

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RAMON A. CASTILLO : ORDER
for Revision of a Determination or for Refund of : DTA NO. 827744
Cigarette Tax under Article 20 of the Tax Law for the :
Period Ended October 30, 2015. :

Petitioner, Ramon A. Castillo, 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 October 30, 2015.

On October 27, 2016, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were granted an extension of time to February 27, 2017 to respond to the proposed dismissal. On January 13, 2017, the Division of Taxation, by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, requested and was granted an additional extension of time to respond by March 22, 2017.¹ Petitioner did not submit a response within the time allowed. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on March 22, 2017. After due consideration of the documents submitted, Barbara J. Russo, Administrative Law Judge, renders the following order.

¹ The petition lists “Zuleyka Rivera” on the line available for entry of petitioner’s representative. A valid power of attorney appointing Ms. Rivera was not included with the petition.

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 July 2, 2016, petitioner, Ramon A. Castillo, filed a petition with the Division of Tax Appeals challenging a cigarette tax liability in the amount of \$12,939.75 from the year 2015. The petition did not list a number for the challenged notice nor did it state any errors or facts in support.

2. The Division of Taxation (Division) issued a Notice of Determination, number L-044549670-7, dated March 29, 2016 to petitioner at “629 Oak Tree Pl Apt 2, Bronx, NY 10457-1615.” The notice assessed cigarette tax penalty totaling \$12,939.75 to petitioner under Article 20 of the Tax Law for the period ended October 30, 2015. The notice was issued to petitioner based on his possession of unstamped or unlawfully stamped cigarettes and/or untaxed tobacco products.

3. On October 27, 2016, Daniel J. Ranalli, then Supervising Administrative Law Judge of the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner. The notice of intent to dismiss petition indicates that:

“[i]n conformity with § 3000.3(d)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and in order to establish timeliness, the petition shall contain a copy of the conciliation order or statutory notice being protested. Petitioner did not include the required conciliation order or statutory notice being protested, and therefore the petition does not appear to have been timely-filed.”

4. In order to prove mailing of Notice of Determination number L-044549670-7, dated March 29, 2016, the Division provided the following documents: (i) an affidavit, dated January 11, 2017, of Frank Nuara, Esq., an attorney employed in the Office of Counsel of the Division;

(ii) an affidavit, dated January 6, 2017, of Anjanette Smith, an auditor in the Division's Criminal Investigations Division; (iii) a certified mail record, PS Form 3877 (CMR), postmarked March 28, 2016; (iv) an affidavit, dated January 9, 2017, of Melissa Kate Koslow, a supervisor in the Division's mail room; (v) a copy of the Notice of Determination, dated March 29, 2016, with the associated mailing cover sheet and a cover letter dated March 29, 2016 to petitioner from the Division's Criminal Investigations Division; (vi) a Postal Service Form 3811 (Domestic Return Receipt); and (viii) a copy of petitioner's electronically filed resident income tax return for the year 2014, dated March 10, 2015, listing his address as 629 Oak Tree Place Apt 2, Bronx, New York 10457, which is the same address as that listed on the subject notice. The 2014 return was the last return filed with the Division by petitioner before the notice was issued.

5. The affidavit of Anjanette Smith, who has been employed with the Division since 2012, sets forth the Division's general practice and procedure for certified mailings of notices of determination by the Criminal Investigations Division. Ms. Smith is an auditor in the Division's Criminal Investigations Division and has been in her current position for the past two years. According to Ms. Smith, statutory notices are electronically generated from the Division's Case and Resource Tracking System (CARTS) and are predated with the anticipated date of mailing. Each statutory notice is assigned a certified control number, which appears on a separate one-page mailing cover sheet that is generated by CARTS for each statutory notice. The mailing cover sheet also bears a bar code, the taxpayer's mailing address and a departmental return address on the front and taxpayer assistance information on the back. Each unit, with the accompanying mailing cover sheet and appropriate enclosures, is a discrete unit within the batch of notices. According to Ms. Smith, the mailing cover sheet is the first sheet in the unit.

6. Ms. Smith states that in some cases, notices are pulled for manual review. In this case, Notice Number L-044549670, dated March 29, 2016, and bearing certified control number 7104 1002 9730 0810 1767 was pulled for manual review from a batch of notices that were scheduled to be mailed on March 29, 2016. The notice was sent to the Criminal Investigations Division for review and preparation of a certified mail record (CMR). According to Ms. Smith, on March 28, 2016, a secretary in the Criminal Investigations Division addressed a mailing envelope, a United States Postal Service (USPS) Domestic Return Receipt (PS Form 3811) and affixed a certified number sticker, number 7001 0360 0000 2259 6731, from the certified mail receipt (PS Form 3800) to the USPS Domestic Return Receipt. Ms. Smith further states that the secretary typed a CMR (PS Form 3877) on March 28, 2016, which notes the name and address of the sender, the article number (7001 0360 0000 2259 6731), the addressee (Ramon A. Castillo, 629 Oak Tree Pl., Apt. 2, Bronx, NY 10457-1615), the postage and other fees, the total number of pieces listed by sender, the number of pieces received at post office, and postmaster information. Two copies of the CMR are printed; one is wrapped around the envelopes containing the notices to be sent to the USPS office, and the other copy is retained within the Criminal Investigations Division. The envelopes wrapped in the CMR are placed in a designated bin to be retrieved by a mailroom employee. The USPS adds the postage amount and fees to the CMR, writes the total number of pieces received at the post office, affixes a postmark, and signs or initials the CMR. The CMR is returned to the Division's mail processing center, which then returns it to the Criminal Investigations Division as confirmation of receipt. The domestic return receipt is returned to the originating auditor, who retains it in the case file. In this case, the domestic return receipt shows a delivery date of "3/30" of an article, number 7001 0360 0000 2259 6731, addressed to "Ramon A. Castillo, 629 Oak Tree Pl., Apt. 2, Bronx, NY 10457-1615." The signature on the domestic

return receipt does not appear to be that of petitioner, in that the name on the signature line, while not entirely legible, appears to begin with “Blan” and end with “arisa.”

7. A copy of Notice of Determination, number L-044549670-7, dated March 29, 2016, and the associated mailing cover sheet addressed to “Castillo - Ramon A, 629 Oak Tree Pl Apt 2, Bronx, NY 10456-1615” and bearing certified control number 7104 1002 9730 0810 1767, is attached to Ms. Smith’s affidavit. A copy of a cover letter dated March 29, 2016, addressed to petitioner from the Division’s Criminal Investigations Division, is also attached to Ms. Smith’s affidavit, and precedes the notice and mailing cover sheet. The cover letter does not contain a certified control number.

8. A copy of the CMR dated March 28, 2016 is attached to Ms. Smith’s affidavit. The CMR lists two pieces of certified mail, but the information regarding the first piece of mail is redacted. There was no explanation in Ms. Smith’s affidavit regarding the redaction. The second piece of mail listed on the CMR lists article number 7001 0360 0000 2259 6731 and addressee “Ramon A. Castillo, 629 Oak Tree Pl., Apt. 2, Bronx, NY 10457-1615.” The CMR does not reference a notice number. At the bottom of the CMR, corresponding to “Total Number of Pieces Listed by Sender,” is the preprinted number 2 and next to “Total Number of Pieces Received At Post Office” is the handwritten entry “2,” as well as initials or a signature, and a USPS postmark dated March 28, 2016.

9. The affidavit of Melissa Kate Koslow describes the Division’s mail room’s general operations and procedures. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Koslow states that a mailing cover sheet precedes each notice and a CMR is received for each batch of notices. For pieces of mail that were pulled for manual review, the originating unit puts each statutory notice and the associated documents into an

envelope and prepares it for certified mailing. The staff member then weighs each envelope and places postage and fee amount on the envelope.

A mail processing clerk checks the first and last pieces of mail against the information on the CMR and performs a random review of pieces of certified mail listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes 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. 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. The CMR in exhibit "A" of the Smith affidavit contains a USPS postmark of March 28, 2016 and the initials or signature of a USPS employee. In accordance with the Division's request, the USPS employee wrote the number "2" next to "Total Number of Pieces Received At Post Office." Ms. Koslow concludes that two pieces of mail listed on the CMR were delivered to the USPS.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a notice of determination (Tax Law §§ 478; 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or 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 (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. 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 statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Smith and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating and issuing statutory notices.

E. The Division has not, however, presented sufficient documentary proof to establish that the subject notice of determination was mailed to petitioner at his last known address on March 28, 2016. In *Matter of Alvarenga*, the Tax Appeals Tribunal found that the absence of a mailing cover sheet raised a material factual issue of whether the Division’s standard mailing procedure was followed because without the cover sheet, the address and certified control number for a particular statutory notice or order cannot be verified against the CMR (*see Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015). In the instant case, although a copy of the cover sheet was provided, it bears a different certified control number than the number listed on the CMR. The domestic return receipt, PS Form 3811, bears the same certified control number as that listed

on the CMR, but this number is not listed on the notice, cover sheet or cover letter. Thus, the notice at issue cannot be verified against the CMR. Additionally, the notice, cover sheet and cover letter all bear a different date (March 29, 2016) than the CMR (March 28, 2016).

Moreover, the notice number is not referenced on the CMR. The CMR also contains redacted information, but there is no explanation in the affidavits regarding the redactions.

The Division's mail proof is also flawed in that the procedure described in the Smith affidavit is inconsistent with the documentary evidence. Specifically, Ms. Smith states that the mailing cover sheet, form DTF-997, "is the first sheet in the unit" of the notice. However, attached to Ms. Smith's affidavit, as Exhibit A, is a letter from the Division's Criminal Investigation Division dated March 29, 2016, which precedes the attached mailing cover sheet and notice. Hence, contrary to Ms. Smith's statement, the mailing cover sheet is not "the first sheet in the unit."

As a result, this failure of proof raises material questions as to "whether the Division's standard mailing procedure . . . was followed in this case" (*Matter of Alvarenga*).

F. The notice of intent to dismiss petition issued to Ramon A. Castillo dated October 27, 2016 is withdrawn and the Division shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
June 15, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE