

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BABU WINE AND LIQUOR, INC.	:	DETERMINATION
	:	DTA NO. 830277
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, 2015 through May 31,	:	
2018.	:	

Petitioner, Babu Wine and Liquor, Inc., 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, 2015 through May 31, 2018.

On July 18, 2022, the Division of Taxation, by its representative, Amanda Hiller, Esq. Esq. (Brian Evans, Esq., of counsel), brought a motion seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, filed a response to the motion on August 8, 2022. The 90-day period for issuance of this determination commenced on August 17, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, 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 deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner, Babu Wine and Liquor, Inc.'s, protest of a notice of determination, dated January 27, 2020, and bearing assessment ID number L-051179434 (notice). The notice is addressed to "BABU WINE & LIQUOR, INC." at a Freeport, New York, address. The mailing cover sheet of this notice bore certified control number 7104 1002 9730 0078 6962.

2. A copy of the notice was also sent to petitioner's then-representative, Falgun Patel, at a Glen Oaks, New York, address. The mailing cover sheet of this notice bore certified control number 7104 1002 9730 0078 6924.

3. The Division subsequently issued a notice and demand, dated May 13, 2020 (notice and demand), to petitioner for payment of the tax due related to the notice.

4. In its petition, petitioner asserts that the Division erroneously determined total taxable sales because certain records were not made available to the Division during the audit because of COVID-19. The petition included a copy of the notice and demand but did not include a copy of the notice.

5. To show proof of proper mailing of the notice, the Division provided the following with its motion papers: (i) the affirmation, dated July 18, 2022, of Brian Evans, Esq., the Division's representative; (ii) an affidavit, dated May 12, 2021, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "Certified Record For Presort Mail – Assessments Receivable" (CMR) postmarked January 27, 2020; (iv) an affidavit, dated May 17, 2021, of Susan Saccocio, a manager in the Division's mail room; (v) copies of the notice mailed to petitioner and its then-representative with the associated mailing cover sheets; (vi) a copy of

petitioner's New York State and local sales and use tax web-filed return (form ST-810) for the period of September 1, 2019 through November 30, 2019; and (vii) a copy of petitioner's New York State and New York City power of attorney (form POA-1) dated April 18, 2019, appointing Falgun Patel, as petitioner's then-representative. Petitioner's Freeport, New York, address reflected on the form ST-810 is the same address reflected on the notice sent to petitioner. On the power of attorney form, Falgun Patel's Glen Oaks, New York, address is the same address as reflected on the notice sent to the representative.

6. Brian Evans, an attorney in the Office of Counsel of the Division, avers in his affirmation that petitioner's New York State and local sales and use tax web-filed return for the period of September 1, 2019 through November 30, 2019, was filed on December 20, 2019, and was the last return filed by petitioner before the Division issued the notice. Mr. Evans also affirms that petitioner's Freeport, New York, address appearing on the last return filed, corresponds to the address appearing on the notice issued to petitioner and that such is the last known address the Division had for petitioner at the time the notice was issued. Mr. Evans affirms that petitioner's then-representative's Glen Oak, New York, address appearing on the power of attorney form provided with the motion corresponds to the address appearing on the notice issued to the representative and was the last known address the Division had for petitioner's representative at the time the notice was issued.

7. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case, “20200171700.” Following the Division’s general practice, this date was manually changed on the first and last pages of the CMR in the present case to “1/27/20.” In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the 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 “PAGE: 1,” and are noted in the upper right corner of each page.

8. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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.”

9. The CMR in the present matter consists of 8 pages and lists 85 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Picard notes

that the copy of the CMR attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a postmark, dated January 27, 2020, to each page of the CMR, wrote the number “85” on page 8 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed the last page of the CMR.

10. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9730 0078 6962, and reference number L-051179494 was mailed to petitioner, “BABU WINE & LIQUOR, INC.” at the Freeport, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

11. Page 5 of the CMR indicates that a notice with certified control number 7104 1002 9730 0078 6924, and reference number L-051179494 was mailed to petitioner’s then-representative, “FALGUN PATEL” at the Glen Oaks, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s representative’s name and address as noted.

12. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room 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 on the CMR. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

13. Each of the 8 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of January 27, 2020. On page 8, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 85 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "85," indicating 85 pieces of mail were received by the USPS. There is a set of initials on page 8.

14. According to both the Picard and Saccocio affidavits, a copy of the notice was properly mailed to petitioner and petitioner's representative on January 27, 2020, as claimed.

15. Petitioner filed a petition with the Division of Tax Appeals in protest of the notice on November 30, 2020. A copy of petitioner's USPS date stamped envelope with that date, used for the mailing of the petition, was included with the Division's motion papers. The petition was date stamped as received by the Division of Tax Appeals on December 3, 2020.

16. Petitioner filed a response, dated August 8, 2022, to the Division's motion. Petitioner's response asserts that the initial problem was the result of petitioner's malfunctioning

point of sale system and that the Division has already admitted to having received the petition timely. Petitioner offers no relevant proof of its assertion regarding the mailing of the petition other than a copy of a USPS return receipt (USPS form 3811) indicating that the Division of Tax Appeals received a document from petitioner on December 3, 2020. The response did not include a copy of the notice.

CONCLUSIONS OF LAW

A. The Division brings a motion to dismiss the petition under section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, a motion for summary determination under section 3000.9 of the Rules. Tax Law § 1138 (a) (1) authorizes the Division to issue a notice of determination for additional tax or penalties due under articles 28 and 29 of the Tax Law. There is a 90-day statutory time limit for filing either a petition for a hearing or a request for a conciliation conference following the issuance of a notice of determination (Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). Since petitioner did not request a conference with the Bureau of Conciliation and Mediation Services (BCMS), the issue is whether dismissal is warranted as petitioner failed to file a timely petition. 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 motion 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. Where, as here, the timeliness of a taxpayer’s protest of 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 (*see 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).

D. 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 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*, 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*).

Here, the Division has offered proof sufficient to establish the mailing of the notice to petitioner’s last known address on January 27, 2020, and to petitioner’s then-representative on the same day. 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 establish 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 sheet and CMR for petitioner conform with the address listed on petitioner's New York State and local sales and use tax web-filed return for the period of September 1, 2019 through November 30, 2019, which satisfies the "last known address" requirement for the mailing to petitioner. Furthermore, the address on the mailing cover sheet and CMR for petitioner's then-representative conforms with the address listed on the petitioner's New York State and New York City power of attorney form dated April 18, 2019, appointing petitioner's representative, which satisfies the "last known address" requirement for the mailing of the notice to petitioner's representative.

It is thus concluded that the Division properly mailed the notice to petitioner and petitioner's representative when it was delivered into the custody of the USPS on January 27, 2020. Since the notice was properly addressed with the requisite amount of postage affixed, the statutory 90-day time limit to file either a request for conciliation conference with the BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]).

The Division has established that notice of determination L-051179494 was properly mailed as addressed to petitioner at its last known address on January 27, 2020, and to petitioner's representative at his last known address on the same day. Having established that the notice was properly mailed to petitioner and its representative, it was incumbent upon petitioner to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter. Petitioner did not file a request for conciliation

conference with BCMS, but rather opted to file a petition for a hearing before the Division of Tax Appeals. However, the petition was not filed until November 30, 2020, a date that falls beyond 90 days after the date of issuance of the notice. Thus, insofar as the petition seeks a hearing on the merits of the notice, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

In its response, petitioner claims the Division conceded that the petition was timely filed; however, there is absolutely no evidence to support this claim. Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*see Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276 [1978]). Furthermore, petitioner did not mail its petition until November 30, 2020, the date the USPS date stamped the envelope in which the petition was mailed (*see* finding of fact 15) and it was received by the Division of Tax Appeals on December 3, 2020.

F. In addition, the petition purports to challenge the notice and demand subsequently issued to petitioner on May 13, 2020 (*see* finding of fact 3). The Division of Tax Appeals is without jurisdiction to provide a hearing on this notice (*see* Tax Law § 173-a [3] [c]).

G. The petition of Babu Wine and Liquor, Inc., is hereby dismissed.

DATED: Albany, New York
November 10, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE