

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SONYA PALTER : ORDER
for Revision of Determinations or for Refund of Sales and : DTA NO. 827869
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2015 through November 30, 2015. :

Petitioner, Sonya Palter,¹ filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2015 through November 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), on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because it was not timely filed. On December 29, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Howard S. Beyer, Esq., of counsel), submitted documents in support of the proposed dismissal. Petitioner did not file a response. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on January 12, 2017. After due consideration of the affidavits and documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following order.

¹ In her petition, petitioner explained that she is the former Sonya Palter, having been married 16 years at the filing of the petition, that her married name is Sonya Keyser, and that she did not consider the name “Sonya Palter” as valid during her married years.

ISSUE

Whether petitioner timely filed her petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. On September 29, 2016, petitioner, Sonya Palter, filed a petition with the Division of Tax Appeals seeking an administrative review of the conciliation order dated June 24, 2016, which was attached to the petition, dismissing her request for review of two notices of determination purportedly issued to her dated February 29, 2016.

2. Petitioner stated she did not receive the conciliation order until September 2 (presumably 2016), and although she has resided at 55 Chipperfield Court, Staten Island, New York for over 11 years, she did so only under her married name. Petitioner claims not to have received either of the notices of determination issued in this matter to Sonya Palter.

3. Petitioner stated that the tax notices in this case relate to a former business interest she owned in Forcella Eatery Inc. (Forcella), and stated that she never received any correspondence at the Chipperfield Court, Staten Island, New York address from the Division of Taxation (Division) regarding Forcella the entire time she resided there prior to May, 2016, when she called the Division on another personal business matter and was informed that there were assessments of tax liabilities under her social security number. Petitioner denies any responsibility for the assessments in issue, on the basis of having sold her shares in the company on March 11, 2013, and she attached a stock sale agreement executed on that date.

4. After petitioner learned about the alleged assessments against her, she corresponded with the Division's "TCC/Account Services Section," by a letter dated May 12, 2016, in order to protest the tax liabilities for which she was being held responsible and to provide a stock sale

agreement as evidence that her shares in Forcella had been sold. This letter, along with the agreement, were attached to her petition.

5. In addition, attached to the petition was a letter dated September 16, 2016, from petitioner to the Bureau of Conciliation and Mediation Services (BCMS), referencing the conciliation order issued to petitioner (CMS No. 270896) dated June 24, 2016, and expressing a desire to petition the order. Below the inside address of the letter, petitioner indicated its transmission to BCMS by United States Postal Service (USPS) mail and facsimile.

6. On October 27, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that the subject petition was filed in protest of a conciliation order dismissing request, CMS No. 270896, which was issued to petitioner on June 24, 2016, and that the petition was not filed until September 29, 2016, or 97 days later.

7. In response to the issuance of the notice of intent to dismiss petition and to prove mailing of the conciliation order under protest, the Division submitted the following: (i) an affidavit, dated December 28, 2016, of Howard S. Beyer, Esq., in support of the notice of intent to dismiss petition; (ii) the petition filed in this matter with the Division of Tax Appeals by petitioner; (iii) a request for conciliation conference dated June 6, 2016, and stamped as received by BCMS on June 7, 2016, filed by "Sonya Palter (Keyser)," attached to which was a consolidated statement of tax liabilities; (iv) the conciliation order dismissing request dated June 24, 2016; (v) the affidavit of Robert Farrelly, Supervisor of Tax Conference of BCMS since October 2002; (vi) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) dated June 24, 2016; and (vii) an affidavit, dated December 28, 2016, of Melissa Kate Koslow, a supervisor

in the Division's mail room since April 2010, who is familiar with both the past and present office procedures as they relate to the issuance of BCMS orders.

8. The affidavit of Robert Farrelly sets forth the Division's general practice and procedure for preparing and mailing conciliation orders. He stated that the BCMS Data Management Services Unit prepares the conciliation orders and accompanying cover letters, and both are predated with the intended date of mailing and forwarded to the conciliation conferee for signature, who in turn forwards them to a clerk who is assigned to process such orders. For each mailing, the Division's Advanced Function Printing Unit (AFP), assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number and certified control number bar code. The AFP unit also generates a computer printout entitled "Certified Record For Presort Mail" (CMR). The CMR is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The control numbers are recorded on the CMR under the heading "Certified No." and the BCMS number is recorded under "Reference No." The AFP unit prints the CMR and cover sheets for processing with the conciliation orders by the BCMS clerk. The clerk verifies the taxpayer's name and address with the information listed on the CMR and the cover sheet and places the cover letter and conciliation order into a three-windowed envelope where the BCMS return address, certified mail control number, bar code, and the name and address of the taxpayer appear.

9. The designation of "Total Pieces and Amounts" is indicated on the last page of the CMR. After stamping the CMR with instructions regarding its return to BCMS, the clerk then indicates the date that the orders were mailed at the top of each page, in this case "6-24-16." The CMR is retained by BCMS in the regular course of its business.

10. The CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders are then picked up by a Division employee of its mail processing center, who is responsible for delivering such items to the USPS.

11. The CMR relevant to the conciliation order under protest, dated June 24, 2016, consisted of five pages and listed 53 certified numbers. The conciliation order mailed to Sonya Palter, 55 Chipperfield CT, Staten Island, New York, on June 24, 2016, was listed on page 2 of the CMR with certified number 7104 1002 9730 0854 9989 and Reference No. 000270896. Postmarks of June 24, 2016, are affixed to each page of the CMR, including the page denoting the mailing to Sonya Palter, and the CMR is retained by BCMS as a permanent record. Mr. Farrelly noted that portions of the CMR had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding.

12. Mr. Farrelly's examination of the CMR in this case resulted in his conclusion that it was a true and accurate copy of the CMR for the Conciliation Order issued by BCMS on June 24, 2016, to Sonya Palter, and the procedures followed in this case were the normal and regular procedures of BCMS for the issuance of conciliation orders.

13. The affidavit of Melissa Kate Koslow, a supervisor in the Division's mail room, attests to the regular procedures, past and present, as they relate to the mailing of BCMS orders. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal

employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

14. Ms. Koslow indicated that the Division's Mail Processing Center specifically requests that postal employees either circle the number of pieces received or indicate the number received by writing the number of pieces received on the CMR. Here, the postal employee affixed a postmark to each page of the CMR, wrote and circled the number "53" on page 5 to indicate the "Total pieces received at post office" and initialed the CMR on that page as well. The USPS postmark on the CMR is its official acknowledgment for the pieces of mail recorded on that mail record. In the ordinary course of business, and pursuant to the procedures of the Mail Processing Center, the CMR is picked up at the post office the following day and delivered to the originating staff.

15. Based upon her review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Ms. Koslow states that on June 24, 2016, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Sonya Palter, 55 Chipperfield Ct., Staten Island, New York 10301-4568, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. She states that she can also determine that a member of her staff obtained a copy of the CMR delivered to and accepted by the post office on June 24, 2016, for the records of BCMS. Ms. Koslow asserts that the procedures described in her affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to Sonya Palter.

16. According to both the Farrelly and Koslow affidavits, a copy of the subject Conciliation Order was mailed to Sonya Palter on June 24, 2016, as claimed.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) the conciliation order in this case would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals. 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). In this case, it appeared upon receipt of the petition by the Division of Tax Appeals that it was filed late and a notice of intent to dismiss petition was issued pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a)(4).

Inasmuch as a determination issued following a notice of intent to dismiss petition under section 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 to a notice of intent to dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination, and “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” (20 NYCRR 3000.9[b][1]).

B. Where, as here, the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry focuses 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 (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When an order is found to have been properly mailed by the Division to the taxpayer's 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).

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 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 Conditioning Sales & Serv.*).

D. In this case, the Division has fulfilled the requirement to introduce adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Ms. Koslow, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders. However, the evidence submitted by the Division to establish that the general mailing procedures were followed in this case raises a material and triable issue of fact. Specifically, BCMS was required to mail the Conciliation Order to Sonya Palter at her last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). The Conciliation Order was mailed to Sonya Palter at the Staten Island address where only Sonya Keyser was known to live. Ms. Keyser readily admits that her maiden name was Sonya Palter. However, Ms. Keyser, having been married for 16 years, resided only under her married name at the Staten Island address for the 11 years of her residence at that location. The mailing of the Conciliation

Order to Sonya Palter at an address where she never resided under that name raises a material fact as to the proper mailing to Sonya Palter's last known address in this matter, and the Division presented no evidence of the last known address of Sonya Palter.²

E. Furthermore, the letter dated September 16, 2016, may be a timely protest to the conciliation order (*see Lehal Realty Associates*, Tax Appeals Tribunal, May 18, 1995). The existence of correspondence that appears to make a timely protest to the conciliation order raises a material and triable issue of fact that must be resolved.

F. Based on the record presented, there appear to be triable issues of fact and, accordingly, the notice of intent to dismiss petition, dated October 27, 2016, is withdrawn. The Division of Taxation shall have 75 days from the date of this order to file an answer to petitioner's petition, after which time a hearing will be scheduled in due course.

DATED: Albany, New York
April 6, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE

² The petition indicated that Ms. Keyser was informed of assessments against her social security number by telephone, when she called the Division on another matter. Thereafter she filed the Request. The use of both names on that form does not establish that the Division mailed the Conciliation Order to Sonya Palter's last known address, given the explanation provided by Ms. Keyser, but merely that Ms. Keyser was acting in a transparent manner to address the information that had come to her attention.