

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBO’S PIZZA, INC.	:	DETERMINATION
D/B/A MARINO’S PIZZA	:	DTA NO. 828651
	:	
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.	:	

Petitioner, Robo’s Pizza, Inc., d/b/a Marino’s Pizza, 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 August 24, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The parties were given until November 8, 2018 to respond to said notice. On October 31, 2018, the Division of Taxation, appearing by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel) submitted documents in support of dismissal. On November 3, 2018, petitioner, appearing pro se, submitted a letter in opposition to dismissal. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order began on November 8, 2018. After due consideration of the documents submitted, Kevin R. Law, 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. This matter concerns a sales tax audit of Robo's Pizza, Inc., d/b/a Marino's Pizza (petitioner), which was subject to a sales and use tax audit for the period September 1, 2012 through May 31, 2015. Following the audit of the restaurant, petitioner was issued notice of determination L-043991031, assessing sales and use taxes of \$24,098.23, plus penalty and interest.

2. Petitioner filed a request for a conciliation conference regarding the notice of determination that had been issued to it. The conciliation conference was held on May 17, 2016.

3. On April 14, 2017, the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 269073, to petitioner denying its request and sustaining notice of determination number L-043991031.

4. Petitioner filed a petition dated March 20, 2018 with the Division of Tax Appeals by United States Postal Service (USPS). The USPS postage-paid priority mail label on the envelope containing the petition is dated March 27, 2018. The petition was received by the Division of Tax Appeals on March 28, 2018.

5. On August 24, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition with respect to the aforementioned petition. The notice of intent to dismiss petition provided that the petition was filed more than 90 days after the issuance of the conciliation order and, therefore, the petition was not timely filed.

6. To show proof of proper mailing of the conciliation order dated April 14, 2017, the Division submitted, among other documents: (i) the affirmation of Justine Clarke Caplan, an attorney employed in the Office of Counsel of the Division, dated October 31, 2018; (ii) a copy of the request for conciliation conference, stamped as received by BCMS on January 15, 2016;

(iii) an affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated October 22, 2018; (iv) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked April 14, 2017; (v) a copy of the conciliation order, cover letter and cover sheet, dated April 14, 2017, as well as a copy of the three-windowed mailing envelope used to mail the order; (vi) an affidavit of Fred Ramundo, a supervisor in the Division’s mail room, dated October 22, 2018; and (vii) a copy of petitioner’s Quarterly ST-100 New York State and Local Sales and Use Tax Web Filed Returns, for the filing periods: December 1, 2014 through February 28, 2015; March 1, 2015 through May 31, 2015; June 1, 2015 through August 31, 2015; September 1, 2015 through November 30, 2015; December 1, 2015 through February 29, 2016; March 1, 2016 through May 31, 2016; June 1, 2016 through August 31, 2016; September 1, 2016 through November 30, 2016; and December 1, 2016 through February 28, 2017.

7. The affidavit of Robert Farrelly sets forth the Division’s general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of the conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division’s Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet

that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros (000). The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk's regular duties include associating each cover sheet, cover letter, and conciliation order. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the CMR.

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case, "4/14/17" was written in the upper right corner of each page of the CMR.

14. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up from BCMS by an employee of the Division's Mail Processing Center.

15. Mr. Farrelly attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the conciliation orders issued by the Division on April 14, 2017. The CMR lists 45 certified control numbers. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number, and the name and address of the addressee, and postage and fee amounts.

16. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0108 0496 is reference or CMS number 000269073, along with the name and last known address of petitioner. Specifically, the Queensbury, New York, address listed on the CMR is the same address referenced on the request for conciliation conference, the last quarterly ST-100 New York State and Local Sales and Use Tax return filed before the issuance of the conciliation order, and the petition filed with the Division of Tax Appeals.

17. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 2013, and currently a stores and mail operations supervisor, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified control 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.

18. In this particular instance, the postal employee affixed a postmark dated April 14, 2017, to each page of the five-page CMR. The postal employee wrote the number “45” and initialed page five to indicate the total pieces of mail received at the post office. The postal employee also circled the typed number “45” corresponding to the heading “Total Pieces and Amounts” to indicate the number received.

19. Mr. Ramundo stated that 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, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on April 14, 2017, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at its Queensbury, New York, address to a branch of the USPS in Albany, New York, in a sealed postpaid 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 April 14, 2017, for the records of BCMS. 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 April 14, 2017.

21. In its response to the notice of intent to dismiss petition, petitioner’s president, Robert Chimiak, submitted a letter dated October 25, 2018, claiming, in pertinent part, that he did not

receive a letter advising him of a 90-day deadline to file a petition with the Division of Tax Appeals.

CONCLUSIONS OF LAW

A. 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.

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 § 170 (3-a) (e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Victory Bagel Time, Inc.*).

D. Where the timeliness of a taxpayer’s petition following the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly issued (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). BCMS is responsible for providing conciliation conferences and issuing conciliation orders (Tax Law § 170 [3-a]; 20 NYCRR 4000.1 [c]). As noted above, a conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its proper mailing to the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter*

of Cato; Matter of DeWeese; Matter of Wilson). An order is properly mailed when it is delivered into the custody of the USPS, properly addressed and with the requisite amount of postage affixed (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In turn, 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 bears the burden of proving that a timely protest was filed (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. 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 orders 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 (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has met its burden of establishing proper mailing of the conciliation order, with the accompanying cover sheet and cover letter. Specifically, BCMS was required to mail the conciliation order to petitioner at its last known address. As indicated by the CMR, and by the affidavits of Robert Farrelly and Fred Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue, along with the cover sheet, and cover letter were actually mailed to petitioner by certified mail on April

14, 2017, the date appearing on the CMR. The affidavits described the various stages of producing and mailing orders and attested to the authenticity and accuracy of the copy of the order and the CMR submitted as evidence of actual mailing. These documents established that the general mailing procedures described in the Farrelly and Ramundo 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 April 14, 2017. There are 45 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "45," that the post office received 45 items for mailing. In short, the Division established that it mailed the order by certified mail on April 14, 2017 (*see Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995).

G. In this case, the order was properly mailed when it was delivered into the custody of the USPS on April 14, 2017, properly addressed to petitioner at its last known address, and with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which a protest had to be filed. Petitioner claims that it did not receive a letter advising it of a 90-day deadline to file a petition with the Division of Tax Appeals, when in fact, the cover letter that accompanied the conciliation order here apprised petitioner of the 90-day time frame for filing a petition following issuance of the conciliation order. Where a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order by the taxpayer. Specifically, that section provides that a conciliation order affirming a written notice described in section 170 (3-a) is binding unless a petition is filed "within ninety days after the conciliation order is issued." As noted previously, issuance in this context means mailing (*see Matter of Air Flex Custom Furniture*). Hence, the 90-day limitations period for the filing of a

petition in this matter, with regard to the conciliation order, commenced as of the date of mailing, i.e., on April 14, 2017.

H. In sum, the Division has established that the conciliation order, with the accompanying cover sheet and cover letter, was properly mailed as addressed to petitioner at its last known address on April 14, 2017. Having established that the conciliation order, with the accompanying cover sheet and cover letter was properly mailed to petitioner, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until March 27, 2018, a date that falls more than 90 days after the issuance of the conciliation order. Accordingly, the petition is untimely and the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Robo's Pizza, Inc., d/b/a Marino's Pizza is dismissed.

DATED: Albany, New York
January 31, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE