

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
CASA DI PIZZA, INC. : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826122
Corporation Franchise Tax under Article 9-A of the Tax :
Law for the Years 2004 through 2010. :

Petitioner, Casa Di Pizza, Inc., filed an exception to the determination of the Administrative Law Judge issued on August 14, 2014. Petitioner appeared by Amigone, Sanchez & Mattrey, LLP (B.P. Olivero, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner filed a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. The six-month period for the issuance of this decision commenced on May 12, 2015, the date petitioner withdrew its request for oral argument.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

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

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact 2, which we have modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. On February 24, 2014, petitioner, Casa Di Pizza, Inc., filed a petition with the Division of Tax Appeals challenging notice of deficiency number L-039623441. Petitioner attached a copy of a statutory notice to its petition as required. Petitioner also indicated that it did not request a conciliation conference with regard to the statutory notice.

2. Notice of deficiency number L-039623441 was dated July 8, 2013 and addressed to petitioner at "477 Elmwood Ave, Buffalo, NY 14222-2013." The statutory notice reflected a claimed tax deficiency under Article 9-A of the Tax Law. Among other information regarding protest rights, the notice of deficiency stated: "You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 10/06/13."

3. As of July 8, 2013, petitioner's then-representative was David E. Gross, with an address of 786 Lee Avenue, North Tonawanda, New York 14120.¹

4. On March 20, 2014, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a notice of intent to dismiss petition to petitioner. The notice of intent to dismiss petition indicates that the subject petition was filed in protest of a notice of deficiency issued to petitioner on July 8, 2013 and that the petition was not filed until February 24, 2014, or some 231 days later.

¹ Attached to the petition is a power of attorney dated June 14, 2013 running from petitioner to B. P. Oliverio, Esq. This power of attorney authorized Mr. Oliverio to represent petitioner only in matters involving sales and use taxes, though, and not corporation franchise taxes, such as those involved in the case at bar.

5. In response to the issuance of the notice of intent to dismiss petition and to prove mailing of the notice of deficiency under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated May 21, 2014, of Daniel A. Maney, a manager in the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 8, 2013; (iii) an affidavit, dated May 21, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; and (iv) a copy of petitioner's New York state and local sales and use tax return (Form ST-810) for the period March 1, 2013 through May 31, 2013, which reports the same Buffalo, New York, address for petitioner as that listed on the subject notice. This return was electronically filed on June 10, 2013.

6. The petition filed in this matter also reports the same Buffalo, New York, address for petitioner as that reported on the subject notice and the aforementioned sales and use tax return submitted by the Division.

7. The affidavit of Daniel A. Maney 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. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "7/8/13." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR

stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

8. 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 P.O. Address."

9. The CMR relevant to the notice of deficiency under protest consists of 17 pages and lists 177 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated July 8, 2013 to each page of the CMR and also wrote his or her initials on each page thereof.

10. Page 15 of the CMR indicates that a notice of deficiency, assigned certified control number 7104 1002 9730 0020 5654 and assessment number L-039623441, was mailed to petitioner at the Buffalo, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

11. Page 15 of the CMR also indicates that a copy of the notice of deficiency, assigned certified control number 7104 1002 9730 0020 5630 and assessment number L-039623441, was mailed to petitioner's then-representative, David E. Gross, at his North Tonawanda, New York,

address. The corresponding mailing cover sheet bears this certified control number and Mr. Gross's name and address as noted.

12. The affidavit of Bruce Peltier, 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. The 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 or initials on the CMR, indicating receipt by the post office. Here, each page of the CMR contains such postmarks and initials. 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 last page of the CMR. Here, the USPS employee complied with this request by circling the number "177" on the last page with his or her initials.

13. According to both the Maney and Peltier affidavits, a copy of the subject notice of deficiency was mailed to petitioner and Mr. Gross on July 8, 2013, as claimed.

14. Petitioner does not dispute receipt of the statutory notice.

15. The petition in this case expressly and solely protests corporation franchise tax assessment number L-039623441. However, petitioner states that the assessment under protest derives from a sales tax audit that also resulted in additional sales and use tax assessments

against both petitioner and its purported responsible persons, Joseph and Jeswald Jacobbi. These sales and use tax notices have been separately petitioned with the Division of Tax Appeals.

16. Petitioner filed a response to the notice of intent to dismiss petition. In it, petitioner does not dispute that it failed to file a timely response to the corporate franchise tax notice at issue here. Instead, petitioner again refers to the sales tax assessments, requests that the separate petitions involving the sales tax notices be consolidated with the instant one as they involve the same facts and issues, and suggests that all sales tax claims against Jeswald Jacobbi, its purported responsible person, be dismissed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness of protests of statutory notices. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, in order to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge concluded that the Division met the foregoing standards and established that the subject notice of deficiency was properly mailed to petitioner and its former representative on July 8, 2013. More specifically, the Administrative Law Judge found that the Division submitted adequate proof of its standard mailing procedures through the affidavits of Mr. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency. The Administrative Law Judge also determined that the CMR was properly completed, thereby establishing that the

Division's standard procedure was followed in this case, and that the subject notice was mailed as addressed to petitioner and its former representative on July 8, 2013.

Having determined that the Division met its burden of proving proper mailing, the Administrative Law Judge found that the period for the filing of a petition with the Division of Tax Appeals to protest the subject notice of deficiency expired 90 days from the July 8, 2013 date of such mailing. As the petition herein was filed with the Division of Tax Appeals on February 24, 2014, a date falling well-beyond the 90-day period of limitations, the Administrative Law Judge concluded that such petition was untimely filed. Consequently, the Administrative Law Judge determined that the Division of Tax Appeals lacked jurisdiction to consider the merits of petitioner's protest and dismissed the petition.

The Administrative Law Judge rejected petitioner's contention that the petition in this case should be consolidated with its other sales tax matters pending before the Division of Tax Appeals. The Administrative Law Judge reasoned that, as petitioner failed to file a timely protest of the subject notice, the Division of Tax Appeals lacked jurisdiction to allow for consolidation and the ensuing consideration of the merits of the franchise tax petition.

ARGUMENTS ON EXCEPTION

Petitioner contends that the facts present in the instant matter are unique and that the dismissal of its petition will result in a manifest injustice. Specifically, petitioner points to the presence of a corporation franchise tax auditor at a Bureau of Conciliation and Mediation Services (BCMS) conciliation conference on August 20, 2013, a date falling within the 90-day period to protest the subject notice of deficiency. Such conciliation conference addressed certain sales tax assessments against petitioner and two of its officers. As noted, according to petitioner, the franchise tax liability in the present matter is derived from those sales tax assessments.

Petitioner contends that, given the presence of the franchise tax auditor at the conciliation conference, it reasonably believed that the franchise tax deficiency² was included in the assessments to be reviewed and considered by the conciliation conferee. Petitioner contends that the Division committed a misrepresentation by omission (or concealment) by failing to make clear that the franchise tax deficiency was not included in the conciliation conference, given the presence of the franchise tax auditor at the conference. Petitioner thus seeks an estoppel against the enforcement of the 90-day limitations period to protest the notice of deficiency at issue.

We note that petitioner does not contend that any Division employees expressly stated that the franchise tax deficiency was included among the assessments that were the subject of the conciliation conference. We note further that petitioner did not request a conciliation conference with respect to the subject franchise tax deficiency and the conciliation order that was issued following the August 20, 2013 conference did not address the franchise tax deficiency.

To show manifest injustice resulting from a denial of a hearing on the merits in the Division of Tax Appeals, petitioner cites the significant financial impact of such an outcome. As another detrimental consequence of the Administrative Law Judge's determination, petitioner asserts that, if the determination is allowed to stand, the res judicata effects of the administrative proceedings in connection with the sales tax assessments will be mooted.

Petitioner thus requests that its petition in the present matter be consolidated with the petitions of sales tax assessments that are pending in the Division of Tax Appeals. Alternatively, petitioner requests that the Division be prohibited from taking any action to enforce the franchise tax assessment herein until the sales tax matters are resolved.

² In its exception and briefs, petitioner refers to the franchise tax deficiency as the "IT Assessment."

The Division contends that it presented sufficient proof to establish proper mailing of the subject notice of deficiency on July 8, 2013 and that, accordingly, the subject petition, filed on February 24, 2014, was untimely. The Division also contends that petitioner's estoppel claim is without merit as it made no misrepresentation of fact.

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of our Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

Our rules provide that a summary determination 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" (20 NYCRR 3000.9 [b] [1]).

As we previously noted in *Matter of United Water New York*:

"Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is 'arguable' (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see Gerard v. Inglese*, 11 AD2d 381 [1960]). Upon such a motion, it is not for the court 'to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist' (*Daliendo v. Johnson*, 147 AD2d 312 [1989])" (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

If, upon review of a taxpayer's corporation franchise tax return under article 9-A, the Division determines that there is a deficiency of tax, it may mail a notice of deficiency to such taxpayer by certified or registered mail to the taxpayer's last known address (Tax Law § 1081

[a]). Such notice of deficiency becomes an assessment subject to levy and collection unless the taxpayer timely files a petition with the Division of Tax Appeals or a request for conciliation conference with BCMS (Tax Law §§ 1081 [b], [c]; 1089; 170 [3-a] [a]).

It is well established that where the timeliness of a taxpayer's protest against a statutory notice is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet its burden "by establishing the use of a standard mailing procedure for [statutory notices] by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the [notice] in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

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).

Upon review of the evidence submitted, we agree with the Administrative Law Judge that the Division established its standard mailing procedures through the affidavits of Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

We also agree with the Administrative Law Judge that the evidence presented establishes that the Division followed its standard mailing procedure in this case. Specifically, we agree with the Administrative Law Judge's conclusion that the CMR was properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of*

Rakusin, Tax Appeals Tribunal, July 26, 2001). Accordingly, we find that the Division has established that the subject notice was mailed as addressed to petitioner and its former representative on July 8, 2013.

Having determined that the Division properly issued the notice of deficiency by certified mail on July 8, 2013 pursuant to Tax Law § 1081 (a), the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (Tax Law §§ 1081 [b]; 170 [3-a] [a]). As the petition herein was filed on February 24, 2014, such petition was untimely.

Petitioner does not challenge either the Division's proof of mailing or the Administrative Law Judge's conclusion that its petition was filed past the 90-day time limit, but, as noted, contends that the circumstances herein justify an estoppel against enforcement of the limitations period.

The doctrine of equitable estoppel may be invoked against a government agency charged with the administration of taxes only where exceptional circumstances are present and application of the doctrine is necessary to prevent a manifest injustice (*see Matter of Sodexo, USA, Inc.*, Tax Appeals Tribunal, November 21, 2007).

In order for the doctrine to apply in a specific case, it must be established that:

“(1) there was a misrepresentation made by the government to a party and the government had reason to believe that the party would rely upon the misrepresentation; (2) the party's reliance on the government's misrepresentation was reasonable; and (3) prior to the party discovering the truth, the party acted to its detriment based upon the misrepresentation” (*Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013).

There is no evidence or allegation that the Division made any express misrepresentation to petitioner regarding statutory requirements related to the protest of a notice of deficiency.

Petitioner contends, however, that the presence of a franchise tax auditor at the sales tax conciliation conference, without any clarification that the franchise tax deficiency was not included in the conference, should be considered a representation by the Division that the franchise tax assessment was included among the assessments to be considered by the conferee. We disagree. As noted previously, the Tax Law requires a taxpayer to file either a petition or a request for conciliation conference within 90 days in order to protest a notice of deficiency issued under Article 9-A (Tax Law §§ 1081 [b]; 170 [3-a] [a]). “As a taxpayer, petitioner is charged with knowledge of the relevant provisions of the Tax Law” (*Matter of Nathel v Commissioner of Taxation & Fin. of State of N.Y.*, 232 AD2d 836 [1996]). Furthermore, the subject notice itself accurately states the statutory filing requirements for timely protests (*see* finding of fact 2). Given these clear and unequivocal statutory filing requirements, and the absence of any express contradictory information from the Division, we reject as unreasonable petitioner’s contention that the franchise tax auditor’s presence at the hearing implied that petitioner was relieved from complying with such filing requirements with respect to the subject franchise tax notice of deficiency.

We thus conclude that the Division made no misrepresentation to petitioner. Accordingly, there is no basis for invoking the doctrine of estoppel (*see Matter of Geiger*, Tax Appeals Tribunal, March 8, 2001; *Matter of Rashbaum v Tax Appeals Trib. of State of N.Y.*, 229 AD2d 723 [1996]).

Even if the presence of the franchise tax auditor at the conference could be construed as a misrepresentation by the Division regarding the statutory requirement to timely file a petition or request for conciliation conference, any reliance thereon by petitioner was unreasonable, given the express language in both the statute and the notice of deficiency (*see Matter of Glover*

Bottled Gas Corp., Tax Appeals Tribunal, September 27, 1990 [reliance on orally communicated erroneous advice regarding a refund claim limitations period was unreasonable given the “clear and unequivocal” language in the relevant statute of limitations]; *Matter of Lamanna*, Tax Appeals Tribunal, March 31, 2003 [reliance on erroneous oral advice regarding a deadline for filing a petition was unreasonable where such purported advice was contrary to the “explicit language” contained in an official written notice of the Division related to such deadline]).

Having determined that petitioner failed to timely file its petition herein, and having further determined that the doctrine of estoppel is not applicable under the instant facts and circumstances, the Division of Tax Appeals is without jurisdiction to consider the merits of the subject petition (*Matter of Lukacs*). Accordingly, the petition herein may not be consolidated with the related pending sales tax matters as requested by petitioner. Furthermore, petitioner’s request that this Tribunal prohibit the Division from taking any enforcement action with respect to the subject franchise tax assessment until the sales tax matters are resolved must be denied, as the Division of Tax Appeals has no authority over the Division’s collection activities after an assessment becomes subject to enforcement (*see Matter of Hogan*, Tax Appeals Tribunal, November 25, 2009).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Casa Di Pizza, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Casa Di Pizza, Inc. is dismissed.

DATED: Albany, New York
November 12, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner