

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
1225 DELI GROCERY CORPORATION : ORDER
for Revision of a Determination or for Refund of : DTA NO. 826127
Cigarette Tax under Article 20 of the Tax Law for the :
Tax Period Ended March 5, 2006. :

Petitioner, 1225 Deli Grocery Corporation, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended March 5, 2006.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osa Iyinbo, Esq., of counsel), brought a motion on August 29, 2014, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

Accompanying the motion was the affidavit of Osa Iyinbo, Esq., dated August 27, 2014, and annexed exhibits. Petitioner did not file a response to the Division of Taxation's motion.

Accordingly, the 90-day period for the issuance of this determination began on September 29, 2014, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, 1225 Deli Grocery Corporation, at its Bronx, New York, address, a Notice of Determination (L-027432495-9) dated July 20, 2006, which assessed a penalty pursuant to Article 20 of the Tax Law, for the period ended March 5, 2006, in the amount of \$2,000.00, for its failure to possess a valid New York State certificate of registration for retail sales of cigarette and tobacco products.
2. A petition, filed with the Division of Tax Appeals on February 20, 2014, and received on February 24, 2014, protested two notices, L027432495 and L026619582.¹
3. To show proof of proper mailing of the notice dated July 20, 2006, the Division provided the following: (i) an affidavit, dated August 26, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and the Director of the Management Analysis and Project Services Bureau (MAPS) of the Division, who is familiar with the Case and Resource Tracking System (CARTS) and procedures for generating statutory notices; (ii) an affidavit, dated August 27, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 20, 2006; and (iv) a copy of petitioner's Notice of Non-Receipt of Sales and Use Tax Return, Form ST-565, for the period June 1, 2003 through August 31, 2003, signed on November 25, 2003, which was the last return filed by petitioner

¹ Although both notices of determination are described in the Division's answer, since the motion in this matter only addressed Assessment No. L027432495, only that assessment will be the subject of this motion.

prior to the issuance of the notice, bearing the same Bronx address as that appearing on the Notice of Determination.

4. The affidavit of Mary Ellen Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing and 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."

Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing, allowing for a manual review of the notices prior to mailing. Following the Division's general practice, this date was manually changed on the last page of the CMR in the present case to reflect the actual mailing date of "7/20/06."

5. According to the Nagengast affidavit, the CMR in the present matter consists of 28 pages and lists 303 certified control numbers along with corresponding assessment numbers, names and addresses. In addition, Ms. Nagengast stated 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 her office unless it is requested that the pages be disconnected. The page numbers of the CMR run consecutively, starting with "PAGE 1," and are noted in the upper right corner of each page.

Ms. Nagengast notes that the portion 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. She also stated that the USPS representative affixed his or her initials or signature and a U.S. postmark to each page of the CMR, wrote "303" on page 28 and initialed the same page.

6. Page 9 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1333 3139 and assessment ID number L 027432495 was mailed to petitioner at its Bronx, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit "B" of attachment 3, bears the same certified control number and petitioner's name and address as noted.

7. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's mail processing unit, describes the unit's general operations and procedures. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that 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. Staff members then weigh, seal and place postage on each envelope. A mail processing clerk then performs a random review of thirty or less pieces of certified mail listed on the CMR by checking those envelopes against the information on the CMR. Once the review is completed, 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 also places his or her signature on the CMR, indicating receipt 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. In this case, all pages of the CMR bear a postmark of July 20, 2006, with the postmark bearing a Colonie Center USPS location in each case. On page 28, corresponding to "Total Pieces and Amounts," is the

preprinted number 303 and a handwritten “303” along with the dated postmark. There are also initials next to the handwritten number 303, though not legible, which are presumably the initials of the postal employee handling this mailing.

8. According to the Nagengast affidavit, the affixation of the postmarks and the Postal Service employee’s initials indicate that all 303 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on July 20, 2006.

9. According to both the Nagengast and Peltier affidavits, a copy of the subject notice was mailed to petitioner on July 20, 2006.

10. Petitioner’s Bronx, New York, address on the CMR and Mailing Cover Sheet matches the address listed on its Notice of Non-Receipt of Sales and Use Tax Return (Form ST-565) for the period June 1, 2003 through August 31, 2003. Signed on November 25, 2003, this is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

CONCLUSIONS OF LAW

A. The Division has brought a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). The first issue to resolve is whether the Division of Tax Appeals has jurisdiction over the petition because if the petition was untimely filed it must be dismissed for lack of jurisdiction. Accordingly, a motion to dismiss under section 3000.9(a)(1)(ii) of the Rules is the proper vehicle to consider the timeliness of the petition for a hearing. This determination will address the instant motion as such.

B. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Article 20. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference

with BCMS, within 90 days of the mailing of the Notice of Determination (*see* Tax Law §§ 478, 170[3-a][b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). It is well established that the 90-day statutory time 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 is without 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).

C. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (*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 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.*).

D. Here, the Nagengast and Peltier affidavits establish the Division's standard mailing procedure. As to whether such procedure was followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, the CMR

contains postmarks identifying the Postal Service location of Colonie Center, the zip code of 12205, and the July 20, 2006 mailing date on each of its 28 pages. Page 9 of the CMR establishes that a Notice of Determination with certified control number 7104 1002 9730 1333 3139 and assessment ID number L 027432495 was mailed to petitioner at its Bronx, New York, address listed on the subject notice. The corresponding mailing cover sheet bears the same certified control number and petitioner's name and address as previously described. Accordingly, the Division has presented sufficient documentary proof, i.e., the respective CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on the date claimed.

E. 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. Tax Law § 1147(a)(1), contained within Article 28, provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to the provisions of [Article 28] 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." The mailing of such notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed."*(Id.)* The last return filed by petitioner was that noted in Finding of Fact 10, filed in 2003, and bore the same address as the Notice of Determination. Thus, the notice is presumed received by petitioner at its Bronx, New York, address.

F. Pursuant to Tax Law § 478, petitioner had 90 days to file a petition for a hearing or a conference with BCMS (Tax Law § 170 [3-a][a]). The documents show that the notice was mailed on July 20, 2006, but petitioner's petition was not mailed until February 20, 2014, many years beyond the

90-day period. Consequently, the Division of Tax Appeals has no jurisdiction to consider the merits of petitioner's protest.

G. The Division's motion to dismiss the petition as it specifically relates to Assessment L-027432495-9, is granted. A hearing will be scheduled before the Division of Tax Appeals as to Assessment L-026619582-6 in due course.

DATED: Albany, New York
December 18, 2014

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE