Nuara, Esq., dated October 1, 2015, and annexed exhibits supporting the motion. Petitioner, appearing by Gelb & Black, P.C. (James I. Gelb, Esq., of counsel), having been granted an extension of time to respond to the Division’s motion, did so on

December 15, 2015,¹ and the 90-day period for issuance of this determination commenced on such date. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of conciliation orders.

FINDINGS OF FACT

1. On July 16, 2014, petitioner, Denise Nwankpa, filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of Consolidated Statement of Tax Liabilities number E-032353573-4 (Consolidated Statement). The request sought a conference for numerous notices of determination issued to petitioner pursuant to Articles 20, 28 and 29 of the Tax Law. Included in the Consolidated Statement were the following notices of determination:

Notice #	Tax Type	Tax Period	Tax	Penalty	Interest
L-038721478	Sales and Use	03/01/12 - 05/31/12	\$728.16	\$218.41	\$246.08
L-035619087	Cigarette	02/24/11	0	\$2,000.00	0
L-039004041	Cigarette	12/07/12	0	\$10,000.00	0

2. Petitioner's address as printed on her request was 660 Morris Park Avenue, Bronx, New York 10462. This was petitioner's last known address at all relevant times.

3. In response to her request, BCMS issued to petitioner two conciliation orders, both dated August 1, 2014. The first, bearing CMS number 262795, addressed Notice of

¹ Although petitioner was represented by James I. Gelb, Esq., as of December 15, 2015, she submitted her response to the instant motion on her own behalf.

Determination number L-038721478, and informed petitioner that her request was late filed and, therefore, dismissed. The second conciliation order, bearing CMS number 262796, addressed notices of determination numbers L-035619087 and L-039004041, and likewise dismissed the request as late filed.

4. On November 22, 2014, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation orders in CMS numbers 262795 and 262796, which included notices of determination numbers L-038721478, L-035619087 and L-039004041. The envelope in which the petition was delivered to the Division of Tax Appeals bears a United States Postal Services (USPS) postmark dated November 22, 2014. The petition itself is signed by petitioner and dated October 25, 2014.

5. On February 26, 2015, the 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 conciliation orders numbered 262795 and 262796 appear to have been issued on August 1, 2014 and the petition appears to have been filed on November 22, 2014, or 113 days later, and was therefore, untimely.

6. By order dated July 2, 2015, the Division of Tax Appeals withdrew the Notice of Intent to Dismiss Petition. The order stated that in support of dismissal, the Division of Taxation (Division) had introduced adequate proof of its standard mailing procedures for generating and issuing its conciliation orders, but failed to present sufficient documentary proof to establish that conciliation orders numbers 262795 and 262796 were mailed to petitioner at her last known address on August 1, 2014. In particular, the Division failed to include in its papers supporting dismissal a copy of the cover sheet generally mailed to taxpayers along with a conciliation order (*see generally Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015).

7. The Division subsequently filed the instant motion, and submitted various documents in support, including an affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, along with an attached CMR. Mr. Farrelly has served in that capacity since October 2002. Mr. Farrelly's affidavit sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the CMR.

8. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards them to the conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division of Taxation's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated certified mail record (CMR) entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The CMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer

located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. On the last page of the CMR, the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit" on each page.

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "8-1-14" is written in the upper right corner of each page of the CMR attached to Mr. Farrelly's affidavit.

14. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up, in BCMS, by an employee of the Division's Mail Processing Center.

15. Mr. Farrelly attests to the truth and accuracy of the copy of the six-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on August 1, 2014. This CMR originally listed 65 computer-printed certified control numbers. Each such certified control number was assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number was a CMS number, the name and address of the addressee, and postage and fee amounts.

16. Twenty-four pieces of mail, located on pages one, two, four and five of the CMR were "pulled" or deleted from the list. A piece may be pulled for any number of reasons, including a

discrepancy in the name or address. A line was placed through the entries that were pulled. No such mark is made on the listings for petitioner. As a result of the deletions, the clerk changed the “total pieces and amounts” listed on page six of the CMR from “65” to “41.”

17. As Mr. Farrelly confirms, information regarding conciliation orders, CMS numbers 262795 and 262796, is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0271 1658 is CMS number 262795, and corresponding to certified control number 7104 1002 9730 0271 1665 is CMS number 262796. Both entries list petitioner’s name and last known address as set forth on her Request for Conciliation Conference.

18. Attached to Mr. Farrelly’s affidavit are two cover sheets, both dated August 1, 2014 and addressed to petitioner at her last known address. The first cover sheet contains certified control number 7104 1002 9730 0271 1665 and references CMS number 262796. The second cover sheet contains certified control number 7104 1002 9730 0271 1658 and references CMS number 262795. According to Mr. Farrelly, these are the cover sheets referenced in his description of the general mailing procedure and were included with the conciliation orders sent to petitioner.

19. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center. The affidavit attests to the regular procedures followed by him and his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the “Outgoing Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the

information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

20. In this particular instance, the postal employee affixed a postmark dated August 1, 2014 to each page of the six-page CMR. On page six, the postal employee also wrote his or her initials or signature, and circled the crossed out preprinted number "65" and handwrote number "41" near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

21. Based upon his review of Mr. Farrelly's affidavit, and the exhibits attached thereto including the CMR, Mr. Peltier states that on August 1, 2014, an employee of the Mail Processing Center delivered to a branch of the USPS in Albany, New York, in sealed envelopes for delivery by certified mail two pieces of certified mail addressed to petitioner at her Bronx, New York, address. Mr. Farrelly states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on August 1, 2014 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are 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 August 1, 2014.

22. In her response to the instant motion, petitioner argues against the merits of the underlying notices. Moreover, she maintains that she mailed her petition on October 26, 2014, and subsequently spoke with an employee of the Division of Tax Appeals in order to inform her of the mailing and also obtain permission to fax a copy. Petitioner acknowledges that she received a letter from the Division of Tax Appeals dated December 11, 2014 confirming receipt

of the petition and seeking additional pertinent information. Furthermore, petitioner states that she faxed the requested additional information to the Division of Tax Appeals on January 6, 2015. Finally, petitioner states that the motion should be denied as this matter was reported to a case advocate with the Office of the Taxpayer Rights Advocate of the Department of Taxation and Finance.

CONCLUSIONS OF LAW

A. The Division's motion for summary determination is brought on the grounds that the Division of Tax Appeals does not have jurisdiction of the subject matter of the petition and that the petition does not state a cause for relief. As the motion is based on the issue of timeliness of the petition, it will be treated as a motion to dismiss pursuant to 20 NYCRR 3000.9(a)(ii).

There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e), the conciliation orders in this case would be binding upon the petitioner unless a timely petition with the Division of Tax Appeals was filed. It is well settled that 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, 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 has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard

mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required 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.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders.

E. Additionally, the Division has cured the concerns regarding compliance with its standard mailing procedure in this matter discussed in the Division of Tax Appeals' July 2, 2015 order (*see* Finding of Fact 6). The Division has presented sufficient documentary proof to establish that conciliation orders numbers 262795 and 262796 were mailed to petitioner at her last known address on August 1, 2014. Specifically, the Division has included the relevant cover sheets that bear petitioner's address, conciliation order and certified control numbers (*c.f. Matter of Alvarenga* [where absence of mailing cover sheet raised the material factual issue of whether the Division's standard mailing procedure was followed]). A review of the cover sheets allows the address and certified control number for a particular conciliation order to be verified against the CMR. Consequently, the Division has established that it performed its standard mailing procedure with regard to the conciliation orders in this particular case.²

² As Mr. Gelb began his representation after the petition in this case was filed, proper service upon him of the statutory notices or conciliation orders is not in issue.

F. Meanwhile, petitioner has failed to raise grounds that would cause denial of the motion. Her mere assertion that she mailed the petition on October 26, 2014 is insufficient in light of the November 22, 2014 postmark on its envelope (*see Matter of Sipam*, Tax Appeals Tribunal, March 10, 1988; 20 NYCRR 3000.22[a][1]). Her remaining arguments are inapt in the context of this motion.

G. The Division of Taxation has established that it properly mailed the conciliation orders to petitioner on August 1, 2014 and that the petition was filed on November 22, 2014, or more than 90 days later. Hence, the petition was not timely filed and the Division of Tax Appeals does not have jurisdiction to hear the merits of this matter (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

H. The Division of Taxation's motion is granted and the petition of Denise Nwankpa is hereby dismissed.

DATED: Albany, New York
March 10, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE