

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
PRIYANKA B. PATEL
for Revision of a Determination or for Refund of
Cigarette Tax under Article 20 of the Tax Law for the
period July 1, 2018 through July 31, 2018.

ORDER
DTA NO. 829830

Petitioner, Priyanka B. Patel, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period July 1, 2018 through July 31, 2018.

On August 10, 2021, petitioner, by Phillip J. Vecchio, Esq., CPA, filed a motion entitled “Motion for accelerated determination under 20 NYCRR §3009.a,” seeking to have the proceeding dismissed. The 90-day period for issuance of this order commenced on September 10, 2021. Thereafter, the Division of Taxation, by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel), responded to the motion on September 21, 2021. Based upon the motion papers and all pleadings and documents submitted in connection with this matter, Jessica DiFiore, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner’s motion to dismiss should be granted where the notice of determination imposing the penalty at issue listed the wrong tax period.

FINDINGS OF FACT

1. On June 20, 2018, Investigators Casey Jensen and Heather Mather from the Criminal Investigations Division of the Division of Taxation (Division) conducted an inspection of the store of petitioner, Priyanka B. Patel, located in Saint Johnsville, New York. During the inspection, Investigator Jensen found a total of 389.5 pounds of untaxed loose and chewing tobacco that the store clerk was not able to provide invoices for from a registered distributor. Investigator Jensen also found 2,150 untaxed cigars that the store clerk was not able to produce invoices for from a registered distributor. The investigators then seized the untaxed tobacco and cigars.

2. On February 19, 2019, the Division issued petitioner a notice of determination (notice) assessing a penalty in the amount of \$15,000.00. The notice provided that the penalty was imposed because after an inspection of her premises, petitioner was found to be in possession of unstamped or unlawfully stamped cigarettes and/or untaxed tobacco products. The notice stated it was for the “tax period ended date” of July 31, 2018.

3. In petitioner’s motion, she asserts that the inspection of her premises that resulted in the notice occurred on June 20, 2018, outside the period of July 1, 2018 through July 31, 2018 provided in the notice. Because of this, petitioner moves for an accelerated determination to have the notice cancelled based on: (i) a defense founded on documentary evidence; (ii) petitioner lacking legal capacity to petition; or (iii) the Division of Tax Appeals lacking jurisdiction over the taxpayer.

4. The Division responded to the motion with the affirmation of Elizabeth Lyons, an attorney in the Office of Counsel of the Division, dated September 7, 2021. In her affirmation,

Ms. Lyons asserts that the incorrect date in the notice is not a material defect and the notice should be upheld.

5. The Division's response to the motion was received in an envelope with a postmark date of September 21, 2021. With the response, the Division provided a cover letter stating it was previously sent on September 7, 2021, by certified mail. The Division also included a copy of its internal certified mail log showing articles of mail were sent to the Division of Tax Appeals and to petitioner's representative on September 7, 2021.

CONCLUSIONS OF LAW

A. The Division's response to petitioner's motion is untimely. The Division has not established proof of mailing to support its assertion that it initially mailed its response to petitioner's motion on September 7, 2021. Proof of proper mailing gives rise to a presumption that an item was received by the addressee (*see Residential Holding Corp v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2nd Dept 2001]). The presumption can be created by either describing the standard operating procedure used to ensure a document is mailed or by submitting proof of actual mailing (*see Tracy v. William Penn Life Ins. Co. of New York*, 234 AD2d 745, 747 [3d Dept 1996]). The Division offers a letter stating its response was sent on September 7, 2021, and a copy of the certified mail log for that day. However, the Division did not submit any evidence, such as an affidavit, establishing the procedure for sending mail from the Division's Office of Counsel, whether that procedure was followed, whether the certified control numbers listed on the mail log were for the Division's response to the subject motion or how the copies of its response arrived at the Post Office.

The Division's response to the motion that was received by the Division of Tax Appeals had a postmark date of September 21, 2021. Responses to motions are required to be filed 30

days after the date of service of the motion pursuant to 20 NYCRR 3000.5 (b). As the motion in this case was served on August 10, 2021, the Division's response to petitioner's motion is untimely. However, administrative law judges have discretion in accepting late-filed non-judicial documents (*see Matter of O'Keh Caterers Corp.*, Tax Appeals Tribunal, November 5, 1992 [brief filed one day late by the Division was accepted by the Tribunal]). As petitioner does not suffer any harm by accepting the Division's response, such response is accepted and will be considered.

B. Petitioner's motion seeks dismissal of the petition pursuant to 20 NYCRR 3000.9 (a) (1) (i), (iii), and (vii) on the grounds that a defense is founded on documentary evidence, the petitioner lacks legal capacity to petition, and the Division of Tax Appeals lacks jurisdiction over the taxpayer. 20 NYCRR 3000.9 (c) provides in relevant part "[w]here not otherwise in conflict with this Part, a motion to dismiss filed pursuant to this section shall be subject to the same provisions as motions filed pursuant to section three thousand two hundred eleven of the CPLR"

Petitioner first argues that because the audit period on the notice of July 1, 2018 through July 31, 2018 occurred after the June 20, 2018 date of the seizure, the case should be dismissed because a defense is founded on documentary evidence. Petitioner asserts the Division's property receipts, arrest report, investigation report and the misdemeanor information filed by Investigator Jensen all show that the cigars and tobacco were seized before the period reflected in the notice and, therefore, the notice is void.

"A CPLR 3211(a)(1) motion 'may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law'" (*Thomas A. Sbarra Real Estate, Inc. v Lavelle-Tomko*, 84 AD3d 1570, 1571

[3d Dept 2011][internal citations omitted]). Here, the fact that the notice has the wrong period as shown by all of the documentation providing the actual date the cigars and tobacco were seized does not negate the validity of the notice. To invalidate the notice, petitioner must be prejudiced by the omission or error (*see Matter of Cheakdkaipejchara*, Tax Appeals Tribunal, April 23, 1992; *Matter of Pepsico, Inc. v Bouchard*, 102 AD2d 1000 [3d Dept 1984]; *Matter of Tops, Inc.*, Tax Appeals Tribunal, November 22, 1989). Petitioner has not offered any evidence that she was prejudiced by the notice stating an incorrect tax period. In fact, it is clear from all of the evidence she submitted that she was aware of the date of the seizure forming the basis of the assessment. The notice served its purpose of notifying petitioner of the penalty due for possession of untaxed cigars and tobacco pursuant to Tax Law § 481 (*see Matter of Pepsico, Inc.*, 102 AD2d at 1001). As the notice is valid despite having the wrong date, petitioner's motion to dismiss on this ground is denied.

C. Petitioner then moves to have the petition dismissed on the ground that petitioner lacks legal capacity to petition. Petitioner asserts this ground again relying on the fact that the date for the tax period in the notice is wrong. This ground does not apply to the instant matter. "In general, a party's competence to commence an action is presumed" (*Vasilatos v Dzamba*, 148 AD3d 1275, 1276 [3d Dept 2017]). As petitioner brought this motion, it would be her burden to demonstrate she was not competent (*see id.*). As petitioner is the one who commenced the petition, any competency argument is deemed waived.

D. Petitioner also seeks an accelerated determination on the grounds that the Division of Tax Appeals lacks jurisdiction over her. Due process of law requires that in order to obtain in personam jurisdiction, the one subjected to such jurisdiction be present or have minimum contacts with the forum, such that legal action does not offend traditional notions of fair play and

substantial justice (*International Shoe Co. v State of Washington*, 326 US 310 [1945]). An individual who is a New York domiciliary is amenable to the jurisdiction of the New York courts. As petitioner does not offer any evidence that she is not a New York domiciliary and in fact submitted evidence, including an arrest report, showing she has an address in Niskayuna, New York, the Division of Tax Appeals unquestionably has jurisdiction over the petitioner.

E. To the extent petitioner is arguing that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition pursuant to 20 NYCRR 3000.9 (a) (1) (ii), despite asserting lack of personal jurisdiction pursuant to 20 NYCRR 3000.9 (a) (1) (vii), such argument will also be addressed. Petitioner asserts that the Division of Tax Appeals lacks subject matter jurisdiction because the incorrect tax period on the notice renders the notice void. Because, as stated above, the incorrect tax period does not invalidate the notice (*see Matter of Tops, Inc.*), this argument is also denied.

F. Petitioner's motion is hereby denied and a hearing in this matter will proceed in due course.

DATED: Albany, New York
December 09, 2021

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE