

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GLEN WAKEMAN	:	ORDER
for Revision of a Determination or for Refund	:	DTA NO. 827178
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 2012 through	:	
February 28, 2014.	:	

Petitioner, Glen Wakeman, 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, 2012 through February 28, 2014.

On September 22, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On November 24, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Jennifer Hink-Brennan, Esq., of counsel) submitted affidavits and accompanying documents in support of the proposed dismissal of the petition. On December 2, 2015, petitioner, appearing pro se, submitted a letter and supporting documents in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced December 7, 2015.¹ After due consideration of the documents and arguments submitted, and all pleadings filed, Dennis M. Galliher, Administrative Law Judge, renders the following order.

¹ By a letter dated October 1, 2015, the due date for comments in response to the Notice of Intent to Dismiss was extended until December 7, 2015.

ISSUE

Whether petitioner filed a timely petition for a hearing before the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. On September 1, 2015, petitioner, Glen Wakeman, filed a petition with the Division of Tax Appeals seeking an administrative hearing to challenge a Notice of Determination dated April 17, 2015, bearing Assessment ID number L-042726849, and assessing sales tax for the period spanning March 1, 2012 through February 28, 2014 in the amount of \$99,117.20, plus interest. The notice was issued to petitioner upon the position that he was a person under a duty to collect, account for and remit sales and use taxes on behalf of Doral Financial Corporation for the period specified in the notice.

2. On September 22, 2015, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition (Notice of Intent), advising the parties that the Notice of Determination appeared to have been issued on April 17, 2015, the petition was not filed thereafter until September 1, 2015, or some 147 days later, and therefore was untimely and subject to dismissal. The parties were afforded 30 days within which to submit comments on the proposed dismissal of the petition. Upon request of the Division of Taxation (Division), the time within which the parties could respond to the Notice of Intent was extended to December 7, 2015.

3. To show proof of proper mailing of the Notice of Determination on April 17, 2015, the Division provided the following: (i) an affidavit, dated November 24, 2015 of Jennifer Hink-Brennan, Esq.; (ii) an affidavit, dated November 13, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services

Bureau (MAPS); (iii) an affidavit, dated November 17, 2014, of Bruce Peltier, Principal Mail and Supply Clerk and a supervisor in the Division's mail room; (iv) the 15 page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated April 17, 2015 together with its associated mailing cover sheet; and (vi) a copy of Form DTF-95 (Business Tax Account Update) filed on July 29, 2012.

4. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency, notices of estimated determination, notices of determination such as the Notice of Determination at issue herein, and other such notices during the period here in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one page "Mailing Cover Sheet" generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

5. The CARTS generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the first columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading entitled

“Reference No.” and the names and addresses of the taxpayers are listed under the third columnar heading entitled “Name of Addressee, Street and PO Address.” Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices are forwarded to the Division’s mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

6. As noted, each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division’s mail room. This CMR listing specifically sets forth, at the upper left corner of the CMR, the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division’s general practice, this preprinted date, identified as the “run,” is to be manually changed by personnel in the Division’s mail room to reflect that the preprinted date on the CMR conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the United States Postal Service (USPS) (i.e., the mailing date).

7. Under the Division’s standard mailing procedures, statutory notices that are ready for mailing are received by the Division’s mail room in an area designated for “Outgoing Certified Mail.” 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, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then 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 of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is delivered back to the Division for storage and retention in the regular course of its business.

8. The CMR for the batch of notices to be issued on April 17, 2015, including that addressed to petitioner herein, consists of 15 cut sheet pages. Each of these pages includes in its upper left corner the preprinted year/day/time "run" listing of "20151001700" (*see* Finding of Fact 6). Appearing in the upper right corner of the CMR on pages 1 and 15 is the handwritten date "4/17/15," indicating the manually inserted date of actual mailing (*see* Finding of Fact 6). Each of the foregoing 15 pages includes a USPS postmark, dated April 17, 2015 and zip code "12205." Each page of the CMR includes 11 entries for pieces of mail, except for page 15 (the

final page) which includes 6 entries for pieces of mail, thus resulting in 160 entries for pieces of mail in total.

9. In this instance, certified control number 7104 1002 9730 0452 6311 was assigned to the notice to be mailed to petitioner at PO Box 71528, San Juan, Puerto Rico 00936-8628. The reference number is the assessment number L-042726849. This same information appears at Page 1 of the CMR to indicate that a notice of determination bearing certified control number 7104 1002 9730 0452 6311 and reference number L-042726849 was to be mailed to petitioner at “PO Box 71528, San Juan, Puerto Rico 00936-8628”²

10. Appearing below the six entries on Page 15 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 160, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office,” to the right of which the number “160” is handwritten and circled. Appearing at the lower right area of page 15 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas.” The area immediately to the right of this stamped instruction reflects the aforementioned USPS postmark as well as initials presumably affixed by the postal clerk.

11. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS bureau, and Bruce Peltier, an

² The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

employee and Supervisor in the Division's mail room (*see* Finding of Fact 3). Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

12. The record includes a copy of the Notice of Determination allegedly mailed by certified mail to petitioner, Glen Wakeman, on April 17, 2015, as described. The record also includes form DTF-95 (Business Tax Account Update), filed on behalf of Doral Bank, petitioner's former employer.³ This form is dated September 9, 2011, is stamped as received by the Division of July 27, 2012, lists petitioner Glen Wakeman as Doral Bank's "CEO/President," and specifies his "home address" as PO Box 71528, San Juan, PR 00936. The Division avers that this was the last application filed prior to the issuance of the subject notice, and that it showed petitioner's last known (home) address of record.

13. The petition and its accompanying cover letter list petitioner's address as "330 Dolias Ct., Coral Gables, FL., 33143." Petitioner maintains the notice was improperly issued because it was sent to the address of his former employer, and that his home address is the Coral Gables, Florida, address noted herein. Petitioner did not receive the notice until August 18, 2015, when the same was provided to him by another former employee of Doral Bank.

³ Form DTF-95 was filed to provide updated information in connection with the merger, effective October 1, 2011 of Doral Bank FSB into Doral Bank.

CONCLUSIONS OF LAW

A. Inasmuch as a determination issued following a Notice of Intent under 20 NYCRR 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review in either instance. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2013), the Tribunal held that the standard to employ for reviewing a Notice of Intent is the same as that used for reviewing a motion for summary determination under 20 NYCRR 3000.9(b).

B. A motion for summary determination shall 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. 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 where the notice is addressed to a person within the United States (Tax Law § 1138[a][1]). Where a notice of determination is addressed to a person outside of the United States, the period within which a protest may be filed is 150 days rather than 90 days (Tax Law § 1138[a][1]). Alternatively, a taxpayer may protest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 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 Voelker*, Tax Appeals Tribunal, August 31, 2006; *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 substantive 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). In this case, there is no claim or evidence that petitioner filed a request for a conciliation conference with BCMS. Thus, the question presented is whether the petition herein was filed within the applicable statutory time period following the issuance of the Notice of Determination.

D. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, by certified or registered mail, to petitioner's last known address (Tax Law § 1138[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). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory 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*).

E. When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or

registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating proper mailing in the first instance rests with the Division (*id*; *see also Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices (*see Matter of Victory Bagel Time*). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the notice of determination at issue was mailed by certified mail addressed to petitioner on April 17, 2015. That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to the notice issued to petitioner. Petitioner's name and address, as well as the numerical information on the notice, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of April 17, 2015 and the initials of the USPS employee. There are 160 certified mail control numbers listed on the CMR for April 17, 2015, and the USPS employee who initialed the CMR indicated, by writing and circling the number "160" near such initials, that 160 items were received for mailing. The CMR has thus been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. Petitioner asserts that the Division's use of the San Juan, Puerto Rico, address in issuing the notice was in error. This assertion is rejected. The Division used the San Juan

address for petitioner since that was the address set forth for petitioner on the most recent filing the Division received, i.e., Form DTF-95, prior to issuance of the notice. It is recognized that where the Division seeks to impose liability for the tax obligations of a business upon individuals allegedly responsible therefor, it may not simply utilize the address of the business in issuing notices assessing liability against such individuals (*see Matter of Nelloquet Rest.*, Tax Appeals Tribunal, March 14, 1996 [wherein the Division knew the taxpayer's home address but elected to mail the notice to the business address]). Here, the Division had substantial justification for mailing the Notice to the San Juan, Puerto Rico, address. This is not a case where the Division had knowledge of petitioner's personal address (in Coral Gables, Florida), but ignored it. Rather, the only return, application or documentation provided to the Division that indicated petitioner's mailing address was Form DTF-95, with its specific listing of San Juan, Puerto Rico, thereon as petitioner's "home" address. The record contains no evidence that petitioner ever advised the Division of his personal address in Coral Gables, Florida, at any time prior to these proceedings. In fact, there is no indication that petitioner was obliged to make, or in fact made, any personal or other tax filings such as tax returns or applications, or filed any other documents with the Division at any prior point in time, from which the Division might have been aware of an address for petitioner other than that specified on Form DTF-95. Thus, the facts distinguish this case from the general rule set forth in *Nelloquet* (*see Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012). Therefore, under the circumstances, the Division appropriately used the San Juan, Puerto Rico address in issuing the Notice of Determination to petitioner.⁴

⁴ Even if the Division's use of the San Juan address was in error, as alleged by petitioner, the result herein would be the same. That is, the period for filing a protest would have been tolled until such time as petitioner received actual notice of the assessment, whereupon the time within which to file a protest would have commenced, unless the assessment itself was precluded by operation of the period of limitations thereon (*see Matter of Agosto v.*

H. In sum, the notice was properly mailed, as above, when it was delivered, properly addressed, into the custody of the USPS on April 17, 2015, and it is this date that triggered the statutory period within which a protest had to have been filed. Here, the notice was addressed to petitioner in San Juan, Puerto Rico. Where a notice of determination is addressed to a taxpayer outside of the United States, the period within which a protest may be filed is 150 days, as opposed to the more typical 90 days (Tax Law § 1138[a][1]). Petitioner's protest was filed when the petition was sent to the Division of Tax Appeals by USPS mail, postmarked on September 1, 2015, or 147 days after the issuance of the statutory notice. Since the period within which a timely protest had to have been filed in this instance was 150 days, the petition was thus timely filed.⁵

Tax Commission of the State of New York, 68 NY2d 891 [1986], *revg* 118 AD2d 894 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990)). If the Coral Gables, Florida, address was the “proper” address, then the 90-day protest period for notices addressed to persons within the United States would have applied (Tax Law § 1138[a][1]). In this case, petitioner admittedly received actual notice of the assessment on August 18, 2015 (*see* Finding of Fact 13), and promptly filed what would have been a timely petition on September 1, 2015 (i.e., within 90 days after receiving such notice) (*see* Finding of Fact 1). Therefore, petitioner would be entitled to a hearing on the merits of his protest in any event.

⁵ The language of the 150-day protest period for sales and use tax purposes (Tax Law § 1138[a][1]) is identical to that applicable for income tax purposes (Tax Law § 681[b]), and also parallels the like-protest period provision for federal income tax purposes (*see* Internal Revenue Code § 6213[a]). Each of such provisions applies where a notice is *addressed to* a taxpayer outside of the United States. Internal Revenue Code § 7701(a)(1)(9) provides that “the term ‘United States’ when used in a geographical sense includes *only* the States and the District of Columbia (italics added)”. The relevant case law focuses on the term “addressed to,” and applies the same in the geographic sense (*see Looper v. Commissioner of Internal Revenue*, 73 T.C. 690 [1980], *citing* Federal Tax Coordinator 2d, T-3001 [RIA 1979] [“if (notice) is *addressed to* a taxpayer outside the U.S. and the District of Columbia, the period is 150 days instead of 90 days (italics added).”]). Hence, for purposes of the issuance of (as here) a notice of determination, Puerto Rico is considered an address outside of the United States, and the proper protest period is 150 days. By contrast, in contexts other than geographical, e.g., for purposes of naturalization, the term “State” more broadly includes the District of Columbia, Puerto Rico, Guam and the U.S. Virgin Islands (*see* 8 USC § 1101[a][36]).

G. The petition of Glen Wakeman was timely filed, the Notice of Intent to Dismiss Petition dated September 22, 2015 is hereby rescinded, and the Division's Office of Counsel shall have 75 days from the issuance of this Order within which to file its answer to the petition.

DATED: Albany, New York
February 25, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE