

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PARVINDER KAUR : DECISION
for Revision of a Determination or for Refund of Sales and : DTA NO. 828188
Use Taxes under Articles 28 and 29 of the Tax Law for the
Period June 1, 2014 through August 31, 2015. :
:

Petitioner, Parvinder Kaur, filed an exception to the determination of the Administrative Law Judge issued on November 2, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

Petitioner did not submit a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was denied. Petitioner's reply brief was due March 9, 2018, which date began the six-month period for issuance of this decision.

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

ISSUE

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

FINDINGS OF FACT

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

1. On February 8, 2017, the Division of Tax Appeals received a petition from petitioner, Parvinder Kaur, which protested a notice of determination issued to her. The envelope containing the petition bears a United States Postal Service (USPS) postmark of February 3, 2017. The notice of determination, assessment number L-044460667, dated February 23, 2016, was issued to petitioner at an address in Newburgh, New York.

2. On May 25, 2017, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition to petitioner. The notice of intent indicated that the relevant notice of determination was issued on February 23, 2016, but that the petition was not filed until February 3, 2017, or 346 days later.

3. In response to the issuance of the notice of intent, the Division of Taxation (Division) submitted the affidavits of Deena Picard, dated July 6, 2017, and Fred Ramundo, dated July 12, 2017, both employees of the Division. The Division also submitted a copy of the notice of determination issued to petitioner, a copy of the certified mail record (CMR) containing a list of notices issued by the Division on February 23, 2016, and a copy of form IT-201 resident income tax return filed by petitioner for the tax year 2014 reflecting the Newburgh, New York, address.

4. The affidavit of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS), sets forth the Division's general practice and procedure for processing statutory notices. As the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, she 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 "2/23/16." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "1" and are noted in the upper right corner of each page.

5. 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 Division's 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."

6. The February 23, 2016 CMR in the present matter consists of 26 pages and lists 275 certified control numbers along with corresponding assessment numbers, names and addresses. Portions of the CMR not relevant to this matter have been redacted to preserve confidentiality of information relating to other taxpayers. A USPS employee affixed a USPS postmark dated February 23, 2016 to each page of the CMR, and also wrote his or her initials on each page thereof. Page 22 of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0780 0012 with corresponding assessment number L-044460667, was mailed to petitioner Parvinder Kaur, at the Newburgh, New York, address listed thereon. The

corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted. The Newburgh, New York, address for petitioner is the same address used by petitioner on her form IT-201 filed with the Division for the tax year 2014.

7. The affidavit of Fred Ramundo, a mail room supervisor since 2013 and currently a Stores and Mail Operations Supervisor, 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. More specifically, once a notice and accompanying mailing cover sheet is placed in an area for "Outgoing Certified Mail" in the Division's mail room, a member of the staff retrieves the notice and mailing cover sheet and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. A staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against the information contained on the CMR. Each of the CMRs has been stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas." Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in the Albany, New York, area. A postal employee affixes a postmark and signs or initials the CMR indicating receipt by the post office.

8. In this particular instance, the postal employee affixed a postmark dated February 23, 2016, and initialed each page of the 26-page CMR. The postal employee also circled the number "275" on page 26 to indicate the "Total Pieces Received at Post Office."

9. 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 room, the CMR is picked up at the post office by a member of Mr. Ramundo's staff on the following day after its initial delivery and is then delivered to the originating office. The CMR is maintained by the Division in the regular course of business.

10. Based upon his review of the affidavit of Deena Picard, the exhibits attached thereto and the CMR, Mr. Ramundo states that on February 23, 2016, an employee of the Division's mail room delivered a piece of certified mail addressed to Parvinder Kaur to a branch of the USPS in the Albany, New York, area, in a sealed envelope for delivery by certified mail. He 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 February 23, 2016, for the records of the Division. Mr. Ramundo asserts that the procedures described in his affidavit are the regular procedures followed by the Division's mail room in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner on February 23, 2016.

11. Petitioner responded to the notice of intent to dismiss with a letter in which she admitted her petition was filed late, due to the fact that she had hired someone to contest the underlying notice of determination who failed to properly handle her tax matter. Therefore, she requests that her petition be considered on the merits.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began the determination in this matter by noting the 90-day statutory time limit to file a petition with the Division of Tax Appeals following the Division's issuance of a notice of determination to a taxpayer. The Administrative Law Judge observed that the Division of Tax Appeals would lack jurisdiction to consider the merits of a petition filed beyond that 90-day time limit. The Administrative Law Judge also noted that the

Division of Tax Appeals issued a notice of intent to dismiss petition because it appeared to have been filed more than 90 days after the issuance of the statutory notice in question.

Next, the Administrative Law Judge described the initial inquiry where timeliness of a petition is at issue. According to the Administrative Law Judge, the Division bears the burden of showing that the statutory notice was properly mailed, as proper mailing creates a presumption that the notice was delivered in the normal course of the mail. The Administrative Law Judge described the evidence as two-fold: there must be proof of a standard mailing procedure used by the Division in issuing statutory notices and that such a procedure was followed in this case.

The Administrative Law Judge found that the Division met its burden of proof by submitting affidavits of two Division employees with knowledge of the Division's mailing procedures and the attached certified mail record, which established that the notice of determination here at issue was mailed to petitioner on February 23, 2016. The Administrative Law Judge noted that the certified mail record was properly completed and thus constituted documentary evidence of both the date and fact of mailing.

As the date of filing of the petition in this matter was February 3, 2017, which fell after the 90-day time limit for filing a petition with the Division of Tax Appeals, the Administrative Law Judge concluded that the petition was untimely and thus the Division of Tax Appeals lacks jurisdiction to consider it on its merits. Consequently, the Administrative Law Judge dismissed the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner asks on exception that she be provided with an opportunity for a hearing to consider the merits of her protest of the notice of determination. The Division argues that the

Administrative Law Judge correctly determined that the petition in this matter was untimely and thus the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest.

OPINION

We agree with the Division that the Administrative Law Judge correctly determined that the petition in this matter was untimely filed and thus the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest of the notice of determination issued on February 23, 2016. Our review of the record accords with the Administrative Law Judge's finding that the Division demonstrated proper mailing of the notice of determination to petitioner on February 23, 2016 through its submission of the affidavits of two of its employees describing the Division's standard mailing procedures and confirming that such procedures were followed in this case (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). This, coupled with the attached properly completed certified mail record, gives rise to a presumption that the notice of determination was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 16, 1991; *Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). As the petition in this case was not filed until February 3, 2017, or beyond the 90-day statutory deadline for filing a protest of a statutory notice, we conclude that the petition in this matter is untimely and the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see* Tax Law §§ 1138 [a] [1] [B], 2006 [4]; 20 NYCRR 3000.3 [c]; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Although the determination included petitioner's response to the notice of intent arguing that the late filing of her petition should be excused due to her reliance on her representative who did not properly handle this matter, the Administrative Law Judge did not address this argument in her conclusions. While we prefer to have the benefit of an Administrative Law Judge's

research and analysis, we believe no purpose would be served by remanding this case to the Administrative Law Judge for further consideration. It is clear that under our prior decisions a petitioner cannot alleviate her responsibility to timely file her petition by asserting reliance upon her representative to do so (*see Matter of Avlonitis, Tax Appeals Tribunal*, February 20, 1992). This is because extenuating circumstances do not provide a basis to excuse the late filing of a petition (*see Matter of Perillo, Tax Appeals Tribunal*, August 2, 1990; *Matter of Rathgaber, Tax Appeals Tribunal*, April 5, 1990), even where a petitioner has relied on the advice and assistance of a representative to her detriment.

Deadlines for filing petitions are strictly enforced and petitions filed even one day late must be dismissed (*see Matter of Am. Woodcraft, Tax Appeals Tribunal*, May 15, 2003).

Therefore, in view of the above, we are without jurisdiction over this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Parvinder Kaur is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Parvinder Kaur is dismissed.

DATED: Albany, New York
September 6, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner