

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CMC FOOD, INC. : ORDER
for Revision of a Determination or for Refund of Sales : DTA NO. 826094
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period December 1, 2006 through May 31, 2010. :

Petitioner, CMC Food, 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, 2006 through May 31, 2010.

On September 12, 2014, 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 granted until November 28, 2014 to respond to the proposed dismissal. On November 26, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted documents in support of dismissal. Petitioner, appearing by Accounting & Tax Associates, LLC (Naveen Shah, CPA), did not respond to the Notice of Intent to Dismiss Petition. On January 22, 2015, the Supervising Administrative Law Judge issued a determination dismissing the petition filed in this matter. The determination repeated the language set forth in the Notice of Intent to Dismiss Petition.

Petitioner filed an exception to the determination of the Supervising Administrative Law Judge. On December 11, 2015, the Tax Appeals Tribunal issued a decision finding that the determination failed to address the issue of whether the Division of Taxation has met its burden of demonstrating the date and fact of issuance of the relevant conciliation order, and remanded

the matter to the Supervising Administrative Law Judge for a supplemental determination based upon the factual record already made. After due consideration of the documents in the record, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Determination (Assessment ID: L-037773794-9), dated May 7, 2012, assessing additional sales and use taxes in the amount of \$132,555.29 plus penalty and interest for the period December 1, 2006 through May 31, 2010. The Notice of Determination is addressed to petitioner, CMC Food, Inc., 48 West 48th Street, New York, NY 10036-1703. A copy of this notice was also issued to petitioner's representative, Naveen Shah, 757 3rd Avenue, New York, NY 10017.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS), hand-dated as signed on June 6, 2012, that was received by BCMS on March 11, 2013. Raj Shah, petitioner's representative, signed this request which protested assessment number L-037773794-9, dated May 7, 2012. The request lists petitioner's address as 48 West 48th Street, New York, NY 10036-1703, and its representative's address as Raj Shah, "Rosen Seymour Shapps [sic] Martin & Co. LLP," 757 Third Avenue, 6th Floor, New York, NY 10017.

3. By a Conciliation Order Dismissing Request (CMS No. 256572), dated March 29, 2013, BCMS dismissed petitioner's request as late filed.

4. On February 5, 2014, petitioner filed a petition with the Division of Tax Appeals in protest of notice number L-037773794. In connection with its petition, petitioner provided a conciliation order dismissing request (CMS No. 256572), dated March 29, 2013, which bears the same notice number as listed on the petition. The petition lists petitioner's address as 178 Fifth Avenue, New York, NY 10010, and its representatives' address as Raj Shah and Naveen Shah, Accounting & Tax Associates LLC, 1276W RXR Plaza, 12th Floor, Uniondale, NY 11556.

5. On September 12, 2014, Daniel J. Ranalli, Supervising Administrative Law Judge of the Division of Tax Appeals, issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the relevant conciliation order was issued on March 29, 2013, but that the petition was not filed until February 5, 2014, or 313 days later.

6. In response to the issuance of the notice of intent to dismiss petition, the Division submitted, among other documents, (i) the affidavit of Leo Gabovich, the Division's representative, dated November 25, 2014; (ii) the affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, dated November 17, 2014; (iii) a "Certified Record for Presort Mail - BCMS Cert Letter" (CMR) dated March 29, 2013; (iv) an affidavit, dated November 19, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (v) a copy of the petition filed with the Division of Tax Appeals on February 5, 2014; (vi) a copy of petitioner's request for conciliation conference received by BCMS on March 11, 2013; (v) a copy of the Conciliation Order Dismissing Request issued on March 29, 2013; and (vi) a copy of the Notice of Determination, dated May 7, 2012.

7. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conference for BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This

procedure culminates in the mailing of the orders by the USPS via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

8. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, and forwards both to the conciliation conferee for signature. The conciliation conferee, in turn, signs and 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 Unit). 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, the 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 zeroes. 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 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 through which the BCMS return address, certified mail control number, bar code, and name and address of the taxpayer appear.

12. Pursuant to the general office practice, the BCMS clerk stamped “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas” on the last page of the CMR and also stamped “MAILROOM: RETURN LISTING TO: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on each page of the CMR.

13. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case “3-29-13” is written in the upper right corner of each page of the CMR.

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 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 5-page CMR, which contains a list of conciliation orders issued by the Division on March 29, 2013. The CMR originally listed 47 computer-printed certified control numbers. Each such certified control number was assigned to an item of mail listed on the five pages of the CMR. Specifically, corresponding to each listed certified control number was a reference/CMS number, the name and address of the addressee, and postage and fee amounts. Portions of the copy of the CMR have been redacted to preserve the confidentiality of information relating to other taxpayers not at issue here.

16. One piece of mail located on page four of the CMR was “pulled” from the list. A piece may be pulled for any number of reasons, including a discrepancy in the name or address.

A line was placed through the entry that was pulled. No such mark is made on the listing for petitioner or its representative. As a result of the deletion, the clerk changed the “TOTAL PIECES AND AMOUNTS” listed on page five of the CMR from “47” to “46.”

17. Information regarding the conciliation order issued to petitioner is contained on page two of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1526 1522 is reference/CMS number 000256572, along with petitioner’s name and the West 48th Street, New York, New York, address that is identical to the address on petitioner’s request for conciliation conference. Additionally, information regarding the conciliation order issued to petitioner’s representative is contained on page one of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1526 1508 is reference/CMS number 000256572, along with petitioner’s representative’s name and address, “RAJ SHAH, ROSEN SEYMOUR ET AL LLP, 757 THIRD AVENUE 6TH FLOOR, NEW YORK, NY 10017,” that is identical to the representative’s address as indicated on the request for conciliation conference.

18. Mr. Farrelly noted that next to petitioner’s name on the CMR, the clerk wrote “Order ret./unclaim. addr. ok remailed (reg.) 4/24/13.” On April 24, 2013, BCMS mailed a copy of the conciliation order to petitioner by regular mail because the certified mailing had been returned by the USPS, consistent with its policy when certified mailings are returned.

19. Attached to Mr. Farrelly’s affidavit is a copy of a one-page redacted cover sheet. It does not bear any of the information referenced in Finding of Fact 17.

20. The affidavit of Bruce Peltier, Principal Mail and Supply Clerk and mail room supervisor of the Division’s Mail Processing Center, 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. He stated that 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 affixes postage and fee amounts. A clerk then counts the envelopes and verifies the names and certified mail 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.

21. In this particular instance, the postal employee affixed a postmark dated March 29, 2013 to each page of the five-page CMR. The postal employee also wrote his or her initials, and circled the crossed out preprinted number "47" and handwritten number "46" next to the printed statement "TOTAL PIECES RECEIVED AT POST OFFICE" on page five of the CMR, in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the mail record, indicating that 46 pieces of mail were actually received.

22. Mr. Peltier stated 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 was maintained by BCMS in the regular course of business.

23. Based upon his review of the affidavit of Robert Farrelly and the exhibits attached thereto, including the CMR, Mr. Peltier stated that on March 29, 2013, an employee of the Mail Processing Center delivered a piece of certified mail addressed to "CMC Food, Inc., 48 West 48th Street, New York, NY 10036-1703," and a piece of certified mail addressed to "Raj Shah,

Rosen Seymour et al LLP, 757 Third Avenue, 6th Floor, New York, NY 10017,” to a branch of the USPS in Albany, New York in a sealed postpaid envelope for delivery by certified mail. He stated that he could also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on March 29, 2013 for the records of BCMS. Mr. Peltier asserted that the procedures described in his affidavit were 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 and its representative on March 29, 2013.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). Pursuant to Tax Law § 170(3-a)(e) and Tax Law § 1138(a)(1), the conciliation order in this case and the underlying determination would be binding upon petitioner unless it filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer’s petition following the issuance of a conciliation order is in question, the initial inquiry focuses on whether the conciliation order was properly mailed. (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). A conciliation order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Dean*, Tax Appeals Tribunal, July 24, 2014; *Matter of Cato*; *Matter of DeWeese*). When an order is found to have been properly mailed by the Division to the taxpayer’s 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).

C. 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 orders by one with knowledge of the relevant procedures, and second, there must be proof that the standard procedure was followed in this particular instance (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Farrelly and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) conciliation orders.

E. The Division has not, however, presented sufficient documentary proof to establish that conciliation order dismissing request number 256572 was mailed to petitioner at its last known address, or that a copy of the same was mailed to petitioner's representative, on March 29, 2013. The Tax Appeals Tribunal has stated that the cover sheet is an important component of the mailing process and its absence raises the material factual issue of whether the Division's standard mailing procedure was followed (*see Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015). The conciliation order dismissing request bears neither petitioner's address nor a certified control number. It also does not bear petitioner's representative's address or a certified control number. Therefore, without the cover sheet, the address and certified control number for a particular conciliation order cannot be verified against the CMR. In the instant case, the redacted copy of the cover sheet attached to Mr. Farrelly's affidavit displays none of this

essential information. As a result, without other evidence of mailing (*cf. Matter of Rywin, Inc.*, Tax Appeals Tribunal, April 24, 2008 [evidence demonstrating receipt of the statutory notice remedied otherwise insufficient mail proof]), the Division has not established that it performed its standard mailing procedure with regard to the conciliation order dismissing request in this particular case.

F. The Notice of Intent to Dismiss Petition issued to CMC Food, Inc., dated September 12, 2014 is withdrawn and the Division of Taxation shall have 75 days from the date of this order to file its answer.

DATED: Albany, New York
March 10, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE