

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LINETTE SIFRE : DECISION
 : DTA NO. 819955
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, 1999 through :
November 30, 2002. :

Petitioner Linette Sifre, 4388 Middlebrook, Orlando, Florida 32811, filed an exception to the order of the Administrative Law Judge issued on February 17, 2005. Petitioner appeared by Joseph H. Hobika, Jr., Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief on exception and oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the merits of the issues raised by petitioner in the petition filed by her.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On May 19, 2003 the Division of Taxation (“Division”) issued a Notice of Determination to petitioner as an officer or responsible person of Phat Cigars, Inc. (“the corporation”) imposing sales and use taxes for the period December 1, 1999 through November 30, 2002 as follows:

Tax Year Ended	Tax Assessed	Interest	Penalty	Balance Due
11/30/00	\$56,000.00	\$19,824.72	\$22,400.00	\$98,224.72
11/30/01	\$108,000.00	\$21,699.93	\$39,960.00	\$169,659.93
11/30/02	\$108,000.00	\$7,035.79	\$27,000.00	\$142,035.79
Totals	\$272,000.00	\$48,560.44	\$89,360.00	\$409,920.44

On December 31, 2003 petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”).

On January 23, 2004 BCMS issued to petitioner a conciliation order dismissing request reading as follows:

The Tax Law requires that a request be filed within 90 days from the mailing of the statutory notice. Since the notice was issued on May 19, 2003, but the request was not mailed until December 31, 2003, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

On April 22, 2004 the Division of Tax Appeals received the petition filed by petitioner in this matter. The United States Postal Service (“USPS”) Express Mail envelope bearing the petition was postmarked April 21, 2004.

On August 26, 2004 the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. A copy of the Notice was sent to the Division. The notice states:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 3000.3(b)(8) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the petition shall contain for the sole purpose of establishing the timeliness of the petition, a legible copy of the order of the conciliation conferee if issued; if no such order was previously issued, a legible copy of any other statutory notice being protested and

Pursuant to § 3000.3(d)(2) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, where the petitioner fails to serve a corrected petition, the supervising administrative law judge will issue a determination dismissing the petition.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.

In response to the Notice of Intent to Dismiss Petition, the Division submitted copies of the missing Notice of Determination and Conciliation Order Dismissing Request as well as affidavits from three Division employees, namely John E. Matthews, Esq., an attorney in the Office of Counsel of the Division; Bruce Peltier, the Mail and Supply Supervisor of the Division's Registry Unit; and Geraldine Mahon, the Principal Clerk of the Division's Case and Resource Tracking System ("CARTS") Control Unit. In his affidavit Mr. Matthews asserts that the Notice of Determination was properly issued to petitioner's last known address, 17 Clarion Drive, Whitesboro, New York 13492, and that because petitioner's request for a conciliation conference was mailed more than 90 days from the date the Notice of Determination was issued, the Division of Tax Appeals lacks jurisdiction to review the notice. Mr. Matthews's affidavit is supported by a copy of petitioner's 2002 New York State Resident Income Tax Return indicating her use of the Whitesboro, New York address, and stating her 2002 New York adjusted gross

income to be \$23,949.00. Ms. Mahon's affidavit sets forth the Division's general procedures for preparing notices of determination and other statutory notices. The affidavit of Mr. Peltier attests to the regular procedures followed by the Registry Unit for delivery of outgoing certified mail to branches of the USPS.

The Mahon affidavit describes the general process for issuing and mailing statutory notices, which in 2003 began with the computer generation of the notices and a listing of the names and addresses and other pertinent information regarding the taxpayers to whom such notices were to be sent by certified mail on a particular day. This listing is referred to as the certified mail record ("CMR"). A discrete certified control number was assigned to each of the 188 statutory notices listed on the 18-page CMR submitted by the Division with the Mahon and Peltier affidavits. Certified control number 7104 1002 9739 0175 6415 appears on page 15 of the CMR next to reference number L022345426 and petitioner's name and address. Her address, as it appears on the CMR, is 17 Clarion Dr, Whitesboro, NY 13492-2703. Petitioner's name with this same address and reference number also appears on the first page of the Notice of Determination.

The names and addresses of the other 187 taxpayers listed on the CMR were redacted to preserve confidentiality. The standard practice of the CARTS Control Unit is to forward the CMR with the associated batch of statutory notices to the Division's Mail Processing Center, where a member of Mr. Peltier's staff operates a machine that inserts each statutory notice into a windowed envelope whereby the taxpayer's name and address are visible. Each envelope is then sealed, weighed and imprinted with postage and fees. Next a mail processing clerk conducts a random comparison of some of the envelopes against the corresponding information on the

CMR. Then another member of the Mail Processing Center staff delivers the sealed and stamped envelopes, with the CMR, to one of the branch offices of the USPS in the Albany, New York area.

An examination of the CMR in the matter here under review reveals that a postal service employee at the Colonie Center branch of the USPS affixed a dated postmark to each of the 18 pages of the CMR. The date of the postmark is May 19, 2003. The USPS employee also placed his or her initials on each page of the CMR and wrote in and circled the number 188 on page 18 of the CMR just below and to the right of the printed words "total pieces received at post office." This step in the process was accomplished because the Division's Mail Processing Center specifically requested that a USPS employee either circle the number of pieces of mail received or indicate the total number of pieces received by writing that number on the CMR.

The CMR was returned to a Mail Processing Center employee by a USPS employee, who, in turn, delivered it to the CARTS Control Unit to be maintained as a permanent record in the regular course of that unit's business.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge pointed out that in response to a Notice of Determination issued pursuant to Tax Law § 1138(a)(1), a taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination or, alternatively, a request for a conciliation conference with BCMS, within 90 days of the mailing of the Notice of Determination.

The Administrative Law Judge noted that when the timeliness of a protest against a Notice of Determination is at issue, the initial inquiry must focus on the issuance (i.e., mailing) of the

notice. Where a notice is found to have been properly mailed, a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. However, the Administrative Law Judge observed that 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. The Administrative Law Judge stated that the Division may meet this burden by producing evidence of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and, further, by demonstrating that the standard procedure was followed in this particular instance.

The Administrative Law Judge found that the Division provided adequate proof that the subject Notice of Determination was issued on May 19, 2003. The Administrative Law Judge found that as petitioner's request for a conciliation conference was not filed until December 31, 2003, as evidenced by the USPS postmark on the envelope containing the request, the request for a conciliation conference was untimely.

The Administrative Law Judge concluded that because petitioner failed to file a timely protest to the subject Notice of Determination, the Division of Tax Appeals had no jurisdiction over the matter and could not consider the merits of petitioner's claims. However, the Administrative Law Judge advised petitioner that she could pay the assessment and apply for a refund. If her refund was disallowed, petitioner could then file a timely petition or a request for a conciliation conference and have the merits of her claim reviewed.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that she was not a person required to collect tax for the periods at issue and she was not an employee of Phat Cigars, Inc. after March 2000. Therefore, petitioner maintains that the Division lacks jurisdiction to assert that she is liable for tax.

OPINION

In this proceeding, the sole issue before us is whether or not the Administrative Law Judge properly determined that the Division of Tax Appeals lacks jurisdiction to entertain the merits of petitioner's claim. As petitioner failed to timely file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or, alternatively, a petition with the Division of Tax Appeals, we have no jurisdiction to consider petitioner's challenge to the Notice of Determination. Tax Law § 1138(a)(1) provides that unless a Notice of Determination is timely protested, it becomes an assessment of the amount of tax specified in such notice. However, as the Administrative Law Judge pointed out in his determination, petitioner may pay the assessment and apply for a refund. If her application for refund is disallowed, petitioner may then file a timely petition or a request for a conciliation conference and have the merits of her claim reviewed.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Linette Sifre is denied;

2. The order of the Administrative Law Judge is affirmed; and
3. The petition of Linette Sifre is dismissed.

DATED: Troy, New York
January 12, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner