

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CASA DI PIZZA, INC. : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826122
Corporation Franchise Tax under Article 9-A of the Tax :
Law for the Years 2004 through 2010. :

Petitioner, Casa Di Pizza, Inc., filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 2004 through 2006.¹

On March 20, 2014, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On April 11, 2014, petitioner, by Amigone, Sanchez & Mattrey LLP (B. P. Oliverio, Esq., of counsel), submitted written comments in opposition to dismissal. On June 2, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), having been granted a 30-day extension to do so, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on June 2, 2014. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

¹ The petition actually captioned a request for redetermination of a deficiency or for refund of taxes claimed under Articles 9 and 9-A of the Tax Law. The notice at issue, however, solely asserts a deficiency under Article 9-A.

ISSUE

Whether petitioner timely filed its petition with the Division of Tax Appeals following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. On February 24, 2014, petitioner, Casa Di Pizza, Inc., filed a petition with the Division of Tax Appeals challenging Notice of Deficiency number L-039623441. Petitioner attached a copy of a statutory notice to its petition as required. Petitioner also indicated that it did not request a conciliation conference with regard to the statutory notice.

2. Notice of Deficiency number L-039623441 was dated July 8, 2013 and addressed to petitioner at “477 Elmwood Ave, Buffalo, NY 14222-2013.” The statutory notice reflected a claimed tax deficiency under Article 9-A of the Tax Law.

3. As of July 8, 2013, petitioner’s then-representative was David E. Gross, with an address of 786 Lee Avenue, North Tonawanda, New York 14120.²

4. On March 20, 2014, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of a Notice of Deficiency issued to petitioner on July 8, 2013 and that the petition was not filed until February 24, 2014, or some 231 days later.

5. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Deficiency under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated May 21, 2014, of Daniel A. Maney, a manager in the

² Attached to the petition is a power of attorney dated June 14, 2013 running from petitioner to B. P. Oliverio, Esq. This power of attorney authorized Mr. Oliverio to represent petitioner only in matters involving sales and use taxes, though, and not corporation franchise taxes, such as those involved in the case at bar.

Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 8, 2013; (iii) an affidavit, dated May 21, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; and (iv) a copy of petitioner's New York state and local sales and use tax return (Form ST-810) for the period March 1, 2013 through May 31, 2013, which reports the same Buffalo, New York, address for petitioner as that listed on the subject notice. This return was electronically filed on June 10, 2013.

6. The petition filed in this matter also reports the same Buffalo, New York, address for petitioner as that reported on the subject notice and the aforementioned sales and use tax return submitted by the Division.

7. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR.

Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "7/8/13." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

8. 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 Departmental 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 P.O. Address."

9. The CMR relevant to the Notice of Deficiency under protest consists of 17 pages and lists 177 certified control numbers along with corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated July 8, 2013 to each page of the CMR and also wrote his or her initials on each page thereof.

10. Page 15 of the CMR indicates that a Notice of Deficiency, assigned certified control number 7104 1002 9730 0020 5654 and assessment number L-039623441, was mailed to petitioner at the Buffalo, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

11. Page 15 of the CMR also indicates that a copy of the Notice of Deficiency, assigned certified control number 7104 1002 9730 0020 5630 and assessment number L-039623441, was mailed to petitioner's then-representative, David E. Gross, at his North Tonawanda, New York, address. The corresponding mailing cover sheet bears this certified control number and Mr. Gross's name and address as noted.

12. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. The 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 or initials on the CMR, indicating receipt by the post office. Here, each page of the CMR contains such postmarks and initials. 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 last page of the CMR. Here, the USPS employee complied with this request by circling the number "177" on the last page with his or her initials.

13. According to both the Maney and Peltier affidavits, a copy of the subject Notice of Deficiency was mailed to petitioner and Mr. Gross on July 8, 2013, as claimed.

14. Petitioner does not dispute receipt of the statutory notice.

15. The petition in this case expressly and solely protests corporation franchise tax assessment number L-039623441. However, petitioner states that the assessment under protest derives from a sales tax audit that also resulted in additional sales and use tax assessments against both petitioner and its purported responsible persons, Joseph and Jeswald Jacobbi. These sales and use tax notices have been separately petitioned with the Division of Tax Appeals.

16. Petitioner filed a response to the Notice of Intent to Dismiss. In it, petitioner does not dispute that it failed to file a timely response to the corporate franchise tax notice at issue here. Instead, petitioner again refers to the sales tax assessments, requests that the separate petitions involving the sales tax notices be consolidated with the instant one as they involve the same facts and issues, and suggests that all sales tax claims against Jeswald Jacobbi, its purported responsible person, be dismissed.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit within which a taxpayer may challenge a statutory notice by filing either a request for a conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals (Tax Law § 170[3-a][e]; § 1089[b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

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 (*see 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). Where a notice of deficiency has been properly mailed, the Tax Law does not require actual receipt by the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

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. Maney and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notice was mailed as addressed to petitioner and its then-representative, Mr. Gross, on July 8, 2013. Specifically, the CMR lists certified control numbers with corresponding names and addresses and bears USPS postmarks on each page, dated July 8, 2013. Additionally, a postal employee circled "177" on the last page of the CMR next to his or her initials to indicate receipt by the post office of all pieces of mail listed thereon. Thus, the CMR has been properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Finally, the Division has produced evidence that the notice was mailed to petitioner's last known address as required by Tax Law § 1081(a) with submission of petitioner's New York state and local sales and use tax return for the period March 1, 2013 through May 31, 2013.

F. The 90-day period for filing a petition in this matter commenced with the mailing of the subject notice on July 8, 2013. The petition was filed on February 24, 2014, well-beyond the 90-day period of limitations, and is untimely. Accordingly, the Division of Tax Appeals is without

jurisdiction to consider the merits of the petition (*see Matter of Northern Ford-Mercury, Inc.*, Tax Appeals Tribunal, May 20, 2004).

G. Finally, petitioner's contention that the petition in this case should be consolidated with its other pending sales tax matters before the Division of Tax Appeals must fail. Petitioner failed to file a timely protest of the subject notice. Consequently, the Division of Tax Appeals is without the requisite jurisdiction to allow for consolidation and the ensuing consideration of the merits.

H. The petition of Casa Di Pizza, Inc. is dismissed.

DATED: Albany, New York
August 14, 2014

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