

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PEGASUS CLEANING CORP.	:	DETERMINATION
	:	DTA NO. 831636
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 March 1, 2018	:	
through November 30, 2020.	:	
	:	

Petitioner, Pegasus Cleaning 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 March 1, 2018 through November 30, 2020.

On August 23, 2024, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). By letter, dated September 4, 2024, the date by which the parties could file responses to the notice of intent to dismiss petition was extended to November 7, 2024. On October 16, 2024, the Division of Taxation, appearing by Amanda Hiller, Esq. (Brandon Batch, Esq., of counsel), submitted affidavits and other documents in support of dismissal. Petitioner, appearing by Zdarsky, Sawicki & Agostinelli, LLP (Gerald T. Walsh, Esq., of counsel), did not submit a response by November 7, 2024, which date commenced the 90-day period for the issuance of this determination.

After due consideration of the documents submitted, Donna M. Gardiner, Supervising 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 determination.

FINDINGS OF FACT

1. On March 11, 2022, the Division of Taxation (Division) issued to petitioner, Pegasus Cleaning Corp., a notice of determination, bearing assessment number L-055451906, asserting sales and use taxes due in the amount of \$43,892.32, plus interest, for the period March 1, 2018 through November 30, 2020. The notice of determination was addressed to petitioner at an address in Buffalo, New York.

2. On March 1, 2024, petitioner filed a petition with the Division of Tax Appeals in protest of the notice of determination. The envelope, containing the petition, bears a United States Postal Service (USPS) postmark of March 1, 2024.

3. On August 23, 2024, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition stated that the relevant notice of determination was issued on March 11, 2022, but the petition was not filed until March 1, 2024, a date that is beyond 90 days from the issuance of the notice of determination.

4. In response to the notice of intent to dismiss petition, the Division submitted the following: (i) an affirmation of Brandon Batch, Esq., an attorney in the Division's Office of Counsel, dated October 15, 2024; (ii) an affidavit of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau

(MAPS), sworn to on September 30, 2024; (iii) a “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE” (CMR), dated March 11, 2022; (iv) a copy of the notice of determination, dated March 11, 2022, with the associated mailing cover sheet addressed to petitioner; (v) an affidavit of Justin Lombardo, a manager of the Division’s mail room, sworn to on September 30, 2024; and (vi) a copy of petitioner’s electronically filed form Annual ST-101, New York State and local sales and use tax web-filed return, for the tax period March 1, 2020 through February 28, 2021, filed on March 2, 2021. The address listed on the form Annual ST-101 is the same Buffalo, New York, address for petitioner as listed on the notice of determination.

5. Mr. Batch asserts in his affirmation that the Buffalo, New York, address was petitioner’s last known address when the notice of determination was issued.

6. Ms. Denier's affidavit sets forth the Division's general practices and procedures for generating and issuing statutory notices. Ms. Denier has served as the Director of MAPS since July 2022 and a Principal Administrative Analyst since August 2022. Prior to this position, Ms. Denier was a Supervisor of Administrative Analysis from July 2019 through August 2022. Ms. Denier began working for the Division in February 1986 and has been a supervisor in MAPS since October 2004. In performing her duties, Ms. Denier has used the Division's electronic Case and Resource Tracking System (CARTS), which generates statutory notices, including notices of determination. As the Director of MAPS, which is responsible for the receipt and storage of CMRs, Ms. Denier is familiar with the Division's past and present procedures as they relate to statutory notices.

The CMR is produced approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial 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 “20220631700.” 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 “03/11/22.” Each batch of statutory notices is accompanied by a CMR. Each CMR and associated batch of statutory notices are forwarded to the mail room together. In addition, as described by Ms. Denier, all pages of the CMR are banded together when the documents are delivered to the Division's mail room and remain so when returned to the Division after mailing. 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. The CMR lists each notice in the order it is generated in the batch.

7. Statutory notices generated from CARTS are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet that is generated by CARTS for each notice. The mailing cover sheet also bears a bar code, the recipient's mailing address and the Division's return address on the front, and taxpayer assistance information on the back. The certified control numbers are also listed on the CMR under the heading “CERTIFIED NO.” 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 P.O. ADDRESS.” CARTS also generates any enclosures referenced in the statutory notice. Each notice, with its accompanying mailing cover sheet and any enclosures referenced in the body of the notice, is a discrete unit within the batch of notices.

8. The CMR for the batch of statutory notices to be issued on March 11, 2022, including the notice of determination addressed to petitioner herein, consisted of 18 cut sheet pages and

listed 187 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 18, which contains zero entries. Ms. Denier noted that portions of the CMR attached to her affidavit had 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 March 11, 2022, to each page of the CMR, wrote “187” on page 18 beneath the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and signed or initialed the last page of the CMR.

9. Page 15 of the CMR indicates that a notice with certified control number 7104 1002 9730 0557 3321, and reference number L 055451906, was mailed to petitioner at the Buffalo, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Denier affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. Ms. Denier states that the notice of determination was mailed on March 11, 2022, and the procedures described and followed in her affidavit were the normal and regular procedures of the Division on March 11, 2022.

11. The affidavit of Mr. Lombardo, a manager of the Division’s mail room since 2016 and currently an Associate Administrative Analyst whose duties include the management of the mail room staff, attested to the mail room’s general operations and procedures as they relate to statutory notices. As a manager of the Division’s mail room, Mr. Lombardo is knowledgeable regarding past and present office procedures as they relate to statutory notices. The mail room receives statutory notices that are ready for mailing in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff

retrieves the notices and associated documents and operates a machine that puts each statutory notice and any associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. That staff member then weighs, seals, and places postage and fee amounts on each envelope. A mail processing clerk then checks the first and last pieces of certified mail against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail 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.

12. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt of the mail listed on the CMR and of the CMR itself. The mail room also 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. Mr. Lombardo avers that each page of the CMR contains a postmark, and that a USPS employee initialed or signed page 18 of the CMR. A review of the CMR indicates that a USPS employee wrote the total number of pieces of certified mail received. Page 18 of the CMR indicates that a total of 187 pieces of mail listed were delivered to the USPS.

14. Based on his review of the affidavit of Ms. Denier and the exhibits attached thereto, and his personal knowledge of the procedures of the mail room, Mr. Lombardo attests that on March 11, 2022, an employee of the mail room delivered to the USPS one piece of certified mail

addressed to petitioner at its Buffalo, New York, address in a sealed postpaid envelope for delivery by certified mail. He also stated that the CMR delivered to the USPS on March 11, 2022, was returned to the Division. Mr. Lombardo further attests that the procedures described in his affidavit were the regular procedures followed by the mail room staff in the ordinary course of business when handling items sent by certified mail and that these procedures were followed in mailing the pieces of certified mail on March 11, 2022.

15. Petitioner did not submit a timely response to the notice of intent to dismiss petition.

CONCLUSIONS OF LAW

A. 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. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law § 1138 [a] [1]).

Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals lacks jurisdiction to consider the substantive merits of the petition (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, the petition appears to have been filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a

notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. In *Matter of Victory Bagel Time* (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.

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. When, as here, the timeliness of a taxpayer’s protest of a notice is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing of the notice to petitioner’s last known address (Tax Law § 1147 [a] [1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is issued when it is properly mailed, which occurs when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer at their last known address by certified or registered mail, it creates presumptive evidence of receipt which the taxpayer can rebut (*see* Tax Law § 1147 [a] [1]; *see also Matter of Ruggerite, Inc. v State Tax Commn.*, 97 AD2d 634, 635 [3d Dept 1983], *affd* 64 NY2d 688 [1984]).

E. In this case, the Division introduced adequate proof to establish the mailing of the notice to petitioner's last known address on March 11, 2022. 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). Further, the address on the mailing cover sheet and the CMR conform with the address listed on petitioner's form Annual ST-101, which satisfies the "last known address" requirement.

F. Since the Division has demonstrated proper mailing of the notice, such a showing gives rise to a presumption of receipt of the notice by the person to whom it is addressed (*see* Tax Law § 1147 [a] [1]). In this case, petitioner has presented no evidence to rebut the presumption of receipt. Therefore, it is concluded that the notice was properly mailed on March 11, 2022 and, thus, the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law §§ 170 [3-a] [a]; 1138 [a] [1]). Here, the petition was filed on March 1, 2024, a date that falls well beyond the 90-day statutory period and, thus, was untimely filed (*see* Tax Law § 1138 [a] [1]). Therefore, the Division of Tax Appeals lacks jurisdiction to address the merits of the petition (*see Matter of Lukacs*).

G. The petition of Pegasus Cleaning Corp. is hereby dismissed.

DATED: Albany, New York
January 30, 2025

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE