

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AMONA DELI CORP. : DETERMINATION
: DTA NO. 828880
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 December 1, 2012 through November 30, 2014. :
:

Petitioner, Amona Deli Corp., 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 December 1, 2012 through November 30, 2014.

On February 15, 2019, 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 May 2, 2019 to respond to said notice. On March 12, 2019 and April 30, 2019, petitioner, appearing pro se, submitted identical letters in opposition to dismissal. On April 26, 2019, the Division of Taxation, appearing 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 began on May 2, 2019. After due consideration of the documents submitted, Kevin R. Law, 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 conciliation order.

FINDINGS OF FACT

1. Petitioner, Amona Deli Corp., requested a copy of the Division of Tax Appeals petition form (TA-100) on or before April 25, 2018. The Division of Tax Appeals mailed a petition form and a copy of the New York State Tax Appeals Tribunal Rules of Practice and Procedure to petitioner on April 25, 2018.

2. Months later, petitioner's president, Emad Mohamed, called to inquire about the status of the case. The Division of Tax Appeals informed Mr. Mohamed that a petition had not been received. Mr. Mohamed claimed that a petition had been filed via United Parcel Service (UPS) on May 25, 2018. The Division of Tax Appeals instructed Mr. Mohamed to mail another copy of the petition, together with the proof of mailing for the May 25, 2018 filing.

3. Petitioner mailed a copy of the petition that was received by the Division of Tax Appeals on September 7, 2018. Petitioner also provided a copy of a Staples customer receipt indicating that a submission had been mailed to the Division of Tax Appeals via UPS on May 25, 2018. While the addressee information on the receipt is correct, the Division of Tax Appeals did not receive the May 25, 2018 submission. As petitioner provided proof of mailing, the filing date of the petition is deemed to be May 25, 2018.

4. The petition included a copy of a notice of determination and notice and demand for payment of tax due (notice and demand) bearing assessment number L-044465995, dated as issued to petitioner on February 25, 2016 and April 14, 2017, respectively.

5. Petitioner checked the box on the petition indicating that a conciliation conference had not been requested.

6. The petition challenges only the foregoing notices, and there were no other statutory notices attached to the petition.

7. On February 15, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition (notice of intent) with respect to the aforementioned petition. The notice of intent stated, in sum, that as the petition had been filed in excess of 90 days after issuance of the notice of determination, the petition was not timely filed.

8. In response to the issuance of the notice of intent, the Division of Taxation (Division) provided the following: (i) the affidavit of Adam Roberts, an attorney employed in the Office of Counsel of the Division; (ii) a copy of the request for conciliation conference, stamped as received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on May 9, 2016; (iii) an affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated March 20, 2019; (iv) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked October 14, 2016; (v) a copy of the conciliation order, cover letter and cover sheet, dated October 14, 2016, as well as a copy of the three-windowed mailing envelope used to mail the order; and (vi) an affidavit of Fred Ramundo, supervisor in the Division mail room - stores and mail operations supervisor, dated March 25, 2019.

9. Unbeknown to the Division of Tax Appeals, petitioner filed a request for conciliation conference resulting in the issuance of a conciliation default order on October 14, 2016 (CMS No. 270492). As such, this determination will address the timeliness of the petition following the issuance of the conciliation default order.

10. 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 the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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, “10-14-16” was written in the upper right corner of each page of the CMR.

17. 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.

18. 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 October 14, 2016. The CMR lists 44 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.

19. Information regarding the conciliation order issued to petitioner is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0035 9456 is reference or CMS number 000270492, along with the name and last known address of petitioner. Specifically, the Bellerose, New York, address listed on the CMR is the same address referenced on the request for conciliation conference and the petition filed with the Division of Tax Appeals.

20. 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.

21. In this particular instance, the postal employee affixed a postmark dated October 14, 2016, to each page of the five-page CMR. The postal employee wrote and circled the number "44" on page 1, circled the number "44" on page 5 and initialed page 5 to indicate the total pieces of mail received at the post office.

22. 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.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on October 14, 2016, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at its Bellerose, New York,

address to a branch of the USPS in Albany, New York, in sealed a 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 October 14, 2016, 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 October 14, 2016.

24. In its response to the notice of intent to dismiss petition, petitioner's president, Emad Mohamed, submitted a letter, claiming, in pertinent part, that it is unclear how or why an assessment was issued against the business at a time when the business was not in operation.

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. Specifically, BCMS was required to mail the conciliation order to petitioner at his 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 October 14, 2016, 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 October 14, 2016. There are 44 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "44," that the post office received 44 items for mailing. In short, the Division established that it mailed the order by certified mail on October 14, 2016 (*see Matter of Auto Parts Center*, 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 October 14, 2016, properly addressed to petitioner at his 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. 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*).

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 his last known address on October 14, 2016. Having established that the conciliation order 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 May 25, 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 Amona Deli Corp. is dismissed.

DATED: Albany, New York
July 25, 2019

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE