

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : DETERMINATION
ROBERT SANTORA : DTA NO. 827096
for Revision of a Determination or for Refund of :
Cigarette Tax under Article 20 of the Tax Law. :

Petitioner, Robert Santora, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law.

On August 7, 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 ground that the petition did not appear to be timely with respect to the statutory notice being petitioned. By request of the Division of Taxation, the 30-day period to respond to the Notice of Intent to Dismiss Petition was extended to October 23, 2015. On August 27, 2015, petitioner, appearing by Lombardino & Nektalov, Esqs. (Boris R. Nektalov, Esq., of counsel), filed a letter in opposition to the dismissal. On October 19, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel), submitted a letter, together with affidavits and accompanying documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on October 23, 2015. After due consideration of the documents and arguments submitted, and all pleadings filed, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of the Notice of Determination.

FINDINGS OF FACT

1. On July 23, 2015, the Division of Tax Appeals received a petition from petitioner, Robert Santora, which protests a Notice of Determination issued to him. The envelope containing the petition bears a United States Postal Service (USPS) postmark of July 21, 2015. The notice issued to petitioner is dated April 10, 2015 and states that a penalty of \$19,560.00 is imposed because, on August 20, 2014, he was found to be in possession of “unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.”

2. On August 7, 2015, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition. The notice indicates that the Notice of Determination was issued on April 10, 2015, but that the petition was not filed until July 21, 2015, or 102 days later.

3. 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 of Mary Hurteau, an attorney employed in the Office of Counsel of the Division, dated October 19, 2015; (ii) an affidavit, dated October 14, 2015, of Mary Ellen Nagengast, a Tax Audit Administrator 1 and Director of the Division’s Management Analysis and Project Services Bureau (MAPS); (iii) a “Certified Record for Non-Presort Manual Mail - Assessments Receivable” (CMR) postmarked April 10, 2015; and (iv) an affidavit, dated October 19, 2015, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division’s mail room.

4. 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 e-filed IT-201 for the year 2014, which was the last document filed with the Division by petitioner prior to the issuance of the Notice of Determination. The address on said form matches the address contained on the Notice of Determination and that listed by petitioner on the petition filed in this matter.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, set 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. The CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. In the upper right corner of the CMR, the date the notice was mailed was handwritten by an individual in the Division's Mail Processing Center in order to conform with the CMR and the date that the CMR and the notice are delivered to the Postal Service.

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 taxpayer's 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 PO Address."

7. The April 10, 2015 CMR consists of one page and lists one certified control number along with the corresponding assessment number, name and address. A USPS employee affixed a USPS postmark dated April 10, 2015 to the CMR and also wrote his or her initials on the CMR. The CMR indicates that the Notice of Determination, assigned certified control number 7104 1002 9730 0446 2909 and assessment number L-042695024, was mailed to petitioner at the Franklin Square, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

8. The affidavit of Bruce Peltier, a supervisor in the mail room since 1999 and currently a mail and supply clerk, describes the mail room's general operations and procedures. The mail room 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. A clerk performs a review of the 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. 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 initialed the CMR, affixed a postmark and wrote the number 1, indicating that 1 piece of mail was delivered to the USPS.

9. According to the Peltier affidavit, the subject notice was mailed to petitioner on April 10, 2015, as claimed.

10. In response to the Notice of Intent to Dismiss Petition, petitioner's representative, Mr. Nektalov, submitted a letter that acknowledges that the petition was filed late but requests that the late filing be overlooked in the interest of justice and because there is no prejudice to the State of New York. Petitioner asks that he be afforded his day in court.

CONCLUSIONS OF LAW

A. Where the timeliness of a petition or Request for Conciliation Conference is at issue, as it is here, 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*).

B. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mary Ellen Nagengast and Bruce Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on the date claimed. Specifically, with respect to the notice in issue, the CMR lists a certified control number with petitioner's name and address, and bears a U.S. Postal Service postmark dated April 10, 2015. A

postal employee added his or her initials to the CMR to indicate receipt by the post office of all pieces of mail listed thereon.

C. Pursuant to Tax Law § 478, petitioner had 90 days to file a petition for a hearing or a conference with the Bureau of Conciliation and Mediation Services (Tax Law § 170[3-a][a]). The documents show that the notice was mailed on April 10, 2015, but petitioner's petition for a hearing was not mailed until July 21, 2015, which is beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter (*see Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late]).

D. Petitioner has offered no evidence to counter the Division's argument regarding the issue of the timeliness of his protest. Consequently, 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 Robert Santora is dismissed with prejudice.

DATED: Albany, New York
January 14, 2016

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE