

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GLC RESTAURANT ASSOCIATES, LLC : DETERMINATION
DTA NO. 827780
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, 2012 through November 30, 2014. :

Petitioner, GLC Restaurant Associates, LLC, 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, 2012 through November 30, 2014.

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) on the ground that the petition did not appear to be timely filed. By request of the Division of Taxation, the 30-day period to respond to the notice of intent to dismiss petition was extended to December 29, 2016. On December 21, 2016, the Division of Taxation, by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by LRC Group Inc. (Lawrence Cole, CPA), did not respond to the notice. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on December 29, 2016. After due consideration of the documents and arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. On July 25, 2016, the Division of Tax Appeals received a petition from petitioner, GLC Restaurant Associates, LLC (GLC Restaurant), which protested a notice of determination issued to it. The envelope containing the petition bears a United States Postal Service (USPS) postmark of July 21, 2016. The Notice of Determination, assessment number L-044117444, dated December 17, 2015, was issued to petitioner at an address in Rhinebeck, New York.

2. On October 13, 2016, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner. The notice of intent indicated that the relevant Notice of Determination was issued on December 18, 2015¹, but that the petition was not filed until July 21, 2016, or 216 days later.

3. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted the affidavits of Mary Ellen Nagengast and Bruce Peltier, both employees of the Division. The Division also submitted a copy of the Notice of Determination issued to petitioner, a copy of the certified mail record (CMR) containing a list of notices issued by the Division on December 17, 2015, a copy of Form ST-809, New York State and Local Sales and Use Tax Return for Part-Quarterly Filers, filed by petitioner for the tax period October 1 - October 31, 2015 reflecting the Rhinebeck, New York, address, and a printout of certain tracking information from the USPS website.

¹This date was a typographical error. As indicated in Finding of Fact 1, the Notice of Determination was dated December 17, 2015. Therefore, the petition, filed on July 21, 2016, appeared to be 217 days late.

4. The affidavit of Mary Ellen Nagengast, Tax Audit Administrator I and Director of the Management Analysis and Project Services Bureau (MAPS), sets forth the Division's general practice and procedure for processing statutory notices. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, she 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 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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "12/17/15." 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 "1" and are noted in the upper right corner of each page.

5. 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 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 PO Address."

6. The December 17, 2015 CMR in the present matter consists of nine pages and lists 94 certified control numbers along with corresponding assessment numbers, names and addresses.

Portions of the CMR not relevant to this matter have been redacted to preserve confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated December 17, 2015 to each page of the CMR, and also wrote his or her initials on each page thereof. Page six of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0704 8568 with corresponding assessment number L-044117444, was mailed to petitioner GLC Restaurant Associates, LLC, at the Rhinebeck, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

7. The affidavit of Bruce Peltier, a mail room supervisor since 1999 and currently a stores and mail operations supervisor in the Division's mail room, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, once a notice and accompanying mailing cover sheet is placed in the "Outgoing Certified Mail" basket in the mail room, a member of the staff retrieves the notice and mailing cover sheet and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. A staff member then weighs, seals, and places 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 last page of the CMR has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." 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 signs or initials the CMR, indicating receipt by the post office.

8. In this particular instance, the postal employee affixed a postmark dated December 17, 2015 to each page of the nine-page CMR. The postal employee also wrote his or her initials and the number "94" near the stamp by the clerk requesting that the post office handwrite the total number of pieces and initial.

9. 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 room, the CMR is picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and is then delivered to the originating office. The CMR is maintained by the Division in the regular course of business.

10. Based upon his review of the affidavit of Mary Ellen Nagengast, the exhibits attached thereto and the CMR, Mr. Peltier states that on December 17, 2015, an employee of the mail room delivered a piece of certified mail addressed to GLC Restaurant Associates, LLC, to a branch of the USPS in Albany, New York, in a sealed envelope for delivery by certified mail. He 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 December 17, 2015, for the records of the Division. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the mail room in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner on December 17, 2015.

11. Petitioner did not respond to the Notice of Intent to Dismiss Petition issued to it.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 2006[4]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law

§ 1138(a)(1), the notice in this case would be binding upon petitioner unless it filed a timely petition with the Division of Tax Appeals. 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). In this case, since it appeared upon receipt of the subject petition by the Division of Tax Appeals that it was filed late, a Notice of Intent to Dismiss Petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

B. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry is on the mailing of the notice, because a properly mailed notice 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 Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notice was mailed as addressed to petitioner on December 17, 2015. Specifically, this document lists the certified control number with the corresponding name and address of petitioner and bears a USPS postmark dated December 17, 2015. Additionally, a postal employee wrote “94” next to the total pieces received heading and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. As noted previously, petitioner’s petition was filed on July 21, 2016. This date falls well beyond the 90-day period of limitations for the filing of a petition following the issuance of a notice of determination and was therefore untimely (*see* Tax Law § 1138[a][1]). As such, the Division of Tax Appeals lacks jurisdiction to address the merits of the petition.

G. The petition of GLC Restaurant Associates, LLC is hereby dismissed.

DATED: Albany, New York
March 9, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE