

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBO’S PIZZA, INC.	:	DECISION
D/B/A MARINO’S PIZZA	:	DTA NO. 828651
	:	
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, 2012 through May 31, 2015.	:	

Petitioner, Robo’s Pizza, Inc. d/b/a Marino’s Pizza, filed an exception to the determination of the Administrative Law Judge issued on January 31, 2019. Petitioner appeared by Robert Chimiak, president. The Division of Taxation appeared by Amanda Hiller, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for issuance of this decision began on April 24, 2019, the date that petitioner’s letter reply brief was received.

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 conciliation order.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts appear below.

1. This matter concerns a sales tax audit of Robo's Pizza, Inc., d/b/a Marino's Pizza (petitioner), which was subject to a sales and use tax audit for the period September 1, 2012 through May 31, 2015. Following the audit of the restaurant, petitioner was issued notice of determination L-043991031, assessing sales and use taxes of \$24,098.23, plus penalty and interest.

2. Petitioner filed a request for a conciliation conference regarding the notice of determination. The conciliation conference was held on May 17, 2016.

3. On April 14, 2017, the Division of Taxation's (Division's) Bureau of Conciliation and Mediation Services (BCMS) issued a conciliation order, CMS number 269073, to petitioner denying its request and sustaining notice of determination L-043991031.

4. Petitioner filed a petition dated March 20, 2018 with the Division of Tax Appeals by United States Postal Service (USPS). The USPS postage-paid priority mail label on the envelope containing the petition is dated March 27, 2018. The petition was received by the Division of Tax Appeals on March 28, 2018.

5. On August 24, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., issued to petitioner a notice of intent to dismiss petition with respect to the aforementioned petition. The notice of intent to dismiss petition provided that the petition was filed more than 90 days after the issuance of the conciliation order and, therefore, was not timely filed.

6. To show proof of proper mailing of the conciliation order dated April 14, 2017, the Division submitted, among other documents: (i) the affirmation of Justine Clarke Caplan, an

attorney employed in the Office of Counsel of the Division, dated October 31, 2018; (ii) a copy of the request for conciliation conference, stamped as received by BCMS on January 15, 2016; (iii) an affidavit of Robert Farrelly, Supervisor of Tax Conferences of BCMS, dated October 22, 2018; (iv) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked April 14, 2017; (v) a copy of the conciliation order, cover letter and cover sheet, dated April 14, 2017, as well as a copy of the three-windowed mailing envelope used to mail the order; (vi) an affidavit of Fred Ramundo, a supervisor in the Division’s mail room, dated October 22, 2018; and (vii) a copy of petitioner’s quarterly ST-100 New York State and local sales and use tax web filed returns, for the filing periods: December 1, 2014 through February 28, 2015; March 1, 2015 through May 31, 2015; June 1, 2015 through August 31, 2015; September 1, 2015 through November 30, 2015; December 1, 2015 through February 29, 2016; March 1, 2016 through May 31, 2016; June 1, 2016 through August 31, 2016; September 1, 2016 through November 30, 2016; and December 1, 2016 through February 28, 2017.

7. The affidavit of Robert Farrelly sets forth the Division’s general practice and procedure for preparing and mailing conciliation orders. The procedure culminates in the mailing of the conciliation orders by USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. 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 cover letters 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’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.

10. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers 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 (000). 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's regular duties include associating each cover sheet, cover letter, and conciliation order. 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 through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. The "Total Pieces and Amounts" is indicated on the last page of the CMR. It is the general office practice that the BCMS clerk stamps "MAIL ROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the bottom left corner of the CMR.

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case, "4/14/17" was written in the upper right corner of each page of the CMR.

14. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up from 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 five-page CMR, which contains a list of the conciliation orders issued by the Division on April 14, 2017. The CMR lists 45 certified control numbers. Each such certified control number is assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number, and the name and address of the addressee, and postage and fee amounts.

16. Information regarding the conciliation order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0108 0496 is reference or CMS number 000269073, along with the name and last known address of petitioner. Specifically, the Queensbury, New York, address listed on the CMR is the same address referenced on the request for conciliation conference, the last quarterly ST-100 New York State and local sales and use tax return filed before the issuance of the conciliation order, and the petition filed with the Division of Tax Appeals.

17. The affidavit of Fred Ramundo, a supervisor in the Division's mail room since December of 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. He states that 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 affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified control 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.

18. In this particular instance, the postal employee affixed a postmark dated April 14, 2017, to each page of the five-page CMR. The postal employee wrote the number "45" and initialed page five to indicate the total pieces of mail received at the post office. The postal employee also circled the typed number "45" corresponding to the heading "Total Pieces and Amounts" to indicate the number received.

19. Mr. Ramundo 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 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, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

20. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Ramundo avers that on April 14, 2017, an employee of the Mail Processing Center delivered an item of mail addressed to petitioner at its Queensbury, New York, address to a branch of the USPS in Albany, New York, in a sealed postpaid 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 April 14, 2017, for the records of BCMS. Mr. Ramundo 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 piece of certified mail to petitioner on April 14, 2017.

21. In its response to the notice of intent to dismiss petition, petitioner's president, Robert Chimiak, submitted a letter dated October 25, 2018, claiming, in pertinent part, that he did not receive a letter advising him of a 90-day deadline to file a petition with the Division of Tax Appeals.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the standard of review in the present matter is the same as that of a summary determination motion. The Administrative Law Judge pointed out that such a motion may be granted where no disputed material issue of fact exists.

Next, the Administrative Law Judge reviewed the law relevant to the timeliness of a petition following the issuance of a conciliation order. The Administrative Law Judge found that 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. According to the Administrative Law Judge, the Division must establish its standard mailing procedure and that such procedure was followed in this case in order to meet this burden.

The Administrative Law Judge found that the Farrelly and Ramundo affidavits and the CMR establish both the Division's general mailing procedure and that such procedure was followed in the present case. The Administrative Law Judge thus concluded that the Division met its burden and established that the subject conciliation order was properly mailed to petitioner on April 14, 2017.

The Administrative Law Judge also found that, where a conciliation order has been properly mailed, the Tax Law does not require actual receipt by the taxpayer to commence the 90-day limitations period. Accordingly, the Administrative Law Judge determined that the 90-day deadline was not tolled by the fact that the order mailed on April 14, 2017 was returned to the Division as unclaimed or by petitioner's claim that he did not receive a letter advising of the 90-day deadline to file a petition with the Division of Tax Appeals.

The Administrative Law Judge thus concluded that, as the petition herein was late-filed, the Division of Tax Appeals lacks jurisdiction in this matter. Accordingly, the Administrative Law Judge dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner continues to assert that it was not advised of the 90-day deadline to file a petition with the Division of Tax Appeals following the issuance of the conciliation order. Rather, petitioner's president contends that he last heard from the conciliation conferee in March 2017 and that the conferee did not advise him of the 90-day limitations period at that time. Petitioner asserts that if it had been aware of the 90-day period, it would have timely filed its petition. Petitioner also complains of enforcement efforts by the Division with respect to the unprotested assessment. Given these circumstances, petitioner requests that this Tribunal show forbearance and provide it with a hearing on the merits.

The Division contends that the Administrative Law Judge correctly determined that the Division demonstrated proper mailing of the conciliation order to petitioner's last known address on April 14, 2017 and that the petition filed on March 27, 2018 was untimely.

OPINION

The Administrative Law Judge's dismissal of the petition was made following the Supervising Administrative Law Judge's issuance of a notice of intent to dismiss petition pursuant to section 3000.9 (a) (4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9 [a] [4]). The standard of review for a notice of intent to dismiss is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). That is, 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" (20 NYCRR 3000.9 [b] [1]).

"The proponent of a summary judgment [or determination] motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (citations omitted)" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). In contrast, the opponent of such a motion "must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v GTE Sylvania*, 182 AD2d 446, 449 [3d Dept 1992] citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With exceptions not relevant here, there is a 90-day statutory time limit for filing a petition in the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170 [3-a] [e]). A conciliation order is binding upon a taxpayer absent a timely filed petition (*id.*). The Division of Tax Appeals and this Tribunal lack jurisdiction to consider the merits of any such late-filed petition (*Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; Tax Law § 2006 [4]).

Where, as here, the timeliness of a taxpayer's petition is in question, the Division has the burden to prove the date and fact of mailing of the statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division must show proof of a standard mailing procedure and proof that such procedure was followed in the instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by "producing affidavits from individuals with the requisite knowledge of mailing procedures and a properly completed CMR (citations omitted)" (*Matter of Balan*, Tax Appeals Tribunal, October 27, 2016).

The Division has met its burden here. The affidavits of Mr. Farrelly and Mr. Ramundo establish the Division's standard mailing procedures. The CMR has been properly completed and thus shows that the Division's standard mailing procedure was followed in this instance (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Furthermore, the cover sheet associated with the subject conciliation order bears petitioner's correct address. We thus agree with the Administrative Law Judge's conclusion that the conciliation order at issue was properly mailed to petitioner on April 14, 2017, as claimed.

As noted, Tax Law § 170 (3-a) (e) provides that a conciliation order is binding unless a petition is filed within 90 days after the conciliation order is "issued." As used here, "issued" means mailing (*Matter of Wilson*, Tax Appeals Tribunal, July 13, 1989). Accordingly, where, as here, a conciliation order has been properly mailed, Tax Law § 170 (3-a) (e) does not require actual receipt of the order by the taxpayer (*see Matter of Dean*, Tax Appeals Tribunal, July 24, 2014). Hence, petitioner's claim that it was never advised of the limitations period, even if proven (and even if relevant), does not toll the 90-day period.

The petition in this matter, filed more than 11 months after the conciliation order was issued, was untimely. As noted, we have no jurisdiction to consider the merits of a late-filed petition (*Matter of Lukacs*). Nor do we have authority to waive or extend the limitations period in a particular case, as petitioner requests (*see Matter of Leibowitz*, Tax Appeals Tribunal, August 13, 2015).

Finally, regarding petitioner's complaints about the Division's enforcement efforts with respect to the subject assessment, such activities are outside our jurisdiction (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998).

We find, therefore, that the Administrative Law Judge properly dismissed the petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robo's Pizza, Inc. d/b/a Marino's Pizza is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Robo's Pizza, Inc. d/b/a Marino's Pizza is dismissed.

DATED: Albany, New York
September 19, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner