

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DEGMOR, INC. : ORDER
 : DTA NO. 828048
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, 2011 through August 31, 2013. :

Petitioner, Degmor, 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 March 1, 2011 through August 31, 2013.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michael Hall), brought a motion dated August 20, 2018, seeking an order dismissing the petition, or in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9 (a), and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Singer & Falk (Robert Singer, CPA), did not respond to the Division of Taxation's motion. The 90-day period for issuance of the order commenced on September 19, 2018. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely request for conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion dated August 20, 2018 for dismissal of the petition, or in the alternative, for summary determination in its favor. The subject of the Division's motion is the timeliness of petitioner's protest of a notice of determination, dated August 23, 2016, and bearing assessment identification number L-045410088 (notice). The notice is addressed to petitioner, Degmor, Inc., at an address in New York, New York. A notice and demand for payment of tax due was issued to petitioner on December 8, 2016, for assessment identification number L-045410088, and addressed to the same New York, New York, address as the notice.

2. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On January 13, 2017, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on August 23, 2016, but the request was not mailed until December 22, 2016, or in excess of 90 days, the request is late filed.”

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on January 18, 2017.

5. In support of the motion and to show proof of proper mailing of the notice, the Division provided, along with an affidavit of Michael Hall, sworn to on August 17, 2018, the following with its motion papers: (i) an affidavit, dated March 22, 2017, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project

Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked August 23, 2016; (iii) an affidavit, dated March 29, 2017, of Melissa Kate Koslow, a supervisor in the Division’s mail room; (iv) copies of the notice mailed to petitioner and its representative with the associated mailing cover sheets; (v) a power of attorney form marked received by the Division on November 22, 2013, listing Mr. Singer’s Melville, New York, address; (vi) an affidavit, dated August 15, 2018, of Heidi Corina, a Legal Assistant 2 in the Office of Counsel for the Division; (vii) two Requests for Delivery Information/Return Receipt After Mailing (USPS form 3811-A) and the USPS responses to such requests dated March 2, 2017; (viii) a copy of petitioner’s request for conciliation conference, postmarked December 22, 2016; (ix) a power of attorney marked as received by the Division on March 11, 2011, listing Mr. Singer’s address as a Plainview, New York, address¹; (x) a copy of petitioner’s New York State and Local Sales and Use Tax Web Filed Return for the period March 1, 2016 through May 31, 2016, filed on June 16, 2016; and (xi) a copy of petitioner’s New York State and Local Sales and Use Tax Web Filed Return for the period June 1, 2016 through August 31, 2016, filed on September 20, 2016. The tax return filed on June 16, 2016 was the last return filed with the Division by petitioner before the notice was issued. The September 20, 2016 tax return was the next return filed with the Division after the notice had been issued. Both tax returns list the same address for petitioner as that listed on the notice.

6. 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

¹ The power of attorney form, date-stamped received by the Division on March 11, 2011, lists three representatives. The power of attorney form, date-stamped received by the Division on November 22, 2013, lists only two representatives.

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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "8/23/16." 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 United States Postal Service (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.

7. 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 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."

8. The CMR in the present matter consists of 26 pages and lists 283 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 26, which contains eight entries. Ms. Nagengast notes that the copy 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. A USPS representative affixed a postmark, dated August 23, 2016, to each page of the CMR, wrote and circled the number “283” on page 26 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 26.

9. Page two of the CMR indicates that a notice with certified control number 7104 1002 9730 0024 5094 and reference number L-045410088 was mailed to petitioner at the New York, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted. Page 23 of the CMR indicates that a notice with certified control number 7104 1002 9730 0024 7401 and reference number L-045410088 was mailed to petitioner’s representative at the Plainview, New York, address listed on the notice. The corresponding mailing cover sheet, also attached to the Nagengast affidavit as exhibit “B,” bears this certified control number and petitioner’s representative’s name and address as noted.

10. The affidavit of Melissa Kate Koslow, a supervisor in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Koslow has been in this position since 2010 and, as a result, is familiar with the practices of the mailroom with regard to statutory notices. The mailroom receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Koslow confirms that a mailing cover sheet precedes each notice. A staff member receives 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 of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. 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 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. Each page of the CMR in exhibit "A" of the Nagengast affidavit contains a USPS postmark of August 23, 2016. On page 26, corresponding to "Total Pieces and Amounts," is the preprinted number 283 and next to "Total Pieces Received At Post Office" is the handwritten and circled entry "283." There is a set of initials or a signature on page 26.

11. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of two USPS forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which a post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this instance, Ms. Corina filed one form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0024 5094 on August 23, 2016, from the Colonie Center, Albany, New York, branch of the USPS to "Degmor, Inc." at a New York, New York, address. In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0024 5094 on August 25, 2016 at 12:56 p.m. in New York, New York 10013. The scanned image of the recipient's signature as shown on the USPS response is illegible. The scanned address of the recipient indicates the same New York, New York, address as listed on the notice. Ms. Corina filed a second form 3811-A seeking information for the item mailed by the Division under certified number 7104 1002 9730 0024 7401 on August 23, 2016, from the Colonie Center, Albany, New York, branch of the USPS

to “Robert Singer, Mark Kirby, Adam Falk” at a Plainview, New York, address.² In response, the USPS confirmed delivery of certified mail item number 7104 1002 9730 0024 7401 on September 2, 2016 at 11:26 a.m. in Plainview, New York 11803. The scanned image of the recipient’s signature is illegible. The scanned address of the recipient as shown on the USPS response is “4BO.”

12. According to the Nagengast, Koslow and Corina affidavits, copies of the notice were mailed to petitioner and its representative on August 23, 2016, as claimed.

CONCLUSIONS OF LAW

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9 (a), or summary determination under 20 NYCRR 3000.9 (b). As the Division of Tax Appeals has subject matter jurisdiction on the issue of the timely filing of a request for a conciliation conference in the instant matter, the Division’s motion will be treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

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 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 (Tax Law § 1138 [a] [1]). Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a

² Mark Kirby was not listed as a representative on the 2013 power of attorney form.

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).

D. Where the timeliness of a petition or a request for a 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 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*).

E. In this case, the mailing cover sheet, cover letter, CMR and affidavits of Ms. Nagengast and Ms. Koslow, 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 with respect to the notice issued to petitioner. 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 New York, 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 August 23, 2016. There are 283 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number “283” on the line stating “Total Pieces Received at Post Office,” and the post office received 283 items for mailing. In short, the Division established that it mailed the notice of determination to petitioner by certified mail on August 23, 2016 (*see Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995).

F. 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]).

A copy of the notice herein was sent to petitioner’s representative at a Plainview, New York, address. This address was listed for petitioner’s representative on a power of attorney form date-stamped received by the Division on March 11, 2011. However, the Division also had a power of attorney on file for petitioner’s representative dated November 22, 2013 that stated a Melville, New York, address. Clearly, the 2013 power of attorney form superceded the earlier form. Therefore, the Division was required to mail a copy of the notice to petitioner’s representative at his Melville, New York, address. Since the notice was erroneously mailed to the address in Plainview, New York, the Division has not proven that its standard procedure for mailing a copy of the notice to petitioner’s representative was followed in this case.

G. The Tax Appeals Tribunal has held that confirmation from the USPS that the piece of certified mail in question was delivered constitutes evidence which provides a sufficient basis for concluding that the notice was mailed (*Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011; *Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992). To show actual receipt by petitioner's representative, the Division produced the affidavit of Ms. Corina, who explained that she prepared form 3811-A that requested proof of delivery of the notice to petitioner's representative. As Ms. Corina states, the postal service did deliver a copy of the notice with certified control number 7104 1002 9730 0024 7401 to the Plainview, New York, address on September 2, 2016. However, the confirmation from the USPS provided an illegible signature of the recipient and the address of recipient merely states "4BO."

Given that the signature of the recipient is illegible and that the notation for the address is unintelligible, the Division has not proven actual receipt by petitioner's representative in this case. Therefore, the 90-day period for filing a petition or request for conciliation conference was tolled.

H. The Division of Taxation's motion for summary determination is denied and this matter will proceed to a hearing on the merits.

DATED: Albany, New York
December 13, 2018

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE