

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARM'S PIZZA CORPORATION	:	DETERMINATION
	:	DTA NO. 827809
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 September 1, 2010	:	
through May 31, 2013, and for Redetermination of a	:	
Deficiency or for Refund of Corporation Franchise	:	
Tax under Article 9-A of the Tax Law for the	:	
Years 2011 through 2013.	:	

Petitioner, Carm's Pizza Corporation, 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 September 1, 2010 through May 31, 2013, and for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2011 through 2013.

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 December 29, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Lori P. Antolick Esq., of counsel), having been granted an extension to do so, submitted affidavits and additional documents in support of dismissal. On December 23, 2016, petitioner, appearing by Long Tuminello, LLP (Harold Seligman, Esq., of counsel), submitted an affirmation 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 29, 2016. After due consideration of the affidavits, additional documents and

arguments 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.

ISSUES

I. Whether petitioner filed a timely protest against the Division of Taxation's assessment of sales tax, penalty and interest via a notice of determination dated March 12, 2015.

II. Whether petitioner is entitled to a hearing to contest the Division of Taxation's assessment of corporation franchise tax via a notice and demand for payment of tax due dated June 6, 2016.

FINDINGS OF FACT

1. Petitioner, Carm's Pizza Corporation, filed a petition with the Division of Tax Appeals. The petition is dated as signed on August 9, 2016, was mailed on August 17, 2016, and the petition and envelope are date stamped as received by the Division of Tax Appeals on August 23, 2016. Petitioner lists its address on the petition as "41-51 Merrick Road, Massapequa, NY, 11758." The petition specifies taxes under articles 28 and 29 (sales and use taxes) and tax under article 9-A (corporation franchise tax) as at issue.

2. Attached to the petition was a Notice of Determination, dated March 12, 2015, and reflecting a sales tax liability for the period spanning September 1, 2010 through May 31, 2013 in the amount of \$145,291.11 (exclusive of interest and penalty). The Notice is addressed to "Carms Pizza Corp., Carmela's Pizzeria and Restaurant, Restaurant Solutions NYC, 75 Maiden Ln., Rm. 902, New York, NY, 10038-4611," and states "[t]his notice is issued because you are liable as a bulk sale purchaser for taxes determined to be due in accordance with sections 1141(c)

and 1138(a)(3) of the New York State Tax Law.” The Notice specifies “Audit Case ID: X-556530144-7,” lists the “Seller’s Name” as “Sandra’s Pizza Inc.,” and lists the “Purchaser’s Assessment ID” as “L-042572712-9.”

A Notice and Demand for Payment of Tax Due dated June 29, 2015 was also attached to the petition. This Notice and Demand set forth the foregoing information, including the same address for petitioner, audit case ID number, assessment ID number, and tax amount assessed, and indicated an increase in the “current balance due” from \$145,291.11 to \$170,279.77, attributable to the calculation and addition of interest and penalty (less a small credit) on the amount of tax assessed.

3. The Division of Taxation (Division) issued a Notice and Demand for Payment of Tax Due, dated June 6, 2016, reflecting a corporation franchise tax liability for the year ended December 31, 2015. This Notice carries “Assessment ID: L-044907016-4,” is addressed to “Carms Pizza Corp., 75 Maiden Ln., Rm. 902, New York, NY, 10038-4611,” and indicates that petitioner did not pay the tax shown on its return (\$300.00) when due, but rather paid only \$25.00, thus resulting in an assessed tax amount of \$275.00, plus penalty and interest.¹

4. On October 13, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, responded to the petition by issuing to petitioner, to petitioner’s representative, and to the Division, a notice of intent to dismiss petition (Notice of Intent). The Notice of Intent provides, in relevant part, as follows:

“In this case, the Notice of Determination under protest, L-042572712, was issued

¹ The petition generically captions the periods in issue as “2011, 2012 & 2013.” However, the documents attached to the petition and pertaining to petitioner, Carm’s Pizza Corporation, clarify that the periods contested are those specifically identified in Findings of Fact 2 and 3.

to petitioner on March 12, 2015. However, the petition was not filed with the Division of Tax Appeals until August 17, 2016, or five hundred and twenty-four (524) days later. As such, the Division of Tax Appeals is without jurisdiction to hear the merits of the petition.

* * *

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 deficiency of corporation franchise tax, 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 so as to provide the requisite statutory document (the Notice of Deficiency of corporation franchise tax) 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 provided a copy of a Notice of Determination, addressed to petitioner and allegedly issued on March 12, 2015, bearing assessment ID L-042572712-9 and assessing sales tax due against petitioner for the period spanning September 1, 2010 through May 31, 2013 in the amount of \$145,291.11, plus penalty and interest. The notice pertains to petitioner as a bulk sale purchaser, identifies the seller as Sandra’s Pizza, Inc., and lists the audit case ID as X-556530144-7. In order to prove proper mailing of the foregoing Notice of Determination to petitioner, as claimed on March 12, 2015, the Division provided the following documents: (i) an affidavit, dated December 29, 2016, of Lori Antolick; (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 mail

operations supervisor in the Division's mail room; (iv) an one page "Certified Record for Non-Presort Manual Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated March 12, 2015 together with its associated mailing cover sheet; and (vi) a copy of petitioner's Form DTF-17 (Application to Register for a Sales Tax Certificate of Authority), dated September 4, 2014. This application lists petitioner's "physical address of business location" as "4151 Merrick Road, Massapequa, NY, 11758," and its "mailing address" as "Restaurant Solutions NYC, 75 Maiden Lane, Suite 902, New York, NY, 10038."

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 here 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 CMR and its associated batch of statutory notices are forwarded to the Division’s mail room together. The CMR for the block of statutory notices to be issued on March 12, 2015 includes therein the individual CMR pertaining specifically to the notice to be issued to petitioner, Carm’s Pizza Corporation. This individual CMR consists of one page. The page number of the CMR is listed at the upper right corner of each page in the format “Page: 1,” and all notices targeted for manual review are printed in one run. Each unit which has notices that may be selected and pulled for manual review receives a separate and complete CMR for their notices. In this case, the notices, pertaining to “Audit Division-Sales Tax- Desk Audit-AG2,” were printed on page five of the run.

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. The one-page CMR listing in this case 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 certified mail listed on the CMR against the information contained on the CMR, and then checks 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 March 12, 2015, including the Notice addressed to petitioner, consists of one page. This page reflects, in its upper left corner, the preprinted year/day/time "run" listing of "20150641700" (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on the page numbered "5" is the handwritten date "3/12/15"

indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). This one-page CMR includes a legible USPS postmark dated March 12, 2015, and lists two entries for pieces of mail.

11. In this case, the printed entry for the piece of mail listed the CMR and bearing certified control number 7104 1002 9730 0420 1089 was assigned to the reference number X-556530144, and was to be mailed to petitioner, Carm's Pizza Corp., Restaurant Solutions NYC, 75 Maiden Ln, Rm 902, New York, NY 10038-4611. This information agrees with such information as appearing on the Notice of Determination and on the cover sheet associated therewith.²

12. Appearing below the two entries on 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 two, 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 appears the handwritten and initialed number "2," and immediately beneath which appears the aforementioned March 12, 2015 USPS postmark.

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 the CMR submitted by the Division. Each affiant avers to their personal involvement in and

² The name and address of the other taxpayer listed on the CMR provided herein has been redacted to protect the confidentiality of that taxpayer.

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. As part of the Division's response to the Notice of Intent, the affidavit of Lori Antolick states that her performance of a "Look Up ZIP code" search on the USPS.com website with respect to the mailing address for petitioner as listed on Form DTF-17, i.e., "75 Maiden Lane, Suite 902, New York, NY, 10038," listed petitioner's address as "75 Maiden Lane, Rm. 902, New York, NY 10038-4611."

15. Finally, the Division notes in its response that the corporate tax assessment listed on the petition and identified as Assessment Number L-044907016-4 represents a Notice and Demand for Payment of Tax Due dated June 6, 2016. A copy of this Notice and Demand accompanying the Division's response reveals that the same pertains to corporation franchise tax under Tax Law Article 9-A, § 209.1, reflects that petitioner did not pay the full amount of tax it reported as due for the year 2015, and that the Division's notice assesses the unpaid balance of tax reported as due (\$275.00), plus penalty and interest thereon (*see* Finding of Fact 3). Review of the documents submitted in this matter reveals that the Notice and Demand is the only document pertaining to a corporation franchise tax liability, 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.

16. In response to the Notice of Intent, petitioner states that the sales tax assessment against it (L-042572712-9) stems from an assessment against Sandra's Pizza Corporation following an audit of that entity, and represents a bulk sale transferee assessment resulting from a

bulk sale transaction involving the sale of Sandra's Pizza Corporation to petitioner. Petitioner admits that all of the parties to the bulk sale transaction were aware that the assessment would carry over to petitioner as the result of its status as the bulk sale purchaser, and notes that the underlying assessed liability against Sandra's Pizza Corporation (and the allegedly responsible individuals connected therewith) is contested and is currently under appeal. Petitioner also states that the person who represented petitioner in its purchase of Sandra's Pizza Corporation agreed to represent petitioner in connection with the bulk sale assessment at issue herein, but became ill, and unbeknownst to petitioner, never filed an appeal. Upon learning of these facts, petitioner's current representative filed the petition at issue herein. Petitioner, in turn, maintains that the foregoing circumstances provide good cause, pursuant to 20 NYCRR 3000.23, for allowing an extension of time for the filing of a petition in this matter and requests the same. Finally, petitioner did not in any manner address the assessment pertaining to the corporation franchise tax liability.

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 bases that: a) 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), with respect to the corporation franchise tax assessment identified by number on the petition, and b) that the petition was untimely with respect to the notice of determination assessing sales and use taxes against petitioner. In *Matter of Victory Bagel Time, Inc.*, (Tax Appeals Tribunal, September 13, 2012) the Tax Appeals 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 response to the subject Notice of Intent, the Division provided a copy of a Notice of Determination, dated March 12, 2015, and addressed to petitioner, together with its evidence that the same was properly issued to petitioner by certified mail on such date. 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 the Bureau of Conciliation and Mediation Services (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.

D. 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]).

E. 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 March 12, 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, and the CMR bears a USPS date stamp of March 12, 2015. There are two certified mail control numbers listed on the CMR for March 12, 2015, and the USPS employee who initialed the CMR indicated, by writing and initialing the number "2," that two items were received for mailing. The notice was issued to petitioner at the mailing address set forth on its Application to Register for a Sales and Use Tax Certificate of Authority dated September 4, 2014. This was the last application filed and last known mailing address provided by and for petitioner prior to the issuance of the subject notice of determination (Tax Law §§ 1138[a][1]; 1147[a][1]; *see* Finding of Fact 5). 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).

F. Establishing proper issuance of the notice 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). In this case, petitioner has not in any manner denied receipt of the Notice, and thus has not overcome the presumption of receipt that attaches to a properly issued notice of determination.

G. Under the foregoing circumstances of proper issuance of a notice of determination, with no rebuttal of the presumed receipt of such notice thereafter, petitioner had 90 days from the date of issuance (March 12, 2015) within which to file either a petition or a request for a conciliation conference to challenge such notice (Tax Law §§ 1138[a][1]; 170[3-a][a]). In fact, petitioner has admitted that no appeal was initiated prior to the petition filed herein (*see* Finding of Fact 16). That petition was filed on August 17, 2016, 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*), and the petition was, therefore,

properly subject to dismissal.³ Petitioner seeks an extension of time for its appeal to proceed, in reliance upon the Tribunal's Rules of Practice and Procedure at 20 NYCRR 3000.23. The noted regulation provides that "[t]he tribunal, administrative law judges or presiding officers, may, on its or their own motion, or on the motion of any party, order a continuance, extension of time or adjournment for good cause, *provided no statutory prohibition exists*" (italics added). As detailed above, the failure to file a petition within the statutorily prescribed time period constitutes a statutory prohibition precluding an extension of time so as to allow petitioner's appeal to proceed.

H. The petition also challenged a notice and demand issued against petitioner based upon its nonpayment of the amount of tax reported as due on its corporation franchise tax return for the year 2015 (*see* Finding of Fact 15). The Division of Tax Appeals is authorized to provide a hearing as a matter of right, unless a right to such a hearing is specifically provided for, modified or denied by another provision of law (Tax Law § 2006[4]). Under Tax Law §173-a(2), the right to a hearing is specifically denied with respect to a notice and demand. Accordingly, petitioner is not entitled to a hearing with respect to the Notice and Demand dated June 6, 2016.

I. The petition of Carm's Pizza Corporation is hereby dismissed.

DATED: Albany, New York
March 23, 2017

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

³ Petitioner notes in its responding papers that the liability assessed herein is the same as that assessed against Sandra's Pizza Corporation, the bulk sale transferor, and that there is a pending appeal with respect to such assessment against Sandra's Pizza Corporation (*see* Finding of Fact 16). In the event such assessment against Sandra's Pizza Corporation is reduced as a consequence of that appeal, such reduction would presumably inure to petitioner's benefit (*see* Tax Law § 1138[a][3][A]).