

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HOWARD ROSENBLUTH :

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, 2008 through February 28, :
2009. :

ORDER
DTA NO. 825849

Petitioner, Howard Rosenbluth, 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, 2008 through February 28, 2009.

On April 4, 2014, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. On June 12, 2014, the Division of Taxation, by Amanda Hiller, Esq. (David Gannon, Esq., of counsel) submitted an affidavit and documents in support of dismissal. Petitioner, appearing by Stephen Jaffe Sabbeth, officer, filed letters and documents in opposition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced October 15, 2014. After due consideration of the documents and arguments submitted, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed its petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. This matter concerns the sales tax audit of an establishment known as Rooms With a View Enterprises, Inc. (RWV). RWV filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was in response to a Notice of Determination, dated May 3, 2011, that assessed RWV sales and use taxes for the period May 31, 2007 through February 28, 2009 in the amount of \$551,814.18 plus penalty and interest for a balance due of \$1,051,409.26.

2. In a letter dated July 11, 2011, the BCMS notified petitioner, Howard Rosenbluth, that it had been informed that the Division of Taxation (Division) had issued assessment number L-035885338 to him as a person who is responsible for the liability of RWV and that the Division also considered this notice to be protested.

3. BCMS issued to petitioner a Conciliation Order, pertaining to assessment number L- 035885338, (CMS No. 246692), dated April 13, 2012, that denied petitioner's request and sustained the Notice of Determination. The Conciliation Order was mailed to petitioner at his "address of record," 6 Bobwhite Drive, Norwalk, Connecticut 06851. The Division notes that the same address appears on the notification letter of July 11, 2011 and on the petition.

4. On June 29, 2013, petitioner mailed a petition to the Division of Tax Appeals challenging assessment L-035885338. The petition was mailed via the United States Postal Service and was received by the Division of Tax Appeals on July 1, 2013. The petition did not include a copy of the Notice of Determination.

5. As stated above, on April 4, 2014, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition on the basis that the petition had not been timely filed.

6. In support of its motion and to prove mailing of the notices under protest, the Division submitted, among other documents, the following: (i) the petition of RWV, (ii) an affidavit, dated June 4, 2014, of Robert Farley, Assistant Supervisor of Tax Conferences of BCMS; (iii) an affidavit, dated June 5, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) postmarked April 13, 2012; and, (v) a copy of a BCMS Associated Assessment Case Entry Worksheet, which, among other things, lists petitioner's address as 6 Bobwhite Dr., Norwalk, CT, 06851. The Division's papers did not include a copy of the Notice of Determination issued to petitioner.

7. As noted, the Division submitted the affidavits of Robert Farley and Bruce Peltier, employees of the Division, sworn to on June 4, 2015 and June 5, 2014, respectively. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences for BCMS, set forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the certified record for presort mail, or certified mail record (CMR).

8. The BCMS Data Management Services Unit prepared and forwarded 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, signed and forwarded the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each conciliation order to be issued were electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit assigned a certified control number and produced a cover sheet that indicated the BCMS return address, date of mailing, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produced a computer-generated CMR entitled "Certified Record for Presort Mail." The CMR was a listing of taxpayers and representatives to whom conciliation orders were sent by certified mail on a particular day. The certified control numbers were recorded on the CMR under the heading "Certified No." The AFP Unit printed the CMR and cover sheets via a printer located in BCMS, and these documents were delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk's regular duties included associating each cover sheet, conciliation order and cover letter. The clerk verified the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folded and placed 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.

12. It was the general office practice that the BCMS clerk stamps on the bottom left corner "Mail Room: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR. The BCMS clerk also wrote the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "4-13-12" was written in the upper right corner of each page of the CMR.

13. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders were picked up in BCMS by an employee of the Division's Mail Processing Center.

14. Mr. Farrelly attests to the truth and accuracy of the copy of the 5-page CMR, which contained a list of the 53 conciliation orders issued by the Division on April 13, 2012. The CMR also listed 53 certified control numbers. Each such certified control number was assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

15. Information regarding the conciliation order issued to petitioner was contained on page one of the CMR. On page one, corresponding to certified control number 7104 1002 9730 1079 8061 was reference number 000246692, along with the name and address of Howard Rosenbluth at 6 Bobwhite Drive, Norwalk, CT 06851-2219. This address corresponds to the address on the BCMS Associated Case Entry Worksheet and on the petition to the Division of Tax Appeals.

16. The affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center, attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

17. Here, the postal employee affixed a postmark date of April 13, 2012 to each page of the five-page CMR. The postal employee also wrote his or her initials on each page of the CMR and circled the number "53" next to the printed statement "TOTAL PIECES AND AMOUNTS" on page five of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR, indicating that 53 pieces of mail were actually received.

18. Mr. Peltier 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 was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

19. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on April 13, 2012 an employee of the Mail Processing Center delivered pieces of certified mail addressed to petitioner, in Norwalk, Connecticut, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on April 13, 2012 for the records of BCMS. He asserted that the procedures described in his affidavit were 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 pieces of certified mail to petitioner on April 13, 2012.

20. In support of its position that the petition was timely filed, RWV presented the affirmation of Gerard Terry, Esq. To the extent that it deals with the timeliness issue, Mr. Terry states that he was retained by RWV and Mr. Rosenbloom after the issuance of the conciliation order and that a petition was timely filed with the Division of Tax Appeals. According to Mr. Terry, he placed a petition, that was applicable to RWV and Howard Rosenbluth, in a United States Postal Service mailbox on or about July 6, 2012. In the second half of 2012, Mr. Terry experienced health-related issues and in December 2012 and again in January 2013, he was hospitalized for extended periods due to a serious medical condition that required him to incur a lengthy suspension of his practice of law.

21. In or about May 2013, Mr. Terry learned that the Division of Tax Appeals was unable to locate a copy of the petition. Thereafter, he conducted a search of his records for proof that the initial petition had been filed. However, since his office had been flooded on two separate occasions, documents were damaged or destroyed including the file in this matter. According to Mr. Terry, on or about August 31, 2013, he filed a supplemental petition with the Division of Tax Appeals.

SUMMARY OF PETITIONER'S POSITION

22. Mr. Rosenbluth states that he was in discussions with officials of the Division of Taxation and that the talks were discontinued when the Division of Tax Appeals was unable to locate the petition. He also asks why anyone would go to such great lengths and not file a petition. According to Mr. Rosenbluth, the affidavit of Bruce Peltier does not address an important aspect of this matter, which is the receipt of the petition.

23. Petitioner contends that after several audits, the Division assessed overlapping periods and was only recently able to provide an accurate accounting. He also posits that the Division

did not acknowledge the previous audits or the supervising auditor's instructions regarding what steps RWV should take. He further alleges that the Division ignored a determination of the Division of Tax Appeals.

24. Petitioner submits that a confusing situation was presented to both himself and the Division. According to petitioner, it was only after the Division's current representative became involved that the Division was able to provide updated amounts for the period that is open. Petitioner then notes that with all of the problems experienced, all he is asking for is a day in court. In the alternative, petitioner requests that the ruling on this matter be stayed until a related audit is adjudicated.

25. Petitioner's remaining documents pertain to the merits of his petition, which is based, in part, upon the doctrine of estoppel and, in part, on the premise that the fees paid by patrons for the use of private rooms are not subject to sales tax. Petitioner also contends that the estimates of the amount of sales tax due are erroneous and that penalties should not have been assessed.

CONCLUSIONS OF LAW

A. There is a 90-day statutory limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[c]; 4000.5[e]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(1), the conciliation order and underlying assessment in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, it appeared to the Division of Tax Appeals that petitions were filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law §

2006(5) and 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 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.

C. 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]).

D. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [1960]).

E. Where the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact

and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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). That is, 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 there must be 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).

F. It is recognized that a copy of the notice of determination is not required to be included with the petition when a conciliation conference has been held and the order of the conciliation conferee has been included with the petition (20 NYCRR 3000.3[b][8]; *see Matter of Novar TV & Air Conditioner Sales & Serv.*). Nevertheless, the failure to include a copy of the notice, that is the subject of the petition, makes resolution of the timeliness issue impossible. First, the failure to include the notice of determination and the accompanying mail cover sheet precludes the opportunity to view how the notice was addressed. In his affidavit in support of the notice of intent to dismiss, the Office of Counsel representative stated that the conciliation order was mailed to petitioner at his “address of record.” A Bureau of Conciliation and Mediation Services Associated Assessment Case Entry Worksheet was apparently offered in support of this statement. However, the difficulty presented by counsel’s assertion and the worksheet is that Tax Law § 1138(a)(1) requires that a “notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax *at his last known address* in or out of this state” (emphasis supplied). Similarly, Tax Law § 1147(a)(1) provides that “[a]ny notice authorized or required under the provisions of this article may be

given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, *then to such address as may be obtainable*" (emphasis supplied).¹ On the papers submitted, it is impossible to conclude whether the "address of record" referred to by the Division meets the requirement of "last known address" in Tax Law § 1138(a)(1) or "such address as may be obtainable" in Tax Law § 1147(a)(1) (*see generally Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012). Absent such a showing, it cannot be concluded that there has been a proper mailing. Since the issue presented concerns the jurisdiction of the Division of Tax Appeals to adjudicate this matter and such jurisdiction may not be waived (*see Strina v. Troiano*, 119 AD2d 566 [2d Dept 1986]), the appropriate course is to withdraw the notices of intent without prejudice to a proper motion to dismiss under section 3000.9(a) of the Rules of Practice and Procedure.

G. The notices of intent to dismiss petition, dated April 4, 2014, are withdrawn without prejudice to a motion to dismiss. The Division's answer will be due within 75 days of the date of this order.

DATED: Albany, New York
March 26, 2015

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

¹ Satisfaction of this section appears to require a preliminary showing that a return was not filed and an application was not made.