

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ABDUL A. SHAMIM : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 827636
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period June 1, 2009 through :
February 29, 2012. :
:

Petitioner, Abdul A. Shamim, 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 June 1, 2009 through February 29, 2012.

On October 13, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). Petitioner, appearing by Arthur Morrison, Esq., and IH Accounting Inc. (Irina Herman, CPA), submitted documents in opposition to dismissal on November 7, 2016. On December 27, 2016, the Division of Taxation, appearing by Amanda Hiller, Esq. (David Gannon, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on December 29, 2016. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition should be dismissed for lack of subject matter jurisdiction.

FINDINGS OF FACT

1. On May 18, 2016, petitioner, Abdul A. Shamim, filed a petition with the Division of Tax Appeals challenging Notice of Determination number L-042864459.
2. Notice of Determination number L-042864459 was dated May 7, 2015 and addressed to petitioner at “5056 46th St, Woodside, NY 11377-7325.” The notice assessed tax, penalty and interest totaling \$416,839.02 against petitioner under Articles 28 and 29 of the Tax Law for the period June 1, 2009 through February 29, 2012. The notice was issued to petitioner as a responsible person for a corporation named Anika USA, Inc. for the period at issue.
3. The petition included a Consolidated Statement of Tax Liabilities, dated April 26, 2016, and pertaining to petitioner (Consolidated Statement). The Consolidated Statement reflected Notice of Determination number L-042864459 as a bill subject to collection action. The petition did not have a copy of the Notice of Determination attached to it.
4. On several occasions, the Division of Tax Appeals requested a copy of Notice of Determination number L-042864459 from petitioner to attach to his petition. In response, on May 26 and August 19, 2016, petitioner provided the Division of Tax Appeals with additional copies of the Consolidated Statement, but not the Notice of Determination.
5. On October 13, 2016, the Supervising Administrative Law Judge issued a notice of intent to dismiss petition to petitioner that provided, in part:

“In conformity with § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the conciliation order or statutory notice being protested. Petitioner did not include the required notice of determination, and therefore the petition does not appear to have been timely filed.

”

Pursuant to § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner has thirty (30) days within which to file a corrected petition. In addition, pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, a party shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.”

6. In response to the Notice of Intent to Dismiss, petitioner filed a letter that was signed by both him and his representative.¹ The letter asserted that a complete petition was timely filed, and that copies of the necessary exhibit (the Notice of Determination) were provided as requested to the Division of Tax Appeals by May 26, 2016. Petitioner attached to his letter copies of e-mail exchanges between his representative and the Division of Tax Appeals supporting his assertion that the exhibits were provided. As a result, according to petitioner, the Notice of Intent to Dismiss should be denied.

7. Petitioner’s letter in response did not include a copy of the Notice of Determination.

8. The Division of Taxation (Division) asserts that dismissal is appropriate as petitioner failed to timely file his petition. In support of this argument and to prove mailing of Notice of Determination number L-042864459 on May 7, 2015, the Division provided the following documents: (i) an affidavit, dated November 17, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (ii) a 11 page “Certified Record for Presort Mail - Assessments Receivable” (CMR), each page of which is legibly postmarked May 7, 2015; (iii) an affidavit, dated November 22, 2016, of Bruce Peltier, a stores and operations supervisor in the Division’s Mail Processing Center; (iv) a copy of Notice of Determination number L-042864459 with cover letter and the associated mailing cover sheet; and (v) a copy of petitioner’s New York State resident

¹ The signatures on the letter were not notarized, but were certified as “true and accurate under penalty of perjury.”

personal income tax return for the year 2014, described in Finding of Fact 16.

9. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing statutory notices from the Division's Case and Resource Tracking System (CARTS). Ms. Nagengast receives 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. Following the Division's general practice, the actual date of mailing is handwritten on the first and last pages of the CMR, in the present case "5/7/15." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

10. 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 Division's return address on the front, and taxpayer assistance 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."

11. The CMR relevant to Notice of Determination number L-042864459 consists of 11 pages and lists 115 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast notes that portions of the CMR that are attached to her

affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated May 7, 2015 to each page of the CMR and also wrote his or her initials on each page thereof.

12. Page eight of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0457 0307 and assessment number L-042864459, was mailed to petitioner at the 5056 46th Street, Woodside, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

13. The affidavit of Bruce Peltier, a stores and operation's supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. The 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 envelopes are counted and the names and certified control numbers verified against 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, each page of the CMR contains such postmarks and initials. The Center further requests 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 handwriting and circling the number "115" on the last page next to his or her initials.

14. According to the affidavits of Ms. Nagengast and Mr. Peltier, a copy of Notice of Determination number L-042864459 was mailed to petitioner on May 7, 2015, as claimed.

15. There is no evidence in the record that petitioner filed a request for conciliation conference or petition challenging Notice of Determination number L-042864459 within 90 days of May 7, 2015.

16. Petitioner electronically filed his New York State resident income tax return for the year 2014 on or about February 21, 2015. This was the last return filed by petitioner with the Division prior to May 7, 2015. On it, petitioner listed his address as “5056 46th St, Woodside, NY 11377.”

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit, measured from the issuance of a notice of determination, for filing a petition for a hearing with the Division of Tax Appeals (Tax Law § 1138[a][1]). The deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996), and the Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond such 90-day statutory time limit (*see 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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

D. The Division has introduced adequate proof of its standard mailing procedures for statutory notices through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing such notices. The Division has also presented sufficient documentary proof, i.e., the properly completed CMR and associated cover sheet, to establish that Notice of Determination number L-042864459, was mailed as addressed to petitioner to his last known address on May 7, 2015, consistent with the standard procedure.

E. When a statutory notice is found to have been properly mailed by the Division, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). Petitioner has offered no evidence to demonstrate that his petition was filed within 90 days of the issuance of Notice of Determination number L-042864459. Instead, the unrefuted evidence shows that the petition was filed on May 18, 2016, or more than 90 days after issuance of the statutory notice. Hence, the Division of Tax Appeals

is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

F. The Notice of Intent to Dismiss Petition refers to petitioner's failure to include a copy of the statutory notice with his petition as required by 20 NYCRR 3000.3(b)(8) and (d)(1). Indeed, petitioner focuses his argument on his belief that he remedied this deficiency by providing the Division of Tax Appeals with copies of the consolidated statement. The Division's demonstration of proper mailing, in conjunction with the absence of evidence of timely filing by petitioner, however, renders this issue moot.

G. The petition of Abdul A. Shamim is dismissed.

DATED: Albany, New York
March 16, 2017

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