

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of
180 CANDY GROCERY TOBACCO CORP.
for Revision of a Determination or for Refund of
Cigarette Tax under Article 20 of the Tax Law for the
Period December 9, 2020; and for Review of a
Proposed Revocation of a Certificate of Authority
under Articles 28 and 29 of the Tax Law for the Period
Ended December 31, 2021.

ORDER
DTA NO. 830810

Petitioner, 180 Candy Grocery Tobacco Corp., filed a petition¹ for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period December 9, 2020; and for review of a proposed revocation of a certificate of authority under articles 28 and 29 of the Tax Law for the period ended December 31, 2021.

On July 20, 2022, the Division of Taxation, by its representative, Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), brought a motion seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (a) (1) (ii) and (b) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by its owner, Fadhil Karinah, did not respond to the motion. The 90-day period for issuance of this order commenced on August 19, 2022. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and

¹ The petition is being treated as challenging notice of determination, assessment no. L-053904031, and the conciliation order sustaining a notice of proposed revocation of a sales tax certificate of authority (*see* finding of fact 4 and conclusion of law “D”).

documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Taxation's motion to dismiss or for summary determination should be granted.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, 180 Candy Grocery Tobacco Corp., a notice of determination, dated July 22, 2021, and bearing assessment ID number L-053904031, assessing a penalty in the amount of \$20,000.00 for the period ended December 9, 2020. The notice of determination advised petitioner as follows:

“On 12/09/20 investigators from the New York State Department of Taxation and Finance inspected your business premise and found cigarettes, tobacco products, or both, offered for sale while:

- you are not registered to sell these products, or
- your registration is suspended or revoked.

This is the second instance where we found your business premise to be selling cigarettes and tobacco products without a valid certificate. Therefore, we issued a civil penalty assessment of \$20,000.00.”

The notice is addressed to “180 CANDY GROCERY TOBACCO CORP.” at a Bronx, New York, address.

2. On August 20, 2021, the Division's Civil Enforcement Division issued to petitioner a notice of proposed revocation of sales tax certificate of authority (Notice of Proposed Revocation), which stated as follows:

“Your sales tax *Certificate of Authority* will be revoked.

You have engaged in the following conduct that allows the revocation of your sales tax *Certificate of Authority* under Tax Law § 1134(a) (4)(A):

– You had three possessions or sales of unstamped or unlawfully stamped packages of cigarettes within a five-year period under Tax Law § 480-A(4)(a).”

On the back of this Notice of Proposed Revocation, it stated that unless petitioner filed a protest within 30 days of the date the notice was mailed, its certificate of authority would be automatically revoked. It further stated that if petitioner disagreed, it could protest the proposed revocation either by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS); or filing a petition with the Division of Tax Appeals.

3. Petitioner protested the Notice of Proposed Revocation by filing a request for conciliation conference with BCMS. After a teleconference held on October 18, 2021, BCMS issued a conciliation order (CMS No. 000332702) (conciliation order), dated November 12, 2021, denying petitioner’s request and sustaining the Notice of Proposed Revocation for the tax period “12/31/2021.”

4. On December 27, 2021, a petition was filed with the Division of Tax Appeals.

Petitioner completed the petition form as follows:

(a) In section I “Caption,” petitioner listed its name and articles numbers 28 and 29 for the year/period “12/31/2021” as the articles and year or period being challenged.

(b) In section II “Petitioner Information,” petitioner listed its name, and the same Bronx, New York, address.

(c) In section IV “Petitioner Hereby Petitions for,” the box next to “redetermination of a deficiency/revision of a determination is checked.

(d) In section V “Notice/Assessment Number(s),” notice/assessment ID number “L-053904031-4” is listed.

(e) In section VI “The Tax in Question is,” the “cigarette tax (Article 20)” box is checked.

(f) In section VII “Tax Determination,” petitioner listed the “amount of tax determined” as \$20,000.00, and the “amount contested” as \$20,000.00.

(g) In section VIII “Reason(s) for Dispute,” petitioner alleged that “[t]he cigarettes that were found in the store were for personal use and NOT for sale.”

(h) In section IX “Conciliation Conference with the Bureau of Conciliation and Mediation Services,” petitioner indicated that a conciliation conference was requested, and the conciliation order was issued on “November 12, 2021.”

The petition was signed by petitioner’s then-representative, Ebrahim Ndure, on December 10, 2021, and was received by the Division of Tax Appeals on December 31, 2021.² The envelope in which the petition was mailed by certified mail bears a United States Postal Service (USPS) postage paid label dated December 27, 2021. Documents attached to the petition included, among other items, the conciliation order, the letter from BCMS that accompanied the conciliation order (BCMS cover letter), and a single-page of form DTF-966FC that contains a printed computation summary section and the handwritten notation “L-053904031-1” at the top of the page.

5. The BCMS cover letter, dated November 12, 2021, stated, in part, that “[p]ursuant to Tax Law § 170.3-a, this order will be binding unless you file a petition with the Division of Tax Appeals within 30 days from the date of this order.” The letter also provided instructions for

² Because Mr. Ndure was not qualified to appear before the Division of Tax Appeals, the Petition Intake Unit requested that an officer or owner of petitioner sign the petition and return same. In compliance with that request, Fadhil Karinah, petitioner’s owner, signed and dated the petition on January 19, 2022, and returned same to the Division of Tax Appeals.

obtaining petition forms and a copy of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) from the Division of Tax Appeals.

6. On June 1, 2022, the Division filed its answer, as amended with the consent of the supervising administrative law judge to correct the caption thereof.

7. On July 20, 2022, the Division filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination in its favor pursuant to sections 3000.5, 3000.9 (a) (1) (ii) and (b) (1) of the Rules.

8. In support of its motion, the Division provided the following: (i) the affirmation, dated July 20, 2022, of Bruce D. Lennard, Esq., the Division's representative; (ii) an affidavit, dated June 23, 2022, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) a "certified Record For Presort Mail – Assessments Receivable" (CMR) postmarked July 22, 2021; (iv) an affidavit, dated June 30, 2022, of Susan Ramundo, a manager in the Division's mail room; (v) a copy of a notice of determination, assessment no. L-053904031, with the associated mailing cover sheet; (vi) a copy of a notice and demand for payment of tax due, assessment no. L-053904031; (vii) a copy of a notice of intent to refer petitioner's debt, dated January 5, 2022; (viii) a copy of warrant E-045528396-W002-9 against petitioner docketed on March 31, 2022; (ix) a copy of the Notice of Proposed Revocation; (x) a copy of petitioner's request for a conciliation conference filed in protest of the Notice of Proposed Revocation; (xi) a copy of the conciliation order (CMS No. 000332702), dated November 12, 2021, denying petitioner's request and sustaining the Notice of Proposed Revocation; (xii) a copy of the petition and the envelope in which the petition was mailed; and (xiii) a copy of petitioner's New York State and

Local quarterly sales and use tax return (form quarterly ST-100) for the period March 1, 2021 through May 31, 2021, electronically filed on June 20, 2021.

9. Bruce D. Lennard, an attorney in the Office of Counsel of the Division, avers in his affirmation that petitioner's form quarterly ST-100 for the period March 1, 2021 through May 31, 2021 was filed on June 20, 2021, and that this was the last return filed before the Division issued the notice of determination. Mr. Lennard affirms that the Bronx, New York, address appearing on the last return filed, corresponds to the address appearing on the notice of determination.

10. Mr. Lennard, in his affirmation, asserts that on December 27, 2021, petitioner mailed the petition to the Division of Tax Appeals "specifically petitioning for a redetermination/revision of a determination of the Notice of Determination." He further asserts that petitioner, in its petition, "does not specifically challenge the Conciliation Order denying its request in connection with the Notice of Proposed Revocation." As such, Mr. Lennard claims that the Notice of Proposed Revocation is not "a subject of the instant Petition." He further claims that the Notice of Proposed Revocation is unrelated to the bases for the notice of determination because the Notice of Proposed Revocation concerns a sales tax certificate of authority while the notice of determination, "by its terms, is based on Petitioner twice selling cigarettes and tobacco products without a valid Certificate of Registration to sell such products."

11. The affidavit of Deena Picard sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard has been a Data Processing Fiscal Systems Auditor 3 since February 2006 and Acting Director of MAPS since May 2017. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Picard 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. Her affidavit explains the procedures surrounding the issuance of notices. CARTS generates the CMR. The CMR is produced (printed) approximately 10 days in advance of the anticipated date of issuance of the notices set forth thereon and lists an initial date (run date) in its upper left corner. That date is expressed as the year, Julian day of the year, and military time of day, in this case "20211961700." 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 "7-22." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the 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.

12. Statutory notices that are generated from CARTS are predated with the anticipated date of mailing and 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."

13. The CMR consists of 16 pages and lists 165 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 16 which contains no entries. Ms. Picard notes that the copy of the CMR 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 employee affixed a postmark, dated July 22, 2021, to each page of the CMR, wrote the number “165” on page 16 next to the preprinted heading “TOTAL PIECES RECEIVED AT POST OFFICE,” and initialed or signed the last page of the CMR.

14. Page 4 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0454 6456, and reference number L-053904031 was mailed to petitioner, “180 CANDY GROCERY TOBACCO CORP.” at the Bronx, New York, address listed on the notice of determination. The corresponding mailing cover sheet, attached to the Picard affidavit as part of exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

15. The affidavit of Susan Ramundo, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Ramundo has been in this position since 2017 and has been employed there since 2012, and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Ramundo 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. The CMR is picked up at the USPS the following day by a member of the mail room staff and is delivered to other Division personnel for storage and retention. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

16. Each of the 16 pages of the CMR attached to the Picard affidavit as exhibit "A" contains a USPS postmark of July 22, 2021. On page 16, corresponding to "TOTAL PIECES AND AMOUNTS" is the preprinted number 165 and next to "TOTAL PIECES RECEIVED AT POST OFFICE" is the handwritten entry "165," indicating 165 pieces of mail were received by the USPS. There is a set of initials or illegible signature on page 16.

17. According to both the Picard and Ramundo affidavits, a copy of the notice of determination was properly mailed to petitioner on July 22, 2021, as claimed.

18. The Division did not submit any proof of mailing of the conciliation order sustaining the Notice of Proposed Revocation.

CONCLUSIONS OF LAW

A. A proceeding in the Division of Tax Appeals is commenced by filing a petition "protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund . . . or any other notice which gives a person the right to a hearing" (Tax Law § 2008 [1]), pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law § 2006 [4]).

B. Among other requirements pertaining to the form of a petition, the Rules provide that “for the sole purpose of establishing the timeliness of the petition, a legible copy of the order of the conciliation conferee if issued; if no such order was previously issued, a legible copy of any other statutory notice being protested [must be provided]” (20 NYCRR 3000.3 [b] [8]).

C. The Rules provide that:

“[t]he purpose of the pleadings is to give the parties and the division of tax appeals fair notice of the matters in controversy and the basis for the parties’ respective positions. All pleadings shall be liberally construed so as to do substantial justice” (20 NYCRR 3000.4 [a]).

D. In its petition, petitioner indicated in section V that notice/assessment ID number L-053904031 was being challenged while in section IX it indicated that a conciliation conference was requested, and the conciliation order was issued on November 12, 2021. Petitioner provided a copy of the conciliation order sustaining the Notice of Proposed Revocation under articles 28 and 29 of the Tax Law for the period ended December 31, 2021. However, petitioner did not provide a legible copy of notice L-053904031 with its petition. To provide substantial justice in this matter (*see* 20 NYCRR 3000.4 [a]), the petition will be treated as challenging both statutory notices.

E. In *Matter of Kokotas* (Tax Appeals Tribunal, December 11, 2015), the Tax Appeals Tribunal (Tribunal) noted that “under the Rules, the sole purpose of the requirement that a copy of the statutory notice be provided is to establish the timeliness of the petition (20 NYCRR 3000.3[b][8]). Logically, then, pursuant to this regulation, the failure to provide a notice means that timeliness of the subject petition has not been established.” The Tribunal then pointed out that the Division must prove mailing when the timeliness of a petition is at issue (*see e.g. Matter of Novar TV and Air Conditioning Sales & Serv., Inc.*, Tax Appeals Tribunal, May 23, 1991).

F. Tax Law § 478 authorizes the Division to issue a notice of determination for additional tax or penalties due under article 20 of the Tax Law. Tax Law § 480-a (2) (d) provides that provisions of article 28 of the Tax Law relating to the personal liability for the tax, and the administration, collection and determination of tax shall apply to article 20 of the Tax Law in the same manner and with the same force and effect as if those provisions of article 28 had been fully incorporated into article 20. Tax Law § 1147 (a) (1), contained in article 28, provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [article 20] The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

G. 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 is produced and the burden of demonstrating proper mailing rests with the Division (*see Matter of Novar TV & Air Conditioner Sales & Serv.*).

H. The Division may meet its burden of proving proper 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). 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 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*).

I. Here, the Division introduced proof sufficient to establish mailing of the notice of determination to petitioner’s last known address on July 22, 2021. 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 affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the mailing cover sheet and CMR conform with the address listed on petitioner’s form quarterly ST-100 for the period March 1, 2021 through May 31, 2021, which satisfies the “last known address” requirement in Tax Law §1138 (a) (1). It is concluded that the notice of determination was properly mailed and thus, the statutory 90-day time limit to file a petition with the Division of Tax Appeals commenced on July 22, 2021 (*see* Tax Law §§ 478; 1138 [a] [1]).

J. Petitioner has offered no evidence to counter the Division’s evidence that the notice of determination was issued on July 22, 2021. It is therefore concluded that the Division properly mailed the notice of determination on July 22, 2021, and the statutory 90-day time limit to file a petition with the Division of Tax Appeals commenced on that date (*id.*). The documents show that the notice of determination was mailed on July 22, 2021, but petitioner’s petition was not mailed until December 27, 2021, a date beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over the notice of determination.

K. With respect to the conciliation order, the Picard and Ramundo affidavits do not address the procedures for issuance of conciliation orders including the subject conciliation order. Additionally, the Division did not produce any proof of mailing of the subject conciliation

order. Since no evidence was presented to establish proper mailing of the subject conciliation order, the Division has not met its burden to show that the petition was untimely filed with respect thereto.

L. The Division's motion to dismiss the petition or for summary determination is granted in accordance with conclusions of law "I" and "J" and the petition is dismissed with respect to notice of determination L-053904031, but in all other respects is denied. A hearing on the protest of the conciliation order will be scheduled in due course.

DATED: Albany, New York
November 17, 2022

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE