

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
JESWALD JACOBBI	:	ORDER
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2004 through February 28, 2011.	:	DTA NOS. 826169 AND 826170

Petitioner, Jeswald Jacobbi, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2004 through February 28, 2011.

On May 15, 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 given 30 days to respond to the proposed dismissal. The parties were subsequently granted an extension, until July 31, 2014, to respond to said notice. On June 12, 2014, petitioner, Jeswald Jacobbi, appearing by Amigone, Sanchez and Mattrey, LLP (B.P. Oliverio, Esq., of counsel), submitted documents in opposition to dismissal. On July 1, 2014, the Division of Taxation, appearing by Amanda Hiller, Esq. (Leo Gabovich) 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 July 31, 2014. After due consideration of the documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed his petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. This matter concerns sales tax audits of the restaurant Casa Di Pizza (the restaurant), which was subject to audits for the periods March 1, 2004 through May 31, 2008 and June 1, 2008 through February 28, 2011. Following the audit of the restaurant for the period March 1, 2004 through May 31, 2008, petitioner, Jeswald Jacobbi, was assessed approximately \$459,115.61 plus penalty and interest as a responsible officer or responsible person of the restaurant. Petitioner was also assessed sales and use taxes as a responsible officer or responsible person of the restaurant for the period June 1, 2008 through February 28, 2011 in the amount of approximately \$314,872.64 plus penalty and interest.¹

2. The restaurant filed a Request for a Conciliation Conference regarding the notices that had been issued to it and, in response, the Bureau of Conciliation and Mediation Conferences (BCMS) mailed letters to petitioner, dated April 9, 2013 and June 12, 2013, with respect to assessments L-039125946 and L-039131034, respectively, which stated that since the restaurant filed a protest in response to the assessments, the notices issued to petitioner are also considered to be protested and, as a result, a conciliation conference would be scheduled.

3. On November 29, 2013, BCMS issued conciliation orders to petitioner stating that petitioner did not appear at the conference. Based upon the determination reached in the

¹ A copy of the notices issued to the restaurant were included in the papers offered by the parties. However, this matter involves petitions for a hearing to review two notices of determination that were issued to petitioner as a responsible person or officer of the restaurant. Neither party offered a copy of the notices that are the subject of the notices of intent to dismiss.

associated matter of Casa Di Pizza, Inc., the statutory notices were sustained and the matter was dismissed.

4. Each of the conciliation orders was mailed by certified mail to petitioner at 4 Birkdale Road, Cheektowaga, New York, and, in each instance, the orders were returned unclaimed. Thereafter, the orders were mailed by regular mail on January 2, 2014. The address used corresponds with a Bureau of Conciliation and Mediation Services Associated Case Entry Worksheet, which lists petitioner's address as 4 Birkdale Rd., Cheektowaga, NY 14225. There is no evidence pertaining to whether this was petitioner's last known address.

5. On March 14, 2014, the Division of Tax Appeals received two petitions challenging the assessments issued to petitioner for the sales and use taxes due from Casa Di Pizza. One petition pertained to the period March 1, 2004 through May 31, 2008 and the other petition challenged an assessment for the period June 1, 2008 through February 28, 2011. The petitions were sent by Federal Express on March 13, 2014.

6. On May 15, 2014, the Petition Intake Unit of the Division of Tax Appeals issued two notices of intent to dismiss petition to petitioner. Each notice stated that the subject petitions were filed in protest of a BCMS conciliation order issued to petitioner on November 29, 2013 and that the petition was not filed until March 13, 2014, or 104 days later.

7. In response to the issuance of the notices of intent to dismiss petition and to prove mailing of the notices of determination under protest, the Division of Taxation (Division) submitted, among other documents, the following with respect to each petition: (i) a statement from Leo Gabovitch, (ii) an affidavit, dated June 24, 2014 of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's Mail Processing Center; (iii) an affidavit, dated June 24, 2014 of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS (iv) a "Certified

Record for Presort Mail - BCMS CERT LETTER” (CMR); and (v) a copy of a BCMS Associated Assessment Case Entry Worksheet, which, among other things, lists petitioner’s address as 4 Birkdale Rd., Cheektowaga, NY 14225.

8. 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 by the United States Postal Service (USPS), via certified mail, and confirmation of such mailing through receipt by BCMS of a postmarked copy of the CMR.

9. The BCMS Data Management Services Unit prepares and forwards the conciliation orders and the accompanying cover letters, predated with the intended date of mailing, to the conciliation conferee for signature. The conciliation conferee, in turn, signs and forwards the orders and cover letter to a BCMS clerk assigned to process the conciliation orders.

10. 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, taxpayer’s name, mailing address, BCMS number, certified control number, and certified control number bar code.

11. The AFP Unit also produces a computer-generated CMR entitled “CERTIFIED RECORD FOR PRESORT MAIL - BCMS CERT LETTER.” 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 via a printer located in BCMS and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

12. 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 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 appears.

13. Pursuant to the general office practice, the BCMS clerk stamps “POST OFFICE Hand write total # of pieces and initial. Do Not stamp over written areas,” and also stamps “Mail Room: Return Listing To: BCMS BLDG 9 RM 180 ATT: CONFERENCE UNIT” on the last page of the CMR.

14. 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, “11/29/13.”

15. The CMR, along with the envelopes containing the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division’s Mail Processing Center. The Division’s Mail Processing Center is responsible for delivering the envelopes and their content to the United States Post Office.

16. Mr. Farrelly attests to the truth and accuracy of the copy of the five-page CMR, which contains a list of the 52 conciliation orders issued by the Division on November 29, 2013.

17. Information regarding the conciliation orders issued to petitioner is contained on page five of the CMR. Corresponding to certified control number 7104 1002 9730 0102 4667 is reference number 000256911, along with petitioner’s name and the address, 4 Birkdale Road, Cheektowaga, NY 14225-1616. Similarly corresponding with certified control number 7104 1002 9737 0102 4674 is reference number 000257918, along with petitioner’s name and the address 4 Birkdale Road, Cheektowaga, NY 14225-1616. On page 5, the BCMS clerk noted in

the two instances next to petitioner's name "ORDER RET./UNCLAIM. ADDR. O.K. REMAILED (REG.) 1/2/14." On January 2, 2014, BCMS mailed copies of the conciliation orders to petitioner by regular mail to the same address as that used for the first mailing. The second mailing was pursuant to BCMS's policy to remail by regular mail any orders returned by the Postal Service. This was the normal and regular procedure of BCMS on November 29, 2013.

18. The affidavit of Bruce Peltier 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 states that after a conciliation order was 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.

19. Here, postmarks of November 27, 2013 and November 29, 2013 appear on each page of the certified mail record. The earlier postmark has been crossed off and the postmark of November 29, 2013 has been left untouched. Mr. Peltier explains that when an error occurs in the normal course of business, the error may be caught by a post office employee or a member of the mail processing center staff. When a member of the mail processing staff catches the error, that person may request that the mail log be changed to correctly reflect the date of mailing.

20. The postal employee circled "52" on page 5 for the purpose of indicating that "52" pieces of mail were received at the post office. This was done 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.

21. Mr. Peltier 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 was picked up at the post office by a member of Mr. Peltier's staff on the following day after its initial delivery and was then delivered to the originating office, in this case, BCMS.

22. Based upon his review of CMR, Mr. Peltier states that he determined that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on November 29, 2013 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 piece of certified mail to petitioner on November 29, 2013.

23. Petitioner and his former wife separated in 1976 and, since then, he has not resided at 4 Birkdale Road, Cheektowaga, New York. Since petitioner does not live at this address, Ms. Jacobbi does not open mail addressed to petitioner. Further, Ms. Jacobbi recalls that she refused to accept a piece of certified mail from the Division that was addressed to petitioner at her Birkdale Road address in December 2013. It is Ms. Jacobbi's usual practice to give the mail to one of her sons, during their next visit, for delivery to their father. Ms. Jacobbi received a second letter from the Division, that was addressed to petitioner at her 4 Birkdale Road address, on or about January 8, 2014. The letter was given to a delivery man for the restaurant. Mr. Joseph Jacobbi, one of petitioner's sons, found the letter with his mail on January 10, 2014. Since petitioner was ill, Mr. Joseph Jacobbi mailed the letter to their attorney that day or the next.

24. Petitioner has lived in Florida for nearly 40 years but spends his summers in Buffalo, New York, where he resides at 481 Elmwood Avenue. According to petitioner, since this is a rear apartment and there is no mail service at this location, petitioner uses the address of the restaurant, 477 Elmwood Avenue, Buffalo, New York 14222, as his mailing address in Buffalo in order to be certain that he receives important mail.

25. The records of the New York State Department of State pertaining to the restaurant as of March 31, 2014 list petitioner's address as 481 Elmwood Avenue, Buffalo, New York 14222.

26. Petitioner's New York State driver's license, which was issued in 2012, lists his address at 477 Elmwood Avenue.

27. Petitioner and Ms. Jacobbi filed joint federal and New York State income tax returns through 2007 and, in each instance, listed the 481 Elmwood Avenue, Buffalo address as the mailing address.

SUMMARY OF PETITIONER'S POSITION

28. With respect to the timeliness of the petitions, which is the only matter at issue at this time, petitioner argues that the petitions were timely filed because he had 90 days in order to file a petition, rather than 30 days, which would be applicable when fraud is assessed. He further argues that the mailing of the conciliation orders on November 29, 2013 was erroneous because petitioner has not lived at 4 Birkdale Rd. in over 40 years, never authorized any mail to be sent to this address and never used this address as a mailing address. Petitioner submits that during the summer months, he uses the address of the restaurant, 477 Elmwood Avenue, Buffalo, NY 14222, as his mailing address in Buffalo, New York. It is noted that the fact that the letters were returned shows that he did not receive the conciliation orders that were mailed on November 29, 2014. Petitioner further argues that Tax Law § 1138(a)(3)(B) gives the Division of Tax Appeals

the authority to redetermine the alleged liability on its own motion. The remaining arguments concern the merits of the petition.

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]). Where a fraud penalty has been assessed, the period of limitations for filing a petition with the Division of Tax Appeals is reduced to 30 days (Tax Law § 170 [3-a][e], [h]; *Matter of Dean*, Tax Appeals Tribunal, July 1, 2014). 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).² In the present matter, it appeared to the Division of Tax Appeals that petitions were 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. In *Matter of Victory Bagel Time* (Tax Appeals Tribunal, September 13, 2012) the 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]).

² It is noted that petitioner’s reliance upon Tax Law § 1138(a)(3)(B) is misplaced because this provision gives the authority to redetermine taxes to the Commissioner of Taxation and Finance and not to an Administrative Law Judge or the Tax Appeals Tribunal (*Matter of Crispo*, Tax Appeals Tribunal, April 13, 1995).

D. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381 [1960]).

E. 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). That is, 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 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).

F. It is recognized that a copy of the notice of determination is not required to be included with the petition when a conciliation conference has been held and the order of the conciliation conferee has been included with the petition (20 NYCRR 3000.3[b][8]; *see Matter of Novar TV & Air Conditioner Sales & Serv.*). Nevertheless, the failure of to include a copy of the notices, that are the subject of the notices of intent, makes resolution of the timeliness issue impossible. First, the failure to include the notices of determination and the accompanying mail cover sheet precludes the opportunity to view how the notices were addressed. The omission is problematic since petitioner claims that the notices were mailed to the wrong address. Further, in his statements³ in support of the notices of intent to dismiss, the Office of Counsel representative stated that the conciliation orders were mailed to petitioner at his “address of record.” A Bureau of Conciliation and Mediation Services Associated Assessment Case Entry Worksheet was apparently offered in support of this statement. It may also be supported by the comment “ADDR O.K.” on the CMR. However, the difficulty presented by these assertions is that Tax Law § 1138(a)(1) requires that a “notice of determination shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax *at his last known address* in or out of this state.” (Emphasis supplied.) On the papers submitted, it is impossible to conclude whether the “address of record” referred to by the Division meets the requirement of “last known address” in Tax Law § 1138(a)(a) (*see generally Matter of Grillo*, Tax Appeals Tribunal, August 23, 2012). Lastly, according to petitioner, the Division has argued that a shorter period to file a petition is applicable because fraud is assessed (*see* Tax Law § 170[3-a][e], [h]). Petitioner maintains that this argument is erroneous. Again, since the notices

³ Since the statements were not sworn, they were not affidavits (Siegel, NY Prac § 205 at 352 [5th ed 2011]).

of determination with documentation explaining what was assessed by the notices were not included in the papers, there is no factual basis to resolve the issue of how long petitioner had to file a petition. Since the issue presented concerns the jurisdiction of the Division of Tax Appeals to adjudicate this matter and such jurisdiction may not be waived (*see Strina v. Troiano*, 119 AD2d 566 [2nd Dept 1986]), the appropriate recourse is to withdraw the notices of intent without prejudice to a proper motion to dismiss.

G. The notices of intent to dismiss petition, dated May 15, 2014, are withdrawn without prejudice to a motion to dismiss. The Division's answer will be due within 75 days of the date of this order.

DATED: Albany, New York
October 23, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE