

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SCOPE INTERNATIONAL, INC. : DETERMINATION
for Revision of Determinations or for Refund of : DTA NO. 827393
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period March 1, 2010 through :
November 30, 2012. :
:

Petitioner, Scope International, Inc., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2010 through November 30, 2012.

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 May 24, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. Petitioner, appearing by David Palmeri, its president, did not submit a response.¹ Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on June 2, 2016. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

¹ The petition lists Bill Berenger as a “witness” on the line for petitioner’s representative. A valid power of attorney appointing Mr. Berenger was not included with the petition, however.

ISSUES

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

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

FINDINGS OF FACT

1. On December 21, 2015, petitioner, Scope International, Inc., filed a petition with the Division of Tax Appeals challenging notices of determination numbers L-040446240 and L-040907594.

2. Notice of Determination number L-040446240 was dated November 26, 2013 and addressed to petitioner at “1520 Montauk Hwy Bellport, NY 11713-1902.” The notice assessed tax, penalty and interest totaling \$15,224.73 to petitioner under Articles 28 and 29 of the Tax Law for the period March 1, 2010 through November 30, 2010.

3. Notice of Determination number L-040446240 was accompanied by a letter from the Division of Taxation (Division) stating that the Division had in its possession a power of attorney for the tax matters covered by the notice running to “William Berenger, PO Box 934, Riverhead, NY 11901” and that a copy of the notice also was sent to him.

4. Notice of Determination number L-040907594 was dated April 1, 2014. A complete copy of the notice was not attached to the petition and the record does not indicate the address to which the notice was sent. Notice number L-040907594 assessed tax, penalty and interest totaling \$44,533.30 to petitioner under Articles 28 and 29 of the Tax Law for the period December 1, 2010 through November 30, 2012.

5. On September 20, 2013, petitioner filed its New York State and Local Quarterly Sales and Use Tax Return for the period June 1, 2013 through August 31, 2013. This was the last return filed by petitioner with the Division prior to April 1, 2014. On it, petitioner listed its address as “1520 Montauk Highway Bellport, NY 11713.”

6. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on June 19, 2014. In it, petitioner sought redetermination of sales tax for “2010, 2011 [and] 2012.” The request included copies of a statement of proposed audit changes for notice number L-040446240 and the last page from notice number L-040907594. The request did not include a valid power of attorney running to Mr. Berenger and there is no evidence that one was provided despite written instruction from the Division that one was required.

7. On November 7, 2014, BCMS issued a conciliation order to petitioner denying its request and sustaining notice number L-040907594. The conciliation order bears CMS case number 262497 and covers the period of December 1, 2010 through November 30, 2012. There is no mention of notice number L-040446240 or the period of March 1, 2010 through November 30, 2010 in the conciliation order.

8. On March 18, 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 subject petition was filed in protest of Notice of Determination L-040446240, issued to petitioner on November 26, 2013 and that the petition was not filed until December 21, 2015, or some 755 days later. The Notice of Intent to Dismiss Petition also indicates that the subject petition was filed in protest of conciliation order, CMS number 262497, issued to petitioner on November 7, 2014 and that the petition was filed 409

days later. As a result, according to the notice, the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition.

Notice of Determination L-040446240

9. In response to the issuance of the Notice of Intent to Dismiss Petition and to prove mailing of the Notice of Determination dated November 26, 2013, the Division provided the following: (i) an affidavit, dated April 22, 2016, of Mary Ellen Nagengast, a Tax Audit Administrator I and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a 19-page "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page of which is legibly postmarked November 26, 2013; (iii) an affidavit, dated April 25, 2016, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) a copy of the November 26, 2013 Notice of Determination with the associated mailing cover sheet; and (v) a copy of petitioner's ST-100 New York State and Local Quarterly Sales and Use Tax Return for the period June 1, 2013 through August 31, 2013, described in Finding of Fact 5.

10. The affidavit of Ms. Nagengast sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast receives from the Division's Case and Resource Tracking System (CARTS) the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is produced approximately 10 days in advance of the anticipated date of mailing and the date and time of such production is listed on each page of the CMR. Following the Division's general practice, the actual date of mailing is handwritten on the first page of the CMR, in the present case "11/26/13." 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 U.S. Postal Service (USPS)

and remain so when returned to its office. The pages of the CMR stay banded together unless ordered otherwise by Ms. Nagengast. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

11. 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 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."

12. The CMR relevant to Notice of Determination L-040446240 consists of 19 pages and lists 205 certified control numbers along with corresponding assessment numbers, names and addresses.² Ms. Nagengast notes that portions of the CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS employee affixed a USPS postmark dated November 26, 2013 to each page of the CMR and also wrote his or her initials on each page thereof.

13. Page 16 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0101 5580 and assessment number L-040446240, was mailed to petitioner at the Bellport, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

² The CMR initially listed 207 certified control numbers. Two of the numbers (unrelated to this matter) were redacted prior to delivery to the USPS.

14. Page 17 of the CMR also indicates that a copy of the Notice of Determination, assigned certified control number 7104 1002 9730 0101 5726 and assessment number L-040446240, was mailed to petitioner's then-representative, William Berenger, at his Riverhead, New York, address. The corresponding mailing cover sheet bears Mr. Berenger's name and address as noted.

15. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. The 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 envelopes are counted and the names and certified control numbers verified against 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 signature or initials on the CMR, indicating receipt by the post office. Here, each page of the CMR contains such postmarks and initials. 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 last page of the CMR. Here, the USPS employee complied with this request by striking the number "207," and by handwriting and circling the number "205" on the last page next to his or her initials.

16. According to the affidavits of Ms. Nagengast and Mr. Peltier, a copy of the subject notice of determination was mailed to petitioner and Mr. Berenger on November 26, 2013, as claimed.

Notice of Determination L-040907594 (CMS 262497)

17. The Division did not offer proof of mailing of Notice of Determination number L-040907594. Instead, in order to prove mailing of the conciliation order for CMS number 262497, issued to petitioner on November 7, 2014, the Division provided the following additional documents: (i) an affidavit, dated April 22, 2016, of Robert Farrelly, the Assistant Supervisor of Tax Conferences of BCMS; (ii) a six-page CMR, each page of which is legibly postmarked November 7, 2014; (iii) an additional affidavit, dated April 25, 2016, of Mr. Peltier; (iv) a copy of petitioner's request for conciliation conference and envelope postmarked June 19, 2014; (v) a copy of the November 7, 2014 conciliation order for CMS number 262497 with cover letter and the associated mailing cover sheet.

18. Mr. Farrelly's affidavit sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by the USPS, via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

19. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letters to a BCMS clerk assigned to process the conciliation orders.

20. 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 Unit). 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, the taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

21. The AFP Unit also produces a computer-generated CMR entitled "Certified Record for Presort Mail - BCMS Cert Letter." 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 AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

22. The clerk's regular duties includes associating each cover sheet, conciliation order and cover letter. The clerk verifies the names and addresses of taxpayers 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 through which the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

23. It is the general office practice that the BCMS clerk stamps on the bottom left corner "Mailroom: Return Listing to: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT" on the last page of the CMR.

24. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "11-7-14" was written in the upper right corner of each page of the CMR.

25. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Center.

26. Mr. Farrelly attested to the truth and accuracy of the copy of the 6-page CMR, which contained a list of the 58 conciliation orders issued by the Division on November 7, 2014. The CMR also listed 58 certified control numbers. Each such certified control number was assigned to an item of mail listed on the six pages of the CMR. Specifically, corresponding to each listed

certified control number was a reference number, the name and address of the addressee, and postage and fee amounts.

27. Information regarding the conciliation order issued to petitioner was contained on page four of the CMR. Corresponding to certified control number 7104 1002 9730 0327 0383 was reference number 000262497, along with the name and last known address of petitioner.

28. Mr. Peltier's affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. He stated that after a conciliation order was placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighed and sealed each envelope and affixed postage and fee amounts. A clerk then counted the envelopes and verified the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivered the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixed a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

29. Here, the postal employee affixed a postmark date of November 7, 2014 to each page of the six-page CMR. The postal employee also wrote an initial for his or her first name and a full last name plus circled the number "58" next to the printed statement "Total Pieces Received at Post Office" on page six of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR, indicating that 58 pieces of mail were actually received.

30. Mr. Peltier stated 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 Center, the CMR was picked up at the post office by a member of Mr. Peltier's

staff on the following day after its initial delivery and was then delivered to the originating office, in this case BCMS. The CMR was maintained by BCMS in the regular course of business.

31. Based upon his review of Mr. Farrelly's affidavit and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on November 7, 2014, an employee of the Center delivered pieces of certified mail addressed to: Scope International Inc., 1520 Montauk Hwy, Bellport, New York 11713-1902, to a branch of the USPS in Albany, New York, in a sealed postpaid envelope for delivery by certified mail. Mr. Peltier stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on November 7, 2014 for the records of BCMS. He asserted that the procedures described in his affidavit were 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 pieces of certified mail to petitioner on November 7, 2014.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit within which a taxpayer may challenge a statutory notice by filing either a request for a conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals (Tax Law §§ 170[3-a][e]; 1138[a][1]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012).

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 has been produced and the burden of demonstrating proper mailing rests with the Division (*see id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. The mailing evidence required 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.*, Tax Appeals Tribunal, May 23, 1991).

D. In the case of the issuance of Notice of Determination L-040446240, 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 notices of determination.

E. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination number L-040446240 was mailed as addressed to petitioner and its then-representative, Mr. Berenger, on November 26, 2013. Specifically, the CMR lists certified control numbers with corresponding names and addresses and bears USPS postmarks on each page, dated November 26, 2013. Additionally, a postal employee circled "205" on the last page of the CMR next to his or her initials to indicate receipt by the post office of all pieces of mail listed thereon. Thus, the CMR has been properly completed and constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Finally, the Division has produced evidence that the notice was mailed to petitioner's last known address as required by Tax Law § 1138(a)(1) with submission of

petitioner's New York State and Quarterly Local Sales and Use Tax Return for the period June 1, 2013 through August 31, 2013.

F. The 90-day period for filing a petition in this matter commenced with the mailing of notice number L-040446240 on November 26, 2013. The request for conciliation conference was filed on June 19, 2014 and the petition on December 21, 2015, both well beyond the 90-day period of limitations. As a result, the petition challenging Notice of Determination number L-040446240 is untimely.

G. Likewise, for the conciliation order bearing CMS number 262497 dated November 7, 2014 resolving Notice of Determination L-040907594, the Division has introduced adequate proof of its standard mailing procedures for conciliation orders through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing such orders. The Division has also presented sufficient documentary proof, i.e., the properly completed CMR and associated cover sheet, to establish that conciliation order CMS number 262497, relating to Notice of Determination L-040907594, was mailed as addressed to petitioner on November 7, 2014. As the petition was filed on December 21, 2015, or more than 90 days later, the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Northern Ford-Mercury, Inc.*, Tax Appeals Tribunal, May 20, 2004).

H. The petition of Scope International, Inc. is dismissed.

DATED: Albany, New York
August 25, 2016

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