

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PATRICIA GILANI : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 827088
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2011 through February 28, 2014. :

Petitioner, Patricia Gilani, 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 June 1, 2011 through February 28, 2014.

On April 8, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until June 23, 2016, to respond to said notice. On June 6, 2016, the Division of Taxation, appearing by Amanda Hiller, Esq. (Frank Nuarra, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing pro se, filed a response on July 13, 2016. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on June 23, 2016. After due consideration of the documents submitted, Kevin R. Law, Administrative Law Judge, renders the following order.

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. This matter concerns sales tax audits of the Manhattan Restaurant, Inc. (the restaurant), which was subject to audit for the period June 1, 2011 through February 28, 2014. Following the audit of the restaurant petitioner, Patricia Gilani, was assessed sales and use taxes of \$85,913.32 plus penalty and interest as a responsible officer or responsible person of the restaurant.

2. The restaurant filed a Request for a Conciliation Conference regarding the Notice of Determination that had been issued to it and, in response, the Bureau of Conciliation and Mediation Services (BCMS) mailed a letter to petitioner, dated August 28, 2014, that stated that since the restaurant filed a request for a conciliation conference in response to a notice of determination issued to it, Notice of Determination L-041766655, issued to petitioner as a responsible person of the restaurant, was considered to be protested and, as a result, a conciliation conference would be scheduled.

3. On March 20, 2015, BCMS issued a conciliation order to petitioner stating that petitioner did not appear at the November 13, 2014 conciliation conference. The order stated that notice of the conciliation conference was mailed to petitioner on October 6, 2014. Based upon the determination reached in the restaurant's BCMS conference, Notice of Determination L-041766655 was sustained and the matter was dismissed.

4. Petitioner filed a petition dated June 19, 2015 with the Division of Tax Appeals by United States Postal Service (USPS) First Class Mail. The USPS postage-paid stamp on the envelope containing the petition is dated July 2, 2015. The petition was received by the Division of Tax Appeals on July 6, 2015.¹

¹The restaurant also filed a petition with the Division of Tax Appeals. By determination dated March 10, 2016 the restaurant's petition was dismissed as untimely filed.

5. On September 22, 2015, Supervising Administrative Law Judge Daniel Ranalli issued to petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The Notice of Intent to Dismiss Petition provided that the petition was filed more than 90 days subsequent to the issuance of the conciliation order and proposed dismissing the petition.

6. The parties were given until January 21, 2016 to respond to the September 22, 2015 Notice of Intent to Dismiss Petition. Following the submission of documents and arguments, Administrative Law Judge Kevin R. Law, issued an Order dated March 10, 2016 holding that while petitioner did not timely file a petition with the Division of Tax Appeals following the issuance of the March 20, 2015 conciliation order, the September 22, 2015 Notice of Intent to Dismiss Petition should nonetheless be rescinded pending the issuance of an additional Notice of Intent to Dismiss Petition proposing to dismiss the petition on the timeliness of the petition as measured from the date of the Notice of Determination to the date of filing of the petition.

7. The findings of facts and conclusions of law of the March 10, 2016 Order are incorporated herein by reference as if set forth in full in this determination.

8. On April 8, 2016, Supervising Administrative Law Judge Daniel Ranalli issued to petitioner an additional Notice of Intent to Dismiss Petition with respect to the timeliness of the petition as measured from the issuance of the Notice of Determination. The Notice of Intent to Dismiss Petition indicates that, since the Notice of Determination was issued on August 8, 2014, but that the petition was not filed until July 2, 2015, or 328 days later, the petition was untimely.

9. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted, among other documents: (i) an affidavit, dated May 27, 2016, 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 Non-Presort Manual

Mail - Assessments Receivable” (CMR) postmarked August 8, 2014; and (iii) an affidavit, dated May 31, 2016, of Bruce Peltier, a stores and operations supervisor in the Division’s mail room.

10. In order to prove that the Notice of Determination was sent to petitioner’s last known address, the Division submitted a copy of petitioner’s 2012 New York State personal income tax return, which was the last return filed by petitioner with the Division prior to the issuance of the Notice of Determination. The address on said return matches the address contained on the Notice of Determination and that listed for petitioner on the petition filed in this matter.

11. 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 is manually changed on the first and last pages of the CMR, in this case August 8, 2014. 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 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.

12. 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 numbers are 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 PO Address."

13. The August 8, 2014 CMR consists of 29 pages and lists 310 computer-printed 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 29, which contains 2 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers.

14. Page 2 of the CMR indicates that the Notice of Determination assigned certified control number 7104 1002 9730 0272 0384 and assessment number L-041766655 was mailed to petitioner at the Princeton, New Jersey, address listed thereon. The corresponding mailing cover sheet for the notice bears this certified control number and petitioner's name and address as noted.

15. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a stores and operations supervisor, describes the mail room's general operations and procedures. The mail room 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. The CMR

has been stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.” A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. In this case, the USPS employee initialed and affixed a USPS postmark dated August 8, 2014 to each page of the CMR. 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. A review of the CMR indicates that the USPS employee complied with this request by circling the preprinted number “310” appearing on the line stating “Total Pieces And Amounts” to indicate the number received.

16. According to the Peltier affidavit, a copy of the notice was mailed on the date indicated as claimed.

17. Petitioner’s late filed response to the Notice of Intent Dismiss Petition, alleges that she never received the Notice of Determination.²

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 the date of mailing of such notice (Tax Law § 1138 [a] [1]). It is well established that the 90-day statutory time limit for filing a petition 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

²Petitioner’s response, although late filed, has been accepted as there is no ensuing prejudice to the Division in considering the arguments raised therein. However, petitioner also alleges that she never received the Conciliation Order in the matter. As the March 26, 2016 Order in this matter has already addressed the timeliness of the petition as measured from the date of issuance of the Conciliation Order, this issue need not be addressed again under the doctrine of the law of the case (*see Matter of McGrath v Gold*, 36 NY2d 406, 413; *Walker v Gerl*, 257 App Div 249, 251).

Division of Tax Appeals is without jurisdiction to consider the merits of the protest (*see* Tax Law § 1138 [a] [1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (*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 the 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*).

C. In this case, the mailing cover sheet, cover letter, CMR and affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination, establish the Division's standard mailing procedure and show that the procedure was followed in this instance. 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 mailing cover sheet bears petitioner's name and a Princeton, New Jersey, address that is identical to the address on the last income tax return filed by petitioner prior to issuance of the notice and on the CMR, and shows the same certified control number as that listed on the CMR for petitioner's entry. The cover sheet bears the same CMR as that listed on the CMR and the notice. Petitioner's name and address, as well as the numerical information on the face of the notice, appear on the CMR, which bears USPS postmarks dated August 8, 2014. There are 310

certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the preprinted number “310” on the line stating “Total Pieces And Amounts,” that the post office received 310 items for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner by certified mail on August 8, 2014 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

D. Petitioner has offered no evidence to counter the Division’s evidence that the Notice of Determination was issued on August 8, 2014. Mere denial of receipt is insufficient to rebut the presumption that a properly mailed notice of determination was delivered or offered for delivery in the normal course of the mail (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011; *see Matter of T. J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]). Since the petition in this matter was filed more than 90 days subsequent to issuance of both the Notice of Determination and the Conciliation Order, the Division of Tax Appeals has no jurisdiction over this matter (*see Matter of Rotondi Industries Corp.*, Tax Appeals Tribunal, July 6, 2006).

E. The petition of Patricia Gilani, is dismissed with prejudice.

DATED: Albany, New York
September 22, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE