

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BELKYS NUNEZ	:	DETERMINATION
D/B/A MYRTLE AVENUE FAMILY DELI	:	DTA NO. 826147
for Revision of a Determination or for Refund	:	
of Cigarette Tax under Article 20 of the Tax Law	:	
for the Period Ended September 20, 2012.	:	

Petitioner, Belkys Nunez d/b/a Myrtle Avenue Family Deli, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended September 20, 2012.

On July 18, 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 August 18, 2014, petitioner, appearing pro se, submitted a letter in opposition to dismissal. On October 1, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich) submitted a letter, together with an affidavit and accompanying documents in support, agreeing with the proposed dismissal of the petition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced October 2, 2014. After due consideration of the documents and arguments submitted, and all pleadings filed, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition for a hearing before the Division of Tax

Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. Petitioner, Belkys Nunez d/b/a Myrtle Avenue Family Deli, filed a petition with the Division of Tax Appeals seeking an administrative hearing to challenge a Notice of Determination dated November 6, 2012, bearing Assessment ID number L-038806463-1 and assessing a penalty in the amount of \$5,000.00. The notice states that the penalty was imposed upon the following basis:

“During an inspection of your premises, on 09/20/12, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarettes and/or tobacco products.”

The petition is dated as signed on February 15, 2014. The envelope in which the petition was mailed bears a United State Postal Service (USPS) postmark date of February 28, 2014, and it, as well as the petition, is date stamped as received by the Division of Tax Appeals on March 4, 2014.

2. On July 18, 2014, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition (Notice of Intent), advising the parties that the Notice of Determination appeared to have been issued on November 6, 2012, the petition was not filed thereafter until February 28, 2014, or some 479 days later, and therefore was untimely and subject to dismissal. The parties were afforded 30 days within which to submit comments on the proposed dismissal of the petition. Upon request of the Division of Taxation (Division), the time within which to respond to the Notice of Intent was extended to October 2, 2014.

3. To show proof of proper mailing of the Notice of Determination on November 6, 2012, the Division provided the following: (i) an affidavit, dated September 29, 2014, of Leo

Gabovich, Law Clerk; (ii) an affidavit, dated September 22, 2014, of Heidi Corina, a legal assistant in the Division's Office of Counsel; (iii) an affidavit, dated September 12, 2014, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iv) an affidavit, dated September 17, 2014, of James Steven VanDerZee, the Head Mail and Supply Clerk and a supervisor in the Division's mail room; (v) pages numbered "1", "174" and "479" from the "Certified Record for Presort Mail - Assessments Receivable" (CMR); (vi) a Request for Delivery Information/Return Receipt After Mailing (USPS Form 3811-A) and USPS response thereto; (vii) a copy of petitioner's Quarterly Sales and Use Tax Return (Form ST-100) for the period June 1, 2012 through August 31, 2012 electronically filed on September 21, 2012; and (viii) a copy of petitioner's Application to Register for a Sales Tax Certificate of Authority filed on May 23, 2011.

4. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of deficiency, notices of estimated determination, notices of determination such as the Notice of Determination at issue herein, and other such notices during the period here in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences 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 such 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 with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

5. 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 first columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading entitled "Reference No." and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and PO Address." Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) 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.

6. As noted, 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. This CMR listing specifically sets forth, at the upper left corner of the CMR, 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 conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

7. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the Division's 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 show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then 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. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to 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 delivered back to the Division for storage and retention in the regular course of its business.

8. The CMR for the batch of notices to be issued on November 6, 2012, including that addressed to petitioner herein, allegedly consisted of 479 cut sheet pages. As noted, the Division included herein only page “1” (the first page), page “174” (the page on which information pertaining to petitioner appears) and page “479” (the last page) from the CMR. Each of these three pages includes in its upper left corner the preprinted year/day/time “run” listing of “20123041700” (*see* Finding of Fact 6). Appearing above this run listing on pages 1 and 479 is the handwritten date 11/6/12, indicating the manually inserted date of actual mailing (*see* Finding of Fact 6). Directly above the handwritten date on these pages is another manually inserted set of numbers, “512972,” the significance of which is not explained in the affidavits or otherwise. Neither of these handwritten items appears on page 174 of the CMR. Each of the foregoing three pages includes a USPS postmark, dated November 6, 2012 and reading “GMF Albany NY 12212.” Pages 1 and 174 each include eleven entries and page 479 includes two entries.

9. In this instance, certified control number 7104 1002 9730 1410 6848 was assigned to the notice to be mailed to petitioner at 332 Myrtle Ave., Brooklyn, NY 11205-3202. The reference number is L-038806463. This same information appears at Page 174 of the CMR to indicate that a notice of determination bearing certified control number 7104 1002 9730 1410 6848 and reference number L-038806463 was to be mailed to petitioner at “332 Myrtle Ave, Brooklyn, NY 11205-3202.”¹

10. Appearing below the two entries on Page 479 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,”

¹ The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

“Postage,” and “Fees.” These columns reflect the preprinted number of pieces of mail for this CMR, here 5,260, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office.” Appearing at the bottom right corner of page 479 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial/ Do Not stamp over written areas.” While the area immediately to the right of this stamped instruction reflects initials presumably affixed by the postal clerk, there is no handwritten or other confirming indication of the number of pieces received at the post office, either to the right of the area bearing this heading, or elsewhere on page 479, or on either of the other two pages of the CMR provided herein.²

11. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS bureau, and Steven VanDerZee, an employee and Supervisor in the Division’s mail room (*see* Finding of Fact 3). Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

12. The record includes a copy of the Notice of Determination allegedly mailed by certified mail to petitioner, Myrtle Avenue Family Deli, on November 6, 2012 as described. The record also includes the petition filed herein on February 28, 2014. On each of these documents, as well as on Form ST-100 (Quarterly Sales and Use Tax Return) and on Form DTF-17

² Paragraph nine of the Nagengast affidavit states, in part, that “[i]n this case, the Postal Service representative affixed a postmark to each page of the [CMR], and initialed or signed Page 13 of the [CMR]. The record does not include page 13 of what is purported to be a 479-page CMR.

(Application to Register for a Sales Tax Certificate of Authority), the same address (332 Myrtle Ave, Brooklyn, NY 11205-3202), is listed for petitioner and there is no claim or indication of any change of such address.³

13. The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing, return receipt, delivery confirmation information may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, Ms. Corina filed form 3811-A seeking information for an item mailed by the Division under certified number 7104 1002 9730 1410 6848 on November 6, 2012 from the Albany General Mail Facility office of the USPS to petitioner at the Brooklyn, New York, address listed above. In response, the USPS confirmed delivery of the certified mail item at the noted address on November 8, 2012 at 11:03 A.M.

14. In response to the Notice of Intent, petitioner submitted a letter in disagreement with the proposed dismissal of the petition, asserting that the petition should not be dismissed for lateness and requesting a 45-day extension.

CONCLUSIONS OF LAW

A. Inasmuch as a determination issued following a Notice of Intent under 20 NYCRR 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss

³ Each of the foregoing documents lists petitioner's name as Myrtle Ave. Family Deli Corp., whereas the petition filed herein lists petitioner's name as Belkys Nunez d/b/a Myrtle Avenue Family Deli. The Form DTF-17 reflects Belkys Nunez, the person who filed the subject petition on behalf of petitioner, as the president of Myrtle Ave. Family Deli Corp.

brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review in either instance. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2013), the Tribunal held that the standard to employ for reviewing a Notice of Intent is the same as that used for reviewing a motion for summary determination under 20 NYCRR 3000.9(b).

B. A motion for summary determination 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 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]).

C. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see, e.g., Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006; *Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In this case, there is no claim or evidence that petitioner

filed a request for a conciliation conference with BCMS. Thus, the question presented is whether the petition herein was filed within 90 days after the issuance of the Notice of Determination.

D. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, by certified or registered mail, to petitioner's last known address (Tax Law § 1138[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). To prove the fact and the date of mailing of a statutory notice, the Division must make the following showing:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question” (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

E. In this case, the Division failed to provide the entire 479 page CMR, but instead supplied only three pages of such CMR (*see* Finding of Fact 3). Furthermore, there are flaws in the three pages of the CMR that were provided concerning confirmation of the total number of pieces of mail actually received by the USPS for mailing. Such flaws are described in Findings of Fact 8 and 10. The consequence of these flaws is that a material question of fact is presented concerning the validity of the Division's claim that the standard mailing practices described in the Division's affidavits were followed in this instance (*see, Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). As a

result, the affidavits and the CMR, as provided, are not sufficient to support the conclusion that the subject Notice of Determination was properly mailed to petitioner as claimed on November 6, 2012.

F. Notwithstanding the foregoing, confirmation that a piece of certified mail was in fact delivered to its intended recipient can serve to overcome flaws in the proof of mailing such as those described above (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011). Here, the Division has established, via the Corina affidavit and accompanying USPS form 3811-A, that the Notice of Determination at issue allegedly mailed to petitioner under certified mail number 7104 1002 9730 1410 6848 was in fact delivered to petitioner on November 8, 2012 (*see* Finding of Fact 14). This proof of delivery of the Notice of Determination confirms the fact of mailing of the same by certified mail and overcomes the noted flaws in the CMR. Under these circumstances, the latest date from which the 90-day period for challenging the assessment made by such Notice of Determination commenced to run on the date of petitioner's actual receipt of the notice, i.e., November 8, 2012, and petitioner was required to file a petition with the Division of Tax Appeals within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *revg* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). In turn, 90 days after such November 8, 2012 date of actual receipt of the notice was February 15, 2013, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. However, the petition was not filed until February 28, 2014, a date which falls far beyond the statutory period within which a timely petition had to have been filed.

Unfortunately, the petition was not timely filed and, as a matter of law, there is no jurisdiction to address the merits of petitioner's petition (*Matter of Sak Smoke Shop*).

G. The petition of Belkys Nunez d/b/a Myrtle Avenue Family Deli is hereby dismissed.

DATED: Albany, New York
December 18, 2014

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE