

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JERRY SALA : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 827389
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period September 1, 2011 through February 28, 2015. :

Petitioner, Jerry Sala, 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 September 1, 2011 through February 28, 2015.

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) on the basis that the petition did not appear to have been filed in a timely manner. By a letter dated February 11, 2016, the date by which the parties could file responses to the Notice of Intent to Dismiss was extended to April 1, 2016, which date commenced the 90-day period for issuance of this determination (20 NYCRR 3000.5[d]; 3000.9[a][4]). On January 26, 2016 and February 15, 2016, petitioner, by Sales Tax Defense, LLC (Mark Stone, CPA) submitted letters and documents in opposition to dismissal.¹ On March 24, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), submitted affidavits and other document in support of dismissal. After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

¹ Mr. Stone also faxed a letter, dated April 11, 2016, in opposition to dismissal. This third, late filed response will not be considered.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Jerry Sala, a Notice of Determination, number L-043539017-4, dated August 19, 2015, assessing sales and use taxes due in the amount of \$200,198.45, plus penalty and interest, for the period September 1, 2011 through February 28, 2015. The notice is addressed to “SALA-JERRY, 367 OLD COUNTRY RD, DEER PARK, NY 11729-1310.” The mailing cover sheet of the Notice of Determination contains the certified control number 7104 1002 9730 0554 8664. The Notice of Determination was issued to petitioner because he was determined to be an officer or responsible person of Asaggio Pizzeria & Restaurant, LLC (Company).

2. On December 21, 2015, the Division of Tax Appeals received a petition seeking revision of the determination issued in this matter. The petition lists petitioner’s address as the Deer Park, New York, address, and is hand-dated as signed by petitioner’s representative, Mark Stone, CPA, on December 18, 2015. The envelope in which the petition was sent by First Class Certified Mail bears a United States Postal Service (USPS) stamp dated December 18, 2015.

3. On January 15, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the relevant Notice of Determination was issued on August 19, 2015, but that the petition was not filed until December 18, 2015 or 121 days later.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted the following: (i) an affidavit, dated February 29, 2016, of Mary Ellen Nagengast, a

Tax Audit Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated August 19, 2015; (iii) an affidavit, dated March 2, 2016, of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room; and (iv) a copy of petitioner's New York State Resident Income Tax Return for the year 2013 electronically filed on April 10, 2014.

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 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 was manually changed on the first and last pages of the CMR in the present case to the actual mailing date of "8/19/15." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. 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 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 number is also listed on the CMR under the

heading “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 CMR relevant to the Notice of Determination under protest consists of 19 pages and lists 203 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 5 such entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee initialed or signed and affixed a postmark dated August 19, 2015 of the Colonie Center branch of the USPS to each page of the CMR, and wrote the number “203” on page 19 below the heading “TOTAL PIECES RECEIVED AT POST OFFICE.” Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 203.

8. Page 14 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0554 8664 and reference number L-043539017, was mailed to “SALA-JERRY” at the Deer Park, New York, address listed thereon. The corresponding mailing cover sheet, attached to the Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s name and address as noted.

9. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999 and currently Principal Mail and Supply Clerk in the Division’s mail room, describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. 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. That staff member then weighs, seals and places 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. 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. Here, as noted, the USPS employee affixed a postmark dated August 19, 2015 to each page of the CMR and initialed or signed each page of the CMR as well. 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. Here, the USPS employee complied with this request by writing the number “203” on the last page of the CMR. The affixation of the postmarks, the postal service employee’s initials or signature, and the writing of the number indicating that all such pieces were received, confirm that the Notice of Determination dated August 19, 2015 was received by the USPS on that date.

10. Petitioner’s 2013 Resident Income Tax Return, electronically filed on April 10, 2014, reported petitioner’s address as Deer Park, New York 11729. This was the last return filed by petitioner prior to the issuance of the subject Notice of Determination.

11. In his petition, petitioner asserts, among other things, that the Division did not properly mail the Notice of Determination to him, and a Notice of Determination could not be delivered to the Company during the period it was closed for construction.

12. In opposition to dismissal, petitioner’s representative, Mr. Stone, submitted two letters with attached exhibits. In both letters, Mr. Stone asserts that at the time a different Notice of

Determination, dated August 13, 2015, was mailed to the Company, it was closed and never received the statutory notice. He further asserts that the Company's address was not a valid address for mailing the Notice of Determination because it was closed from January 8, 2015 to August 24, 2015 due to a water main break and the resulting renovations that were needed to be done. Mr. Stone maintains that, since the Company is entitled to a hearing, petitioner is entitled to a hearing because his assessment is associated with the Company's assessment.

13. The document attached to Mr. Stone's first letter was a letter dated December 10, 2014 from the Division's Transaction Field Audit Bureau indicating that an in-person observation of Asaggio Pizzeria & Restaurant, LLC, would be conducted in the near future. The documents enclosed with Mr. Stone's second letter consisted of a copy of a letter dated February 4, 2016 from the Division of Taxation's representative, Anita Luckina, Esq., to Judge Daniel J. Ranalli, Supervising Administrative Law Judge, requesting an extension of time to respond to the subject Notice of Intent to Dismiss Petition; and a copy of the executed power of attorney appointing, among others, Mark Stone, CPA, MST, Sales Tax Defense, LLC, as petitioner's representative in this matter. No additional documents were attached to either letter.

14. A petition in the matter of Asaggio Pizzeria & Restaurant, LLC, was filed with the Division of Tax Appeals on December 18, 2015.² Subsequently, on January 15, 2016, the Division of Tax Appeals issued to Asaggio Pizzeria & Restaurant, LLC, a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner.

15. After review of the documents and arguments submitted in connection with the matter

² The Division of Tax Appeals assigned DTA No. 827388 to the matter of Asaggio Pizzeria & Restaurant, LLC, 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 September 1, 2011 through February 28, 2015.

of the petition of Asaggio Pizzeria & Restaurant, LLC, the undersigned rendered a Determination of even date with this determination that dismissed the petition. The Determination concluded that the Notice of Determination (Notice number L-043487990), dated August 13, 2015, was properly mailed to Asaggio Pizzeria & Restaurant, LLC, at its last known address, on August 13, 2015. The Determination further concluded that Asaggio Pizzeria & Restaurant LLC's petition mailed (filed) on December 18, 2015, a date beyond the 90-day period within which a timely protest had to have been filed, was untimely filed, and the Division of Tax Appeals lacked jurisdiction to address the merits of Asaggio Pizzeria & Restaurant, LLC's protest of the Notice of Determination.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138[a][1]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Where, as here, the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until

sufficient evidence of mailing is produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

E. The 19-page CMR provides sufficient documentary proof to establish that the Notice of Determination dated August 19, 2015 was mailed by certified mail to petitioner at his last known address on August 19, 2015. Specifically, each page of this 19-page document lists certified control numbers with corresponding notice numbers, names and addresses and bears a U.S. Postal Service postmark dated August 19, 2015. A postal service employee handwrote the number "203" below the "TOTAL PIECES RECEIVED AT POST OFFICE" heading and initialed the last page, thereby indicating that all 203 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 203 pieces so listed. The CMR has thus been properly completed and therefore constitutes sufficient documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Tax Law § 1138(a)(1) provides that a notice of determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at 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. . . . The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

G. Here, the record shows that petitioner’s address as listed on his 2013 Resident Income Tax Return, electronically filed on April 10, 2014, was in Deer Park, New York 11729. Thus petitioner’s last known address prior to the issuance of the Notice of Determination on August 13, 2015 was the address stated on his 2013 resident income tax return.

Accordingly, the Division has shown that it properly mailed the Notice of Determination dated August 19, 2015 to petitioner at his last known address consistent with Tax Law §§ 1138(a)(1) and 1147(a)(1). It is concluded that the notice was properly mailed and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on August 19, 2015 (Tax Law §§ 170[3-a][b]; 1138[a][1]).

H. In order to timely protest the Notice of Determination issued on August 19, 2015, petitioner was required to file a petition or request for a conciliation conference within 90 days of August 19, 2015, i.e., on or before November 17, 2015. Petitioner’s petition was not filed until it was sent to the Division of Tax Appeals by USPS Certified Mail on December 18, 2015, a date beyond the statutory period within which a timely protest had to have been filed, and thus was

not timely filed.

I. Tax Law § 1138(a)(3)(B) provides, in relevant part, as follows:

“The liability, pursuant to subdivision (a) of section eleven hundred thirty-three of [Article 28], of any officer, director or employee of a corporation or of a dissolved corporation, member or employee of a partnership . . . who as such officer, director, employee or member is under a duty to act for such corporation, partnership . . . in complying with any requirement of this article for the tax imposed, collected or required to be collected, or for the tax required to be paid or paid over to the tax commission under this article, and the amount of such tax liability (whether or not a return is filed under this article, whether or not such return when filed is incorrect or insufficient, or where the tax shown to be due on the return filed under this article has not been paid or has not been paid in full) shall be determined by the tax commission in the manner provided for in paragraphs one and two of this subdivision. Such determination shall be an assessment of the tax and liability for the tax with respect to such person unless such person, within ninety days after the giving of notice of such determination, shall apply to the division of tax appeals for a hearing. If such determination is identical to or arises out of a previously issued determination of tax of the corporation, dissolved corporation, partnership . . . for which such person is under a duty to act, an application filed with the division of tax appeals on behalf of the corporation, dissolved corporation, partnership . . . shall be deemed to include any and all subsequently issued personal determinations and a separate application to the division of tax appeals for a hearing shall not be required.”

J. Petitioner’s representative, in his letters in opposition to dismissal, asserts that Asaggio Pizzeria & Restaurant, LLC, is entitled to a hearing in the matter of the petition it filed in protest of Notice of Determination (Notice number L-0433487990) and, therefore, petitioner is entitled to a hearing because his assessment is associated with Asaggio Pizzeria & Restaurant, LLC’s assessment. The Determination issued in the matter of Asaggio Pizzeria & Restaurant, LLC, dismissed the petition because the petition was untimely filed, and the Division of Tax Appeals lacked jurisdiction to address the merits of Asaggio Pizzeria & Restaurant, LLC’s protest of the Notice of Determination (*see* Finding of Fact 15). While the Notice of Determination issued to Mr. Sala as officer or responsible person of Asaggio Pizzeria & Restaurant, LLC arose out of the Notice of Determination (Notice number L-043487990) previously issued to Asaggio Pizzeria &

Restaurant, LLC, the untimely filed petition of Asaggio Pizzeria & Restaurant, LLC cannot confer jurisdiction to address petitioner's protest of the Notice of Determination, dated August 19, 2015. In addition, petitioner failed to produce any evidence that the Division did not properly mail the Notice of Determination to him, an assertion made by petitioner in his petition. Since petitioner's petition was not filed until December 18, 2015, a date beyond the expiration of the 90-day period of limitations for protesting the Notice of Determination issued on August 19, 2015, the petition was untimely filed (*see* Tax Law § 1138[a][1]). As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest of the Notice of Determination (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

K. The petition of Jerry Sala is hereby dismissed.

DATED: Albany, New York
June 16, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE