

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SOLO PIZZA, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 826771
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period March 1, 2010 through November 30, 2012. :

Petitioner, Solo Pizza, Inc., 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 March 1, 2010 through November 30, 2012.

On August 19, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Michael Hall), 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 Michael Hall, dated August 19, 2015, and annexed exhibits. On September 19, 2015, petitioner, appearing by Gregory A. Crasto, CPA, late filed a letter in opposition to the motion. The 90-day period for issuance of this determination commenced on September 18, 2015, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Solo Pizza, Inc., a Notice of Determination, number L-040913465-2, dated April 2, 2014, assessing sales and use taxes due in the amount of \$111,369.01, plus penalty and interest, for the period March 1, 2010 through November 30, 2012. The notice is addressed to “Solo Pizza, Inc., 27 Avenue B, New York, NY 10009-7438.” The mailing cover sheet of the Notice of Determination contains the certified control number 7104 1002 9730 0210 1763. A copy of this Notice of Determination was also issued to petitioner’s representative, “Gregory A. Crasto, 161 10A Crossbay Boulevard, Howard Beach, NY 11414,” under a mailing cover sheet bearing certified control number 7104 1002 9730 0210 8779.

2. On July 18, 2014, the Division issued to petitioner a Notice and Demand for Payment of Tax Due (Notice and Demand) (assessment identification number L-040913465-2) assessing sales and use taxes due in the amount of \$111,369.01, plus penalty and interest, for the period March 1, 2010 through November 30, 2012. This Notice and Demand bore the Avenue B, New York, New York, address.

3. Petitioner filed a Request for Conciliation Conference (Request) with the Division’s Bureau of Conciliation and Mediation Services (BCMS) hand-dated as signed October 28, 2014. Petitioner’s representative signed this Request, which protested the July 18, 2014 Notice and Demand. The envelope in which the Request was mailed bears the United States Postal Service (USPS) metered stamp dated October 28, 2014. The basis for the Request was “[t]he Sales Tax audit was never completed. Additional Information was requested but never reviewed. We have tried on numerous occasions to have this information/documents reviewed but to no avail.” The Request lists petitioner’s address as the Avenue B, New York, New York, address, and its

representative's address as Gregory A. Crasto, CPA, 161-10A Crossbay Blvd., Howard Beach, New York 11414. Included with the Request was a copy of the July 18, 2014 Notice and Demand.

4. On November 14, 2014, BCMS issued a Conciliation Order Dismissing Request (Order) to petitioner. Bearing CMS No. 263884 and referencing notice number L-040913465, the Order determined that petitioner's protest was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on April 2, 2014, but the request was not mailed until October 28, 2014, or in excess of 90 days, the request is late filed.”

5. On February 6, 2015, the Division of Tax Appeals received a petition seeking a revision of the determination issued in this matter. The envelope in which the petition was sent by First Class Certified Mail bears a USPS metered stamp dated February 3, 2015. There is no dispute that the petition was filed within 90 days after the November 14, 2014 issuance of the Order, and constitutes a timely challenge thereto. The assertions in the petition address the merits of the case, not the timeliness of the request for conciliation conference.

6. In support of the motion and to prove proper and timely mailing of the Notice of Determination under protest, the Division submitted the following: (i) an affidavit, dated April 6, 2015, of Mary Ellen Nagengast, a Tax Auditor Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) dated April 2, 2014; (iii) an affidavit, dated April 8, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (iv) a copy of the power of attorney form, executed by petitioner's vice president on February 21, 2013, appointing Mr. Crasto, Howard Beach, NY 11414, as its representative in connection with the

sales tax matter for the years 2010 through 2012, date stamped received on February 21, 2013 by the Division's Transaction Field Audit Bureau; (v) a copy of petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the tax period December 1, 2013 through February 28, 2014 filed on March 17, 2014; and (vi) a copy of petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the period March 1, 2014 through May 31, 2014 filed on June 18, 2014.

7. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "4/2/14." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," 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 "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 Determination under protest consists of 125 pages and lists 1,367 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 125, which contains 3 such entries. Ms. Nagengast noted that portions of the CMR that was attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee initialed or signed and affixed a postmark dated April 2, 2014 of the Colonie Center branch of the USPS to each page of the CMR, and circled the preprinted number "1,367" on page 125 next to the heading "TOTAL PIECES AND AMOUNTS." Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 1,367.

10. Page 10 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0210 1763 and reference number L-040913465, was mailed to "SOLO PIZZA, INC." at the Avenue B, New York, New York, address listed thereon. The corresponding mailing cover sheet, attached to the Nagengast affidavit as "Exhibit B," bears this certified control number and petitioner's name and address as noted.

11. Page 74 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0210 8779 and the reference number L-040913465 was sent to "Gregory A Crasto, 161 10A Crossbay Boulevard, Howard Beach, NY 11414." The corresponding mailing cover sheet, attached to the Nagengast affidavit as "Exhibit B," bears this

certified control number and petitioner's representative's name and address as noted. An enclosure with the notice states that a copy of the notice was forwarded to Mr. Crasto because the Division's records indicate that a power of attorney is on file for the tax matters at issue in the matter.

12. The affidavit of Bruce Peltier, a supervisor in the Division's mail room since 1999 and currently Principal Mail and Supply Supervisor in the Division's mail room, describes the mail room's general operations and procedures. The mail room receives the notices in an area designated for "Outgoing Certified Mail." Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer pieces listed on the CMR by checking those envelopes against information contained on 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 initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated April 2, 2014 to each page of the CMR and initialed or signed each page of the CMR as well. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by circling "1,367" on the last page of the CMR. The affixation of the postmarks, the postal service employee's initials or signature, and the circling of the number indicating that all such pieces were received, confirm

that the Notice of Determination dated April 2, 2014 was received by the USPS on that date.

13. Petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the period December 1, 2013 through February 28, 2014 filed on March 17, 2014, reported petitioner's address as Avenue B, New York, New York 10009-7438. This was the last return filed by petitioner prior to the issuance of the April 2, 2014 Notice of Determination. Petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the period March 1, 2014 through May 31, 2014 filed on June 18, 2014, reported petitioner's address as Avenue B, New York, New York 10009-7438. This was the next return filed by petitioner after the issuance of the April 2, 2014 Notice of Determination.

14. In opposition to the Division's motion, petitioner's representative late filed a letter that addressed the merits of the case.

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).

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 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 by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such 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 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).

D. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 1147[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). To prove the fact and date of mailing of the subject 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 has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing)

statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

F. The 125-page CMR provides sufficient documentary proof to establish that the Notice of Determination dated April 2, 2014 was mailed by certified mail to petitioner at its last known address on April 2, 2014. Specifically, each page of this 125-page document lists certified control numbers with corresponding notice numbers, names and addresses and bears a U.S. Postal Service postmark dated April 2, 2014. A postal service employee circled the preprinted number “1,367” next to the “TOTAL PIECES RECEIVED AT POST OFFICE” heading and initialed the last page, thereby indicating that all 1,367 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 1,367 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

G. Tax Law § 1138(a)(1) provides that a notice of determination “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. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. . . . The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

H. Here, the record shows that petitioner’s address listed on its sales and use tax web filed return for the period December 1, 2013 through February 28, 2014, filed on March 17, 2014, was in New York, New York. Thus, petitioner’s last known address prior to the issuance of the

Notice of Determination on April 2, 2014 was the one stated on the sales and use tax web filed return for the period December 1, 2013 through February 28, 2014.

Accordingly, the Division has shown that it properly mailed the Notice of Determination dated April 2, 2014 to petitioner at its last known address consistent with Tax Law §§ 1138(a)(1) and 1147(a)(1). It is concluded that the notice was properly mailed, and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on April 2, 2014 (Tax Law §§ 170[3-a][b]; 1138[a][1]).

I. In order to timely protest the Notice of Determination issued on April 2, 2014, petitioner was required to file a petition or request for a conciliation conference within 90 days of April 2, 2014, i.e., on or before July 1, 2014. Petitioner's Request for Conciliation Conference was filed on October 28, 2014, a date beyond the statutory period within which a timely protest had to have been filed. Consequently, the Request was untimely (*see* Tax Law §§ 170[3-a][b]; 1138[a][1]) and the same was properly dismissed by the November 14, 2014 Order issued by BCMS.

J. The Division of Taxation's motion for summary determination is granted and the petition of Solo Pizza, Inc., is denied.

DATED: Albany, New York
November 12, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE