

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DAVID J. PALMERI : DETERMINATION
for Revision of Determinations or for Refund of : DTA NO. 827464
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period December 1, 2010 through :
November 30, 2012. :
:

Petitioner, David J. Palmeri, 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 period December 1, 2010 through November 30, 2012.

On March 18, 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 May 24, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response.¹ Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on June 2, 2016. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

¹ The petition lists “Wm Berenger” as a “witness” on the line available for entry of petitioner’s representative. A valid power of attorney appointing Mr. Berenger was not included with the petition.

ISSUE

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

FINDINGS OF FACT

1. On December 21, 2015, petitioner, David J. Palmeri, filed a petition with the Division of Tax Appeals challenging Notice of Determination number L-040914110.
2. Notice of Determination number L-040914110 was dated April 2, 2014 and addressed to petitioner at “1539 Yarrow Cir, Bellport, NY 11713-3035.” The notice assessed tax, penalty and interest totaling \$44,547.28 to petitioner under Articles 28 and 29 of the Tax Law for the period December 1, 2010 through November 30, 2012. The notice was issued to petitioner as a responsible person for a corporation named Scope International, Inc. (Scope International) for the period at issue.
3. On July 1, 2014, the Division of Taxation (Division) issued a letter to petitioner informing him that its Bureau of Conciliation and Mediation Services (BCMS) had received a formal protest from Scope International on an associated notice for the same sales and use tax period and that, as a responsible person for the corporation, his notice was deemed protested under the law. The letter also informed petitioner that his conciliation conference would be consolidated with that of Scope International. The conciliation conference was held on September 12, 2014.
4. On November 7, 2014, BCMS issued a conciliation order to petitioner denying his request and sustaining notice number L-040914110. The conciliation order bears CMS case number 262511.

5. On March 18, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of conciliation order, CMS number 262511, issued to petitioner on November 7, 2014 and that the petition was filed on December 21, 2015, or 409 days late. As a result, according to the Notice of Intent to Dismiss Petition, the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition.

6. Petitioner filed his New York State Resident Income Tax Return for the year 2011 on October 15, 2012. This was the last return filed by petitioner with the Division prior to April 1, 2014. On it, petitioner listed his address as “1539 Yarrow Circle Bellport NY 11713.”²

7. In order to prove mailing of the conciliation order for CMS number 262511, issued to petitioner on November 7, 2014, the Division provided the following documents: (i) an affidavit, dated April 22, 2016, of Robert Farrelly, the Assistant Supervisor of Tax Conferences of BCMS; (ii) a six-page “Certified Record for Presort Mail - BCMS Cert Letter” (CMR), each page of which is legibly postmarked November 7, 2014; (iii) an affidavit, dated April 25, 2016, of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center; (iv) a copy of the Division’s letter of July 1, 2014 informing petitioner of his inclusion in the conciliation process (*see* Finding of Fact 3); (v) a copy of the November 7, 2014 conciliation order for CMS number 262511 with cover letter and the associated mailing cover sheet, and (vi) a copy of petitioner’s

² Petitioner filed an application for automatic six-month extension for the year 2012 with the Division on April 13, 2013. This document bore the same Bellport, New York, address as petitioner’s 2011 return.

New York State Resident Personal Income Tax Return for the year 2011 and described in Finding of Fact 6.³

8. Mr. Farrelly's affidavit set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminated in the mailing of the orders by the U.S. Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

9. 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.

10. 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.

11. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." 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

³ The Division also included with its papers an affidavit, dated April 22, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau and a CMR dated April 2, 2014. These two documents were offered to establish the date of mailing of the Notice of Determination. The timeliness of petitioner's request for conference is not in issue in this proceeding, however.

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.

12. 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.

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

14. 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 "11-7-14" was written in the upper right corner of each page of the CMR.

15. 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.

16. Mr. Farrelly attested to the truth and accuracy of the copy of the 6-page CMR, which contained a list of the 58 conciliation orders issued by the Division on November 7, 2014. The CMR also listed 58 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 reference number, the name and address of the addressee.

17. Information regarding the conciliation order issued to petitioner was contained on page four of the CMR. Corresponding to certified control number 7104 1002 9730 0327 0390 was reference number 000262511, along with the name and last known address of petitioner.

18. Mr. Peltier's affidavit 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.

19. Here, the postal employee affixed a postmark date of November 7, 2014 to each page of the six-page CMR. The postal employee also wrote his or her initials and circled the number "58" handwritten next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page six 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 58 pieces of mail were actually received.

20. 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.

21. Based upon his review of Mr. Farrelly's affidavit and the exhibits attached thereto, including the CMR and cover sheet, Mr. Peltier stated that on November 7, 2014, an employee of the Mail Processing Center delivered pieces of certified mail addressed to: David Palmeri, 1539 Yarrow Circle, Bellport, New York 11713-3035, 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, 2014 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 November 7, 2014.

CONCLUSIONS OF LAW

A. Tax Law § 170(3-a)(e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is "issued" within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012).

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 (*see 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 or conciliation 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.*, Tax Appeals Tribunal, May 23, 1991).

D. The Division has introduced adequate proof of its standard mailing procedures for conciliation orders through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing such orders. The Division has also presented sufficient documentary proof, i.e., the properly completed CMR and associated cover sheet, to establish that conciliation order CMS number 262511, relating to Notice of Determination number L-040914110, was mailed as addressed to petitioner to his last known address on November 7, 2014. As the petition was filed on December 21, 2015, or more than 90 days later, the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

E. The petition of David J. Palmeri is dismissed.

DATED: Albany, New York
August 25, 2016

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