

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ZAKI ALSAYEDI : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 827910
Cigarette Tax under Article 20 of the Tax Law for :
the Period Ended September 30, 2014. :

Petitioner, Zaki Alsayed, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended September 30, 2014.

The Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition, dated December 2, 2016, pursuant to 20 NYCRR 3000.9(a)(4), on the ground that the Division of Tax Appeals lacks jurisdiction over the petition because the petition was untimely filed. In response to a request for additional time, the parties were granted until February 17, 2017 to respond to the proposed dismissal. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michael J. Hall), submitted documents on February 10, 2017, in support of the proposed dismissal. Petitioner, appearing by Lazzaro Law Firm, P.C. (Lance Lazzaro, Esq.), submitted a response on February 16, 2017, in opposition to the proposed dismissal. The 90-day period to issue this order commenced on February 17, 2017. Based upon the pleadings in this matter, and the affidavits and documents submitted by both the Division of Taxation and petitioner, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Zaki Alsayedi, filed a petition on October 12, 2016, which was date-stamped as received by the Division of Tax Appeals on October 24, 2016. The petition was filed in protest of a notice of determination (notice number L-042365416-6), issued by the Division of Taxation (Division), dated March 2, 2015. The petition asserts that petitioner pled guilty to possession of less than 50 cartons of cigarettes, accepted a charge of misdemeanor possession, reduced from the original charge of felony possession by the Bronx County District Attorney, and argues that accordingly, he is not responsible for any taxes owed for over 49 cartons, i.e., an amount not greater than \$29,400.00, or \$600.00 per carton. The envelope in which the petition was filed, bearing a certified mail label, bears a machine metered (Pitney Bowes) postmark dated October 12, 2016.

2. On December 2, 2016, Daniel J. Ranalli, then Supervising Administrative Law Judge, issued a notice of intent to dismiss petition (notice of intent) to petitioner. The notice of intent indicates that the relevant notice of determination was issued on March 2, 2015, but that the petition was not filed until October 12, 2016, or 590 days later.

3. In its response to the notice of intent and to prove mailing of the notice of determination, in support of the proposed dismissal, the Division submitted the following documents: (i) an affidavit of Michael J. Hall, a law clerk employed in the Office of Counsel of the Division, dated February 10, 2017; (ii) a copy of the petition filed in this matter; (iii) a copy of the notice of determination dated March 2, 2015, with the associated mailing cover sheet,

addressed to petitioner at an East Elmhurst, New York address; (iv) an affidavit of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS) (since October 2005), who is familiar with the Case and Resource Tracking System (CARTS) and past and present procedures for generating statutory notices; (v) an affidavit, dated February 3, 2017, of Melissa Kate Koslow, a supervisor in the Division's mail room since April 2010; (vi) pages 1, 85 and 148 of the "New York State Department of Taxation and Finance Certified Record for Presort Mail - Assessments Receivable" (CMR), postmarked March 2, 2015; (vii) an affidavit of Heidi Corina, a legal assistant in the Division's Office of Counsel since April 2005, involved in making requests to the United States Postal Service (USPS) for delivery information; (viii) a Postal Service Form 3811-A (Request for Delivery Information/Return Receipt After Mailing), and the USPS response to such request dated December 13, 2016; and (ix) a copy of a representation of petitioner's e-filed New York resident income tax return for the year 2014, filed on February 19, 2015, according to the Division's records, listing the same East Elmhurst, New York address as that listed on the subject notice of determination.

4. 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.

5. The 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 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.

6. 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 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.

7. The affidavit of Ms. Koslow attests to the regular procedures, past and present, as they relate to the mailing of statutory notices. 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. Ms. Koslow indicated that the Division's Mail Processing Center specifically requests that postal employees either circle the number of pieces received or indicate the number received by writing the number of pieces received on the CMR. 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.

8. In this case, pages 1, 85 and 148 (the last page) of the CMR were provided. Each of the pages contain a USPS postmark of March 2, 2015. The printed entry for the piece of mail listed on page 85 of the CMR and bearing certified control number 7104 1002 9730 0407 1637 was assigned to the reference notice (i.e., assessment) number L-042365416, and was to be mailed to petitioner, Zaki A. Alsayed, 2311 95th St., East Elmhurst, New York 11369-1205. This information agrees with the information that appears on the notice of determination and on the cover sheet associated therewith.¹

9. Appearing below the final entry on page 148 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appears a preprinted column headed “Pieces.” This column reflects the preprinted number of pieces of mail for this CMR, here 1618. However, the number “1,618” is manually stricken and replaced with “1,617.” Immediately below the “Total Pieces and Amounts” heading is the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number 1,617 is handwritten and circled. Appearing at the lower right area of page 148 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 below and to the left of this stamped instruction reflects the aforementioned March 2, 2015 USPS postmark as well as the initials affixed by the postal clerk.

10. The facts set forth above were established through the affidavits of Ms. Nagengast and Ms. Koslow upon their review of the CMR submitted by the Division. Each affiant avers to their

¹ The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

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).

11. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject notice of determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 71041002973004071637. The USPS response to this request indicates that the article bearing certified control number 71041002973004071637 and addressed to petitioner was delivered as addressed on March 4, 2015, at 3:22pm in East Elmhurst, New York. Attached to the Corina affidavit as exhibit "A" is the Division's request for delivery information for article number 71041002973004071637, and exhibit "B" is the USPS response to the Division's request indicating delivery of the same article.

12. In response to the notice of intent, petitioner disputes that he owes taxes in excess of \$29,400.00. He also sets forth the following sequence of events concerning his contact with the Division, in an affidavit, as follows:

a) In August 2015, he submitted a request for a conciliation conference with regard to the cigarette taxes assessed. He was informed by a Division employee that the power of attorney of his representative did not reflect the correct type of tax and that it should list "driver's license suspension" instead of cigarette tax, which was the subject of his conference request.

b) On November 16, 2015, at the conciliation conference, petitioner was informed by a second Division employee that he had been given wrong information and should have filed a

request for a conciliation conference for the cigarette tax issue. He was informed that in order to fix the problem, he had to then file a petition with the Office of Taxpayer Rights Advocate.

c) In December 2015, petitioner submitted a petition with the Office of Taxpayer Rights Advocate, which was acknowledged as received by a third Division employee who advised that she would look into the matter and thereafter contact petitioner and his representative. Seven months passed without hearing back from this Division employee.

d) In July 2016, the third Division employee informed petitioner that he had again been given wrong advice and that he should have filed a petition for redetermination of a deficiency or revision for a determination and not a petition with the Office of Taxpayer Rights Advocate. This employee also informed petitioner that since the time had passed for the proper petition to be filed, he would then have to submit a new petition with the Office of Taxpayer Rights Advocate.

e) In October 2016, petitioner received correspondence from the director of the Office of Taxpayer Rights Advocate who informed petitioner that it could not provide any further assistance. The letter stated that BCMS had been correct in advising petitioner to apply for a conference regarding the license suspension, since that was the only issue for which petitioner still had formal protest rights. The reason for this was because “any disagreement with assessment L042365416 needed to be formally protested by May 31, 2015 as noted on the original Notice of Determination submitted to the taxpayer on March 2, 2015.”

13. Petitioner’s East Elmhurst, New York, address on the petition, the CMR, the notice of determination and its cover sheet matches the address listed on petitioner’s 2014 personal income tax return: 2311 95th Street, East Elmhurst, New York 11369. According to the Division’s

records, this return was filed on February 19, 2015, and was the last return petitioner filed with the Division before the issuance of the notice in issue.

CONCLUSIONS OF LAW

A. This matter proceeds by way of a notice of intent to dismiss petition, under 20 NYCRR 3000.9(a)(4), upon the premise that the Division of Tax Appeals is without jurisdiction to hear the merits of the petition, since the petition was not timely filed pursuant to Tax Law § 20006(4), 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. Tax Law § 478 provides, in relevant part, as follows:

“Any determination [of tax due on cigarettes and tobacco products] made pursuant to this section shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing.”

The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

D. Where, as here, the timeliness of a taxpayer’s petition following the issuance of a statutory notice is in question, the initial inquiry focuses 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; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 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). When a notice is found to have been properly mailed by the Division to a petitioner'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).

E. 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.*).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency. These affidavits and their exhibits, however, do not demonstrate that such procedures were followed in this case. Most importantly, a properly completed CMR is missing from the record. Exhibit "A" of the Nagengast affidavit contains three pages of an admittedly longer multi-page computer-generated CMR. Moreover, unlike in the procedure described in the

Nagengast affidavit, the three pages referenced are not physically connected and the pages are not consecutively numbered. In addition, there is a manual change in the pre-printed total number of pieces of mail delivered to the USPS from 1,618 to 1,617 without explanation, leaving open the possibility that petitioner's notice was never delivered to the USPS.

G. Such flaws may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008), and the Division has provided such necessary additional evidence of receipt in this case. Specifically, the Corina affidavit, and the USPS delivery information accompanying it shows that a copy of the notice at issue, addressed to petitioner and also listed on the CMR, was delivered as addressed on March 4, 2015.

Importantly, petitioner does not deny receipt of the subject notice, and petitioner's response to the notice of intent includes an August 2015 request for a conciliation conference to protest the tax liability established by such notice. This additional evidence establishes the fact of receipt of the subject notice, as claimed, on March 4, 2015 (*see Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010).

H. Petitioner's address on the notice of determination, corresponding mailing cover sheet, CMR, and USPS delivery information all conform with the address reported on petitioner's 2014 New York Resident income tax return, filed on February 19, 2015, which was the last document filed before the notice of determination was issued. This satisfies the "last known address" requirement. Accordingly, the Division has established that petitioner received the subject notice on March 4, 2015.

I. Where the Division fails to establish the exact date of mailing of a statutory notice, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of*

Riehm v. Tax Appeals Tribunal, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., March 4, 2015, and petitioner was required to file either a request for conciliation conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commn. of the State of N. Y.*, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [3d Dept 1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). The petition in this matter was not filed until October 12, 2016, a date which falls beyond the required statutory period.

J. Although petitioner set forth a series of communications with the Division from August, 2015 forward, petitioner has offered no evidence to counter the Division's evidence regarding the timeliness of petitioner's protest of the notice. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest (Tax Law § 2006[4]; *see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

K. The petition of Zaki Alsayed is hereby dismissed.

DATED: Albany, New York
May 11, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE