

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOEL S. HOFFMAN : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 827273
Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 2003 :
through May 31, 2010. :
:

Petitioner, Joel S. Hoffman, filed a petition for revision of determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2003 through May 31, 2010.

On January 29, 2016, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner pursuant to 20 NYCRR 3000.9(a)(4). On March 28, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Nicholas A. Behuniak, Esq., of counsel), having been granted an extension of time until April 14, 2016, submitted documents in support of dismissal. Petitioner did not respond in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on April 14, 2016. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals challenging two notices of determination.

FINDINGS OF FACT

1. Petitioner, Joel S. Hoffman, filed a petition on March 30, 2015 protesting notices of determination numbers L-036786182 and L-036786185, each covering the period March 1, 2013 through May 31, 2010 and assessing additional sales and use taxes under Tax Law Articles 28 and 29. Both notices are dated October 25, 2011. Notice of Determination L-036786182 assessed tax in the amount of \$31,334.58, plus interest, while Notice of Determination L-036786185 assessed tax in the amount of \$62,416.14, plus interest.

2. The petition also challenged a notice of proposed driver license suspension referral dated August 20, 2014, and issued to petitioner pursuant to Tax Law § 171-v (suspension notice). The suspension notice was treated as a separate matter under DTA number 826828 and the subject of a determination by the Division of Tax Appeals in the *Matter of Joel S. Hoffman* (April 14, 2016).¹

3. Also attached to the petition was a Consolidated Statement of Tax Liabilities for petitioner, also dated August 20, 2014 (consolidated statement). The consolidated statement referenced “[b]ills subject to collection action” and included the following:

Tax Type	Assessment ID	Tax Period Ended	Balance Due
Sales	L-036786185-6	5/31/10	\$127,096.50
Sales	L-036786182-9	5/31/10	\$35,529.88
Sales	L-033917623-5	11/30/08	\$559,210.25
Sales	L-029755922-6	8/31/05	\$675,706.75

¹ Prior to filing his petition, petitioner requested a conciliation conference before the Bureau of Conciliation and Mediation Services (BCMS) to address the suspension notice and the matter was assigned CMS number 263228. By order of January 16, 2015, BCMS issued its order in CMS number 263228 sustaining the suspension notice.

4. The consolidated statement also separately listed four notices with assessment numbers L-033789352 through L-033789355, inclusive. These additional four notices of determination were identified as “[e]stimated amounts due because of returns not yet filed,” and totaled \$504,733.70 as of August 20, 2014.

5. On the cover of the petition, petitioner stated that he was challenging “CMS No. 263228” (*see* Footnote 1), the suspension notice, and the sales tax notices referenced in the consolidated statement. As grounds for the challenge, petitioner only wrote “[t]he audits were performed incorrectly.”

6. Petitioner’s challenge to the substance of the notices of determination was initially severed from the suspension notice into a separate matter bearing DTA number 827273.

7. On January 29, 2016, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition for DTA number 827273, which stated, in pertinent part:

“Pursuant to § 3000.8 of the Tax Law, in order to establish timeliness, all proceedings in the Division of Tax Appeals shall be commenced by the filing of a petition with the Division of Tax Appeals protesting any written notice of the Division of Taxation which has advised the petitioner of . . . a determination of tax due . . . or any other notice which gives a person the right to a hearing [before] the Division of Tax Appeals under this chapter or other law. In this case you filed the petition, attaching a Consolidated Statement of Tax Liabilities including assessment numbers, L-029755922, L-033917623, L-036786185, L-036786182, L-033789355, L-033789354, L-033789353 and L-033789352. You must submit a copy of the original notices of determination for these assessment numbers. Therefore, the petition does not appear to have been timely filed.

After reviewing your petition, it does not appear that the Division of Tax Appeals has any jurisdiction over this matter.”

The parties were afforded 30 days from the date of the Notice of Intent to submit written comments on the proposed dismissal. That 30-day period was extended, upon the request of the

Division of Taxation (Division), to April 14, 2016.

8. The Division provided a response to the Notice of Intent to Dismiss Petition on March 25, 2016. In its response, the Division stated that it did not have sufficient mail proof to sustain dismissal of notices of determination numbers L-029755922, L-033917623, L-033789355, L-033789354, L-033789353 and L-033789352. As a result, the notice of intent to dismiss was rescinded as to those notices, and they became the subject of a newly severed matter, which was assigned DTA number 827550, and is proceeding separately from this case.

9. The instant matter solely involves petitioner's challenge to notices of determination numbers L-036786185 and L-036786182 and the pending notice of intent to dismiss petition. In support of dismissal of the petition, the Division provided the following on March 25, 2016: (i) an affidavit, dated March 24, 2016, of Nicholas A. Behuniak; (ii) an affidavit, dated March 10, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated March 11, 2016, of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room; (iv) a copy of petitioner's 2010 New York State Resident Income Tax Return (Form IT-201), filed on October 14, 2011, which reports the same address for petitioner as that listed on the notices of determination at issue herein; and (v) the 12-page "Certified Record for Presort Mail - Assessments Receivable" (CMR) for October 25, 2011, together with copies of notices of determination numbers L-036786185 and L-036786182.

10. According to the affidavit of Ms. Nagengast, the process by which the Division generates and subsequently issues statutory notices, such as the notices of determination at issue here, involves the use of the Division's electronic Case and Resource Tracking System

(CARTS). Ms. Nagengast attests to her use of and familiarity with the Division's CARTS system.

11. The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predated with the anticipated date of their mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" generated for each such notice, and that sheet bears a bar code, the taxpayer's mailing address and a departmental return address on the front, and taxpayer assistance information on the back. CARTS also generates any enclosures referenced within the body of each notice, and each notice, with its accompanying Mailing Cover Sheet and appropriate enclosures, is a discrete unit within the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

12. The CARTS-generated CMR for each batch of notices lists each statutory notice in the order in which the notices are generated in the batch. The certified control numbers for the notices appear on the CMR under the column heading entitled "Certified No." The assessment numbers for the notices appear under the second column heading entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third column heading entitled "Name of Addressee, Street, and P.O. Address." Remaining column headings list appropriate postage and fee amounts. Each CMR and associated batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively and appear at the upper right corner of each page of the CMR. All pages are banded when the documents are delivered to the mail room and remain banded when the postmarked documents are returned to the Division after mailing, unless ordered otherwise.

13. Each statutory notice is predated with the anticipated date of its mailing. In contrast, each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing in order to allow sufficient lead time for manual review and processing for postage by personnel in the Division's mail room. The CMR lists in its upper left corner the date, ordinal day of the year and military time of the day when the CMR was printed. Following the Division's general practice, this preprinted date, identified as the "run," is to be manually changed by personnel in the Division's mail room to reflect that the preprinted date on the CMR is conformed to the actual date on which the statutory notices and the CMR were delivered into the possession of the United States Postal Service (USPS).

14. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the mail room in an area designated for "Outgoing Certified Mail." Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff, in turn, operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the address and certified number from the Mailing Cover Sheet shows through the windows. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. In turn, a member of the mail room staff delivers the sealed, stamped envelopes to a branch of the USPS in the Albany, New York, area for mailing. A USPS employee then affixes his or her initials or signature and/or a

USPS postmark to a page or pages of the CMR to indicate receipt of the mail listed on the CMR and of the CMR itself. The CMR is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. In the ordinary course of business and pursuant to the practices and procedures of the mail room, each CMR is picked up at the post office by a staff member on the following day after its initial delivery and is then delivered back to the Division for storage and retention in the regular course of its business.

15. A piece of mail may be "pulled" from a scheduled mailing for any number of reasons including, though not limited to, a discrepancy in name or address. A piece of mail so pulled is segregated from the remaining group of items being mailed, so as to allow for correction or issuance at another time. When a piece of mail is pulled, a line is placed through the entry on the CMR for that piece of mail, and the preprinted total number of pieces of mail listed on the last page of the CMR is manually adjusted to reflect the actual number of pieces being mailed after any items have been pulled.

16. The CMR for the batch of notices to be issued on October 25, 2011 includes the two notices of determination addressed to petitioner bearing assessment numbers L-036786185 and L-036786182. The CMR consists of 12 cut sheet pages, including page 8, which is the page on which information pertaining to petitioner appears. Each page of the CMR includes in its upper left corner the preprinted year/day/time "run" listing of "20112911700." Appearing in the upper right corner of the first and last pages of the CMR is the handwritten date "10/25/11" reflecting the manual change made by Division personnel to ensure that the preprinted date on the CMR was changed to conform with the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS. Each page of the CMR includes a USPS postmark

dated October 25, 2011. All pages of the CMR include 11 entries, with the exception of page 1, where one of the original 11 entries is crossed out, and page 12, the last page of the CMR, which contains 9 remaining entries after an additional one was crossed out.

17. In this case, certified control numbers “7104 1002 9730 0858 6694” and “7104 1002 9730 0858 6700,” pertaining to petitioner, were assigned to the notices of determination bearing assessment numbers L-036786185 and L-036786182, and were to be mailed to petitioner at his “12 Pinetree Ln, Old Westbury, NY 11568-1118” address.

18. Appearing on Page 12 of the CMR is the preprinted heading “Total Pieces and Amounts,” to the right of which appear preprinted columns headed “Pieces,” “Postage,” and “Fee.” These columns reflect the preprinted number of pieces of mail for this CMR, here 131, as well as the postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading “Total Pieces Received At Post Office.” Appearing to the immediate right of this heading is the handwritten, circled and initialed number 129, above which the preprinted number 131 has been manually canceled. Appearing at the lower right side of page 12 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over” The area above this stamped instruction reflects the initials of the postal clerk and the aforementioned USPS postmark dated October 25, 2011. In fact, these same initials and USPS postmark appear on each page of the CMR. Thus, page 12 of the CMR indicates that a total of 129 pieces of mail were delivered into the custody of the USPS on October 25, 2011.

19. The facts set forth above as Findings of Fact 10 through 18 were established through the affidavits of Mary Ellen Nagengast and Bruce Peltier, together with the documents submitted

therewith. Each affiant avers to their personal involvement in and familiarity with the ongoing past and present practices and procedures concerning, respectively, the preparation and generation of notices such as those notices of determination at issue herein as well as their subsequent issuance by mailing via delivery to the USPS.

20. Petitioner's Form IT-201, filed on October 14, 2011, lists petitioner's name and same Old Westbury, New York, address as on the notices of determination and CMR. This was the last return filed by petitioner with the Division prior to issuance of the notices of determination.

21. The Division maintains that the foregoing evidence establishes that the notices of determination at issue herein were properly issued to petitioner on October 25, 2011. In turn, the Division asserts that the petition challenging such notices was filed more than 90 days after the date on which they were issued, leaving the same untimely and the Division of Tax Appeals without jurisdiction to review the same on the merits.

22. Petitioner did not file a response to the Notice of Intent to Dismiss Petition.

CONCLUSIONS OF LAW

A. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2012) the Tribunal held that the standard to employ for reviewing a Notice of Intent To Dismiss Petition is the same as that used for reviewing a motion for summary determination.

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 that 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 date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with BCMS “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 Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). 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). In this case, there is no claim or evidence that petitioner filed a request for a conciliation conference with BCMS for notices of determination numbers L-036786185 and L-036786182 within the requisite 90 day period. Consequently, the question presented is whether the petition herein was filed within 90 days after the issuance of the notices of determination.

D. Where, as here, the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the underlying statutory notices by mailing the same, via certified or registered mail, 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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). 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*).

E. Here, the Division has offered proof sufficient to establish the proper mailing of the two statutory notices of determination to petitioner’s last known address on October 25, 2011. 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 the last return (Form IT- 201) filed by petitioner prior to the issuance date of the subject notices, and therefore satisfies the “last known address” requirement. Hence, the notices were properly mailed on October 25, 2011, and it was incumbent upon petitioner to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals within 90 days thereafter.

F. The two notices of determination were, as set forth above, properly mailed on October 25, 2011. However, the petition in this matter was not filed until March 30, 2015, long after the statutory deadline passed. Moreover, petitioner has not offered evidence or argument to rebut the proposed dismissal. Consequently, it is determined that the petition was not timely filed and the

Division of Tax Appeals is without jurisdiction to provide a hearing to address the substantive merits of these notices.

G. The Notice of Intent to Dismiss Petition is sustained and the petition of Joel S. Hoffman is dismissed.

DATED: Albany, New York
June 23, 2016

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