

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SIM JEWELRY, INC. : DETERMINATION
DTA NO. 827070
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 December 1, 2007 through :
February 29, 2012.

Petitioner, Sim Jewelry, 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 December 1, 2007 through February 29, 2012.

On November 6, 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 the basis that the petition did not appear to have been filed in a timely manner. On January 19, 2016, the Division of Taxation, by Amanda Hiller, Esq. (James Connolly, Esq., of counsel), having been granted an extension of time to do so, submitted an affidavit and documents in support of dismissal. Petitioner, appearing by Simon Moas, President, did not file a response. Pursuant to 20 NYCRR 3000.5(d), the 90-day period for issuance of this determination commenced on January 21, 2016. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. On July 1, 2015, petitioner, Sim Jewelry, Inc., filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a Notice of Determination, assessment number L-040436905, which was attached to the petition.

2. The subject Notice of Determination, dated November 22, 2013, was addressed to petitioner at a New York, New York, address.

3. On November 6, 2015, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicated that the subject petition was filed in protest of a notice of determination issued to petitioner on November 22, 2013 and that the petition was not filed until July 1, 2015.

4. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Determination under protest, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated December 11, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked November 22, 2013; (iii) an affidavit, dated December 14, 2015, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center); (iv) a copy of the November 22, 2013 Notice of Determination with the associated mailing cover sheet; and (v) a copy of petitioner's Annual ST-101, New York State and Local Sales and Use Tax Web Filed Return, for the period March 1, 2012 through February 28, 2013, filed on March 13, 2013, which reports the same New

York, New York, address for petitioner as that listed on the subject Notice of Determination, and was the last return filed by petitioner prior to the issuance of the subject notice.

5. 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 are 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 "11/22/13." In addition, as described by Ms. Nagengast, generally all pages of the CMR are banded together when the documents are delivered into possession of the United States Postal Service (USPS) and remain so when returned to the Division. 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.

6. 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."

7. The CMR in the present matter consists of 21 pages and lists 221 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 21, which contains 1 entry. Ms. Nagengast notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a USPS postmark dated November 22, 2013 to each page of the CMR, wrote his or her initials on each page thereof, and circled the number "221" on page 21 next to the heading "Total Pieces and Amounts."

8. Page three of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0100 8810 and assessment number L-040436905, was mailed to petitioner at the New York, New York, address listed on the subject notice. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

Page one of the CMR also indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0100 8537 and assessment number L-0040436905, was mailed to petitioner's representative at that time, Kendal Ludden, at an address in New Brunswick, New Jersey. The corresponding mailing cover sheet bears this certified control number and the representative's name and address as noted.

9. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply supervisor, describes the Center's 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 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 the 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 November 22, 2013 on and initialed each page of the CMR. 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. Here, the USPS employee complied with this request by circling the number “221” on the last page next to the heading “Total Pieces and Amounts.”

10. Based upon his review of the affidavit of Ms. Nagengast and the exhibits attached thereto, including the CMR, and his personal knowledge of the procedures of the mail room, Mr. Peltier stated that on November 22, 2013, an employee of the mail room delivered pieces of certified mail addressed to petitioner, in New York, New York, and petitioner’s representative in Brunswick, New Jersey, to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. Mr. Peltier attested that the procedures described in his affidavit were the regular procedures followed by mail room staff in the ordinary course of business when handling items to be sent by certified mail, and that these procedures were followed in mailing the pieces of certified mail to petitioner and petitioner’s representative on November 22, 2013.

CONCLUSIONS OF LAW

A. 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 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 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 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).

B. Where, as here, the timeliness of a request for conciliation conference or petition is at issue, the initial inquiry is whether the Division has carried 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 Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice to petitioner’s last known address on November 22, 2013, as well as to petitioner’s then representative. The CMR has been properly completed and therefore constitutes highly probative

documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's annual sales and use tax return filed for the period March 1, 2012 through February 28, 2013, which satisfies the "last known address" requirement. It is thus concluded that the Division properly mailed the notice on November 22, 2013 and 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 that date (Tax Law §§ 170[3-a][a]; 1138[a][1]).

D. Petitioner's protest was not filed until July 1, 2015, or 586 days later. As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*).

E. This determination, made pursuant to the Notice of Intent to Dismiss Petition and the evidence and arguments submitted by the parties, is the equivalent of an order in favor of the Division on a motion for summary determination for failure to timely file a petition, and precludes petitioner from having a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), addressing motions for summary determination, 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. . . ."

Petitioner submitted no evidence that the petition was filed within the time frame required, i.e., within 90 days from the date the statutory notice was issued. Moreover, petitioner has failed to

respond to the Notice of Intent to Dismiss Petition or to challenge the Division's proof of mailing of the notice with any evidence. The proper mailing of a statutory notice, as in the present matter, gives rise to a presumption of receipt (*see Matter of Sugranes*, Tax Appeals Tribunal, October 3, 2002) and petitioner has failed to present any evidence to overcome this presumption (*see Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995).

F. Without a timely filed petition, this agency does not have the jurisdiction to entertain the substantive issues presented in the petition. Therefore, it must be concluded that petitioner has failed to meet its burden of proof.

G. The petition of Sim Jewelry, Inc., is dismissed.

DATED: Albany, New York
March 31, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE