

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAYMOND MELLEADY : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 825716
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2008 through February 28, 2011. :

Petitioner, Raymond Melleady, 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 June 1, 2008 through February 28, 2011.

On July 25, 2013, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). In a letter dated August 23, 2013, the Division of Taxation requested an additional 45 days to respond to the notice and, in a letter dated September 4, 2013, the Division of Taxation was given until on or before October 10, 2013 to respond to the notice. On August 29, 2013, the Division of Tax Appeals received correspondence from petitioner in opposition to the dismissal. On September 26, 2013, the Division of Taxation, by Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), submitted an affidavit and documents in support of dismissal. On December 16, 2013, parties were advised that official notice would be taken of certain facts discerned from a file in the possession of the Division of Tax Appeals. The parties were given until December 27, 2013 to dispute those facts or challenge their materiality.

After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. On May 15, 2013, petitioner, Raymond Melleady, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a Notice of Determination dated June 12, 2012 and bearing assessment identification number L-038083878. The notice stated that the Division's records indicated that petitioner was a responsible officer or responsible person of Melleady, LLC. It also stated in bold type that petitioner "must file a Request for Conciliation Conference or a Petition For A Tax Hearing by 09/10/12."

2. On July 25, 2013, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent indicates that the relevant Notice of Determination was issued on June 12, 2012 but that the petition was not filed until May 15, 2013, or 342 days later.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents, the following: (i) an affidavit, dated September 23, 2013, of Daniel A. Maney, manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 12, 2012; (iii) an affidavit, dated September 24, 2013 of Bruce Peltier, a mail and supply supervisor in the Division's mail room; and (iv) a copy of petitioner's 2011 New

York State Resident Income Tax Return. Petitioner's address as reported on this return is the same as that listed on the subject Notice of Determination.

4. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 page of the CMR in the present case to the actual mailing date of "6/12/12." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

5. 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 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."

6. The CMR relevant to the present matter consists of 15 pages and lists 155 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to

preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated June 12, 2012 to each page of the CMR and also wrote his or her initials on the last page thereof.

7. Page 12 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 1137 2352 and assessment number L-038083878, was mailed to petitioner at the Clifton Park, New York, address listed thereon. The corresponding mailing cover sheet, submitted with the Division's motion papers, bears this certified control number and petitioner's name and address as noted. There is no indication that petitioner has listed a representative.

8. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. A clerk then compares the first and last pieces of certified mail shown on the CMR with the information shown on the CMR and performs a review of 30 or fewer pieces of certified mail by comparing the envelopes with the information on the CMR. Staff members then weigh, seal and place postage on each envelope. Thereafter, a staff member 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. Here, as noted, each page of the CMR contains such postmarks and the last page contains such initials. 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 last page of the CMR. In this instance, the USPS complied with this request by circling “155” on the last page of the CMR.

9. According to both the Maney and Peltier affidavits, a copy of the subject Notice of Determination was mailed to petitioner on June 12, 2012 as claimed.

10. In opposition to the dismissal of the petition, petitioner states that he and his wife formerly owned the Philly Pretzel Factory (the store) in Clifton Park, New York. The business was subject to an audit that concluded that the store should have been collecting tax on its sales of soft pretzels. Petitioner submits that this conclusion is counter to the advice he received at the opening of the store and counter to how other bagel, donut or similar bakery establishments are taxed. It is noted that this matter, as well as the matters involving the store and his wife (Shannon Melleady), all arise from the same audit findings. Petitioner states that if the hearing conclusions in the matter involving Shannon Melleady also apply to his case and the case involving the store, he will not object to the dismissal of the petition. However, if this is not the case, he requests that each of the cases be heard. Petitioner contends that the Notice of Determination did not address the need to challenge both the audit of the store and the derivative notices. Petitioner also submits that there was an inconsistency insofar as the conciliation conferee did not mention the need to challenge each notice and petitioner was advised at one juncture that his case was pending a hearing.

11. In accordance with State Administrative Procedure Act § 306(4), official notice is taken of the file of the Division of Tax Appeals in the *Matter of Melleady, LLC, Philly Soft Pretzel Factory* (DTA# 825675). The file shows that the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to the business because the Notice of Determination was issued on June 7, 2012 but the petition was not filed until May 15, 2013 or 342 days later.

Further proceedings on the petition have not occurred because the Division of Tax Appeals was notified that the business chose to proceed in bankruptcy.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a Notice of Determination (Tax Law § 1138[a][1]). 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).

B. Where the timeliness of a petition is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

C. In this case, the CMR, along with the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination, establish 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 Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus established that the Notice of Determination at issue was mailed and addressed to petitioner on June 12, 2012.

D. The petition in this matter was filed well beyond the 90-day time limit. It is well established that the deadlines for filing petitions are strictly enforced (*see e.g. Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996 [petition filed *one* day late dismissed]). Furthermore, the Division of Tax Appeals has no authority to waive the filing period in particular cases.

E. It is recognized that when a determination that tax is due from a responsible officer arises out of a determination that tax is due from a corporation and the corporation filed a timely petition with the Division of Tax Appeals, a separate petition for a hearing by a person under a duty to act is not required (Tax Law § 1138[a][3][B]). Here, a petition for a hearing was filed by the corporation. However, the filing was untimely and, as a result, it failed to create any hearing rights on behalf of the corporation. It follows that the late filing by the corporation cannot confer hearing rights upon the responsible officers.

Petitioner's reliance upon a petition filed by his wife is also unavailing. There is no provision in the Tax Law which permits the filing of a petition by one responsible officer to confer hearing rights upon another responsible officer. In addition, the Notice of Determination clearly advised petitioner of the need to file a request for a conciliation conference or a petition for a hearing by a certain date. Petitioner's remaining arguments pertain to the merits of the proceeding. However, since the petition was untimely filed, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).¹

¹ It is recognized that the petition contained a checked box stating that a conciliation conference was requested and that a conciliation order was issued or a conciliation conference was discontinued on March 5, 2013. Since the petition did not include a copy of the conciliation order, this allegation has been disregarded.

F. The petition of Raymond Melleady is dismissed.

DATED: Albany, New York
January 16, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE