

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MOHAMMAD K. UDDIN	:	DETERMINATION
	:	DTA NO. 827637
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, 2009	:	
through February 29, 2012.	:	

Petitioner, Mohammed K. Uddin, 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, 2009 through February 29, 2012.

On October 4, 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 December 16, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Michael J. Hall), having been granted an extension to do so, submitted affidavits and additional documents in support of dismissal. On November 7, 2016, petitioner, appearing by Arthur Morrison, Esq., submitted documents and argument in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination (as extended) began on December 19, 2016. After due consideration of the affidavits, additional documents and argument submitted in response to the Notice of Intent to Dismiss Petition, and upon all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest against the Division of Taxation's assessment of tax, penalty and interest against him.

FINDINGS OF FACT

1. Petitioner, Mohammad K. Uddin, filed a petition with the Division of Tax Appeals. The petition is dated as signed on May 4, 2016, was mailed by United States Postal Service (USPS) certified mail, and the envelope in which the petition was mailed bears a USPS postmark dated May 18, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on May 23, 2016. Petitioner lists his address on the petition as "5056 46 Street, Woodside, NY, 11377-7325." The petition specifically identifies the assessment at issue as Assessment ID # L-042864461-2, and further specifies that a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) was not requested.

2. Attached to the petition was a consolidated statement of tax liabilities, dated April 26, 2016 and reflecting a sales tax liability (under the heading "Bills subject to collection action") in the amount of \$179,568.71, plus penalty and interest, against petitioner for the period spanning June 1, 2009 through February 29, 2012.¹

3. The Petition Intake Section of the Division of Tax Appeals responded to the petition by a letter dated June 22, 2016, advising petitioner that a copy of the appropriate "notice/assessment/denial" had not been provided with the petition. The letter noted that it was petitioner's responsibility to submit such document, and provided information to petitioner as to

¹ The Consolidated statement also reflects, under the heading "Bills not yet subject to collection action," a sales tax assessment bearing a different assessment ID number and pertaining to a different tax period. That assessment ID number, included as part of petitioner's protest under the petition filed herein, was assigned a different DTA number and is proceeding as a separate matter (*see* DTA No. 827695).

how to obtain a copy thereof to be furnished to the Division of Tax Appeals.

4. On October 4, 2016, Daniel J. Ranalli, then-Supervising Administrative Law Judge of the Division of Tax Appeals, responded to the petition by issuing a notice of intent to dismiss petition (Notice of Intent) to petitioner, petitioner's representative, and the Division of Taxation.

The Notice of Intent provides as follows:

“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.”

Under the Notice of Intent, petitioner was afforded a period of thirty days within which to file a corrected petition (i.e., provide the requisite statutory document conferring the right to a hearing), and to provide written comments on the proposed dismissal of the petition.

5. In response to the Notice of Intent, the Division of Taxation (Division) provided a copy of a Notice of Determination, addressed to petitioner and allegedly issued on May 7, 2015, bearing assessment ID L-042864461-2, and assessing sales tax due against petitioner as an officer or responsible person of Anika USA, Inc., for the period spanning June 1, 2009 through February 29, 2012 in the amount of \$179,568.71, plus penalty and interest. In order to prove proper mailing of the foregoing Notice of Determination to petitioner, as claimed, on May 7, 2017, the Division provided the following documents: (i) an affidavit, dated December 16, 2016 of Michael Hall; (ii) 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); (iii) an affidavit, dated November 22, 2016, of Bruce Peltier, a stores and operations supervisor and a supervisor in the Division's mail room; (iv) an 11-page

“Certified Record for Presort Mail - Assessments Receivable” (CMR); (v) a copy of the Notice of Determination dated May 7, 2015, together with its associated mailing cover sheet; and (vi) a copy of petitioner’s Form IT-201 (New York State Resident Income Tax Return) as e-filed for the year 2014 on February 26, 2015, listing petitioner’s address as that set forth above, and representing petitioner’s last filed return and last known address prior to the claimed date of issuance of the Notice of Determination at issue.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of determination such as that at issue herein, and other such notices during the period in question, involves the use of the Division’s electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page Mailing Cover Sheet (Form DTF-997) generated for each such notice, and that sheet bears a bar code, the taxpayer’s mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

7. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled “Certified No.” The assessment numbers for the notices appear under the second columnar heading, entitled

“Reference No.,” and the names and addresses of the taxpayers are listed under the third columnar heading entitled “Name of Addressee, Street and P.O. Address.” Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices are forwarded to the Division’s mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

8. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division’s mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division’s general practice, this preprinted date, identified as the “run,” is to be manually changed by personnel in the Division’s mail room to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

9. Under the Division’s standard mailing procedures, statutory notices that are ready for mailing are received by the Division’s mail room in an area designated for “Outgoing Certified Mail.” Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated

documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business, and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on May 7, 2015, including the Notice addressed to petitioner, consists of 11 cut sheet pages. Each of the pages includes, in its upper left corner, the preprinted year/day/time "run" listing of "20151201700" (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on pages numbered "1" and "11" is the handwritten date "5/7/15" indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). Each of the CMR pages submitted includes a legible USPS postmark of the Colonie Center branch office of the USPS, dated May 7, 2015 and listing zip code "12205." All pages of the CMR include 11 entries for pieces of mail, with the exception of page 11 (the final page),

which includes 5 entries for pieces of mail, thus resulting in a total of 115 pieces of mail listed on the CMR as originally printed.

11. In this case, the printed entry for the piece of mail listed on page 8 of the CMR and bearing certified control number 7104 1002 9730 0457 0314 was assigned to the reference (i.e., assessment) number L-042864461, and was to be mailed to petitioner, Mohammed K. Uddin, at 5854 46th St., Woodside, NY 11377-7325. This information agrees with such information that appears on the Notice of Determination and on the cover sheet associated therewith.²

12. Appearing below the five entries on page 11 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 115, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number 115 is handwritten and circled. Appearing at the lower right area of page 11 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately above and to the right of this stamped instruction reflects the aforementioned May 7, 2015 USPS postmark as well as the initials affixed by the postal clerk.

13. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS Bureau, and Bruce Peltier, an employee and supervisor in the Division’s mail room (*see* Finding of Fact 5), and upon review of

² The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

the CMR submitted by the Division. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

14. In response to the Notice of Intent, petitioner contends that a complete and timely petition was filed, including a copy of the assessment. Review of the documents attached to petitioner's response reveals that the "assessment" to which petitioner refers is the consolidated statement of tax liabilities (*see* Finding of Fact 2), and that no other assessing document (e.g., a notice of determination), was included with the petition as filed or as part of petitioner's response to the Notice of Intent.

CONCLUSIONS OF LAW

A. This matter proceeds by way of a notice of intent to dismiss petition, under 20 NYCRR 3000.3(d)(1), upon the premise that the petition did not include a copy of any statutory document giving rise to the right to a hearing, as required under 20 NYCRR 3000.3(b)(8), such that it was not possible to determine whether the petition was timely filed, i.e., filed within the applicable period of time after issuance of the relevant statutory document giving rise to the right to protest an assessment of tax. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination, and this matter shall proceed under that standard.

B. A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is

presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

C. In this case, petitioner alleges that he filed a “complete petition,” including the “assessment document.” However, the assessment document included with the petition and to which petitioner refers is a statement of consolidated tax liabilities dated April 26, 2016, and it is apparent that this is the document upon which petitioner’s protest is predicated (*see* Finding of Fact 14). A statement of consolidated tax liabilities is not a statutory notice which gives rise to the right to a hearing (Tax Law § 170[3-a][a]; § 1138[a][1]). Since petitioner did not, as required, include with the petition as initially filed a copy of any document giving rise to the right to a hearing (20 NYCRR 3000.3[b][8]), did not provide any such document at any time thereafter, including in response to the Notice of Intent, and has not made any express or implied claim of non-receipt of such a document, the petition is properly subject to dismissal (20 NYCRR 3000.3[d][1]; *Matter of Francis*, Tax Appeals Tribunal, June 18, 2009).

D. In addition, and in connection with its December 16, 2016 response to the subject Notice of Intent, the Division provided a copy of a Notice of Determination, dated May 7, 2015, and addressed to petitioner, together with its evidence that the same was properly issued to petitioner by certified mail on such date. This manner of responding by the Division is fully consistent with the holding in *Matter of Marin* (Tax Appeals Tribunal, December 11, 2015), and together with the balance of the evidence submitted by the Division, serves to address any argument or claim, express or implied, that petitioner might raise that he did not receive such notice carrying with it the right to file a protest.

E. A taxpayer is entitled to protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such a notice

(Tax Law §§ 1138[a]; § 2006[4]). Alternatively, a taxpayer may protest a notice of determination by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that statutory time limits for filing either a petition or a request for a conciliation conference are strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a statutory notice, to which protest rights attach, becomes fixed and final and, consequently, BCMS and the Division of Tax Appeals are without jurisdiction to consider the substantive merits of the protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). It is also well established that where the timeliness of a taxpayer’s protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. Specifically, the question presented is whether the Division has carried its burden of demonstrating the fact and date of proper mailing of the notice being protested (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *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, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*). In the case of a notice of determination, proper mailing requires mailing of the notice by registered or certified mail (Tax Law § 1138[a][1]), and it is the Division’s initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

F. The Division may meet its burden of proving proper mailing by providing 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). The mailing evidence is two-fold, and to prove the fact and 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*).

When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast 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, Inc.*). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination at issue was mailed by certified mail addressed to petitioner on May 7, 2015. That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to the Notice of Determination at issue. Petitioner’s name and address, and the numerical information

on the Notice, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of May 7, 2015. There are 115 certified mail control numbers listed on the CMR for May 7, 2015, and the USPS employee who initialed the CMR indicated, by writing and initialing the number “115,” that 115 items were received for mailing. The notice was issued to petitioner at the address set forth on his resident income tax return filed on February 26, 2015. This was the last return filed and last known address for petitioner prior to the issuance of the Notice (*see* Finding of Fact 5), and the record includes no claim or evidence that the Division was notified of any new or changed address for petitioner replacing the address specified herein. 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; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

H. Establishing proper issuance of the notices serves to toll the generally applicable three-year period of limitations (i.e., absent instances of nonfiling of a return) within which the Division may issue an assessment (Tax Law § 1147[b]), and in turn to trigger the 90-day period within which a taxpayer may challenge such a notice by filing a petition (Tax Law § 1138[a][1]) for a hearing before the Division of Tax Appeals, or a request for a conciliation conference (Tax Law § 170[3-a][a]) with BCMS. The Division’s proper issuance of a notice of determination by mailing also gives rise to a rebuttable presumption that the assessment made by the notice was received by the taxpayer in due course (Tax Law § 1147[a][1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Shanghai Pavilion, Inc.*, Tax Appeals Tribunal, June 10, 2010; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002).

I. Under the foregoing circumstances of proper issuance of a notice of determination, with no rebuttal of the presumed receipt of the notice thereafter, petitioner had 90 days from the date of issuance within which to file either a petition for a hearing or a request for a conciliation conference to challenge such notice (Tax Law §§ 1138[a][1]; 170[3-a][a]). Here, the Notice of Determination in question was properly issued by the Division to petitioner on May 7, 2015, and in order to be considered timely, petitioner's protest had to have been filed within 90 days thereafter. In turn, 90 days after the May 7, 2015 date of issuance of the Notice was August 5, 2015, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. The petition in this case was not filed until May 18, 2016 (*see* Finding of Fact 1), a date that clearly falls far beyond the statutory period within which a timely protest had to have been filed. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Modica; Matter of Lukacs; Matter of Sak Smoke Shop*).

J. The petition of Mohammed K. Uddin is hereby dismissed.

DATED: Albany, New York
March 16, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE