

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RACE PROPERTIES, LLC : DETERMINATION
for Revision of a Determination or for Refund or Sales : DTA NO. 828754
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 2012 through :
August 31, 2015. :

Petitioner, Race Properties, LLC, filed a petition for the revision of a determination or for refund of sales and use tax under article 28 and 29 of the Tax Law for the period September 1, 2012 through August 31, 2015.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated August 3, 2018, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition did not appear to have been filed in a timely manner. The Division of Taxation, appearing by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), submitted an affirmation and documentation in support of the dismissal. Petitioner, appearing by Omni Financial (Morgan Q. Anderson, EA and Robert A. Fix, EA), submitted a letter in opposition to dismissal. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance on this determination commenced on October 18, 2018. After due consideration of the documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

FINDINGS OF FACT

1. As a result of an audit, the Division of Taxation (Division) issued to petitioner, Race Properties, LLC, a notice of determination bearing assessment number L-046592218 and dated June 7, 2017, which assessed sales and use tax due in the amount of \$57,177.91, plus interest, for a total amount due of \$71,390.59, for the period September 1, 2012 through August 31, 2015. This notice was addressed to “RACE PROPERTIES, LLC, 1683 DEWEY AVE., ROCHESTER, NY 14615-2923.”

2. The Division issued to petitioner a notice and demand for payment of tax due (notice and demand) bearing assessment number L-046592218, dated September 22, 2017, which assessed sales and use tax due in the amount of \$57,177.91, plus interest, for the period September 1, 2012 through August 31, 2015. This notice was addressed to “RACE PROPERTIES, LLC, 1683 DEWEY AVE., ROCHESTER, NY 14615-2923.”

3. On May 31, 2018, a petition protesting assessment number L-046592218 was filed by petitioner. The envelope in which the petition was mailed bears a Federal Express Standard Overnight postage label dated May 31, 2018. The petition lists the petitioner’s address as 2255 Lyell Ave., Suite 204, Rochester, NY 14606. Morgan Anderson, EA signed the petition.¹

4. On August 3, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr.,

¹ Ms. Anderson and Mr. Fix of Omni Financial are representing petitioner before the Division of Tax Appeals. During the audit, petitioner was represented by Andrew Giller, CPA.

of the Division of Tax Appeals, issued a notice of intent to dismiss petition (notice of intent) to petitioner, on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the notice of determination was issued on June 7, 2017, but the petition was not filed until May 31, 2018, or three hundred and fifty seven (357) days later. Furthermore, as the petition had also been filed in protest of a notice and demand, it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

5. In response to the issuance of the notice of intent, the Division provided the following:

- (i) an affirmation of Anita K. Luckina, an attorney employed by the Office of Counsel of the Division;
- (ii) an affidavit, dated October 10, 2018, of Deena Picard, Data Processing Fiscal Systems Auditor 3 and Acting Director of the Management Analysis and Project Services Bureau (MAPS);
- (iii) an affidavit, dated October 10, 2018, of Fred Ramundo, supervisor of the Division's mail room;
- (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 7, 2017;
- (v) copies of the notice of determination, dated June 7, 2017, together with associated mailing cover sheets;
- (vi) a copy of the petitioner's address summary from the Division's e-MPIRE database showing the petitioner's address as updated via the United States Postal Service (USPS) National Change of Address (NCOA) database, effective May 16, 2015
- (vii) a copy of a power of attorney, executed on November 8, 2015, appointing Andrew Giller, CPA, as petitioner's then-representative;
- (viii) a copy of the petitioner's address summary from the Division e-EMPIRE database as updated via the USPS NCOA database, effective November 12, 2017; and
- (ix) copies of the petition and the envelope in which it was mailed.

6. The affidavit of Deena Picard, who has been in her current position since May 2017,

and was previously a Data Processing Fiscal Systems Auditor since February 2006, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting 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 was manually changed on the first and last page of the CMR in the present case to the actual mailing date of "6/7/17." 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.

7. 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 the taxpayer assistance information on the back. The certified control number is 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 Address, Street, and PO Address."

8. The June 7, 2017 CMR consists of 21 pages and lists 226 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 21, which contains 6 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the

confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark dated June 7, 2017 to each page of the CMR, wrote the number “226” next to the heading “Total Pieces Received at Post Office” on page 21, and initialed or signed the first and last page of the CMR.

9. Page 19 of the CMR indicates that a notice with a certified control number 7104 1002 9730 0135 1299 and reference number L-046592218 was mailed to petitioner at 1683 Dewey Ave., Rochester, NY 14615-2923. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. Page 19 of the CMR indicates that a notice with a certified control number 7104 1002 9730 0135 1282 and reference number L-046592218 was mailed to petitioner’s then-representative, Mr. Giller, at 510 Clinton Square, Rochester, NY 14604. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit “B,” bears this certified control number and petitioner’s then representative’s name and address as noted.

11. The affidavit of Fred Ramundo describes the general operations and procedures within the Division’s mail room. Mr. Ramundo has been in his position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the “Outgoing Certified Mail” area. 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 retrieves the notices and associated documents, and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and certified

number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter 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 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 places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room 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 CMR. As noted, each page of the CMR attached to the Picard affidavit as Exhibit "A" contains a USPS postmark dated June 7, 2017. In addition, the USPS employee's initials, "PM," appear on the first and last page of the CMR. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 226 articles of mail listed on the CMR, including the articles addressed to petitioner and its then-representative, were received by the USPS for mailing on June 7, 2017.

12. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner and its then-representative on June 7, 2017, as claimed.

13. The record includes a copy of the power of attorney appointing Mr. Giller as petitioner's then-representative. This power of attorney, executed by petitioner's sole member, Randi Streb, on November 8, 2015, listed petitioner's address as 1683 Dewey Avenue, Rochester, NY 14615 and Mr. Giller's address as 510 Clinton Square, Rochester, NY 14604.

14. Attachment four to Ms. Luckina's affirmation is petitioner's address summary from

the Division's e-MPIRE database that shows the address of "1683 Dewey Ave., Rochester, NY 14615-2923" was updated via the USPS NCOA database effective May 16, 2015. This was petitioner's last known address prior to the issuance of the subject notice of determination.

15. Petitioner's representative sent a letter in response to the notice of intent. In that letter, petitioner's representative asserted that the taxpayer did not understand its protest rights upon completion of the audit; the subject petition should be considered concurrently with the petition of its sole member currently pending before the Division of Tax Appeals; and petitioner has a "legitimate basis for claims raised in the petition."

CONCLUSIONS OF LAW

A. The petition in this matter seeks review of a notice of determination. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law §§ 1138 [a]; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment, and consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals 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.

C. 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]).

D. 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 conference 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.*).

E. 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.*, Tax Appeals Tribunal, May 23, 1991). The Division may meet its burden of establishing proper mailing by providing evidence of its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Picard and Mr. Ramundo, Division employees involved in and possessing knowledge of the process of generating reviewing and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*).

G. The Division has also presented sufficient documentary proof, i.e., a properly completed CMR to establish that the notice of determination was mailed as addressed on June 7, 2017. Further, petitioner's address on the subject notice of determination, the corresponding mailing cover sheet and the CMR all conform with the address on the USPS NCOA database and the power of attorney form appointing its then-representative. It is thus concluded that the Division properly mailed the notice of determination on June 7, 2017, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date (*see* Tax Law § 1138 [a] [1]).

H. Although the Tax Law does not specifically provide for the service of a statutory 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 statutory notice (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, citing *Matter of Bianca v. Frank*, 43 NY2d 168 [1977]). Here the evidence demonstrated that the notice was sent by certified mail to Mr. Giller, petitioner's then-representative, at his last known address on June 7, 2017, thus fulfilling the case law requirement for doing so.

I. In sum, the Division has established that notice of determination L-046592218 was properly mailed to petitioner at its last known address and its then-representative on June 7, 2017. Having established that the notice of determination was properly mailed to petitioner and its then-representative, it was incumbent upon petitioner to file a petition with the Division of Tax Appeals within 90 days thereafter. However, the petition was not filed until May 31, 2018, a date that falls beyond 90 days after the date of issuance of the notice of determination.

Accordingly, the petition is untimely, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

J. The petition also challenges the notice and demand issued against petitioner for the amount of sales and use tax and interest remaining due on notice of determination L-046592218. The Division of Tax Appeals is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . , unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]). In conclusion of law I, it was determined that the Division properly mailed the notice of determination to petitioner on June 7, 2017; however, the petition was not filed until May 31, 2018, a date that falls beyond the 90-day period for filing a petition in protest of such notice of determination. The amount of the notice of determination was deemed to be finally and irrevocably fixed on September 5, 2017 (*see* Tax Law §§ 1138 [a]; 173-a [3] [a]). Subsequently, on September 22, 2017, the Division issued the notice and demand to petitioner stating the amount of tax and interest finally and irrevocably fixed that remained unpaid, and demanding payment of the same (*see* Tax Law § 173-a [3] [b] [1]). Accordingly, petitioner is not entitled to a hearing with respect to the notice and demand, dated September 22, 2017.

K. The petition of Race Properties, LLC, is dismissed.

DATED: Albany, New York
January 10, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

