

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GEORGE MANTHAS : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 827369
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 2009 through February 28, 2011. :

Petitioner, George Manthas, 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, 2009 through February 28, 2011.

On January 15, 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 April 1, 2016, to respond to said notice. On March 9, 2016, the Division of Taxation, appearing by Amanda Hiller, Esq. (Michael Hall) submitted documents in support of dismissal. On April 1, 2016, petitioner, appearing by Buxbaum Sales Tax Consulting LLC (Michael Buxbaum, CPA), submitted documents 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 began on April 1, 2016. After due consideration of the documents submitted, Kevin R. Law, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. This matter concerns a sales tax audit of the Bread Factory, Inc. (the corporation), which was subject to audit for the period December 1, 2009 through February 28, 2011. Following the audit of the corporation petitioner, George Manthas, was assessed sales and use taxes of \$43,225.92 plus penalty and interest as a responsible officer or responsible person of the corporation.

2. The corporation filed a Request for 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 May 15, 2013, that stated that since the corporation filed a request for a conciliation conference in response to a notice of determination issued to it, Notice of Determination L-039091245, issued to petitioner as a responsible person of the corporation, was considered to be protested and, as a result, a conciliation conference would be scheduled.

3. On November 15, 2013, BCMS issued a conciliation order to petitioner stating that petitioner did not appear at the September 24, 2013 conciliation conference. The order stated that notice of the conciliation conference was mailed to petitioner on August 20, 2013. Based upon the determination reached in the corporation's BCMS conference, Notice of Determination L-039091245 was sustained and the matter was dismissed.

4. Petitioner filed a petition dated December 4, 2015 with the Division of Tax Appeals by United Parcel Service Ground (UPS). The UPS shipping label on the envelope containing the

petition is dated December 4, 2015. The petition was received by the Division of Tax Appeals on December 7, 2015.

5. On January 15, 2016, 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 provides, in pertinent part, that:

“It appears that the conciliation order under protest in this matter, CMS No. 257539, was issued to petitioner on November 15, 2013. However, the petition in this matter was not filed with the Division of Tax Appeals until December 4, 2015, or seven hundred and forty-nine (749) days later.”

6. To show proof of proper mailing of the conciliation order dated November 15, 2013, the Division of Taxation (Division) submitted, among other documents: (i) the affidavit of Michael Hall, a law clerk employed in the Office of Counsel of the Division, dated March 8, 2016; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated February 26, 2016; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked November 15, 2013; (iv) a copy of the conciliation order, cover letter and cover sheet, dated November 15, 2013, as well as a copy of the three-windowed mailing envelope used to mail the order; (v) an affidavit, dated February 29, 2016, of Bruce Peltier, Principal Mail and Supply Clerk in the Division’s mail room; (vi) petitioner’s 2012 New York State personal income tax return, showing petitioner’s mailing and physical address in Rocky Point, New York; and (vii) a copy of Notice of Determination L-039091245.

7. The affidavit of Robert Farrelly sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by U.S. Postal Service (USPS) certified mail and confirmation of the mailing through BCMS’s receipt of a postmarked copy of the CMR.

8. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature, who in turn forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

9. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

10. The AFP Unit also produces a computer-generated CMR. The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of his or her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers and taxpayers' representatives with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. The “Total Pieces and Amounts” is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit.”

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case, “11/15/13” is written in the upper right corner of pages 1 through 14 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of November 15, 2013.

14. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, is picked up in BCMS by an employee of the Division’s Mail Processing Center. The Division’s Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the 14-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on November 15, 2013. This CMR originally listed 147 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a reference or CMS number, and the names and addresses of the addressees.

16. Information regarding the conciliation order issued to petitioner is contained on page five of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0099 3193 is reference or CMS number 000257539, along with petitioner’s name and a Rocky Point, New York, address that is identical to the address on petitioner’s electronically filed 2012 New York State personal income tax return, filed on April 13, 2013, which was the last return filed by petitioner with the Division prior to the issuance of the conciliation order.

17. The cover sheet bearing petitioner's name and the Rocky Point, New York, address appearing on petitioner's electronically filed 2012 New York State personal income tax return and on the CMR shows the same certified control number as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

18. 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 conciliation orders being mailed, so as to allow for correction and issuance at another time. When an order is pulled, the BCMS clerk is to adjust the preprinted total number of pieces of mail listed on the last page of the CMR to reflect the actual number of pieces being mailed after any items have been pulled.

19. The CMR in this case reflects that two pieces of mail were pulled from the run, and these deletions are reflected in the change to the listing for total pieces received at the post office. The specific pulled items appear on pages one and three, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run. There are no such lines drawn on or near the CMR listing pertaining to petitioner. The preprinted number "147," as appearing next to the heading "Total Pieces and Amounts," on the last page of the CMR was crossed out and replaced with the handwritten number "145" to reflect the 2 pieces pulled from the run.

20. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Clerk in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing

Certified Mail” basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

21. In this particular instance, the postal employee affixed a postmark dated November 15, 2013 to, and also wrote his or her signature or initials on, each page of the 14-page CMR. The Mail Processing Center further requests that the USPS employees either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the November 15, 2013 CMR indicates that the USPS employee complied with this request by circling the written number “145” corresponding to the heading “Total Pieces and Amounts.” to indicate the number received.

22. Mr. Peltier’s affidavit states that the CMR is the Division’s record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on November 15, 2013, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his Rocky Point, New York, address to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery

by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 15, 2013 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the piece of certified mail to petitioner.

24. In his response to the Notice of Intent to Dismiss Petition, petitioner submitted an affidavit dated April 1, 2016. Petitioner avers that his last known address was not the address on his 2012 personal income tax return but a New York, New York, address listed on a closing statement resulting from an August 15, 2013 real estate purchase. Petitioner further avers that the address appearing on his 2012 return was not his last known address and that his tax preparer mistakenly used that address. Petitioner acknowledges that the Rocky Point address is his home address but not his mailing address. Along with the closing statement petitioner submitted a copy of a New York City Real Property Transfer Tax Return upon which the same New York, New York, address appears.

25. Petitioner also submitted a responsible person questionnaire dated June 22, 2011 and signed by the former representative for the corporation. The questionnaire indicates petitioner was the responsible person of the corporation and gives the same New York, New York, address for petitioner. According to petitioner, a copy of this questionnaire was communicated to the conciliation conferee by the corporation's former representative during conciliation conference.

26. Petitioner has not challenged the issuance of Notice of Determination L-039091245 or denied receipt thereof.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the applicable time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, it appeared to the Division of Tax Appeals that the petition was filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony by one with knowledge of the procedures or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). Together, the mail cover sheet, cover letter, CMR and affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, 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 Rocky Point, New York, address that is identical to the address on petitioner's 2012 New York State personal income tax return and on the CMR, and shows the

same certified control number as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of November 15, 2013. There are 145 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "145" on the line stating "Total Pieces Received at Post Office," that the post office received 145 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on November 15, 2013 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

C. Petitioner claims that the Division failed to issue the notice to his "last known address" at the time they were mailed, so as to be considered "properly mailed." Petitioner asserts that the Rocky Point, New York, address as appearing on his 2012 personal income tax return was not his last known address because his tax preparer mistakenly used that address instead of his New York, New York, address, which petitioner contends is his mailing address.

D. Tax Law § 1147(a)(1), governing the giving of notice for sales and use tax purposes, provides for the mailing of notices to "the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." Under these rules, the Division must mail the notice to the last known address provided by the person through his own tax filings or applications. In this case, the Rocky Point address provided for on petitioner's 2012 personal income return was his last known address as this was the address provided through his own filings. The assertion that the address contained on his 2012 return and used by the Division was used in error and therefore cannot constitute his last known address has no merit. No knowledge

that the tax preparer was mistaken in listing the Rocky Point, New York, address on his 2012 personal income tax return can be imputed to the Division (*Pomeroy v. United States*, 864 F2d 1191, 1194 [5th Cir 1989]).

E. Petitioner's assertion that the New York, New York, address contained on the New York City Real Property Transfer Tax Return was his last known address is rejected. The form attached to petitioner's affidavit is for a New York City tax administered by the City of New York and not by the Division. Likewise, there is no indication that petitioner ever filed a New York State Transfer return as grantee of the realty much less provided a copy of an actual return required to be filed with the Division. Likewise, the responsible person questionnaire is of no import as it is not a return or application filed by him (Tax Law § 1147[a][1]). Accordingly, it is concluded that the Division properly mailed the conciliation order to petitioner's last known address as reflected on his 2012 New York State personal income tax return. Since the petition in this matter was filed over two years later, the petition is untimely and the Division of Tax Appeals is without jurisdiction to consider the merits thereof.

F. The petition of George Manthas is dismissed.

DATED: Albany, New York
June 23, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE