

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANK A. CILIONE : **DETERMINATION**
 : **DTA NO. 829493**
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods June 1, 2016 through November 30, 2016 and June :
1, 2017 through August 31, 2017. :

Petitioner, Frank A. Cilione, 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 periods June 1, 2016 through November 30, 2016 and June 1, 2017 through August 31, 2017.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), brought a motion on April 21, 2020, seeking an order dismissing the petition or, in the alternative, summary determination in its favor pursuant to sections 3000.5 and 3000.9 (a) (i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing pro se, had until May 21, 2020, to file his response to the Division of Taxation's motion, which date began the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) brought a motion on April 21, 2020, seeking dismissal of the petition. The subject of the Division's motion is the timeliness of petitioner's protest of notices of determination dated November 14, 2018 and bearing assessment identification numbers L-049121135, L-049121136 and L-049121137 (notices). The notices are addressed to petitioner, Frank A. Cilione, at an address in East Hampton, New York.

2. On July 17, 2019, petitioner filed his petition with the Division of Tax Appeals in protest of the notices.

3. In support of the motion and to show proper mailing of the notices, the Division provided, along with an affidavit of Mary R. Humphrey, Esq., the following with its motion papers: (i) an affidavit, dated April 15, 2020, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail – Assessments Receivable" (CMR) postmarked November 14, 2018; (iii) an affidavit, dated April 20, 2020, of Susan Saccocio, a manager in the Division's mail room; (iv) copies of the notices mailed to petitioner with the associated mailing cover sheets; and (v) a copy of petitioner's application for automatic six-month extension of time to file his 2016 New York resident income tax return (application), form IT-370, dated April 6, 2017. This was the last application filed by petitioner before the notices were issued and it lists the same East Hampton, New, York, address that is listed on the notices and petition.

4. The affidavit of Deena Picard, who has been in her current position since February 2006 and Acting Director since May 2017, sets forth the Division's general 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 pages of the CMR in the present case to the actual mailing date of "11/14/18." In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the United States Postal Service (USPS) and remain so when returned to the Division. 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.

5. 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 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 PO Address."

6. The CMR in the present matter consists of 18 pages and lists 197 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 18, which contains 10 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 November 14, 2018, to each page of the CMR, wrote the number “197” on page 18 next to the heading “Total Pieces Received at Post Office,” and initialed or signed page 18.

7. Page 11 of the CMR indicates that three notices were mailed to petitioner at his East Hampton, New York, address listed on the notices: certified control number 7104 1002 9730 0312 6284 and reference number L-049121135, certified control number 7104 1002 9730 0312 6291 and reference number L-049121136, and certified control number 7104 1002 9730 0312 6307 and reference number L-049121137. The corresponding mailing cover sheets, attached to the Picard affidavit as exhibit “B,” bear the certified control number for each notice and petitioner’s name and address as noted.

8. The affidavit of Susan Saccocio, a manager in the Division’s mail room, describes the mail room’s general operations and procedures. Ms. Saccocio has been in this position since 2017 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an “Outgoing Certified Mail” area. Ms. Saccocio confirms that a mailing cover sheet precedes each notice. A staff member receives 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 first and last pieces of mail are checked against the information

on the CMR. A clerk then performs a random review of up to 30 pieces of mail listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers 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. 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. Each page of the CMR in exhibit "A" of the Picard affidavit contains a USPS postmark of November 14, 2018. On page 18, corresponding to "Total Pieces and Amounts," is the preprinted number 197 and next to "Total Pieces Received At Post Office" is the handwritten entry "197." There is a set of initials or signature on page 18. According to the Picard and Saccocio affidavits, copies of the notices were mailed to petitioner on November 14, 2018, as claimed.

9. Petitioner did not respond to the motion.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (*see* Tax Law § 2006 [4]; 20 NYCRR 3000.3 [c]). Pursuant to Tax Law § 1138 (a) (1), the notices in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. Alternatively, a taxpayer may contest a notice by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) "if the time to petition for such a hearing has not elapsed" (Tax Law § 170 [3-a] [a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see 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 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 Lukas*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice 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 (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and must also show proof that the standard procedure was followed in this particular instance.

C. The Division has established the existence of a standard mailing procedure through the affidavits of Ms. Picard and Ms. Saccocio, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination during the relevant period. Moreover, the CMR in the present matter has been properly completed and, thus, constitutes highly probative evidence of both date and fact of mailing (*see Matter of Modica*, Tax Appeals Tribunal, October 1, 2015). Therefore, the Division has met its burden to show that copies of the notices at issue were mailed, as addressed, to petitioner on November 14, 2018.

D. Since the Division has demonstrated proper mailing of the notices, such a showing gives rise to a presumption of receipt of the notices by the person to whom it was addressed (*see* Tax Law § 1147 [a] [1]). In this matter, petitioner did not respond to the Division's motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v Standard Metals*, 99 AD2d 227 [1st Dept 1984], *lv dismissed* 62 NY2d 942 [1984]). Therefore, petitioner has failed to rebut the presumption of receipt of the notices.

E. As set forth above, a taxpayer may protest a notice by filing a petition with the Division of Tax Appeals, or by filing a request for conciliation conference with BCMS, within 90 days from the date of mailing the notices (*see* Tax Law §§ 1138 [a] [1]; 170 [3-a] [a]). In this case, petitioner filed his petition with the Division of Tax Appeals on July 17, 2019, a date that falls more than eight months after the November 14, 2018 mailing date of the notices. Therefore, the petition was not timely filed and the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs; Matter of Sak Smoke Shop*).

F. The Division of Taxation's motion to dismiss the petition is granted.

DATED: Albany, New York
August 13, 2020

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE