

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLINTON DELICATESSEN, INC.	:	DETERMINATION
	:	DTA NO. 827746
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, 2010	:	
through November 30, 2013.	:	

Petitioner, Clinton Delicatessen, Inc., 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, 2010 through November 30, 2013.

On July 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 September 9, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel), having been granted an extension to do so, submitted documents in support of dismissal. Petitioner, appearing by Jack Stuart Beige and Associates, PC (Jack Stuart Beige, Esq., of counsel), did not respond to the Notice of Intent to Dismiss Petition. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination began on September 29, 2016. After due consideration of the documents submitted in response to the Notice of Intent to Dismiss Petition, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest following the Division of Taxation's issuance of a Notice of Determination assessing tax, penalties and interest.

FINDINGS OF FACT

1. Petitioner, Clinton Delicatessen, Inc., by its duly appointed representative, Jack Stuart Beige, Esq., filed a petition with the Division of Tax Appeals.¹ The petition is dated as signed on July 8, 2016, was mailed by United States Postal Service (USPS) signature confirmation mail, and the envelope in which the petition was mailed bears a USPS postmark dated July 8, 2016. The petition and envelope are date stamped as received by the Division of Tax Appeals on July 11, 2016. Petitioner lists its address on the petition as "426 Clinton Street, Hempstead, NY 11550."

2. The petition (at item five thereof) specifically identifies the notice at issue as Assessment ID # L-042700138-7, and further specifies (at item seven thereof) that a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) was not requested. In addition to setting forth certain substantive arguments regarding the assessment, the petition also alleges that neither petitioner nor its (then) representative received the Notice of Determination representing the assessment being petitioned.

3. Attached to the petition was a Notice of Determination, dated April 13, 2015, bearing assessment ID L-042700138-7, and addressed to petitioner at the above-noted Hempstead, NY, address. This Notice asserts sales tax due for the period spanning December 1, 2010 through

¹ The record includes a Power of Attorney, executed on November 2, 2015, appointing petitioner's current representative, Jack Stuart Beige, Esq. (Law Office of Jack Stuart Beige & Assoc., PC).

November 30, 2013 in the amount of \$221,906.09, plus interest and penalties (including a fraud penalty). Form DTF-974.1, included with the Notice, indicates that a copy of the Notice was also issued to one Carla R. Gallegos, 11800 Ridge Parkway, Suite 400, Broomfield, Co, 80021, based on records of the Division of Taxation (Division) indicating that Ms. Gallegos held a power of attorney as legal representative for petitioner.

4. On July 15, 2016, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued to petitioner, to petitioner's current representative, and to the Division of Taxation, a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the subject petition was filed in protest of a Notice of Determination, Assessment No. L-042700138-7, issued to petitioner on April 13, 2015, that the petition was not filed until July 8, 2016, or some 452 days later, and was therefore untimely and subject to dismissal.

5. In order to prove mailing and delivery of the foregoing Notice of Determination to petitioner on April 13, 2015, the Division provided the following documents: (i) an affidavit, dated September 8, 2016 of Robert A. Maslyn, Esq.; (ii) an affidavit, dated September 1, 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 September 1, 2016, of Bruce Peltier, a stores and operations supervisor and a supervisor in the Division's mail room; (iv) an 85-page "Certified Record for Presort Mail - Assessments Receivable" (CMR); (v) a copy of the Notice of Determination dated April 13, 2015 together with its associated mailing cover sheet; and (vi) a copy of petitioner's Quarterly Form ST-100 (New York State and Local Sales and Use Tax Web Filed Return) for the period December 1, 2014

through February 28, 2015 listing petitioner's address as that set forth above and representing petitioner's last filed return and last known address prior to issuance of the Notice of Determination at issue.

6. According to the affidavit of Ms. Nagengast, the electronic generation and subsequent issuance of notices of determination such as that at issue herein, and other such notices during the period here in question, involves the use of the Division's electronic Case and Resource Tracking System (CARTS). The process commences with the CARTS computer-generation of a CMR and corresponding notices. The notices are predicated 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 (Form DTF-997) 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 with the batch of notices. The Mailing Cover Sheet is the first sheet in the unit.

7. 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 first columnar heading entitled "Certified No." The assessment numbers for the notices appear under the second columnar heading, entitled "Reference No.," and the names and addresses of the taxpayers are listed under the third columnar heading entitled "Name of Addressee, Street and P.O. Address." Remaining columnar headings list appropriate postage and fee amounts. Each certified mail record and associated

batch of statutory notices are forwarded to the Division's mail room together. The page numbers of the CMR are listed consecutively (i.e., Page: 1, Page: 2, etc.) and appear at the upper right corner of each page of the CMR. All pages are banded together 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.

8. As noted, each statutory notice is predicated 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 such 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. This CMR listing specifically sets forth, at the upper left corner of the CMR, 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 conforms to the actual date on which the statutory notices and the CMR were delivered into the possession of the USPS (i.e., the mailing date).

9. Under the Division's standard mailing procedures, statutory notices that are ready for mailing are received by the Division's 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 show through the window. The staff member then weighs, seals and affixes postage and fee amounts on the envelopes. A mail processing clerk then 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. Thereafter, a member of the mail room staff delivers the sealed, stamped envelopes to a branch office of the USPS in the Albany, New York, area for mailing. A USPS employee is instructed to affix a postmark and his or her initials or signature to 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 delivered back to the Division for storage and retention in the regular course of its business.

10. The CMR for the batch of notices to be issued on April 13, 2015, including the Notice addressed to petitioner and the copy thereof addressed to petitioner's then-representative, consists of 85 cut sheet pages. Each of the pages includes, in its upper left corner, the preprinted year/day/time "run" listing of "20150961700" (*see* Finding of Fact 8). Appearing in the upper right corner of the CMR on pages numbered "1" and "85" is the handwritten date "4/13/15" indicating the manually inserted date of actual mailing (*see* Finding of Fact 8). Each of the CMR pages submitted includes a legible USPS postmark of the Colonie Center branch office of the USPS, dated April 13, 2015 and listing zip code "12205." All pages of the CMR include 11 entries for pieces of mail, with the exception of page 85 (the final page), which includes 5 entries for pieces of mail, thus resulting in a total of 929 pieces of mail listed on the CMR as originally printed.

11. It is noted that the printed entries for two piece of mail, listed on pages 26 and 32 of the CMR, and bearing certified numbers 7104 1002 9730 0446 5771 and 7104 1002 9730 0446 6396, respectively, have lines drawn through them and are described in the Division's affidavits as "pulled" items. 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 documents being mailed, so as to allow for correction and issuance at another time.

12. In this case, certified control number 7104 1002 9730 0446 8833 was assigned to the reference (i.e., assessment) number L-042700138, and was to be mailed to petitioner, Clinton Delicatessen, Inc., at 426 Clinton Street, Hempstead, NY 11550-1738. This information appears on the Notice of Determination and on the cover sheet associated therewith, and also appears at page 54 of the CMR. Further, certified control number 7104 1002 9730 0447 2113 was also assigned to reference (i.e., assessment) number L-042700138, and was to be mailed to petitioner's then-representative, Carla R. Gallegos, at 11800 Ridge Parkway, Suite 400, Broomfield, CO, 80021. This information appears on page 84 of the CMR.²

13. Appearing below the five entries on page 85 of the CMR is the preprinted heading "Total Pieces and Amounts," to the right of which appear preprinted columns headed "Pieces," "Postage," and "Fees." These columns reflect the preprinted number of pieces of mail for this CMR, here 929, as well as postage and fee amounts for such pieces of mail. Immediately below this heading is the preprinted heading "Total Pieces Received At Post Office," to the right of

² The names and addresses of other taxpayers listed on the CMR pages provided herein have been redacted to protect the confidentiality of those taxpayers.

which the number 927 is handwritten. Appearing at the lower right area of page 85 is a stamped box bearing the instruction “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas.” The area immediately above and to the left of this stamped instruction reflects the aforementioned April 13, 2015 USPS postmark as well as the noted handwritten number “927” and initials affixed by the postal clerk. As noted, 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 26 and 32, and a line has been drawn through the entries on the CMR for these items to indicate that they were pulled from the run (*see* Finding of Fact 11). There are no such lines drawn on or near the CMR listings pertaining to petitioner and to petitioner’s representative.

14. The facts set forth above were established through the affidavits of Mary Ellen Nagengast, an employee and Director of the Division’s MAPS Bureau, and Bruce Peltier, an employee and supervisor in the Division’s mail room (*see* Finding of Fact 5), and upon review of the CMR submitted by the Division. 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 that at issue herein as well as the subsequent issuance of such notices by mailing (via delivery to the USPS).

15. Petitioner did not respond to the Notice of Intent to Dismiss Petition,

CONCLUSIONS OF LAW

A. This matter proceeds by way of a Notice of Intent to Dismiss Petition upon the premise that the petition was not filed within 30 days after issuance of the relevant statutory document giving rise to the right to a hearing, i.e., the Notice of Determination. In ***Matter of***

Victory Bagel Time, Inc., (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 may 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 that includes the assertion of a penalty for fraud by filing a petition for a hearing with the Division of Tax Appeals within 30 days from the date of mailing of such a notice (Tax Law §§ 170[3-a][h][iii]; 2006[4]). Alternatively, a taxpayer may protest a notice of determination by filing a request for a conciliation conference with BCMS “if the time to petition for such hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that statutory time limits for filing either a petition or a request for a conciliation conference are strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a statutory notice, to which protest rights attach, becomes fixed and final and, consequently, BCMS and the Division of Tax Appeals are without jurisdiction to consider the substantive merits of the protest (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. It is well settled that where the timeliness of a taxpayer’s protest is at issue, the initial inquiry is whether the Division has given proper notice to the taxpayer. Specifically, the question

presented is whether the Division has carried its burden of demonstrating the fact and date of proper mailing of the notice being protested (*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, properly addressed and with the requisite amount of postage affixed (*Matter of Novar TV & Air Conditioner Sales & Serv.*). In the case of a notice of determination, proper mailing requires mailing of the notice by registered or certified mail (Tax Law § 1138[a][1]), and it is the Division's initial burden to demonstrate both the fact and date of such mailing, for it is from such date that the limitations period within which a protest may be filed is measured.

E. The Division may meet its burden of proving proper mailing by providing 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). The mailing evidence is two-fold, and to prove the fact and 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*).

When a statutory notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer (and his representative, if any) at his last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). However, as noted, the burden of demonstrating

proper mailing in the first instance rests with the Division (*id.*; *see also Matter of Ruggerite, Inc.*

v. State Tax Commission, 97 AD2d 634 [1983], *aff'd* 64 NY2d 688 [1984]).

F. 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 statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012). Further, the Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination at issue was mailed by certified mail addressed to petitioner, and to petitioner's then-representative, respectively, on April 13, 2015.³ That is, the documents establish that the general mailing procedures described in the affidavits were followed with respect to the Notice of Determination at issue. Petitioner's name and address, as well as its then-representative's name and address, and the numerical information on the Notice, appear on and correspond to such information as set forth on the CMR, each page of which bears a USPS date stamp of April 13, 2015. There are 929 certified mail control numbers listed on the CMR for April 13, 2015, and the USPS employee who initialed the CMR indicated, by writing and initialing the number "927," that 927 items were received for mailing. The two-item difference has been satisfactorily explained in the Peltier affidavit and by reference to the CMR as resulting from two items of mail having been "pulled" (*see* Findings of Fact 11 and 13). The CMR has

³ While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). Here, the record establishes that the Division properly served petitioner's then-representative, Ms. Gallegos, with a copy of the Notice (*see* Findings of Fact 3 and 12).

thus 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; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

G. Given the foregoing, the Notice in question was properly issued by the Division to petitioner, with a copy thereof properly issued to petitioner's then-representative, on April 13, 2015, and in order to be considered timely, petitioner's protest had to have been filed within 30 days thereafter. In turn, 30 days after the April 13, 2015 date of issuance of the Notice was May 13, 2015, and in order to be considered timely, petitioner's protest had to have been filed on or before such date. Here, the petition was not filed until July 8, 2016 (*see* Finding of Fact 1), a date that clearly falls far beyond the statutory period within which a timely protest had to have been filed. Unfortunately, as a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest (*Matter of Modica*; *Matter of Lukacs*; *Matter of Sak Smoke Shop*).

H. The petition of Clinton Delicatessen, Inc., is hereby dismissed.

DATED: Albany, New York
December 22, 2016

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE