

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PARVINDER KAUR : DETERMINATION
DTA NO. 828188
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 June 1, 2014 through August 31, 2015. :

Petitioner, Parvinder Kaur, 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 June 1, 2014 through August 31, 2015.

On May 25, 2017, 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 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 August 10, 2017. On June 6, 2017, petitioner submitted a letter in opposition to dismissal. On July 27, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this determination commenced on August 10, 2017. 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 February 8, 2017, the Division of Tax Appeals received a petition from petitioner, Parvinder Kaur, which protested a notice of determination issued to him. The envelope containing the petition bears a United States Postal Service (USPS) postmark of February 3, 2017. The notice of determination, assessment number L-044460667, dated February 23, 2016, was issued to petitioner at an address in Newburgh, New York.

2. On May 25, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., 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 February 23, 2016, but that the petition was not filed until February 3, 2017, or 346 days later.

3. In response to the issuance of the notice of intent, the Division submitted the affidavits of Deena Picard, dated July 6, 2017, and Fred Ramundo, dated July 12, 2017, 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 February 23, 2016, and a copy of form IT-201 Resident Income Tax Return filed by petitioner for the tax year 2014 reflecting the Newburgh, New York, address.

4. The affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting 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 Acting 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 are 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 page of the CMR in the present case to the actual mailing date of "2/23/16." In addition, as described by Ms. Picard, 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 number is 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 February 23, 2016 CMR in the present matter consists of 26 pages and lists 275 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 February 23, 2016 to each page of the CMR, and also wrote his or her initials on each page thereof. Page 22 of the CMR indicates that a notice of determination, assigned certified control

number 7104 1002 9730 0780 0012 with corresponding assessment number L-044460667, was mailed to petitioner Parvinder Kaur, at the Newburgh, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted. The Newburgh, New York, address for petitioner is the same address used by petitioner on his Form IT-201 filed with the Division for the tax year 2014.

7. The affidavit of Fred Ramundo, a mail room supervisor since 2013 and currently a Stores and Mail Operations Supervisor, 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 Processing Center, 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. Each of the CMRs 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 the Albany, New York, area. 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 February 23, 2016, and initialed each page of the 26-page CMR. The postal employee also circled the number "275" on page 26 to indicate the "Total Pieces Received at Post Office."

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 Processing Center, the CMR is picked up at the post office by a member of Mr. Ramundo'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 Deena Picard, the exhibits attached thereto and the CMR, Mr. Ramundo states that on February 23, 2016, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Parvinder Kaur to a branch of the USPS in the Albany, New York, area, 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 February 23, 2016, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center 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 February 23, 2016.

11. Petitioner responded to the notice of intent to dismiss with a letter in which he admitted his petition was filed late, due to the fact that he had hired someone to contest the underlying notice of determination who failed to properly handle his tax matter. Therefore, he requests that his petition be considered on the merits.

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) (B), the notice in this case would be binding upon petitioner unless he 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. Picard and Mr. Ramundo, 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 February 23, 2016. Specifically, this document lists the certified control number with the corresponding name and address of petitioner and bears a USPS postmark dated February 23, 2016. Additionally, a postal employee circled “275” 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 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 February 3, 2017. This date falls well beyond the 90-day period of limitations for the filing of a petition following the issuance of the notice of determination and was therefore untimely (*see* Tax Law § 1138 [a] [1] [B]). As such, the Division of Tax Appeals lacks jurisdiction to address it.

G. The petition of Parvinder Kaur is hereby dismissed.

DATED: Albany, New York
November 2, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE