

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

PATRICIA GILANI :

ORDER
DTA NO. 827088

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 June 1, 2011 through February 28, 2014. :

Petitioner, Patricia Gilani, 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 June 1, 2011 through February 28, 2014.

On September 22, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). The parties were given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until December 7, 2015, to respond to said notice. On October 15, 2015 and December 3, 2015, petitioner, appearing by Khondaker Haque, CPA, submitted documents in opposition to dismissal. On November 25, 2015, the Division of Taxation, appearing by Amanda Hiller, Esq. (Jennifer L. Hink-Brennan, Esq., of counsel) submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order began on December 7, 2015. After due consideration of the documents submitted, Kevin R. Law, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. This matter concerns sales tax audits of the Manhattan Restaurant, Inc. (the restaurant), which was subject to audit for the period June 1, 2011 through February 28, 2014. Following the audit of the restaurant, petitioner, Patricia Gilani, was assessed sales and use taxes of \$85,913.32 plus penalty and interest as a responsible officer or responsible person of the restaurant.

2. The restaurant filed a Request for a Conciliation Conference regarding the Notice of Determination that had been issued to it and, in response, the Bureau of Conciliation and Mediation Services (BCMS) mailed a letter to petitioner, dated August 28, 2014, that stated that since the restaurant filed a request for a conciliation conference in response to a notice of determination issued to it, Notice of Determination L-041766655, issued to petitioner as a responsible person of the restaurant, was considered to be protested and, as a result, a conciliation conference would be scheduled.

3. On March 20, 2015, BCMS issued a conciliation order to petitioner stating that petitioner did not appear at the November 13, 2014 conciliation conference. The order stated that notice of the conciliation conference was mailed to petitioner on October 6, 2014. Based upon the determination reached in the restaurant's BCMS conference, Notice of Determination L-041766655 was sustained and the matter was dismissed.

4 Petitioner filed a petition dated June 19, 2015 with the Division of Tax Appeals by United States Postal Service (USPS) First Class Mail. The USPS postage-paid stamp on the

envelope containing the petition is dated July 2, 2015. The petition was received by the Division of Tax Appeals on July 6, 2015.¹

5. On September 22, 2015, Supervising Administrative Law Judge Daniel Ranalli issued to petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petition.

The notice of intent provides, in pertinent part, that:

“It appears that the conciliation orders [sic] under protest in this matter, CMS No. 263156, was issued to petitioner on March 20, 2015, however the instant petition was not filed with the Division of Tax Appeals until July 2, 2015, or one hundred four (104) days later. As such, the Division of Tax Appeals is without jurisdiction to consider the merits of the petition.”

6. To show proof of proper mailing of the conciliation order dated March 20, 2015, the Division of Taxation (Division) submitted, among other documents: (i) the affidavit of Jennifer L. Hink-Brennan, Esq., an attorney employed in the Office of Counsel of the Division, dated November 24, 2015; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated November 10, 2015; (iii) a “Certified Record for Presort Mail - BCMS Cert Letter” (CMR) postmarked March 20, 2015; (iv) a copy of the conciliation order, cover letter and cover sheet, dated March 20, 2015, and copy of the three-windowed mailing envelope; (v) an affidavit, dated November 12, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division’s mail room; (vi) petitioner’s 2012 New York State personal income tax return, showing petitioner’s address in Princeton, New Jersey; and (vii) a copy of Notice of Determination L-041766655.

7. The affidavit of Robert Farrelly sets forth the Division’s general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders

¹The restaurant has also filed a petition with the Division of Tax Appeals. By determination of today’s date, the restaurant’s petition has been dismissed as untimely filed.

by USPS certified mail and confirmation of the mailing through BCMS's receipt of a postmarked copy of the CMR.

8. To commence this procedure, the BCMS Data Management Services Unit prepares the conciliation order and the accompanying cover letter, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature, who in turn, forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

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

10. The AFP Unit also produces a computer-generated CMR. 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 BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets using a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

11. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers and taxpayers' representatives 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 where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

12. The “Total Pieces and Amounts” is indicated on the last page of the CMR. Also on the last page of the CMR, the BCMS clerk stamps “Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit.”

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of the pages of the CMR. In this case “3/20/15” is written in the upper right corner of pages 1 through 3 of the CMR. Each page of the CMR also contains a USPS postmark indicating the date of March 20, 2015.

14. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders, is picked up in BCMS by an employee of the Division’s Mail Processing Center. The Division’s Mail Processing Center employee delivers the CMR along with the envelopes containing the cover sheets, cover letters and conciliation orders to the USPS.

15. Mr. Farrelly attested to the truth and accuracy of the copy of the three-page CMR relevant to this matter, which contains a list of the conciliation orders issued by the Division on March 20, 2015. This CMR lists 25 computer-printed certified control numbers. Each such certified control number is assigned to an item of mail listed on the three pages of the CMR. Specifically, corresponding to each listed certified control number is a reference/CMS number, and the names and addresses of the addressees. There are no deletions from the list.

16. Information regarding the conciliation order issued to petitioner is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 0424 1207 is reference/CMS number 000263156, along with petitioner’s name and a Princeton, New Jersey, address that is identical to the address on petitioner’s 2012 New York State personal

income tax return, which was the last return filed by petitioner with the Division prior to the issuance of the conciliation order.

17. The cover sheet bearing petitioner's name and the Princeton, New Jersey, address appearing on petitioner's 2012 New York State personal income tax return and on the CMR shows the same certified control number as that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order.

18. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center. This affidavit attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified control numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office.

19. In this particular instance, the postal employee affixed a postmark dated March 20, 2015 to, and also wrote his or her signature or initials on, each page of the three-page CMR. The Mail Processing Center further requests that the USPS employees either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the March 20, 2015 CMR indicates that the USPS employee complied with

this request by writing the number “25” to indicate the number received as well as circling the preprinted number “25” corresponding to the heading “Total Pieces and Amounts.”

20. Mr. Peltier’s affidavit states 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 Division’s Mail Processing Center, the CMR is picked up at the post office by a member of Mr. Peltier’s staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

21. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. Peltier avers that on March 20, 2015, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at her Princeton, New Jersey, address to a branch of the USPS in Albany, New York, in sealed postpaid envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on March 20, 2015 for the records of BCMS. Mr. Peltier asserts that the procedures described in his affidavit are 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.

22. In her response to the Notice of Intent to Dismiss Petition, petitioner claims she filed the petition on June 19, 2015, the date the petition was signed. In addition, petitioner denies receipt of Notice of Determination L-041766655. Petitioner also denies receipt of the October 6, 2014 letter from BCMS informing her of the conciliation conference and claims she was not expecting a conciliation order as she never filed a request for a conciliation conference.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the applicable time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). In the present matter, it appeared to the Division of Tax Appeals that the petition was filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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). Together, the mail cover sheet, cover letter, CMR and affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing conciliation orders, establish the Division's standard mailing procedure and show that the procedure was followed in this instance. The CMR has 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). The mail cover sheet bears petitioner's name and a Princeton, New Jersey, address that is identical to the address on petitioner's 2012 New York State personal income tax return and on the CMR, and shows the same certified control number, 7104 1002 9730 0424 1207, as

that listed on the CMR for petitioner's entry. Additionally, the cover sheet bears the same CMS number as that listed on the CMR and the conciliation order. Petitioner's name and address, as well as the numerical information on the face of the order, appear on the CMR, which bears a USPS date stamp of March 20, 2015. There are 25 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling and writing the number "25" on the line stating "Total Pieces Received at Post Office," that the post office received 25 items for mailing. In short, the Division established that it mailed the order to petitioner by certified mail on March 20, 2015 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

C. Petitioner claims she filed the petition on June 19, 2015, which is the date petitioner signed same. This assertion is rejected. In this case, the petition was filed on July 2, 2015, the date of the USPS postmark appearing on the envelope containing the petition (20 NYCRR 3000.22 [a][1]). However, even if petitioner's contention that the petition was filed on June 19, 2015 were accepted, the petition would still fall outside the 90-day period to file a petition with the Division of Tax Appeals following the issuance of a conciliation order as June 19, 2015 was the 91st day. Accordingly, it is determined that the petition as measured from the issuance of the conciliation order is untimely.

D. Notwithstanding that the Division has established the fact and date of mailing of the conciliation order, and that the petition herein was filed more than 90 days after the issuance of such order, these findings do not end the inquiry as to whether the Division of Tax Appeals has jurisdiction in this matter. Petitioner's original entry into the formal appeal process was not by virtue of her request for a conciliation conference in response to the Notice of Determination

issued to her, rather it was by operation of law (Tax Law § 1138[a][3][B]).² In this case, since the restaurant filed a timely request for a conciliation conference protesting the Notice of Determination issued to it, petitioner was deemed to have also filed a timely protest (*id*).³ Petitioner's response to the notice of intent to dismiss questions the issuance of the underlying Notice of Determination, which she claims she never received. Petitioner also alleges that she never received the letter from BCMS notifying her of the conciliation conference. In fact, and consistent with her allegation, petitioner did not appear at the conciliation conference. Tax Law § 1138(a)(3)(B) was not intended to limit a responsible person's ability to request a conciliation conference with BCMS and/or file a petition with the Division of Tax Appeals; rather the statute was meant to insure that any protest rights the entity was exercising inured equally to any allegedly responsible person's benefit without the need to separately file a formal protest. If the petition were to be dismissed at this juncture, with petitioner not having participated in the conciliation conference process or having ever affirmatively filed a request for conciliation conference, then petitioner would effectively be precluded from ever challenging whether the Division properly issued a notice of determination to her in the first instance. This is a result surely at odds with basic tenets of due process and notions of fundamental fairness. Petitioner is challenging not only the conciliation order but also the very issuance of the notice of determination upon which it is based. Petitioner, in this instance, should not be put in any worse position than she would be in had the restaurant not timely filed a request for a conciliation

² Tax Law § 1138(a)(3)(B) provides that a timely protest against liability filed by a business will also be deemed to include a protest by any individuals charged with responsibility for such liability

³ Unfortunately, although the restaurant has also filed a petition with the Division of Tax Appeals following the issuance of a conciliation order to it, that petition has been dismissed as untimely by determination of today's date.

conference. Therefore, the timeliness of her petition should be measured from the time the Notice of Determination was issued. Although the Division has claimed it issued the Notice of Determination to petitioner by mailing it to her Princeton, New Jersey, address, the record at this juncture included no evidence of the fact and date of mailing. A blanket statement by the Division that it mailed the Notice of Determination to petitioner will not suffice when the right to a hearing is in question. Accordingly, as the September 22, 2015 Notice of Intent to Dismiss Petition was not premised on the timeliness of the petition as measured from the issuance of the Notice of Determination, it would be premature to dismiss the petition at this stage.

E. The Notice of Intent to Dismiss Petition, dated September 22, 2015, is rescinded pending the issuance of an additional Notice of Intent to Dismiss Petition proposing to dismiss the petition on the timeliness of the petition as measured from the date of the Notice of Determination to the date of filing of the petition herein.

DATED: Albany, New York
March 10, 2016

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE