

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
KCV QUEENS, LLC : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 826061
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period June 1, 2010 :
through May 31, 2011. :
:

Petitioner, KCV Queens, LLC, filed a petition 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 June 1, 2010 through May 31, 2011.

On June 5, 2015, the Division of Taxation, by Amanda Hiller, Esq. (David Gannon, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affidavit of David Gannon, dated June 4, 2015, and annexed exhibits. Petitioner, appearing by Gaurav Mehta, EA, did not respond to the motion. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for conciliation conference following the issuance of a notice of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner, KCV Queens, LLC's, protest of a Notice of Determination dated September 17, 2013 and bearing assessment identification number L-040104255-3. The notice is addressed to petitioner at "KCV Queens, LLC, Glamour Shots, 14 Decicco Drive, Raritan, NJ 08869-1125." Petitioner does not dispute receipt of the statutory notice.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Determination.¹ The request was dated December 15, 2013, submitted in an envelope bearing a postmark of December 17, 2013, and stamped as received by BCMS on December 19, 2013.

3. On January 3, 2014, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, in part:

"The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on September 17, 2013, but the request was not mailed until December 17, 2013, or in excess of 90 days, the request is late filed."

4. Petitioner filed a petition with the Division of Tax Appeals dated January 8, 2014 that was stamped as received on January 22, 2014. The petition was signed by Cara Lovello, as a member of petitioner, and stated:

"The request for conciliation conference was mailed on December 7th. The request was made timely. Please grant us a conciliation conference."

¹ The request identified the taxpayer as "Cara Lovello," a member of petitioner. However, the request also protested notice number L-040104255-3 and named the instant petitioner in the section identifying the protested notices.

5. Accompanying the petition was a power of attorney dated October 23, 2013 from petitioner to Gaurav Mehta, EA. Mr. Mehta's address was listed as 3171 Route 9 North, Suite 282, Old Bridge, N.J. 08857. Although Ms. Lovollo signed the petition, Mr. Mehta was identified on the petition as petitioner's representative in this matter.

6. To show proof of proper mailing of the September 17, 2013 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated May 29, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a 19-page "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page of which is legibly postmarked September 17, 2013; (iii) an affidavit, dated May 29, 2015, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) a copy of the September 17, 2013 Notice of Determination with the associated mailing cover sheet; and (v) a copy of a power of attorney form from petitioner to Gary Mehta dated July 12, 2013, which lists the same address for petitioner as that listed on the subject notice.² This document was the last one filed by petitioner with the Division before the statutory notice was issued.

7. According to the affidavit of Ms. Nagengast, the process by which the Division generates and subsequently issues statutory notices, such as the notice of determination at issue here, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). Ms. Nagengast attests to her use of and familiarity with the Division's CARTS

² The July 12, 2013 power of attorney was not signed by Mr. Mehta, and it failed to identify his qualifications to represent petitioner at that time. As a result, the power of attorney was invalid for purposes of representation (*see* 20 NYCRR 3000.2). As noted in Finding of Fact 5, petitioner subsequently provided a fully executed power of attorney with its petition authorizing Mr. Mehta to represent it.

system.

8. The process begins with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one page "Mailing Cover Sheet" generated for each notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

9. The CARTS generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the heading entitled "Certified No." The assessment numbers for the notices appear under the second heading entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third heading entitled "Name of Addressee, Street and PO Address." Remaining headings list appropriate postage and fee amounts. Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively and appear at the upper right corner of each page of the CMR. All pages are banded when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

10. Each statutory notice is predated with the anticipated date of its mailing. In contrast,

each page of the CMR lists an initial date that is approximately 10 days in advance of such anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the United States Postal Service (USPS).

11. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet shows through the windows. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York, area for mailing. A USPS employee then affixes his or her initials or signature and/or a USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR

and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is then delivered back to the Division for storage and retention in the regular course of its business.

12. The CMR for the batch of notices issued on September 17, 2013 includes the notice of determination addressed to petitioner, bearing assessment number L-040104255. The CMR consists of 19 cut sheet pages, including page 1 on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20132531700." Appearing in the upper left corner of the first and last pages of the CMR, is the handwritten date "9/17/13," reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each page of the CMR includes a USPS postmark dated September 17, 2013. All pages of the CMR include 11 entries, with the exception of the last page of the CMR, which contains 7 entries.

13. In this case, certified control number "7104 1002 9730 0061 1301" was assigned to the Notice of Determination bearing assessment number L-040104255, and to be mailed to petitioner at its 14 Decicco Drive, Raritan, NJ 08869-1125 address.

14. Appearing on Page 19 of the CMR is the preprinted heading "Total Pieces and Amounts," to the right of which appear preprinted columns headed "Pieces," "Postage," and "Fee." These columns reflect the preprinted number of pieces of mail for this CMR, in this case

205, as well as the postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office,” and to the immediate right of this heading, the number 205 is circled. Appearing at the lower right side of page 19 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately below and to the right of this stamped instruction reflects the initials of the postal clerk and the aforementioned USPS postmark dated September 17, 2013. Thus, page 19 of the CMR indicates that a total of 205 pieces of mail were delivered into the custody of the USPS on September 17, 2013.

15. Attached to Ms. Nagengast’s affidavit, as exhibit “A,” is a copy of all 19 pages of the CMR.

16. The affidavit of Bruce Peltier describes the Division’s Mail Processing Center’s (Center) general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a 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 on the CMR, indicating receipt by the post office. 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 CMR. As noted, each page of the CMR in exhibit “A” of Ms. Nagengast’s affidavit

contains a USPS postmark of September 17, 2013. On page 19, corresponding to “Total Pieces and Amounts,” is the preprinted number 205, which is surrounded by a circle that extends into the space next to the line reading “Total Pieces Received At Post Office.” There is a set of initials or a signature in this area on page 19.

17. According to both the Nagengast and Peltier affidavits, a copy of the subject notice was mailed to petitioner on September 17, 2013, as claimed by the Division.

CONCLUSIONS OF LAW

A. The Division has filed alternative motions, seeking dismissal under 20 NYCRR 3000.9(a), or summary determination under 20 NYCRR 3000.9(b). As the Division of Tax Appeals has subject matter jurisdiction on the issue of the timely filing of a request for a conciliation conference in the instant matter, the Division’s motion will be treated as one for summary determination (*see Matter of Ryan*, Tax Appeals Tribunal, September 12, 2013). A motion for summary determination may 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 and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9[b][1]).

B. Petitioner did not respond to the Division’s motion. Accordingly, it is deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Division’s affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel, Inc. v. Baiden; Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]).

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of

Determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient. . . .” This section further provides that such a notice “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

D. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a Notice of Determination (*see* Tax Law §§ 170[3-a][b]; 1138[a][1]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond the 90-day limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the Division must carry its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011).

F. In the instant case, the Nagengast and Peltier affidavits establish the Division’s standard mailing procedure. Additionally, the production of the CMR by the Division, along with the aforementioned affidavits, constitutes sufficient documentary evidence to establish the subject Notice of Determination was mailed as addressed to petitioner on September 17, 2013. The CMR listed: (1) the correct name and address, (2) a corresponding certified control number, (3)

USPS postmarks dated September 17, 2013, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. Consequently, the CMR was properly completed, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

G. Petitioner's address on the notice, corresponding mail cover sheet, and CMR all conform with the address reported on the power of attorney form dated July 12, 2013, which was the last document filed by petitioner before the notice was issued. This satisfies the "last known address" requirement in Tax Law § 1138(a)(1).³

H. Petitioner had 90 days from the issuance of the Notice of Determination to either file for a conciliation conference with BCMS or file a petition with the Division of Tax Appeals. Its request for conciliation conference was mailed on December 17, 2013, or more than 90 days from the September 17, 2013 issuance of the subject notice. Thus, based on the undisputed evidence in this record, it is untimely.

I. The Division's motion for summary determination is hereby granted, the petition of KCV Queens, LLC is denied, and the Division's Notice of Determination L-040104255-3 is sustained.

DATED: Albany, New York
September 10, 2015

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

³ The statutory notice and cover sheet contain the additional line reading "Glamor Shots" (*see* Finding of Fact 1). Given the accuracy of the remaining address, however, along with petitioner's concession of receipt of the notice, this additional line is deemed inconsequential (*see Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).