

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WOOD BROTHERS AIR COMPRESSOR, LLC : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 824621
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period January 1, 2003 through November 30, 2009. :

Petitioner, Wood Brothers Air Compressor, LLC, 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 January 1, 2003 through November 30, 2009.

On October 25, 2011, 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 basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. Petitioner, appearing by its employee Christine Wood, filed its responses to the notice on November 7 and December 7, 2011. The Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), upon extension, submitted its response to the notice on December 22, 2011. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on December 27, 2011, the date set by the Division of Tax Appeals for submissions by the parties. After due consideration of the documents and arguments submitted by the parties and the pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the petition.

FINDINGS OF FACT

1. Petitioner was issued a refund denial by the Division of Taxation (Division) on September 28, 2010. In response, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) dated October 5, 2010. After a conciliation conference, a Conciliation Order dated June 24, 2011 was issued denying the request and sustaining the statutory notice. Petitioner filed a petition with the Division of Tax Appeals on September 24, 2011.

2. On October 25, 2011, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated as follows:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to Tax Law § 170.3-a(e), a conciliation order is binding upon both the Division of Taxation and the taxpayer unless a petition is filed with the Division of Tax Appeals within ninety days from issuance of such conciliation order. The Division of Tax Appeals is without jurisdiction to consider the merits of petitions filed in excess of ninety days following the issuance of a conciliation order (20 NYCRR 3000.3[c]).

On June 24, 2011, a Conciliation Order, CMS No. 241858, was issued to petitioner sustaining Refund Denial dated September 28, 2010. However, it appears that the instant petition, filed in protest of this Conciliation Order, was filed with the Division of Tax Appeals on September 24, 2011, or ninety-two days following the issuance of the Conciliation Order.

Pursuant to 20 NYCRR 3000.9(a)(4), a party shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

3. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner submitted correspondence on November 7 and December 7, 2011. Petitioner did not argue that its petition was timely filed in either submission. Instead, petitioner solely addressed the substantive merits of its case.

4. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the following: affidavits of three Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel, Bruce Peltier, the Principal Mail and Supply Supervisor in the Division's Registry Unit, and Robert Farrelly, the Assistant Supervisor of Tax Conferences of the BCMS of the New York State Department of Taxation and Finance; a copy of the petition filed with the Division of Tax Appeals on September 24, 2011; a copy of the conciliation order issued on June 24, 2011; and a copy of the certified mail record (CMR) containing a list of the conciliation orders issued by the Division on June 24, 2011.

5. The affidavit of Robert Farrelly sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

6. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and covers letter to a BCMS clerk assigned to process the conciliation orders.

7. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP Unit). For each mailing, the AFP Unit 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.

8. The AFP Unit also produces a computer-generated CMR entitled "CERTIFIED RECORD FOR PRESORT MAIL." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

9. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope through which the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear.

10. Pursuant to the general office practice, the BCMS clerk stamps "POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas," and also stamps "Mail Room: Return Listing To: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR.

11. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case, "6/24/11" was written in the upper right corner of each page of the CMR.

12. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center.

13. Mr. Farrelly attests to the truth and accuracy of the copy of the seven-page CMR, which contains a list of the 73 conciliation orders issued by the Division on June 24, 2011. The CMR lists 73 certified control numbers. Each certified control number is assigned to an item of mail listed on the seven pages of the CMR. Specifically, corresponding to each listed certified control number is a reference number and the name and address of the addressee.

14. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Corresponding to certified control number 7104 1002 9730 0644 9700 is reference number 000241858, along with petitioner's name and address, which is 162 Express Drive South, Brentwood, NY 11717. This is the same address listed by petitioner on its request for a conciliation conference, i.e., its last known address.

15. The affidavit of Bruce Peltier attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He states that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and affixes postage and fee amounts. 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.

16. Here the postal employee affixed a postmark dated June 24, 2011 to each page of the seven-page CMR. The postal employee also wrote his or her initials and the number “73” next to the printed statement “TOTAL PIECES RECEIVED AT POST OFFICE” on page 7 of the CMR, indicating that 73 pieces of mail were actually received.¹ This was done in compliance with the Division’s specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record.

17. Mr. Peltier states that the CMR is the Division’s record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR was picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and was then delivered to the originating office, in this case, BCMS. The CMR was maintained by BCMS in the regular course of business.

18. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier states that on June 24, 2011, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Wood Brothers Air Compressor, 162 Express Drive South, Brentwood, NY 11717, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. He states that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on June 24, 2011 for the records of BCMS. Mr. Peltier asserts that the procedures described in his 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

¹Mr. Peltier states in his affidavit that the postal clerk initialed “page 5,” but does not mention page seven of the CMR. A review of the CMR, however, shows that page seven was also initialed.

that these procedures were followed in mailing the piece of certified mail to petitioner on June 24, 2011.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals 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) and Tax Law § 1139(b), the conciliation order in this case and the underlying refund denial would be binding upon petitioner unless it 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).

B. Where the timeliness of a taxpayer's petition following a conciliation order is in question, the initial inquiry focuses on the mailing of the conciliation order because a properly mailed 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 (*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). However, the burden of demonstrating proper mailing in the first instance rests with the Division (*Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634 [1983], *affd* 64 NY2d 688 [1984]).

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 orders 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 Conditioner Sales & Serv.*). In this case, the Division has met its burden of establishing proper mailing. Specifically, BCMS was required to mail the Conciliation Order to petitioner at its last known address (*see Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). As indicated by the CMR and the affidavits of Bruce Peltier and Robert Farrelly, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders, the Division has offered adequate proof to establish the fact that the order in issue was actually mailed to petitioner by certified mail on June 24, 2011, the date appearing on the CMR, to its last known address. The affidavits describe the various stages of producing and mailing orders and attest to the authenticity and accuracy of the copies of the order, and the CMR was submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Peltier and Farrelly affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of June 24, 2011. There were 73 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the number "73" near his or her initials, that 73 items were received for mailing. In short, the Division established that it mailed the order to petitioner by

certified mail on June 24, 2011 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. An order is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS, as described above (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this case, the order was properly mailed when it was delivered into the custody of the USPS on June 24, 2011, and it is this date which commenced the 90-day period within which a protest had to have been filed. Ninety days after the June 24, 2011 date of mailing was September 22, 2011, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Petitioner's protest was not filed until September 24, 2011, however. Thus, as a matter of law, the Division of Tax Appeals has no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

E. This order, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of a determination in favor of the Division on a motion for summary determination for failure to have filed a timely petition, and precludes petitioner from having a hearing on the substantive issues of the refund denial. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, such a motion "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. . . ."

Petitioner submitted no evidence that its petition was filed within the time required. In addition, petitioner has failed to challenge the Division's proof of mailing of the Conciliation

Order with any evidence or arguments. Therefore, it must be concluded that petitioner has failed to meet its burden of proof.

F. The petition of Wood Brothers Air Compressor, LLC is dismissed.

DATED: Albany, New York
February 23, 2012

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE