

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ASAGGIO PIZZERIA & RESTAURANT, LLC :

DETERMINATION
DTA NO. 827388

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 September 1, 2011 through February 28, 2015. :

Petitioner, Asaggio Pizzeria & Restaurant, LLC, 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 September 1, 2011 through February 28, 2015.

On January 15, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. By a letter dated February 11, 2016, the date by which the parties could file responses to the Notice of Intent to Dismiss was extended to April 1, 2016, which date commenced the 90-day period for issuance of this determination (20 NYCRR 3000.5[d]; 3000.9[a][4]). On January 26, 2016 and February 15, 2016, petitioner, by Sales Tax Defense, LLC (Mark Stone, CPA) submitted letters and documents in opposition to dismissal.¹ On March 24, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Anita Luckina, Esq., of counsel), submitted affidavits and other document in support of dismissal. After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative

¹ Mr. Stone also faxed a letter, dated April 11, 2016, in opposition to dismissal. This third, late filed response will not be considered.

Law Judge, renders the following determination

ISSUE

Whether petitioner timely filed its 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, Asaggio Pizzeria & Restaurant, LLC, a Notice of Determination, number L-043487990-9, dated August 13, 2015, assessing sales and use taxes due in the amount of \$200,198.45, plus penalty and interest, for the period September 1, 2011 through February 28, 2015. The notice is addressed to “Asaggio Pizzeria & Restaurant, LLC, 1011-45 Route 109 Store 6, East Farmingdale, NY 11735.” The mailing cover sheet of the Notice of Determination contains the certified control number 7104 1002 9730 0548 8366. A copy of this Notice of Determination was also issued to petitioner’s representative, “Stephen Venuti, 43-69 162nd St, Flushing, NY 11358,” under a mailing cover sheet bearing certified control number 7104 1002 9730 0548 7970.

2. On December 21, 2015, the Division of Tax Appeals received a petition seeking revision of the determination issued in this matter. The petition lists petitioner’s address as the Route 109, East Farmingdale, New York, address, and is hand-dated as signed by petitioner’s current representative, Mark Stone, CPA, on December 18, 2015. The envelope in which the petition was sent by First Class Certified Mail bears a United States Postal Service (USPS) stamp dated December 18, 2015.

3. On January 15, 2016, 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 Notice of Determination was issued on August 13, 2015, but that the petition was not filed until December 18, 2015 or 127 days later.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted the following: (i) an affidavit, dated February 29, 2016, of Mary Ellen Nagengast, a Tax Auditor Administrator I and Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) dated August 13, 2015; (iii) an affidavit, dated March 2, 2016, of Bruce Peltier, Principal Mail and Supply Clerk in the Division's mail room; and (iv) a copy of petitioner's New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the tax period March 1, 2015 through May 31, 2015 filed on June 22, 2015.

5. The affidavit of Mary Ellen Nagengast, who has been in her current position since October 2005, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Nagengast is the 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 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 "8/13/15." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into the possession of the USPS and remain so when returned to its office. 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 taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading “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 P.O. Address.”

7. The CMR relevant to the Notice of Determination under protest consists of 16 pages and lists 169 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 16, which contains 4 such entries. Ms. Nagengast noted that portions of the CMR that were attached to her affidavit had been redacted to preserve the confidentiality of information relating to taxpayers who were not involved in this proceeding. A USPS employee initialed or signed and affixed a postmark dated August 13, 2015 of the Colonie Center branch of the USPS to each page of the CMR, and wrote and circled the number “169” on page 16 next to the heading “TOTAL PIECES RECEIVED AT POST OFFICE.” Ms. Nagengast adds that the total number of statutory notices mailed pursuant to the CMR was 169.

8. Page 9 of the CMR indicates that a Notice of Determination, assigned certified control number 7104 1002 9730 0548 8366 and reference number L-043487990, was mailed to “ASAGGIO PIZZERIA & RESTAURANT, LLC” at the Route 109, East Farmingdale, New York, address listed thereon. The corresponding mailing cover sheet, attached to the Nagengast

affidavit as “Exhibit B,” bears this certified control number and petitioner’s name and address as noted.

9. Page 6 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0548 7970 and the reference number L-043487990 was sent to “STEPHEN VENUTI, 43-69 162ND ST, FLUSHING, NY 11358.” The corresponding mailing cover sheet, attached to the Nagengast affidavit as “Exhibit B,” bears this certified control number and petitioner’s previous representative’s name and address as noted. An enclosure with the notice states that a copy of the notice was forwarded to Mr. Venuti because the Division’s records indicated that a power of attorney was on file for the tax matters at issue in the matter.

10. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999 and currently Principal Mail and Supply Clerk in the Division’s mail room, describes the mail room’s general operations and procedures. The mail room receives the notices in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a mailing cover sheet. A CMR is also received by the mail room for each batch of notices. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. That staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information contained on the CMR. A clerk then performs a random review of 30 or fewer 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 also places his or her initials or signature on the CMR, indicating receipt by the post office. Here, as noted, the USPS employee affixed a postmark dated August 13, 2015 to each page of the CMR and initialed or signed each

page of the CMR as well. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number received by writing the number on the CMR. Here, the USPS employee complied with this request by writing and circling the number “169” on the last page of the CMR. The affixation of the postmarks, the postal service employee’s initials or signature, and the writing and circling of the number indicating that all such pieces were received, confirm that the Notice of Determination dated August 13, 2015 was received by the USPS on that date.

11. Petitioner’s New York State and Local Sales and Use Tax Web Filed Return (Quarterly ST-100) for the period March 1, 2015 through May 31, 2015 filed on June 22, 2015, reported petitioner’s address as Route 109, East Farmingdale, New York 11735. This was the last return filed by petitioner prior to the issuance of the August 13, 2015 Notice of Determination. Gross sales in the amount of \$5,282.00 and net taxable sales in the same amount were reported on petitioner’s web filed sales tax return for the period March 1, 2015 through May 31, 2015.

12. In its petition, petitioner asserts, among other things, that a conference was requested by its representative at the time but the Division “never scheduled [it] and has now determined that the tax, interest, and statutory penalties due are fixed and final;” and that the Division did not properly mail the Notice of Determination to it because the business was closed for construction from January 8, 2015 through August 24, 2015 and mail could not be and was not delivered to it between those dates. No documents requesting a conference were attached to the petition.

13. In opposition to dismissal, petitioner’s current representative, Mr. Stone, submitted two letters. In the first letter, Mr. Stone asserted that petitioner never received the Notice of Determination because petitioner was closed from January 8, 2015 to August 24, 2015 due to a

water main break. He claimed that the auditor was unable to conduct an observation of the business because it was closed due to the water main break, and she used other means to calculate additional tax due. Mr. Stone further claimed that the auditor and the Division had notice the petitioner's address was not a valid address for mailing the Notice of Determination because of its closure due to a water main break. In the second letter in opposition to dismissal, Mr. Stone stated that petitioner is not disputing that the notice was mailed; however, it is stating that the notice was not mailed to the proper address, as it was closed for renovations at the time the notice was mailed and the Division had knowledge of such closure.

14. The document attached to Mr. Stone's first letter was a letter dated December 10, 2014 from the Division's Transaction Field Audit Bureau indicating that an in-person observation of Asaggio Pizzeria & Restaurant, LLC, would be conducted in the near future. The documents enclosed with Mr. Stone's second letter consisted of a copy of a letter dated February 4, 2016 from the Division of Taxation's representative, Anita Luckina, Esq., to Judge Daniel J. Ranalli, Supervising Administrative Law Judge, requesting an extension of time to respond to the Notice of Intent to Dismiss Petition; and a copy of the executed power of attorney appointing, among others, Mark Stone, CPA, MST, Sales Tax Defense, LLC, as petitioner's representative in this matter. No additional documents were attached to either letter.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a notice of determination (Tax Law § 1138[a][1]). 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). In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day

period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. 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 order 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 is produced and the burden of demonstrating proper mailing rests with the Division (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

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 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.*).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Nagengast and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) statutory notices (*see Matter of Victory Bagel Time*, Tax Appeals Tribunal, September 13, 2012).

E. The 16-page CMR provides sufficient documentary proof to establish that the Notice of Determination dated August 13, 2015 was mailed by certified mail to petitioner at its last known address on August 13, 2015. Specifically, each page of this 16-page document lists certified

control numbers with corresponding notice numbers, names and addresses and bears a U.S. Postal Service postmark dated August 13, 2015. A postal service employee handwrote and circled the number “169” next to the “TOTAL PIECES RECEIVED AT POST OFFICE” heading and initialed the last page, thereby indicating that all 169 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 169 pieces so listed. A copy of the notice addressed to petitioner’s former representative, Stephen Venuti, was also among the 169 pieces listed on the CMR. The CMR has thus been properly completed and therefore constitutes sufficient documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Tax Law § 1138(a)(1) provides 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. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. . . . The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

G. Here, the record shows that petitioner’s address on its web-filed sales and use tax return for the period March 1, 2015 through May 31, 2015, filed on June 22, 2015, was 1011-45 Route 109 Store 6, East Farmingdale, New York, 11735. Thus petitioner’s last known address prior to the issuance of the Notice of Determination on August 13, 2015 was that stated on the sales and use tax return for the period March 1, 2015 through May 31, 2015.

Accordingly, the Division has shown that it properly mailed the Notice of Determination dated August 13, 2015 to petitioner at its last known address consistent with Tax Law §§ 1138(a)(1) and 1147(a)(1). It is concluded that the notice was properly mailed and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on August 13, 2015 (Tax Law §§ 170[3-a][b]; 1138[a][1]).

H. In order to timely protest the Notice of Determination issued on August 13, 2015, petitioner was required to file a petition or request for a conciliation conference within 90 days of August 13, 2015, i.e., on or before November 12, 2015.² Petitioner's petition was not filed until it was sent to the Division of Tax Appeals by USPS Certified Mail on December 18, 2015, a date beyond the statutory period within which a timely protest had to have been filed, and thus was not timely filed. In response to the Notice of Intent to Dismiss Petition, petitioner's current representative, Mr. Stone, submitted two unsworn letters. In the first letter, Mr. Stone asserted that petitioner never received the Notice of Determination because it was closed from January 8, 2015 through August 24, 2015 due to a water main break. In his second letter, Mr. Stone asserted that petitioner never received the Notice of Determination because it was not mailed to a proper address, as petitioner was closed for renovations at the time of mailing of the notice. No documentation was submitted in support of petitioner's representative's assertions. There is no evidence that petitioner notified the Division of any address change prior to the issuance of the Notice of Determination. It is noted that petitioner reported gross and taxable sales on its web

² November 11, 2015 is the due date for a request for conciliation conference or petition as listed on the Notice of Determination. However, since Wednesday, November 11, 2015 was a public holiday, Veterans' Day, the petition or request for a conciliation conference was required to be filed by Thursday, November 12, 2015 (*see* Tax Law § 1147[a][3]; General Construction Law §§ 20; 24; 25-a; *Matter of American Express Co.*, Tax Appeals Tribunal, July 3, 1991).

filed sales tax return for the period March 1, 2015 through May 31, 2015, i.e., the last return filed prior to the issuance of the Notice of Determination. Mere denial of receipt is insufficient to rebut the presumption that a properly mailed notice of determination was delivered or offered for delivery in the normal course of the mail (*Matter of New York City Billionaires Construction Corp.*, Tax Appeals Tribunal, October 20, 2011; *see Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 315 [1986]; *Matter of Azzato*, Tax Appeals Tribunal, May 19, 2011; *Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). In addition, petitioner submitted no evidence to prove that its former representative requested a conference that was never scheduled by the Division, an assertion made by petitioner in its petition. Since petitioner's petition was not filed until December 18, 2015, a date beyond the expiration of the 90-day period of limitations for protesting the Notice of Determination issued on August 13, 2015, the petition was untimely filed (*see* Tax Law § 1138[a][1]). As a matter of law, the Division of Tax Appeals lacks jurisdiction to address the merits of petitioner's protest of the Notice of Determination (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007).

I. The petition of Asaggio Pizzeria & Restaurant, LLC is hereby dismissed.

DATED: Albany, New York
June 16, 2016

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE