

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WILLIAM R. COVINGTON :
for Revision of a Determination or for Refund or Sales : **DETERMINATION**
and Use Taxes under Articles 28 and 29 of the Tax Law : **DTA NO. 829383**
for the Tax Year 2016. :
:

Petitioner, William R. Covington, filed a petition for the revision of a determination or for refund of sales and use tax under articles 28 and 29 of the Tax Law for the tax year 2016.

Pursuant to 20 NYCRR 3000.9 (a) (4), the Division of Tax Appeals issued a notice of intent to dismiss petition, dated November 25, 2019, 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 parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until March 20, 2020, to respond to said notice. The Division of Taxation, appearing by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel) submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order began on March 20, 2020. As a result of the COVID-19 public health emergency, the deadline for the issuance of the determination was extended by an additional three months consistent with Tax Law 2010 (3). After due consideration of the documents submitted, Herbert M. Friedman, Jr., Supervising 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. The Division of Taxation (Division) issued to petitioner, William R. Covington, a notice of determination bearing assessment number L-049364114 and dated January 16, 2019, which asserted sales and use tax due in the amount of \$1,391.95, plus interest and penalty, for a total amount due of \$2,212.92, for the period tax period ending December 31, 2016.

2. On May 21, 2019, a petition protesting assessment number L-049364114 was filed by petitioner. The envelope in which the petition was mailed bears a USPS postage label dated May 21, 2019.

3. On November 25, 2019, Supervising Administrative Law Judge Herbert M. Friedman, Jr., 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 January 16, 2019, but the petition was not filed until May 21, 2019, or in excess of (90) days later. Thus, it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition.

4. In response to the issuance of the notice of intent, the Division provided the following: (i) an affirmation of Adam Roberts, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated December 12, 2019, 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 December 16, 2019, of Fred Ramundo, supervisor of the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable"

(CMR) postmarked January 16, 2019; (v) a copy of the notice of determination, dated January 16, 2019, together with associated mailing cover sheet; and (vi) a copy of the petitioner's IT-201 for the tax year 2017, filed on April 17, 2018.

5. 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 "1/16/19." 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 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."

7. The January 16, 2019 CMR consists of 40 pages and lists 430 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 40, which contains 1 entry. 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 January 16, 2019 to each page of the CMR, wrote the number "430" next to the heading "Total Pieces Received at Post Office" on page 40, and initialed or signed the first and last page of the CMR.

8. Page 35 of the CMR indicates that a notice with a certified control number 7104 1002 9730 0324 4063 and reference number L-049364114 was mailed to petitioner at 147 LEXINGTOVA AVE APT 803, BUFFALO, NY 14222-1809. 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.

9. 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 amount 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 January 16, 2019. In addition, the USPS employee's initials, "PM," appear on the first and last page of the CMR and the employee wrote the number "430" next to the heading "Total Pieces Received at Post Office" on page 40. According to Mr. Ramundo, the affixation of the postmarks and the USPS employee's initials indicate that all 430 articles of mail listed on the CMR, including the article addressed to petitioner were received by the USPS for mailing on January 16, 2019.

10. Petitioner's IT-201 for the year 2017 contained the same address as on the notice and was the last return filed prior to issuance of the notice.

11. According to the Picard and Ramundo affidavits, the notice was mailed to petitioner on January 16, 2019, as claimed.

12. Petitioner did not submit a response to the notice of intent.

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 January 16, 2019. Further, petitioner's address on the subject notice of determination, the corresponding mailing cover sheet and the CMR all conform with the address listed on petitioner's IT-201 for the tax year 2017. This was the last return filed prior to the issuance of the notice. It is thus concluded that the Division properly mailed the notice of determination on January 16, 2019, 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. In sum, the Division has established that notice of determination L-049364114 was properly mailed to petitioner at his last known address on January 16, 2019. Having established that the notice of determination was properly mailed to petitioner, 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 21, 2019, 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).

I. The petition of William R. Covington is dismissed.

DATED: Albany, New York
September 10, 2020

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