

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TAWFIK S. MOHAMED :
for Revision of a Determination or for Refund of : **ORDER**
Cigarette Tax under Article 20 of the Tax Law for the : **DTA NO. 830985**
Period July 29, 2021. :

Petitioner, Tawfik S. Mohamed, 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 29, 2021.

On April 25, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing by Kenneth K. Frenkel, Esq., did not submit a response by July 9, 2023, which date began the 90-day period for the issuance of this order. After due consideration of the documents submitted, Donna M. Gardiner, Supervising Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Tawfik S. Mohamed, a notice of determination, dated December 16, 2021, bearing assessment number L-054922378

imposing a fine under article 20 of the Tax Law in the amount of \$5,000.00, for the period July 29, 2021 (notice). The notice was addressed to petitioner at an address in New York, New York.

2. On May 19, 2022, petitioner filed a petition with the Division of Tax Appeals.

3. On April 25, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition indicated that the notice of determination was issued on December 16, 2021, but the petition was not filed until May 19, 2022, or in excess of 90 days later.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted among other documents: (i) an affirmation, dated June 13, 2023, of Brian Evans, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated May 24, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated May 25, 2023, of Susan Ramundo, a manager of the mail room of the Department of Taxation and Finance; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked December 16, 2021; (v) a copy of the notice of determination, dated December 16, 2021, together with the associated mailing cover sheet, that reflects the New York, New York, address listed on the petition; and (vi) a copy of the petitioner's ST-100, New York State and Local quarterly sales and use tax return (sales tax return), dated December 7, 2021, for the period

September 1, 2021 through November 30, 2021. The address listed on the sales tax return is the same address as listed on the petition.

5. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier was the Supervisor of Administrative Analysis from July 2019 through August 2022 and has been the Principal Administrative Analyst and the Director of MAPS since August 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier 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 page of the CMR in the present case to the actual mailing date of December 16, 2021. 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.

6. 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 the 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.”

7. The CMR for December 16, 2021 consists of 22 pages and lists 240 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 24 which contains 9 entries. Ms. Denier 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 December 16, 2021 to each page of the CMR, wrote the number “262” next to the heading “Total Pieces Received at Post Office” on page 24, and initialed or signed the first and last page of the CMR.

8. The CMR attached to the Denier affidavit as exhibit A does not include pages 12 and 13.

9. Page 4 of the CMR indicates that a notice with reference number L-054922378 and certified control number 7104 1002 9730 0521 9410 was mailed to petitioner at his New York, New York, address. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit B, bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Susan Ramundo, a manager in the Division’s mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail

room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained 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 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. As noted, each page of the CMR attached to the Denier affidavit as exhibit A contains a USPS postmark dated December 16, 2021. In addition, she attests that the USPS employee's initials, or signature appear on the last page of the CMR.

11. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 262 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on December 16, 2021. However, as noted in finding of fact 8, the CMR attached to the Denier affidavit contains only 22 pages and 240 certified control numbers.

12. According to the Denier and Ramundo affidavits, the notice was mailed to petitioner on December 16, 2021, as claimed.

13. In his petition, petitioner alleges that he never received the notice at issue.

Petitioner states that he became aware of the notice after he received a consolidated statement of tax liabilities, dated April 1, 2022, that listed the subject notice.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

A motion for summary determination may 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 that 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]).

B. Tax Law § 478 authorizes the Division to issue a notice of determination for cigarette tax due. 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 (*see* Tax Law § 478). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003). A petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a taxpayer's protest of a notice is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the date and fact of mailing the subject notice to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). 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).

D. In this case, the Division has not met its burden. Both the Denier and Ramundo affidavits state that the CMR consisted of 24 pages and that 262 articles of mail were delivered to the USPS, relying on the USPS employee's handwritten number 262 and the signature to corroborate that the USPS received 262 articles from the Division on December 16, 2021. However, the CMR attached to the Denier affidavit consisted of 22 pages, with pages 12 and 13 omitted from the CMR. The CMR only contains 240 certified control numbers. Therefore, the Division failed to prove the fact of mailing (*see Matter of Kayumi*, Tax Appeals Tribunal, June 27, 2019).

Additionally, Ms. Denier affirms that the CMR pages remain banded together when the postmarked documents are returned to the Department and stay banded unless ordered otherwise. Clearly, the pages in the CMR for December 16, 2021 did not remain banded together and she provides no explanation for the omission of two pages from the CMR. Thus, the Division failed to demonstrate it followed its standard procedures for mailing.

E. In a case where the Division has failed to establish the date of mailing, the period within which a protest must be filed does not commence and the presumption of receipt does not attach (*Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002, citing *Matter of Katz*). However, other evidence establishing the date of actual receipt of the notice, thereby commencing the 90-day period within which to bring a protest thereof, can overcome the Division's failure to prove the date of mailing of the statutory notice in the flawed CMR (*see Matter of New York City Billionaires Constr. Corp.*; *Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008).

Petitioner stated that he became aware of the notice at issue when he received a consolidated statement of tax liabilities dated April 1, 2022. Thus, it is on April 1, 2022, that commenced the 90-day period within which to protest the notice. Since the petition was filed on May 19, 2022, the Division of Tax Appeals has jurisdiction to address the merits of his protest (Tax Law § 478).

F. Accordingly, the notice of intent to dismiss petition, dated April 25, 2023, is withdrawn. The Division of Taxation shall have 75 days from the date of this order to file an answer to the petition of Tawfik S. Mohamed.

DATED: Albany, New York
September 28, 2023

/s/ Donna M. Gardiner
SUPERVISING ADMINISTRATIVE LAW JUDGE