

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GURU KIRPA CORPORATION : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 827860
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 2012 through May 31, 2015. :

Petitioner, Guru Kirpa 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, 2012 through May 31, 2015.

On October 27, 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 grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because it was not timely filed. On January 6, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel), submitted documents in support of the proposed dismissal. Petitioner did not file a response. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on January 12, 2017. After due consideration of the affidavits and documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Guru Kirpa Corporation, filed a petition with the Division of Tax Appeals dated September 15, 2016, seeking administrative review of the conciliation order issued to the company dated June 3, 2016, which was attached to the petition, dismissing its request for review of the statutory notice issued on February 1, 2016. The petition was date-stamped as received by the Division of Tax Appeals on September 26, 2016. The envelope in which the petition was delivered bore no United States Postal Service (USPS) postmark, though it bore stamps in the upper right-hand corner location of the envelope, and appears to have been delivered by the USPS. There is no evidence in the record to the contrary.

2. In its petition, petitioner explained that the conciliation order was late filed because “he,” presumably the company’s owner, was out of the country for 4 months due to the illness of a family member and by the time he returned, it was late, and he thereafter filed it. Petitioner also requested an opportunity to resolve the matter.

3. On October 27, 2016, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of a Conciliation Order Dismissing Request, CMS No. 270645, which was issued to petitioner on June 3, 2016, and that the petition was not filed until September 26, 2016, or 115 days later.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Conciliation Order under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated January 6, 2017, of Justine Clarke Caplan, Esq., in support of the Notice of Intent to Dismiss Petition; (ii) the petition filed in this matter by petitioner with the Division of Tax Appeals; (iii) correspondence dated August 5, 2016, from the Bureau of

Conciliation and Mediation Services (BCMS) addressing petitioner's Request for Conciliation Conference dated July 25, 2016, and referencing a prior request filed in the same matter on May 19, 2016; (iv) the previously filed Request for Conciliation Conference dated May 1, 2016, and date-stamped as received by BCMS on May 23, 2016; (v) the Conciliation Order Dismissing Request (CMS No. 270645) dated June 3, 2016; (vi) a consolidated statement of tax liabilities in petitioner's name; (vii) the affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS since April 2016; (viii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) dated June 3, 2016; (ix) a copy of a mailing cover sheet from BCMS dated June 3, 2016, bearing "BCMS Number: 270645," certified control number 7104 1002 9730 0848 3894 and addressed to petitioner at "1556 Route 22, Wingdale, NY 12594-1700;" (x) a copy of a certified mail three-windowed envelope; and (xi) an affidavit, dated December 28, 2016, of Melissa Kate Koslow, a supervisor in the Division's mail room since April 2010, who is familiar with both the past and present office procedures as they relate to the issuance of BCMS conciliation orders.

5. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. He stated that the BCMS Data Management Services Unit prepares the conciliation orders and accompanying cover letters, and both are predated with the intended date of mailing and forwarded to the conciliation conferee for signature, who in turn forwards them to a clerk who is assigned to process such orders. For each mailing, the Division's Advanced Function Printing (AFP) Unit, assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name and mailing address, BCMS number, certified control number and certified control number bar code. The AFP unit also generates a CMR. The CMR is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The control

numbers are recorded on the CMR under the heading "Certified No." and the BCMS number is recorded under "Reference No." The AFP unit prints the CMR and cover sheets for processing with the conciliation orders by the BCMS clerk. The clerk verifies the taxpayer's name and address with the information listed on the CMR and the cover sheet and places the cover letter and conciliation order into a three-windowed envelope where the BCMS return address, certified mail control number, bar code, and the name and address of the taxpayer appear.

6. The designation of "Total Pieces and Amounts" is indicated on the last page of the CMR. After stamping the CMR with instructions regarding its return to BCMS, the clerk then indicates the date that the orders were mailed at the top of each page, in this case "6-3-16." The CMR is retained by BCMS in the regular course of its business.

7. The CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders are then picked up by an employee of the Division's mailroom, who is responsible for delivering such items to the USPS.

8. The CMR relevant to the Conciliation Order under protest, dated June 3, 2016, consisted of four pages and listed 35 certified numbers. The Conciliation Order mailed to Guru Kirpa Corporation, 1556 Route 22, Wingdale, New York 12594-1700, on June 3, 2016, was listed on page three of the CMR with certified control number 7104 1002 9730 0848 3894 and Reference No. 000270645. Postmarks of June 3, 2016, are affixed to each page of the CMR, including the page denoting the mailing to petitioner, and the CMR is retained by BCMS as a permanent record. Mr. Farrelly noted that portions of the CMR had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding.

9. Mr. Farrelly's examination of the CMR in this case resulted in his conclusion that it was a true and accurate copy of the CMR for the Conciliation Order issued by BCMS on June 3,

2016, to petitioner, and that the procedures followed in this case were the normal and regular procedures of BCMS for the issuance of conciliation orders. The CMR information concerning the conciliation order issued to petitioner is the same as that listed on the mailing cover sheet, and utilizes petitioner's address as it appeared on its Request for Conciliation Conference.

10. The affidavit of Melissa Kate Koslow, a supervisor in the Division's mail room, attests to the regular procedures, past and present, as they relate to the mailing of BCMS orders. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the mail room, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. 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 his or her initials or signature to the CMR indicating receipt by the post office.

11. Ms. Koslow indicated that the Division's mail room specifically requests that postal employees either circle the number of pieces of certified mail received or indicate the number received by writing the number of pieces received on the CMR. Here, the postal employee affixed a postmark to each page of the CMR, circled the number "35" on page four to indicate the "Total pieces received at post office" and initialed the CMR on page four. The USPS postmark on the CMR is its official acknowledgment for the pieces of mail recorded on that mail record. In the ordinary course of business, and pursuant to the procedures of the mail room, the CMR is picked up at the post office the following day and delivered to the originating office.

12. Based upon her review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Ms. Koslow states that on June 3, 2016, an employee of the mail room delivered a

piece of certified mail addressed to Guru Kirpa Corporation, 1556 Route 22, Wingdale, New York 12594-1700, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to and accepted by the post office on June 3, 2016, for the records of BCMS. Ms. Koslow asserts that the procedures described in her 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 pieces of certified mail to petitioner.

13. According to both the Farrelly and Koslow affidavits, a copy of the subject Conciliation Order was mailed to petitioner on June 3, 2016, as claimed.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e), the conciliation order 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, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a notice of intent to dismiss petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

Inasmuch as a determination issued following a notice of intent to dismiss petition under 20 NYCRR 3000.9(a)(4) would have the same impact as a determination issued following a motion for summary determination brought under 20 NYCRR 3000.9 (b), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a

notice of intent to dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination, and “shall 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” (20 NYCRR 3000.9[b][1]).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry focuses 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 Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to the taxpayer’s 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, the burden of demonstrating proper mailing in the first instance rests with the Division (*see Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of 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 Conditioning Sales & Serv.*).

D. In this case, the Division has fulfilled the requirement to introduce adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating, issuing and mailing conciliation orders. Specifically, BCMS was required to mail the Conciliation Order to petitioner at its last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989), which is the address petitioner provided on its Request for Conciliation Conference in May, 2016, and in this case, the Division has met its burden of establishing proper mailing to petitioner. As indicated by the CMR and the affidavits of Mr. Farrelly and Ms. Koslow, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by certified mail on June 3, 2016, the date appearing on the CMR, to its last known address. The affidavits describe the various stages of producing and mailing orders and attest to the authenticity and accuracy of the copies of the order, and the CMR was submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Farrelly and Koslow affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of June 3, 2016. There were 35 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "35" and writing his or her initials on the last page, that 35 items were received for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on June 3, 2016 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

E. A conciliation order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom*

Furniture, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on June 3, 2016, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the June 3, 2016 date of mailing was September 1, 2016, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. The rules governing the mailing of documents to the Division of Tax Appeals are contained in 20 NYCRR 3000.22(a)(2), and essentially provide that the envelope containing the petition must be deposited in the mail of the United States within the prescribed period, or on or before the prescribed date, with sufficient postage prepaid (20 NYCRR 3000.22[a][2][ii]), and the envelope must bear a date stamped by the USPS which is within the prescribed time granted for filing such document (20 NYCRR 3000.22[a][2][iii]). If the postmark stamped by the USPS does not bear a date which falls within such period, the document will be considered not to be timely filed (*id.*). However, as in this case, if an envelope is missing a postmark which should have been affixed by the USPS, then whether the envelope was mailed in accordance with the aforementioned rules will be determined solely by applying the provisions of 20 NYCRR 3000.22(a)(3) and (b)(1)(ii). Such rules provide that the document must be received by the Division of Tax Appeals at its address not later than the time when an envelope which is properly addressed, mailed and sent by the same class of mail "would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document)." In *Matter of Harron's Electric Service, Inc.* (Tax Appeals Tribunal, February 19, 1988), the Tribunal adopted the rule that five days for mailing would be an ordinary time span for delivery of mail under these circumstances. The petition was date-stamped as received by the Division of Tax Appeals on

September 26, 2016. If five days are allowed for mailing, as required by the mailing rules previously set forth and *Matter of Harron's Electric Service, Inc.*, then it must be concluded that the petition was mailed after expiration of the 90-day prescribed period for filing, i.e., after September 1, 2016. Thus, as a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

F. Petitioner submitted no evidence that its petition was filed within the time required. In addition, petitioner has failed to challenge the Division's proof of mailing of the Conciliation Order with any evidence or arguments. Therefore, it must be concluded that petitioner has failed to meet its burden of proof.

G. The petition of Guru Kirpa Corporation is hereby dismissed.

DATED: Albany, New York
April 6, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE