

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NASRIN BITHI	:	DETERMINATION
	:	DTA NO. 850874
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period January 12, 2020.	:	

Petitioner, Nasrin Bithi, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period January 12, 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 23, 2024, the due date by which the parties could file responses to the notice of intent to dismiss petition was extended to November 7, 2024. The Division of Taxation, appearing by Amanda Hiller, Esq. (Kaitlyn Smith, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by Lazzaro Law Firm, P.C. (Lance Lazzaro, Esq., of counsel), did not submit a response by November 7, 2024, which date began 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. The Division of Taxation (Division) issued to petitioner, Nasrin Bithi, a notice of determination, bearing assessment number L-053137247, dated April 14, 2021, for the period January 12, 2020 (notice). The notice was issued to petitioner at an address in Brooklyn, New York.

2. On June 9, 2022, petitioner filed a petition with the Division of Tax Appeals in protest of the notice. Her address listed on the petition is the same Brooklyn, New York, address listed on the notice.

3. On August 23, 2024, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice 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 notice was issued on April 14, 2021, but the petition was not filed until June 9, 2022, or in excess of 90 days later.

4. In response to the notice of intent to dismiss petition, the Division submitted among other documents: (i) an affirmation, dated October 17, 2024, of Kaitlyn Smith, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, sworn to on September 30, 2024, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, sworn to on September 30, 2024, of Justin Lombardo, a manager of the Division's mail room and currently an Associate Administrative Analyst; (iv) a "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (CMR), postmarked April 14, 2021; (v) a copy of the notice, dated April 14, 2021, together with the associated mailing cover sheet; and (vi) a copy of

petitioner's electronically filed New York State resident personal income tax return, form IT-201, for the year 2019 (2019 tax return), filed on March 11, 2020. The address listed on the 2019 tax return is the same address as listed on both the petition and the notice and was the last known address for petitioner at the time the notice was issued.

5. The affidavit of Ms. Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier has served as the Director of MAPS since July 2022 and as Principal Administrative Analyst since August 2022. Prior to this position, she was a Supervisor of Administrative Analysis from July 2019 through August 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier 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 mailing. Each page of 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 "4/14/21." 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 the notices are generated in the batch.

6. 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 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.”

7. The CMR, dated April 14, 2021, consists of 21 pages and lists 225 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Denier notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A United States Postal Service (USPS) representative affixed a postmark, dated April 14, 2021, to each page of the CMR, wrote the number “225” next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE” on page 21, and initialed or signed the last page of the CMR.

8. Page 10 of the CMR indicates that a notice, with reference number L 053137247 and certified control number 7104 1002 9730 0311 2287, was mailed to petitioner at her Brooklyn, New York, address. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit B, bears this certified control number and petitioner’s name and address as noted.

9. 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 processing center staff, attested to 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. 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 associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. A staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter

checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained 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 of the mail listed on the CMR and on the CMR itself 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. As noted, each page of the CMR attached to the Denier affidavit, as exhibit A, contains a USPS postmark dated April 14, 2021. In addition, he attests that the USPS employee's initials or signature appear on the last page of the CMR. According to Mr. Lombardo, the affixation of the postmarks and the USPS employee's initials indicate that all 225 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on April 14, 2021.

10. According to the Denier and Lombardo affidavits, the notice was mailed to petitioner on April 14, 2021, as claimed.

11. Petitioner did not respond to the notice of intent to dismiss petition.

CONCLUSIONS OF LAW

A. Tax Law §§ 478 and 480-a (3) (a) authorize the Division to issue a notice of determination to a taxpayer asserting civil fines for the failure to obtain and display a valid certificate of registration for the retail sale of cigarettes and tobacco products. 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 § 480-a [2] [d]).¹

Alternatively, a taxpayer may contest a notice of determination by filing a request for conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The 90-day statutory time limit for filing either a petition or a request for conciliation conference is strictly enforced (*see e.g. Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003). A petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

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. Where, as here, the timeliness of a taxpayer’s protest of a notice is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing the subject notice to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This means that the Division must show proof of a standard

¹ Tax Law § 480-a (2) (d) provides that the provisions of article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax shall apply to article 20 of the Tax Law in the same manner and with the same force and effect as if those provisions of article 28 had been fully incorporated into Article 20 (*see Matter of Alawi*, Tax Appeals Tribunal, April 15, 2004).

mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

D. Petitioner did not respond to the notice of intent to dismiss petition and, thus, has offered no evidence to contest the facts asserted in the Division's documents supporting the dismissal. Accordingly, those facts are deemed admitted (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]).

E. In this case, the CMR, along with the affidavits of Ms. Denier and Mr. Lombardo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing notices of determination, establishes the Division's standard mailing procedure. Additionally, the CMR has been properly completed and, therefore, constitutes documentary evidence of both the date and fact of mailing (*see Matter of DeWeese*). The Division has established that the notice was mailed as addressed to petitioner, at her last known address, by certified mail, on April 14, 2021.

F. It is concluded that the notice was properly mailed when it was delivered into the custody of the USPS on April 14, 2021, and properly addressed to petitioner at her last known address. Hence, the 90-day period for filing a petition commenced on April 14, 2021. However, the petition was not filed until June 9, 2022, a date that falls well beyond 90 days after the issuance of the notice. Accordingly, the petition is untimely, and the Division of Tax Appeals lacks jurisdiction to address it (*see Matter of Lukacs*).

G. The petition of Nasrin Bithi is dismissed.

DATED: Albany, New York
January 30, 2025

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE