

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
COLLIE BREWER : ORDER
DTA NO. 825818
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2001 through May 31, 2007. :

Petitioner, Collie Brewer, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2001 through May 31, 2007.

On November 6, 2013, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner pursuant to 20 NYCRR 3000.9(a)(4). On January 16, 2014, petitioner, by Matthews and Grieco (Robert C. Grieco, Esq., of counsel), having been granted an extension of time, submitted a letter in opposition to dismissal. On January 21, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), also having been granted an extension of time, submitted documents in support of dismissal, which date commenced the 90-day period for issuance of this order pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4). After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. On May 4, 2009, petitioner, Collie Brewer, filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) in protest of notices of determination numbers L-031602448, dated December 31, 2008, and L-031612153, dated March 5, 2009.¹ Petitioner's address as printed on his request is 11 Hudson Lane, Ulster Park, New York 12487.

2. Petitioner listed Henry A. Gleich, CPA, with an address of 144 Pine Street, Suite 210, Kingston, New York, 12401, as his representative on his Request for Conciliation Conference.

3. In response to petitioner's request, BCMS issued to petitioner two conciliation orders dated February 5, 2010 and bearing CMS numbers 232285 and 232286. Each conciliation order recomputed the tax and interest on the statutory notices.

4. On August 1, 2013, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review notices of determination L-031602448 and L-031612153, as modified by conciliation orders numbers 232285 and 232286.² The envelope in which the petition was delivered to the Division of Tax Appeals bears a United States Postal Services (USPS) postmark dated August 1, 2013.

5. On November 6, 2013, Daniel J. Ranalli, 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 indicates that conciliation orders numbers 232285 and

¹ Copies of notices number L-031602448 and L-031612153 were not attached to the petition or request for conference. The latter document, however, identifies the dates of the notices as described in Finding of Fact 1.

² Initially, petitioner filed a combined petition with an associated company named Rondout Lift, Inc. On August 13, 2013, the petition was amended and divided into a separate case for each petitioner. Rondout Lift, Inc.'s case is proceeding separately under DTA number 825852.

232286 appeared to have been issued on February 5, 2010 and the petition appeared to have been filed on August 13, 2013, or 1,285 days later and is therefore, untimely.³

6. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted documents in support of dismissal of the petition. Among the documents submitted was an affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS. 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.

7. 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.

8. 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 (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.

9. 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

³ As noted in Finding of Fact 4, the petition actually was filed on August 1, 2013. August 13, 2013 is the date of amendment of the petition referenced in Footnote 2. This difference does not effect the result in this case.

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.

10. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and covering 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, covering 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.

11. On each 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."

12. 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 "2/05/10" is written in the upper right corner of each page of the CMR.

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

14. Mr. Farrelly attests to the truth and accuracy of the copy of the eight-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on February 5, 2010. This CMR lists 83 computer-printed certified control numbers. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the eight pages of the CMR. Specifically, corresponding to each listed certified control

number is a CMS number, the name and address of the addressee, and postage and fee amounts.

15. Mr. Farrelly also makes a point to attest to the issuance of a conciliation order to petitioner. In his affidavit, though, Mr. Farrelly states the following:

In this case certified control number 7104 1002 9730 1776 0672 was used for the Conciliation Order mailed to Rondout Lift, Inc. and certified control number 7104 1002 9730 1776 0634 was used for the copy of the Conciliation Order mailed to Henry A. Gleich. The CMS number is 232284.

16. Contrary to Mr. Farrelly's statement, on page six of the CMR, certified control number 7104 1002 9730 1776 0672 corresponds with the name and address of petitioner as set forth on his Request for Conciliation Conference, rather than those of Rondout Lift, Inc. The referenced certified control number also corresponds with CMS number 232286, not 232284, on the CMR.

17. Mr. Farrelly's affidavit does not mention the conciliation order issued under CMS number 232285. Likewise, there is no evidence of CMS number 232285 on the CMR.

18. 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 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.

19. In this particular instance, the postal employee affixed a postmark dated February 5,

2010 to each page of the eight-page CMR. On page eight, the postal employee also wrote his or her initials or signature and the number “83” near the stamp affixed by the BCMS clerk requesting that the post office handwrite the total number of pieces and initial the form.

20. Based upon his review of Mr. Farrelly’s affidavit, the exhibits attached thereto and the CMR, Mr. Peltier states that on February 5, 2010, 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 1) a piece of certified mail to petitioner at his Ulster Park, New York, address; and, 2) a piece of certified mail to Henry A. Gleich at his Kingston, New York, address. 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 5, 2010 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 and his representative on February 5, 2010.

21. Petitioner responded to the Notice of Intent to Dismiss with a letter stating that he did not receive the conciliation orders in question.

CONCLUSIONS OF LAW

A. 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]). Pursuant to Tax Law § 170(3-a)(e), each of the conciliation orders in this case would be binding upon petitioner unless a timely petition with the Division of Tax Appeals was filed. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of*

Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be 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).

D. In this case, 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.

E. It must be concluded, however, that Mr. Farrelly's affidavit, as executed, fails to show that the procedure articulated by the Division's affiants was followed with respect to petitioner and the mailing of conciliation orders CMS numbers 232285 and 232286. First, Mr. Farrelly's affidavit does not mention CMS number 232285 whatsoever. Moreover, the CMR for February

5, 2010 does not have an entry for a conciliation order under that number. Hence, the Division fails to meet the standard for demonstrating that Conciliation Order CMS number 232285 was properly mailed to petitioner (*see Matter of Chung*, Tax Appeals Tribunal, September 22, 2011).

F. A more complex problem confronts the Division with regard to its proof concerning the mailing of the conciliation order for CMS number 232286. In his affidavit addressing this issue, Mr. Farrelly maintains that certified control number 7104 1002 9730 1776 0672 was used for the conciliation order sent to Rondout Lift, Inc., and not petitioner, Collie Brewer. Additionally, Mr. Farrelly asserts that the referenced certified control number applied to CMS number 232284. Meanwhile, in the CMR attached to Mr. Farrelly's affidavit, certified control number 7104 1002 9730 1776 0672 aligns with a certified mailing to "Collie C. Brewer" and reference number 000232286. These glaring inconsistencies are of sufficient materiality to cause there to be issues of fact dictating against dismissal of the petition in the instant case (*see* 20 NYCRR 3000.9[b][1]; *see Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

G. The Notice of Intent to Dismiss Petition issued to Collie Brewer dated November 6, 2013 is withdrawn and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
March 27, 2014

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