

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DEANCO SERVICES, INC. : DETERMINATION
 : DTA NO. 825135
 :
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 September 1, 2003 through February 28, 2005.

Petitioner, Deanco Services, 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 September 1, 2003 through February 28, 2005.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (John E. Matthews, Esq., of counsel), brought a motion on January 24, 2013 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, dated January 24, 2013, and annexed exhibits. On February 22, 2013, petitioner, appearing by Rider Weiner & Frankel P.C. (Jeffrey S. Sculley, Esq., of counsel) submitted the affirmation of Jeffrey S. Sculley, Esq., and additional documents in opposition to the motion, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

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 subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated January 3, 2011 and bearing assessment identification number L-035249317 and Audit case identification number X-085737843-6.¹ The notice is addressed to petitioner, Deanco Services, Inc., at "2051 Route 44 55, Modena, NY 12548-5209."

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the January 3, 2011 Notice of Determination. The request was mailed to BCMS on April 11, 2012.

3. On April 27, 2012, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice of determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on January 3, 2011, but the request was not mailed until April 11, 2012, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the January 3, 2011 Notice of Determination, the Division provided the following with its motion papers: i) an affidavit, dated October 2, 2012, of Daniel A. Maney, a manager of the Division's Refunds, Deposits, Overpayments and

¹According to the Affidavit of John E. Matthews, the Notice of Determination bearing audit identification number X-085737843-6 was also assigned assessment number L-035249317. This latter number appears in the computation section of the subject notice.

Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) pages numbered 1, 1,336, and 1,471 from the “Certified Record for Presort Mail - Assessments Receivable” (CMR), each legibly postmarked January 3, 2011; (iii) an affidavit, dated October 10, 2012, of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center; (iv) an affidavit, dated October 9, 2012, of Heidi Corina, a legal assistant in the Division’s Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated September 7, 2012; (vi) a copy of the January 3, 2011 Notice of Determination with the associated mailing cover sheet; and (vii) petitioner’s quarterly sales tax return for the period ended November 30, 2010, which lists the same address for petitioner as that listed on the subject notice.² This sales tax return was the last return filed with the Division by petitioner before the notice was issued.

5. The affidavit of Daniel A. Maney, who has been in his current position since January 2010, sets forth the Division’s general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices 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 page of the CMR in the present case to the actual mailing date of “1/3/11.” In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered

² The same address for petitioner is also listed on its petition, dated July 25, 2012.

into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. 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 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. According to the Maney affidavit, the CMR in the present matter consists of 1,471 pages and lists 16,172 certified control numbers along with corresponding assessment numbers, names and addresses. There are no deletions from the list. Mr. Maney notes that the portion of the CMR that is attached to his affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed page 1,471. Mr. Maney adds that the total number of statutory notices mailed pursuant to the CMR was 16,172.

8. Attached to the Maney affidavit, as exhibit "A," is a copy of pages 1, 1,336 and 1,471 of the CMR issued by the Division on January 3, 2011. Pages 1 and 1,471 have a handwritten entry referring to January 3, 2011 on the top; however, page 1,336 does not have a similar entry.

9. Page 1,336 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 0391 4706 and reference number X- 085737843 was mailed to

petitioner at the Modena, New York, address listed on the subject notice of determination. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Bruce Peltier, a supervisor in the Registry Unit since 1999 and currently a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves 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 envelopes are counted and the names and certified control numbers verified against 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 signature on the CMR, indicating receipt by the post office. The Center 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.

11. Each of the three pages of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of January 3, 2011. On page 1,471, corresponding to "Total Pieces and Amounts," is the preprinted number 16,172, and next to "Total Pieces Received At Post Office" is the handwritten entry "16,172" along with initials or a signature. According to Mr. Maney, the affixation of the postmarks and the Postal Service employee's initials indicate that all 16,172 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on January 3, 2011.

12. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on January 3, 2011, as claimed.

13. The affidavit of Heidi Corina describes the Division's request to the USPS for delivery information on the subject notice of determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0391 4706. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 0391 4706 and addressed to petitioner was delivered as addressed on January 6, 2011. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article number 7104 1002 9730 0391 4706. Exhibit "B" to the Corina affidavit is the USPS response to the Division's request indicating delivery of the same article on January 6, 2011 to "2051 Route 44/55" in "Modena, NY 12548." The USPS response also identifies the recipient as "A. DiPaul" and bears a copy of his signature in that capacity.

14. Petitioner submits the affidavit of Andrew DiPaul in opposition to the Division's motion. Mr. DiPaul avers that he is the sole shareholder and president of petitioner. He states that in January 2011, he was overwhelmed attempting to correct various problems caused by co-shareholders of a previously owned company and, as a result, he does not recall receiving or signing for the subject notice on January 6, 2011.

CONCLUSIONS OF LAW

A. 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 § 1138(a)(1) authorizes the Division of Taxation to issue a notice of determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient.” This section further provides that such a notice “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

C. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a notice of determination (*see* Tax Law § 170(3-a)(a); § 1138[a][1]). If a taxpayer fails to file a timely petition protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. Here, the Maney and Peltier affidavits establish the Division’s current standard mailing procedure. In this case, however, the Division has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notice. First, Mr. Peltier indicates that he has been a supervisor in the Registry Unit of the New York

State Department of Taxation and Finance since March 1999 but does not explain what the Registry Unit does or whether his duties in the Registry Unit at the time of the issuance of the subject notice involved mailing procedures. Meanwhile, although he separately states that he is currently a Principal Mail and Supply Supervisor, Mr. Peltier does not aver that he was in that role in January 2011 when the subject notice was issued. This missing foundational link and resulting ambiguity has recently been considered by the Tribunal to be fatal to the presumption of delivery (*see Matter of Madoff*, Tax Appeals Tribunal, April 19, 2012).

F. Moreover, in the present matter, a properly completed CMR is missing from the record (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Exhibit “A” of the Maney affidavit contains three pages of what purports to be a longer multi-page computer-generated CMR. Unlike in the procedure described in the Maney affidavit, the three pages in exhibit “A,” are not physically connected, and the pages are not consecutively numbered. Moreover, the date on the top of pages 1 and 1,471 has been changed to January 3, 2011, but remains unchanged on page 1,336. Pages 1 and 1,471, therefore, bear a different date than page 1,336. As a result, the partial CMR submitted as exhibit “A” of the Maney affidavit also does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

G. These flaws may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the Corina affidavit and the accompanying USPS delivery information clearly and convincingly shows that a copy of the notice at issue, addressed to petitioner, which was also listed on the CMR, was delivered as addressed on January 6, 2011. The signature provided by the USPS evidencing receipt matches

Mr. DiPaul's signature on petitioner's quarterly sales tax return for the period ended November 30, 2010. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that the notice was delivered to petitioner's last known address, as claimed, on January 6, 2011 (*see Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012; *Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, June 10, 2010).

H. Based on the above conclusions, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., January 6, 2011, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *revg* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Consequently, petitioner had until April 6, 2011 to file a timely protest. Petitioner's request for conciliation conference was not filed until April 11, 2012, however, a date which falls beyond the required statutory period. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

I. It is noted that petitioner's mere uncertainty or outright denial of receipt of the statutory notice, contained in its papers in opposition, is insufficient on its own to rebut the evidence of receipt (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

J. Petitioner's Request for Conciliation Conference was filed on April 11, 2012. This date falls after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1], § 170[3-a][b]). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

K. The Division of Taxation's motion for summary determination is granted, and the petition of Deanco Services, Inc. is dismissed.

DATED: Albany, New York
May 2, 2013

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