

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
679 GRAND, LLC	:	DETERMINATION
for Revision of a Determination or for Refund of Real Estate Transfer Tax under Article 31 of the Tax Law for the Period January 2, 2013.	:	DTA NO. 827325

On November 16, 2015, petitioner, 679 Grand, LLC, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the period January 2, 2013.

On March 18, 2016, 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 grounds 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 June 2, 2016. On May 13, 2016, the Division of Taxation by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted affidavits and accompanying documents in support of dismissal of the petition. Petitioner, appearing pro se, did not respond. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on June 2, 2016. After due consideration of the documents and arguments submitted, and all pleadings filed, Kevin R. Law, 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 November 17, 2015, the Division of Tax Appeals received a petition from petitioner, 679 Grand, LLC, which protests a Notice of Determination issued to it. The petition did not include a copy of the notice, but instead included a copy of a Notice and Demand for Payment of Tax Due (notice # L-0043049521) dated November 12, 2015. The petition was filed via Federal Express Overnight Delivery on November 16, 2015.

2. On March 18, 2016, Supervising Administrative Law Judge Daniel J. Ranalli of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition states:

“In conformity with the Tax Appeals Tribunal Rules of Practice and Procedure, § 3000.3(b)(8), in order to establish timeliness, the petition shall contain a copy of the order of conciliation issued or other statutory notice being protested. Petitioner did not include the required statutory notice and therefore the petition does not appear to have been timely filed.”

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, dated April 22, 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 July 27, 2015; (iii) an affidavit, dated April 25, 2016, of Bruce Peltier, a Principal Mail and Supply Clerk in the Division’s mail room; and (iv) a copy of Notice of Determination L-0043049521

4. In order to prove that the Notice of Determination was sent to petitioner's last known address, the Division submitted a copy of a 2014 Form IT-370-PF, Application for Automatic Extension of Time to File for Partnerships and Fiduciaries, which was the last application 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 for petitioner on the petition filed in this matter.¹

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 is manually changed on the first and last pages of the CMR, in this case "7/27." 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.

6. All notices are assigned a certified control number. The certified control number of

¹The Division's representative's affidavit points out that the U.S. Postal Service (USPS) zip code look up found online, for the street address used by petitioner, "315 W Roslyn Rd.," defaults to the address utilized by the Division in issuing the Notice of Determination, i.e., "315 Roslyn Rd."

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 P.O. Address."

7. The July 27, 2015 CMR consists of 19 pages and lists 206 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 19, which contains 8 such entries. Portions of the CMR not relevant to this matter have been redacted to preserve the confidentiality of information relating to other taxpayers. Page 13 of the CMR indicates that the Notice of Determination, assigned certified control number 7104 1002 9730 0514 6457 and assessment number L-043049521, was mailed to petitioner at the Mineola, New York, address listed thereon. The corresponding mailing cover sheet for the notice 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 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 July 27, 2015 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 number “206” to indicate the number received.

9. According to the Peltier affidavit, a copy of the Notice of Determination was mailed on the date indicated as claimed.

CONCLUSIONS OF LAW

A. A taxpayer may protest a notice of determination issued under the authority of Article 31 of the Tax Law 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 § 1411[a]). Where the timeliness of a petition is in question, 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 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 mail cover sheet bears petitioner’s name and a Mineola, New York, address that is the same as the address used on the Application for Automatic Extension of Time to File for Partnerships and Fiduciaries 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. 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 July 27, 2015. There are 206 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing and circling the number “206” on the line stating “Total Pieces and Amounts,” that the post office received 206 items for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner by certified mail on July 27, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

C. Petitioner has offered no evidence to counter the Division’s evidence that the Notice of Determination was issued on July 27, 2015 or show that the petition was timely filed. Since the

Notice of Determination was issued more than ninety days prior to the petition in this matter being filed, the Division of Tax Appeals has no jurisdiction over this matter (*see Matter of Rotondi Industries Corp.*, Tax Appeals Tribunal, July 6, 2006).

D. The petition of 679 Grand, LLC, is dismissed with prejudice.

DATED: Albany, New York
August 25, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE