

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KENNEDY DELI RESTAURANT CORPORATION	:	DETERMINATION
	:	DTA NO. 826902
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period Ending September 27, 2014.	:	

Petitioner, Kennedy Deli Restaurant Corporation, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ending September 27, 2014.

On July 17, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 25, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. Petitioner, appearing by Mohd A. Abdalla, its vice president, did not submit a response. Daniel J. Ranalli, Supervising Administrative Law Judge, issued a determination dated November 5, 2015, which dismissed the petition.

Petitioner filed an exception to the determination and in a decision dated June 30, 2016, the Tax Appeals Tribunal remanded this matter for the issuance of a supplemental determination that, based upon the factual record already made, includes findings of fact and conclusions of law with regard to whether the Division of Taxation met its burden to prove mailing of the statutory

notice. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition should be dismissed because it was not timely filed following the issuance of a notice of determination.

FINDINGS OF FACT

1. On April 10, 2015, petitioner, Kennedy Deli Restaurant Corporation, filed a petition with the Division of Tax Appeals in protest of Notice of Determination number L-042231196. A copy of the notice was attached to the petition.

2. Notice of Determination number L-042231196 was dated November 25, 2014 and addressed to petitioner at “302 W 231st St., Bronx NY 10463-3805.” The notice assessed penalty totaling \$20,000.00 to petitioner under Article 20 of the Tax Law for failure to possess a valid New York State registration for retail sales of cigarettes or tobacco products upon an inspection held on September 27, 2014.

3. Petitioner filed its New York State and Local Quarterly Sales and Use Tax Return for the period June 1, 2014 through August 31, 2014. This return was dated September 18, 2014 and was the last return filed by petitioner with the Division of Taxation (Division) prior to November 25, 2014. On it, petitioner listed its address as “302 W. 231st Street, Bronx, NY 10463.”

4. On July 17, 2015, 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 stated that pursuant to Tax Law § 2006(4), a petition must be filed

within 90 days from the date a statutory notice was issued. Meanwhile, the Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of Notice of Determination number L-042231196, issued to petitioner on November 25, 2014, and that the petition was not filed until April 10, 2015, or some 136 days later. As a result, petitioner and the Division were provided 30 days to submit written comments on the proposed dismissal.¹

5. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of Notice of Determination number L-042231196, the Division provided the following: (i) an affidavit, dated September 21, 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 50-page "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page of which is legibly postmarked November 25, 2014; (iii) an affidavit, dated September 21, 2015, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel; (v) a copy of the November 25, 2014 Notice of Determination with the associated mailing cover sheet; and (vi) a copy of petitioner's form ST-100, New York State and Local Quarterly Sales and Use Tax Return for the period June 1, 2014 through August 31, 2014, described in Finding of Fact 3.

6. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from the Division's Case and Resource Tracking System 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

¹ This period was extended to October 1, 2015 at the request of the Division.

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 "11/25/14." 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 Ms. Nagengast. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

7. 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."

8. The CMR relevant to Notice of Determination L-042231196 consists of one page and lists eight certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Nagengast notes that portions of the CMR that are attached to her 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 November 25, 2014 to the CMR and also wrote his or her initials on it.

9. The CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0329 7397 and assessment number L-042231196, was mailed to petitioner at the

Bronx, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

10. 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. 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 or initials on the CMR, indicating receipt by the post office. Here, the one page of the CMR contains such a postmark 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 did not comply with this request. There is no entry next to the line reading total pieces received at post office, nor is the number of pieces accompanying the CMR, in this case eight, circled.

11. According to the affidavits of Ms. Nagengast and Mr. Peltier, a copy of Notice of Determination number L-042231196 was mailed to petitioner on November 25, 2014, as claimed.

12. The affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel, details her filing of PS Form 3811-A (Request for Delivery Information/Return Receipt After Mailing) with regard to the Notice of Determination. Filing PS Form 3811-A commences a

process by which post-mailing, return receipt, delivery confirmation may be obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. Ms. Corina filed PS Form 3811-A seeking information for one item mailed by the Division under certified number 7104 1002 9730 0329 7397 on November 25, 2014 from the USPS General Mail Facility to petitioner at its Bronx, New York, address listed above. The USPS response to the request indicates that the article bearing certified control number 7104 1002 9730 0329 7397 and addressed to petitioner was delivered to the above address in Bronx, New York, on November 29, 2014. Attached to the Corina affidavit as exhibit “A” is the Division’s “Request for Delivery Information” for article number 7104 1002 9730 0329 7397. Exhibit “B” attached to the Corina affidavit is the USPS response to the Division’s request. The response for this article number indicates delivery of the same article to 302 W. 231st Street in Bronx, New York, and bears the signature of the recipient.

13. Petitioner did not respond to the notice of Intent to Dismiss Petition.

CONCLUSIONS OF LAW

A. The standard of review for a notice of intent to dismiss petition is the same as that for a summary determination motion (*Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Such a motion “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” (20 NYCRR 3000.9 [b] [1]).

B. With certain exceptions not relevant herein, there is a 90-day statutory time limit for filing a petition with the Division of Tax Appeals following the issuance of a notice of determination (Tax Law §§ 478, 2006 [4]). The Division of Tax Appeals lacks jurisdiction to

consider the merits of a petition filed beyond the 90-day time limit (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

C. Where, as here, the timeliness of a taxpayer's petition is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of issuance of the relevant notice of determination (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden "by establishing the use of a standard mailing procedure for conciliation orders [or notices] by a person with knowledge of such procedures, and by introducing the evidence that this procedure was used in connection with the mailing of the order [or notice] in this case" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

D. In the case of the issuance of Notice of Determination number L-040233543, 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 and issuing notices of determination.

E. The Division, however, has not fulfilled the requirement to introduce adequate proof that its standard mailing procedure was followed in issuance of the subject notice. Specifically, a properly completed CMR is missing from the record (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The CMR attached to Ms. Nagengast's affidavit does not bear an entry indicating how many total pieces of mail were received at the USPS. As a result, the CMR submitted as an exhibit to Ms. Nagengast's affidavit does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

F. This flaw may be overcome, however, by other evidence of mailing in the record (*see*

Matter of Rywin, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in the matter with respect to the Notice of Determination at issue. Specifically, the Corina affidavit and the accompanying USPS delivery information clearly and convincingly shows that a copy of this notice, addressed to petitioner, which was also listed on the CMR, was delivered to petitioner at its Bronx, New York, address on November 29, 2014. Thus, the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that Notice Determination number L-042231196 was delivered to petitioner's last known address, as claimed, on November 29, 2014 (*see Matter of Victory Bagel Time, Inc.; Matter of Winners Garage, Inc.* Tax Appeals Tribunal, June 10, 2010).

G. Furthermore, petitioner did not respond to the Notice of Intent to Dismiss Petition and, therefore, has 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], *appeal dismissed* 62 NY2d 942 [1984]).

H. The 90-day period for filing a petition in this matter commenced with the receipt of Notice of Determination number L-042231196 on November 29, 2015 (*see Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011). Meanwhile, the petition was filed on April 10, 2015, well beyond the 90-day period of limitations. As a result, the petition challenging Notice of Determination number L-042231196 is untimely, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Northern Ford-Mercury, Inc.*, Tax Appeals Tribunal, May 20, 2004).

I. The petition of Kennedy Deli Restaurant Corporation is dismissed.

DATED: Albany, New York
September 1, 2016

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