

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PET ARK DALE, INC.	:	ORDER
	:	DTA NO. 827342
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, 2012 through May 31, 2014.	:	

On November 16, 2015, petitioner, Pet Ark Dale, Inc., 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, 2012 through May 31, 2014.

On March 11, 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 grounds that the petitions did not appear to be timely with respect to the statutory notice being petitioned. By request of the Division of Taxation, the 30-day period to respond to the Notice of Intent to Dismiss Petition was extended to May 26, 2016. On May 10, 2016, the Division of Taxation by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel), submitted affidavits and accompanying documents in support of dismissal of the petition. On May 27, 2016, petitioner, appearing by Ahmed Abdelhalim, CPA, filed a letter in response. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 26, 2016. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. On November 16, 2015, the Division of Tax Appeals received a petition from petitioner, Pet Ark Dale, Inc., which protests a Notice of Determination issued to it. The envelope containing the petition bears a United States Postal Service (USPS) postmark of November 10, 2015. The petition alleges that a notice of determination was never received.

2. On March 11, 2016, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to the parties. The notice indicates that the Notice of Determination was issued on April 20, 2015, but that the petition was not filed until November 10, 2015, or 204 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: (i) an affidavit, dated April 14, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Non-Presort Manual Mail - Assessments Receivable" (CMR) postmarked April 20, 2015; and (iii) an affidavit, dated April 15, 2016, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division's mail room.

4. In order to prove that the Notice of Determination was sent to petitioner's last known address, the Division submitted a copy of petitioner's e-filed ST-100 for the sales tax quarter ended May 31, 2014, filed on June 17, 2014, which was the last document filed with the Division by petitioner prior to the issuance of the Notice of Determination. The address on said form

matches the address contained on the Notice of Determination and that listed for petitioner on the petition filed in this matter.¹

5. 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 is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and 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 is manually changed on the first and last pages of the CMR, in this case April 20, 2015. In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

6. 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 numbers are also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated

¹This sales tax return was submitted with the unnotarized affidavit of the Division's representative, Frank Nuara. Although the affidavit is not notarized, the sales tax return speaks for itself.

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 P.O. Address."

7. The April 20, 2015 CMR consists of 30 pages and lists 324 computer-printed certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 30, which contains 5 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers.

8. Page 7 of the CMR indicates that Notice of Determination, assigned certified control number 7104 1002 9730 0452 8612, and assessment number L-042732869 was mailed to petitioner at the Bronx, New York address listed thereon. The corresponding mailing cover sheet for the notice bears this certified control number and petitioner's name and address as noted.

9. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the mail room'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. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. The CMR has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." A staff member then delivers the envelopes and the CMR to one of the various USPS branches

located in the Albany, New York, area. In this case, the USPS employee initialed and affixed a USPS postmark dated April 20, 2015 to each page of the CMR. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. A review of the CMR indicates that the USPS employee complied with this request by handwriting the number “324” to indicate the number received.

10. According to the Peltier affidavit, a copy of the notice was mailed to petitioner on the date indicated as claimed.

11. The Notice of Determination indicates that petitioner’s then representative, Ashraf Hanno, was mailed a copy of the notice. The Division did not submit any proof that Mr. Hanno was, in fact, mailed a copy of the notice.

12. Petitioner’s letter in response alleges that petitioner’s representative was in negotiations with the auditor so the filing of a petition was put on hold. Petitioner requests that the Notice of Intent to Dismiss Petition be held in abeyance pending further negotiations.

CONCLUSIONS OF LAW

A. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing 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 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*).

B. In this case, the mailing cover sheet, cover letter, CMR and affidavits of Ms. Nagengast 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 and show that the procedure was followed in this instance. The CMR has 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). The mailing cover sheet bears petitioner’s name and a Bronx, New York, address that is identical to the address on the last sales tax return filed by petitioner prior to issuance of the notice and on the CMR, and shows the same certified control number as that listed on the CMR for petitioner’s entry. Petitioner’s name and address, as well as the numerical information on the face of the notice, appear on the CMR, which bears USPS postmarks dated April 20, 2015. There are 324 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number “324” on the line stating “Total Pieces Received at Post Office,” that the post office received 324 items for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner by certified mail on April 20, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

C. Petitioner has offered no evidence to counter the Division’s evidence that the Notice of Determination was issued on April 20, 2015. Mere denial of receipt is insufficient to rebut the presumption that a properly mailed notice of determination was delivered or offered for delivery in the normal course of the mail (*Matter of New York City Billionaires Construction Corp.*, Tax

Appeals Tribunal, October 20, 2011; *see Matter of T. J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]).

D. Although the Notice of Determination indicates that a copy was being mailed to petitioner's former representative, the Division's affidavits neglected to address this issue. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988 *citing Matter of Bianca v. Frank*, 43 NY2d 168 [1977]). Since the Division did not submit proof with respect to service on the representative, dismissal is not appropriate at this juncture.

E. The Notice of Intent to Dismiss Petition is rescinded without prejudice to the filing of any future motion as to timeliness of the petition; the Division is directed to serve its answer to the petition within 75 days of the date of this order.

DATED: Albany, New York
August 18, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE