

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TE YU LEE	:	ORDER
	:	DTA NO. 827530
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period December 1, 2011 through May 31, 2013.	:	

Petitioner, Te Yu Lee, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2011 through May 31, 2013.¹

On May 4, 2016, 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. By a letter dated May 17, 2016, the date by which the parties could file responses to the Notice of Intent to Dismiss Petition was extended to July 18, 2016, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). On June 2, 2016, petitioner, appearing by Jamie Lee, submitted a letter and attached documents in response to the Notice of Intent to Dismiss Petition. On July 15, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), submitted affidavits and other documents in support of dismissal. After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative Law Judge, renders

¹ Assessments challenged by the subject petition included assessment numbers L-041453926 and L-041313884, which have been petitioned previously and are currently pending before the Division of Tax Appeals under DTA No. 827519.

the following order.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Te Yu Lee, at a Woodside, New York, address, four notices of estimated determination, each dated September 10, 2013, assessing sales and use taxes due as follows:

a. Notice number L-040079816-8, assessing tax in the amount of \$750.00, plus penalty and interest, for the period March 1, 2013 through May 31, 2013;

b. Notice number L-040079817-7, assessing tax in the amount of \$18,257.52, plus penalty and interest, for the period December 1, 2012 through February 28, 2013;

c. Notice number L-040079818-6, assessing tax in the amount of \$18,257.52, plus penalty and interest, for the period September 1, 2012 through November 30, 2012; and

d. Notice number L-040079819-5, assessing tax in the amount of \$18,257.52, plus penalty and interest, for the period June 1, 2012 through August 31, 2012.

Each of these notices of estimated determination was issued because petitioner was determined to be an officer or responsible person of 888 Orient Express Inc. (888 Orient), and such corporation had failed to file a required return.

2. The Division also issued to petitioner, as an officer or responsible person of 888 Orient, a Notice of Determination, number L-040079820-5, dated September 10, 2013 and assessing sales and use taxes due in the amount of \$18,257.52, plus penalty and interest, for the period December 1, 2011 through February 29, 2012. This Notice of Determination was addressed to petitioner at the same Woodside, New York, address.

3. On October 2, 2015, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request (Order) to petitioner. Bearing CMS No. 267901 and referencing Notice number L-040079820, the Order determined that petitioner's protest was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on September 10, 2013, but the request was not mailed until August 23, 2014, or in excess of 90 days, the request is late filed.”

4. On March 4, 2016, the Division of Tax Appeals received a petition seeking review of the four notices of estimated determination (assessment numbers L-040079816, L-040079817, L-04007918 and L-040079819) and the Order (CMS No. 267901) issued in this matter. The envelope in which the petition was sent by United States Postal Service (USPS) Priority Mail bears a USPS stamp dated March 2, 2016.

5. On May 4, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a Notice of Intent to Dismiss Petition, which stated, in pertinent part, as follows:

“Pursuant to § 2006.4 of the Tax Law, a petition must be filed within ninety (90) days from the date a statutory notice is issued. Similarly, according to Tax Law § 170(3-a)(e), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a BCMS conciliation order.

In this case, the notices of estimated determination and the conciliation order under protest, L-040079816-8, L-040079817-7, L-040079818-6, L-040079819-5, and CMS No. 267901, were issued to petitioner on September 10, 2013 and October 2, 2015, respectively. However, the petition was not filed with the Division of Tax Appeals until March 2, 2016, or nine hundred and four (904) and one hundred and fifty-two (152) days later. As such, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.”

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division

submitted the following: (i) an affidavit of Anita Luckina, Esq., the Division's representative, dated July 14, 2016; (ii) a copy of the petition and attachments; (iii) the affidavit, dated July 6, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated September 10, 2013; (v) the affidavit, dated July 7, 2016, of Bruce Peltier, Stores and Operations Supervisor in the Division's mail room; (vi) a copy of a Request for Conciliation Conference received by BCMS on September 15, 2015; (vii) a copy of the Conciliation Order Dismissing Request (CMS No. 267901); (viii) a copy of petitioner's New York State Resident Income Tax Return for the year 2012, which was electronically filed on or about April 6, 2013; and (ix) copies of the Division's Case and Resource Tracking System (CARTS) Assessments Receivable - Transaction Inquiry Selection screenshots for assessment numbers L-040079816, L-040079817, L-040079818 and L-040079819 and a Consolidated Statement of Tax Liabilities (Consolidated Statement), dated July 13, 2016, issued to petitioner.

7. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and has accessed and used CARTS, the electronic system that the Division uses to issue and adjust assessments, record payments, and generate taxpayer notices of determination pursuant to Articles 28 and 29 of the Tax Law. As a result, Ms. Nagengast is familiar with CARTS and the Division's past and present procedures as they relate to statutory notices. Attachments to Ms. Nagengast's affidavit include among other documents, a CMR dated September 10, 2013.

8. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently stores and operations supervisor in the Division's mail room, describes the mail room's general operations and procedures. Mr. Peltier, in his affidavit, also attested that the standard procedures were followed with respect to the delivery to the USPS of pieces of certified mail on September 10, 2013.

9. The Division submitted no proof of mailing with respect to the subject Conciliation Order Dismissing Request.

10. In her affidavit, Ms. Luckina states that the Division cancelled assessment numbers L-040079816, L-040079817, L-040079818 and L-040079819. Attachment 7 to Ms. Luckina's affidavit consists of copies of the Division's CARTS Assessments Receivable-Transaction Inquiry Selection screenshots for assessment numbers L-040079816, L-040079817, L-040079818 and L-040079819 and a Consolidated Statement of Tax Liabilities (Consolidated Statement), dated July 13, 2016, issued to petitioner. The CARTS screenshots indicate under the transaction type that the assessments were adjusted and the transaction reason/amount shows "auto assoc lib canc," which Ms. Luckina states "means the assessments were cancelled." Review of the Consolidated Statement indicates that there is no outstanding balance on assessment numbers L-040079816, L-040079817, L-040079818 and L-040079819 as of July 13, 2016.

11. In response to the Notice of Intent to Dismiss Petition, petitioner filed a letter and attached documents that addressed the merits of the petition, not its timeliness.

CONCLUSIONS OF LAW

A. The petition filed in this matter seeks review of four notices of estimated determination and a Conciliation Order Dismissing Request. There is a 90-day statutory time limit for filing a

petition for a hearing with the Division of Tax Appeals following the issuance of a notice of determination (Tax Law § 1138[a][1]). Similarly, there is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division lacks jurisdiction to consider the merits of a petition filed beyond such 90-day limits (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day periods. 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. With respect to the four notices of estimated determination (assessment numbers L-040079816, L-040079817, L-040079818 and L-040079819), the Division submitted copies of its CARTS Assessments Receivable-Transaction Inquiry Selection screenshots for those assessments that indicate all four assessments were cancelled. In addition, the Division submitted a Consolidated Statement of Tax Liabilities, dated July 13, 2016, issued to petitioner, which indicates that there is no outstanding balance on the foregoing assessment numbers. Since the four notices of estimated determination have been cancelled, there is nothing to review (Tax Law § 2006[4]). As such, the Notice of Intent to Dismiss Petition is sustained as to the foregoing four notices of estimated determination and the petition is dismissed with respect thereto.

C. Turning to the timeliness of petitioner's protest against Conciliation Order Dismissing Request (CMS No. 267901), the initial inquiry focuses on the mailing of the conciliation order because a properly mailed conciliation order 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 (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

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 conciliation orders by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in this particular instance (*Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

E. In the present matter, the Nagengast and Peltier affidavits do not address the procedures for issuance of conciliation orders including the subject Conciliation Order Dismissing Request. Additionally, the Division did not produce any proof of mailing of the subject Conciliation Order Dismissing Request. Since no evidence was presented to establish proper mailing of the subject Order, the Division has not met its burden to show that the petition was untimely filed with respect thereto. Consequently, the Notice of Intent to Dismiss Petition is properly rescinded as to the Order. The Division of Taxation shall have 75 days from the date of this order to file its answer in this matter with respect to the Conciliation Order Dismissing Request.

F. The Notice of Intent to Dismiss Petition is sustained, and the petition of Te Yu Lee is dismissed to the extent indicated in Conclusion of Law B; the Notice of Intent to Dismiss

Petition is rescinded to the extent indicated in Conclusion of Law E, and the Division of Taxation shall have 75 days from the date of this order to file its answer to the petition in this matter in accordance with the foregoing.

DATED: Albany, New York
October 13, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE