

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PET ARK BROADWAY, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Sales	:	DTA NO. 827343
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 2011 through	:	
November 30, 2013.	:	

On November 16, 2015, petitioner, Pet Ark Broadway, Inc., 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 December 1, 2011 through November 30, 2013..

On March 11, 2016, 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 grounds that the petition did not appear to be timely with respect to the statutory notice being petitioned. By request of the Division of Taxation, the 30-day period to respond to the Notice of Intent to Dismiss Petition was extended to May 26, 2016. On May 10, 2016, the Division of Taxation by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel), submitted affidavits and accompanying documents in support of dismissal of the petition. On May 27, 2016, petitioner, appearing by Ahmed Abdelhalim, CPA, filed a letter in response. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 26, 2016. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On November 16, 2015, the Division of Tax Appeals received a petition from petitioner, Pet Ark Broadway, Inc., which protests a Notice of Determination issued to it. The envelope containing the petition bears a United States Postal Service (USPS) postmark of November 10, 2015. The petition alleges that a Notice of Determination was never received.

2. On March 11, 2016, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition. The notice indicates that the Notice of Determination was issued on April 16, 2015, but that the petition was not filed until November 10, 2015, or 208 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents: (i) an affidavit, dated April 14, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 16, 2015; (iii) an affidavit, dated April 15, 2016, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division's mail room; and (iv) an affidavit dated April 27, 2016, of Heidi Corina, a Legal Assistant II in the Division's Office of Counsel.

4. In order to prove that the Notice of Determination was sent to petitioner's last known address, the Division submitted a copy of petitioner's e-filed ST-100 for the sales tax quarter

ended February 28, 2015, filed on March 20, 2015, which was the last document filed with the Division by petitioner prior to the issuance of the Notice of Determination. The address on said form matches the address contained on the Notice of Determination and that listed for petitioner on the petition filed in this matter.¹

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and 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. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date is manually changed on the first and last pages of the CMR, in this case April 16, 2015. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into 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.

6. 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

¹This sales tax return was submitted with the unnotarized affidavit of the Division's representative, Frank Nuara. Although the affidavit is not notarized, the sales tax return speaks for itself.

information on the back. The certified control numbers are 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."

7. The April 16, 2015 CMR consists of 224 pages and lists 2,457 computer-printed 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 224, which contains 4 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers.

8. Page 51 of the CMR indicates that the Notice of Determination, assigned certified control number 7104 1002 9730 0450 7129, and assessment number L-042721916 was mailed to petitioner at the Bronx, New York address listed thereon. The corresponding mailing cover sheet for the notice bears this certified control numbers and petitioner's name and address as noted.

9. Page 85 of the CMR also indicates that a Notice of Determination with certified control number 7104 1002 9730 0451 0815 and assessment number L-042721916 was sent to "Ashraf Hanno 24-16 Steinway Street, Astoria, NY 11100." An enclosure with the notice states that a copy of the notice was forwarded to Mr. Hanno because the Division's records indicate that a power of attorney is on file for the tax matters at issue in the notice.

10. The CMR in this case reflects that two pieces of mail were pulled from the run, and these deletions are reflected in the handwritten change to the listing for total pieces received at the post office. A piece of mail may be pulled for any number of reasons including, but not limited to, a discrepancy in a name or address. Any piece of mail so pulled is segregated from

the remaining group of statutory notices for correction and issuance at another time. The specific pulled items appear on pages 210 and 212, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listing pertaining to petitioner or Mr. Hanno. The preprinted number "2457," as appearing next to the heading "Total Pieces and Amounts," on the last page of the CMR was crossed out and replaced with the handwritten number "2455" to reflect the two pieces pulled from the run.

11. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that 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 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 the information contained on the CMR. The CMR has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. In this case, the USPS employee initialed the last page of the CMR and affixed a USPS postmark dated April 16, 2015 to each page of the CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. A review of the CMR indicates

that the USPS employee complied with this request by handwriting the number “2455” as well as circling the same to indicate the number received.

12. According to the Peltier affidavit, copies of the notice was mailed to petitioner on the date indicated as claimed.

13. The affidavit of Heidi Corina describes the Division’s request to the USPS for delivery information on the April 16, 2015 Notice of Determination addressed to Mr. Hanno. Specifically, using PS Form 3811-A, the Division requested delivery information for the article of mail bearing the certified control number addressed to Mr. Hanno as detailed in Finding of Fact 9. The USPS response to this request indicates the notice was delivered on April 18, 2015 to “2416 Steinway Street, Astoria, NY 11103 (emphasis supplied).” In his unnotarized affidavit, the Division’s representative acknowledged that it used an incorrect zip code for Mr. Hanno when sending a copy of the notice to him. Instead of using 11103 the Division addressed the notice with a zip of 11100.

14. Petitioner’s letter in response alleges that petitioner’s representative was in negotiations with the auditor so the filing of a petition was put on hold.² Petitioner requests that the notice of intent to dismiss petition be held in abeyance pending further negotiations.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1138(a)(1), a taxpayer has 90 days after the issuance of a notice of determination to file a petition with the Division of Tax Appeals. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of

²There is no indication in the record that establishes that petitioner had representation at the time the notice of determination was issued.

demonstrating proper mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

B. In this case, the mailing cover sheet, cover letter, CMR and affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination, establish the Division's standard mailing procedure and show that the procedure was followed in this instance. The CMR has 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). The mailing cover sheet bears petitioner's name and a Bronx, New York, address that is identical to the address on the last sales tax return filed by petitioner prior to issuance of the notice and on the CMR, and shows the same certified control number as that listed on the CMR for petitioner's entry. Petitioner's name and address, as well as the numerical information on the face of the notice, appear on the CMR, which bears USPS postmarks dated April 16, 2015. There are 2,455 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing and circling the number “2,455” on the line stating “Total Pieces Received at Post Office,” that the post office received 2,455 items for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner by certified mail on

April 16, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

C. Petitioner has offered no evidence to counter the Division's evidence that the Notice of Determination was issued on April 16, 2015. Mere denial of receipt is insufficient to rebut the presumption that a properly mailed notice of determination was delivered or offered for delivery in the normal course of the mail (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011; *see Matter of T. J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]). In addition, the Division also shouldered its burden of proving that a copy of the notice was also sent to petitioner's then representative and submitted proof that the item was actually delivered despite the use of an incorrect zip code.³ Since the Notice of Determination was issued more than 90 days prior to the date the petition in this matter was filed, the Division of Tax Appeals has no jurisdiction over this matter (*see Matter of Rotondi Industries Corp.*, Tax Appeals Tribunal, July 6, 2006).

D. The petition of Pet Ark Broadway, Inc., is dismissed with prejudice.

DATED: Albany, New York
August 18, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE

³It should be noted that a zip code is not a required element of an address, therefore the use of an incorrect zip code by the Division does not render the address used by the Division in mailing said notice invalid (*Matter of Karolight, Ltd.*, Tax Appeals Tribunal, July 30, 1992).