

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN T. KUJAWA : DETERMINATION
for Revision of Determinations or for Refund : DTA NO. 829309
of Sales and Use Taxes under Articles 28 and :
29 of the Tax Law for the Tax Periods :
December 1, 2008 through February 28, 2013. :

Petitioner, John T. Kujawa, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 2008 through February 28, 2013.

On December 11, 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 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until February 24, 2020 to respond to said notice. On February 21, 2020, the Division of Taxation, appearing by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing by Dawson Law Firm, P. C. (Raymond C. Stilwell, Esq.) did not submit a response by February 24, 2020. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order began on February 24, 2020. As a result of the COVID-19 public health emergency, the deadline for the issuance of the determination was extended by an additional three months consistent with Tax Law 2010 (3). After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. Petitioner filed a petition that was received by the Division of Tax Appeals on April 9, 2019. The envelope containing the petition bears a United States Postal Service (USPS) postmark indicating the petition was mailed on April 5, 2019.

2. The petition protests notice of determination bearing assessment number L-048483845 issued to the petitioner by the Department of Taxation and Finance on June 26, 2018. This notice of determination included a fraud penalty.

3. Petitioner filed a request for a conciliation conference with the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) on July 20, 2018 regarding notice of determination L-048483845.

4. On January 25, 2019, BCMS issued a conciliation order, CMS number 303787, to petitioner denying his request and sustaining notice of determination number L-048483845. The cover letter informed petitioner that the order would be binding unless he filed a petition with the Division of Tax Appeals unless within 30 days.

5. The petition also challenges notice of determination bearing assessment number L-048682760 issued by the Department of Taxation and Finance on August 13, 2018. This notice of determination includes a fraud penalty under Tax Law § 1145. There is no evidence that petitioner requested a conciliation conference for this notice.

6. On December 11, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner and his representative 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 30 days after the issuance of the conciliation order and notice of determination where a fraud penalty was imposed, and, therefore the petition was not timely filed.

7. In response to the issuance of the notice of intent to dismiss, to show proof of proper mailing of the conciliation order dated January 25, 2019 and notice of determination dated August 13, 2018, the Division submitted, among other documents: (i) an affidavit of Brandon Batch, an attorney employed in the Office of Counsel of the Division, dated February 13, 2020; (ii) an affidavit of Joseph Digaudio, Assistant Supervisor of Tax Conferences of BCMS, dated January 28, 2020 ; (iii) a Certified Record for Presort Mail - BCMS Cert Letter (CMR) postmarked January 25, 2019; (iv) a copy of the conciliation order, cover letter and cover sheet, dated January 25, 2019, as well as a copy of the three-windowed mailing envelope used to mail the order; (v) an affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau, dated January 15, 2020 (MAPS); (vi) a CMR postmarked August 13, 2018; (vii) a copy of notice of determination L-048682760 with the associated mailing and cover sheets addressed to the petitioner; (viii) an affidavit of Fred Ramundo, Stores and Mail Operations Supervisor of the Department of Taxation and Finance, Supervisor of Tax Conferences of BCMS, dated February 4, 2020; and (ix) a copy of petitioner's e-Filed IT-203 Nonresident and Part-Year Resident Income Tax Return for tax year 2017, filed on April 2, 2018. This tax return lists the same address for the petitioner as that listed on the conciliation order and notice of determination and was the last tax return filed by the petitioner prior to the issuance of the subject notice and conciliation order.

8. The affidavit of Joseph Digaudio 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.

9. 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.

10. 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.

11. 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.

12. The clerk's regular duties including 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.

13. 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.

14. 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, “1-25-19” was written in the upper right corner of each page of the CMR.

15. 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.

16. Mr. Digaudio attests to the truth and accuracy of the copy of the three-page CMR, which contains a list of the conciliation orders issued by the Division on January 25, 2019. The CMR lists 24 certified control numbers. Each such certified control number is assigned to an item of mail listed on the three 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.

17. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 4732 2234 is reference or CMS number 000303787, along with the name and last known address of petitioner. Specifically, the Rochester, New York, address listed on the CMR is the same address listed on the e-Filed IT-203 Nonresident and Part-Year Resident Income Tax Return filed before the issuance of the conciliation order.

18. The affidavit of Deena Picard, who has been in her current position since May 2017, and was previously a Data Processing Fiscal Systems Auditor starting February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs and 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 their mailing. 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 "8/13/2019." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of 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 "PAGE: 1," and are noted in the upper right corner of each page.

19. 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 the 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 Address, Street, and PO Address."

20. The CMR for the notice of determination in the present matter consists of 12 pages and lists 127 certified control numbers along with corresponding assessment numbers, names and addresses. A USPS representative affixed a postmark dated August 13, 2019, to each page of the CMR, wrote the number “127” next to the heading “Total Pieces Received at Post Office” on page 12, and initialed or signed page 12 of the CMR.

21. Page 11 of the CMR indicates that a notice with a certified control number 7104 1002 9730 0277 9733 and reference number L-048682760 was mailed to petitioner at the Rochester, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

22. The affidavit of Fred Ramundo describes the general operations and procedures within the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope, so that the address and certified number from the mailing cover sheet shows through the window. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office. The delivering mail room

employee further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number of the CMR. As noted, the CMR attached to the Picard affidavit as Exhibit “A” contains a USPS postmark dated August 13, 2019, and the last page contains the handwritten number “127” in the blank for the “Total Pieces Received at Post Office.” According to Mr. Ramundo, the affixation of the postmarks and the USPS employee’s initials, and the handwritten number for the total of the pieces received at the post office, indicate that all 127 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on August 13, 2019.

23. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner on August 13, 2019, as claimed.

24. Petitioner did not submit a response to the notice of intent to dismiss.

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 30 days after the conciliation order is issued where fraud penalty is imposed. A conciliation order is “issued” within the meaning of Tax Law § 170 (3-a) (e) at the time of its mailing to the taxpayer. The

Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 30-day time limit under the circumstances presented here.

D. There is a 30-day statutory time limit for filing a petition following the issuance of a notice of determination where a fraud penalty is imposed (*see* Tax Law §§ 1138 [a][1]; 2008 [2]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 30-day time limit under the circumstance presented here.

E. Where the timeliness of a taxpayer's petition following 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).

F. Where, as here, the timeliness of a taxpayer's protest of a notice of determination 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*

Tax Law § 1147 [a] [1]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002). 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 id.*).

G. 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).

H. In this case, the Division has met its burden of establishing proper mailing of the conciliation order and notice of determination. Specifically, BCMS was required to mail the conciliation order to petitioner at his last known address. As indicated by the CMR, and by the affidavit of Joseph Digaudio, the Division employee 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 January 25, 2019, the date appearing on the CMR. The affidavit 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 Digaudio affidavit 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 January 25, 2019. There are 24 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "24," that the post office received 24 items for mailing. In short, the Division established that it mailed the order by certified mail on January 25, 2019 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

I. 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 January 25, 2019. 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 30 days thereafter. However, the petition was not filed until April 5, 2019, a date that falls beyond 30 days after the issuance of the conciliation order. Accordingly, the petition is untimely with regard to the conciliation order, and the Division of Tax Appeals lacks jurisdiction to address it.

J. Furthermore, the Division has offered proof sufficient to establish the mailing of the notice of determination to petitioner's last known address on August 13, 2018. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establishes that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The address on the mailing cover sheets and CMR conforms with the address listed on

petitioner's IT-203 for the year 2017 which satisfies the "last known address" requirement (*see* Tax Law § 1138 [a] [1]). It is thus concluded that the Division properly mailed the notice on August 13, 2019, and the statutory 30-day time limit to file a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law § 1138 [a] [1]). The petition was filed long after the 30-day time limit expired. Accordingly, the petition is untimely, and the Division of Tax Appeals lacks jurisdiction to address it.

K. The petition of John T. Kujawa is dismissed.

DATED: Albany, New York
August 20, 2020

/s/ Herbert M. Friedman, Jr.
SUPERVISING ADMINISTRATIVE LAW JUDGE