

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
M & M PIO RESTAURANT, LLC : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 829982
of Sales and Use Taxes under Articles 28 and :
29 of the Tax Law for the Periods June 1, 2014 :
Through November 30, 2017. :

Petitioner, M & M Pio Restaurant, LLC, 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 periods June 1, 2014 through November 30, 2017.

On October 1, 2020, 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 December 17, 2020 to respond to said notice. On November 10, 2020, the Division of Taxation, appearing by Amanda Hiller, Esq. (Eric R. Gee, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing by Jhonatan Mondragon, E.A., did not submit a response by December 17, 2020, which date triggered the 90-day deadline for issuance of this determination). After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising 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. On December 27, 2019, the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 305083, to petitioner sustaining notice number L-048706972 for the periods June 1, 2014 through November 30, 2017.

2. Petitioner filed a petition that was received by the Division of Tax Appeals on June 18, 2020 challenging the December 27, 2019 conciliation order. The envelope containing the petition bears a United States Postal Service (USPS) postmark indicating the petition was mailed on June 5, 2020. The petition lists a Gold Street, Brooklyn, New York, address for petitioner.

3. October 1, 2020, 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, was not timely filed.

4. In response to the issuance of the notice of intent to dismiss, to show proof of proper mailing of the conciliation order dated December 27, 2019, the Division submitted, among other documents: (i) an affidavit of Eric R. Gee, an attorney employed in the Office of Counsel of the Division, dated November 10, 2020; (ii) an affidavit of Joseph Digaudio, Assistant Supervisor of Tax Conferences of BCMS, dated November 2, 2020; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked December 27, 2019; (iv) a copy of the conciliation order, cover letter and cover sheet, dated December 27, 2019, as well as a copy of the three-windowed mailing envelope used to mail the order; and (v) an affidavit of Susan Saccocio, Manager of the Mail Room of the Department of Taxation and Finance, dated November 2, 2020.

5. 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.

6. 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.

7. 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, taxpayers name, mailing address, BCMS number, certified control number, and certified control number bar code.

8. 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.

9. 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.

10. 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.

11. 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, “12-27-19” was written in the upper right corner of each page of the CMR.

12. 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.

13. Mr. Digaudio attests to the truth and accuracy of the copy of the eight-page CMR, which contains a list of the conciliation orders issued by the Division on December 27, 2019. The CMR lists 96 certified control numbers. Each such certified control number is assigned to an item of mail listed on the eight 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.

14. Information regarding the conciliation order issued to petitioner is contained on page on five of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 5349 4253 is reference or CMS number 000305083, along with the name and last known address of petitioner.

15. Petitioner lists Jhonatan Mondragon as his representative, with an address on 64th Street, Woodside, New York. Information regarding a copy of the conciliation order issued to

petitioner and mailed to Mr. Mondragon is contained on page three of the CMR. Specifically, corresponding to certified control number 7104 1002 9735 5349 4055 is reference to CMS number 000305083, along with the name and last known address of Mr. Mondragon.

16. The affidavit of Susan Saccocio, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the regular procedures followed by her staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. She 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.

17. In this particular instance, the postal employee affixed a postmark dated December 27, 2019, to each page of the eight-page CMR. The postal employee wrote the number "96" and initialed page eight to indicate the total pieces of mail received at the post office. The postal employee also circled the typed number "96" corresponding to the heading "Total Pieces and Amounts" to indicate the number received.

18. Ms. Saccocio 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 Ms. Saccocio 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.

19. Based upon her review of the affidavit of Joseph Digaudio, the exhibits attached thereto and the CMR, Ms. Saccocio avers that on December 27, 2019, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at the Brooklyn, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelope for delivery by certified mail. She also avers that on December 27, 2019, an employee of the Mail Processing Center delivered an item of certified mail addressed to Mr. Mondragon at his Woodside, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to and accepted by the post office on December 27, 2019, for the records of BCMS. Ms. Saccocio asserts that the procedures described in her 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 and his representative on December 27, 2019.

20. Petitioner nor its representative submitted a response to the notice of intent to dismiss petition.

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 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 9600.1 [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 twofold: 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's last known address, along with a copy to its representative. As indicated by the CMR, and by the affidavits of Joseph Digaudio and Susan Saccocio, 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 and its representative by certified mail on December 27, 2019, 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 Digaudio and Saccocio affidavits were followed with respect to the conciliation order issued to petitioner, with a copy to its representative. 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 December 27, 2019. Likewise, Mr. Mondragon's pertinent information appears on the CMR. There are 96 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "96," that the post office received 96 items for mailing. In short, the Division established that it mailed the order by certified mail on December 27, 2019 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. In this case, the conciliation order was properly mailed when it was delivered into the custody of the USPS on December 27, 2019, properly addressed to petitioner and its representative at their last known addresses, and with the requisite amount of postage affixed, and it is this date that commenced the 90-day period within which protests had to have been filed. 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 December 27, 2019.

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, and its representative, at their last known addresses on December 27, 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 90 days thereafter. However, the petition was not filed until June 5, 2020, a date that falls beyond 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 M & M Pio Restaurant, LLC is dismissed.

DATED: Albany, New York
March 11, 2021

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