

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

DENISE NWANKPA :

DECISION
DTA NO. 826643

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 March 1, 2012 through May 31, 2012, and for :
Revision of Determinations or for Refund of Cigarette :
Tax under Article 20 of the Tax Law for the Periods :
February 24, 2011 and December 7, 2012.

Petitioner, Denise Nwankpa, filed an exception to the determination of the Administrative Law Judge issued on March 10, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Frank Nuara, Esq., of counsel).

Petitioner did not submit a brief in support of her exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested. The six month period for issuance of this decision began on May 10, 2016, the date that the Division of Taxation's notification that it would not file a brief was received by the Tax Appeals Tribunal.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of conciliation orders.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. On July 16, 2014, petitioner, Denise Nwankpa, filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of consolidated statement of tax liabilities number E-032353573-4 (consolidated statement). The request sought a conference for numerous notices of determination issued to petitioner pursuant to Articles 20, 28 and 29 of the Tax Law. Included in the consolidated statement were the following notices of determination:

Notice #	Tax Type	Tax Period	Tax	Penalty	Interest
L-038721478	Sales and Use	03/01/12 - 05/31/12	\$728.16	\$218.41	\$246.08
L-035619087	Cigarette	02/24/11	0	\$2,000.00	0
L-039004041	Cigarette	12/07/12	0	\$10,000.00	0

2. Petitioner's address as printed on her request was 660 Morris Park Avenue, Bronx, New York 10462. This was petitioner's last known address at all relevant times.

3. In response to her request, BCMS issued to petitioner two conciliation orders, both dated August 1, 2014. The first, bearing CMS number 262795, addressed notice of determination number L-038721478, and informed petitioner that her request was late filed and, therefore, dismissed. The second conciliation order, bearing CMS number 262796, addressed notices of determination numbers L-035619087 and L-039004041, and likewise dismissed the request as late filed.

4. On November 22, 2014, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the conciliation orders in CMS numbers 262795 and 262796, which included notices of determination numbers L-038721478, L-035619087 and L-039004041. The envelope in which the petition was delivered to the Division of Tax Appeals

bears a United States Postal Services (USPS) postmark dated November 22, 2014. The petition itself is signed by petitioner and dated October 25, 2014.

5. On February 26, 2015, the Supervising Administrative Law Judge of the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent to dismiss petition indicated that conciliation orders numbered 262795 and 262796 appear to have been issued on August 1, 2014 and the petition appears to have been filed on November 22, 2014, or 113 days later, and was therefore untimely.

6. By order dated July 2, 2015, the Division of Tax Appeals withdrew the notice of intent to dismiss petition. The order stated that in support of dismissal, the Division of Taxation (Division) had introduced adequate proof of its standard mailing procedures for generating and issuing its conciliation orders, but failed to present sufficient documentary proof to establish that conciliation orders numbers 262795 and 262796 were mailed to petitioner at her last known address on August 1, 2014. In particular, the Division failed to include in its papers supporting dismissal, a copy of the cover sheet generally mailed to taxpayers along with a conciliation order (*see generally Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015).

7. The Division subsequently filed a motion for summary determination, and submitted various documents in support, including an affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, along with an attached CMR. Mr. Farrelly has served in that capacity since October 2002. Mr. Farrelly's affidavit sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the CMR.

8. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards them to the conciliation conferee for signature, who in turn, forwards the order and covering letter to a BCMS clerk assigned to process the conciliation orders.

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

10. The AFP Unit also produces a computer-generated certified mail record (CMR) entitled "Certified Record for Presort Mail - BCMS Cert Letter." 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 CMS 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 using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. 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 on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. On the last page of the CMR, the BCMS clerk stamps “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas” and also stamps “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit” on each page.

13. 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 “8-1-14” is written in the upper right corner of each page of the CMR attached to Mr. Farrelly’s affidavit.

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

15. Mr. Farrelly attests to the truth and accuracy of the copy of the six-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on August 1, 2014. This CMR originally listed 65 computer-printed certified control numbers. Each such certified control number was assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed certified control number was a CMS number, the name and address of the addressee, and postage and fee amounts.

16. Twenty-four pieces of mail, located on pages one, two, four and five of the CMR were “pulled” or deleted from the list. A piece may be pulled for any number of reasons, including a discrepancy in the name or address. A line was placed through the entries that were pulled. No such mark is made on the listings for petitioner. As a result of the deletions, the clerk changed the “total pieces and amounts” listed on page six of the CMR from “65” to “41.”

17. As Mr. Farrelly confirms, information regarding conciliation orders, CMS numbers 262795 and 262796, is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0271 1658 is CMS number 262795, and corresponding

to certified control number 7104 1002 9730 0271 1665 is CMS number 262796. Both entries list petitioner's name and last known address as set forth on her request for conciliation conference.

18. Attached to Mr. Farrelly's affidavit are two cover sheets, both dated August 1, 2014 and addressed to petitioner at her last known address. The first cover sheet contains certified control number 7104 1002 9730 0271 1665 and references CMS number 262796. The second cover sheet contains certified control number 7104 1002 9730 0271 1658 and references CMS number 262795. According to Mr. Farrelly, these are the cover sheets referenced in his description of the general mailing procedure and were included with the conciliation orders sent to petitioner.

19. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. The affidavit attests to the regular procedures followed by him and his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. 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.

20. In this particular instance, the postal employee affixed a postmark dated August 1, 2014 to each page of the six-page CMR. On page six, the postal employee also wrote his or her initials or signature, and circled the crossed out preprinted number "65" and hand wrote number

“41” near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

21. Based upon his review of Mr. Farrelly’s affidavit, and the exhibits attached thereto including the CMR, Mr. Peltier states that on August 1, 2014, an employee of the Mail Processing Center delivered to a branch of the USPS in Albany, New York, in sealed envelopes for delivery by certified mail, two pieces of certified mail addressed to petitioner at her Bronx, New York, address. Mr. Farrelly states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on August 1, 2014 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 that these procedures were followed in mailing the pieces of certified mail to petitioner on August 1, 2014.

22. In her response to the Division’s motion, petitioner argued against the merits of the underlying notices. Moreover, she maintained that she mailed her petition on October 26, 2014, and subsequently spoke with an employee of the Division of Tax Appeals in order to inform her of the mailing and also obtain permission to fax a copy. Petitioner acknowledged that she received a letter from the Division of Tax Appeals dated December 11, 2014 confirming receipt of the petition and seeking additional pertinent information. Furthermore, petitioner stated that she faxed the requested additional information to the Division of Tax Appeals on January 6, 2015. Finally, petitioner stated that the motion should be denied as this matter was reported to a case advocate with the Office of the Taxpayer Rights Advocate of the Department of Taxation and Finance.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first noted that the Division's motion for summary determination would be treated as a motion to dismiss the petition because the issue presented, i.e., the timeliness of the petition, is determinative of whether the Division of Tax Appeals has jurisdiction over the subject matter of the petition.

Next, the Administrative Law Judge reviewed statutory and case law relevant to the timeliness of petitions following the issuance of a conciliation order. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the conciliation order 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 this procedure was followed in this specific case.

The Administrative Law Judge found that the Division had met its burden of establishing the date and fact of mailing of the subject conciliation orders to petitioner's last known address on November 22, 2014. Specifically, the Administrative Law Judge found that the CMR in the matter was properly completed and constituted probative evidence of the date and fact of mailing. Accordingly, the Administrative Law Judge concluded that the CMR, along with the Farrelly and Peltier affidavits, established that the Division had a general mailing procedure and that such procedure was followed in this instance. The Administrative Law Judge also noted that the Division cured the concerns regarding compliance with its standard mailing procedure, as discussed in the July 2, 2015 order (*see* finding of fact 6), by submitting copies of the cover sheets mailed to petitioner along with the conciliation orders. As petitioner's petition was filed on November 22, 2014, which was beyond the statutory 90-day period in which to file a petition,

the Administrative Law Judge held that the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner disagrees with some of the mailing procedures that were sworn to in the Farrelly and Peltier affidavits, but did not identify any specific procedure with which she disagrees.

The Division relies upon the determination of the Administrative Law Judge and the papers submitted by the Division with its motion.

OPINION

We concur in the Administrative Law Judge's treatment of the Division's motion as a motion to dismiss the petition pursuant to 20 NYCRR 3000.9 (a) (ii). We note that the standard of review on such a motion is the same as that for a summary determination motion.

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)."

There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170 [3-a] [e]; 20 NYCRR 4000.5 [c] [4]). Accordingly, pursuant

to Tax Law § 170 (3-a) (e), the conciliation orders in this case would be binding upon the petitioner unless a timely petition with the Division of Tax Appeals was filed.

As the Administrative Law Judge correctly noted, it is well established that, where, as here, the timeliness of a taxpayer's protest is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). 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 its burden by producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (*see e.g. Matter of Western Aries Constr.*, Tax Appeals Tribunal, March 3, 2011; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

We agree with the Administrative Law Judge that the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders.

We also find that the CMR has been properly completed and therefore constitutes highly probative evidence of both the date and fact of mailing (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). Specifically, this document lists certified control numbers and reference numbers with corresponding names and addresses and bears USPS postmarks dated

August 1, 2014 on each page. As noted, the name, address, reference and the certified control numbers for petitioner appear on page 2 of the CMR. There are 65 pieces of mail listed on the CMR, but as a result of deletions, 41 pieces were delivered to the USPS for mailing. The conciliation orders addressed to petitioner were not deleted from the CMR. On the last page of the CMR, a postal employee wrote his or her initials or signature and also wrote "41" to indicate receipt by the post office of all 41 pieces of mail listed thereon in accordance with the Division's standard mailing procedure. We thus conclude that the Division has presented sufficient documentary proof to establish that the subject conciliation orders were mailed as addressed petitioner on August 1, 2014.

Additionally we note that, as the history of this case indicates, the absence of a mail cover sheet may raise an issue of fact as to whether the Division's standard mailing procedure for conciliation orders was followed in a particular instance (*see* finding of fact 6; *see also Matter of Alvarenga*). Here, the Division eliminated this potential issue by providing copies of the relevant mail cover sheets with its motion papers.

A petition 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, January 6, 1989). As petitioner's petition was not filed until November 22, 2014, which was beyond the 90-day statutory period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Denise Nwankpa is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Denise Nwankpa is dismissed, with prejudice.

DATED: Albany, New York
October 27, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner