

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ZOHIR LAHAM : DECISION
for Revision of Determinations or for Refund of DTA NO. 822554
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period June 1, 2004 through :
February 28, 2007. :

Petitioner, Zohir Laham, filed an exception to the determination of the Administrative Law Judge issued on June 18, 2009. Petitioner appeared by George Maiman, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel). Petitioner did not file a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

ISSUE

Whether the Administrative Law Judge properly granted summary determination to the Division of Taxation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "3," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation (Division) issued to petitioner, Zohir Laham, at his Brooklyn, New York, address, the following notices of determination with the corresponding dates, periods and amounts of sales and use taxes due:

Notice #	Issue Date	Period Ended	Deficiency
L-029134711	09/04/07	08/31/04	\$11,633.03
L-029482823	12/06/07	11/30/04 - 02/28/07	\$104,930.71

By his Request for Conciliation Conference, filed May 15, 2008, petitioner protested the notices numbered L-029134711 and L-029482823, dated September 4, 2007 and December 6, 2007, respectively.

On June 6, 2008, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 6, 2007 and September 4, 2007, but the request was not mailed until May 15, 2008, or in excess of 90 days, the request is late filed.

We have modified finding of fact "3" of the Administrative Law Judge's determination to read as follows:

Petitioner filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2004 through February 28, 2007. On February 17, 2009, the Division of Taxation filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). With its motion papers, the Division, to show proof of proper mailing of the notices dated September 4, 2007 and December 6, 2007, respectively, provided the following: (i) two affidavits, dated February 6, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) two affidavits, dated February 5, 2009, of

Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 4, 2009 and December 6, 2007, respectively; and (iv) petitioner's New York State personal income tax return for 2006, dated February 26, 2007, which was the last return filed before issuance of the notices. Petitioner did not file a response to the motion.¹

The affidavits of Patricia Finn Sears set forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predicated with the anticipated date of mailing. Following the Division's general practice, this date is manually changed to reflect the actual mailing date. Each notice is assigned a certified control number. The certified 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 entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

The affidavits of James Steven VanDerZee, the mail and supply supervisor in the Division's Mail Processing Center (Center), describe the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The envelopes are counted and

¹ We have modified this fact to more accurately reflect the record.

the names and certified mail numbers are verified against the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various United States Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

Here, with respect to the mailing on September 4, 2007, page 4 of the 11-page CMR establishes that the notice with certified number 7104 1002 9730 0276 3350 and notice number L029134711 was sent to petitioner at his Brooklyn, New York, address. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each of the 11 pages of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the printed number 117. To the lower left of this number is a handwritten number 117. Adjacent to the number is a stamp which directed the post office to write the total number of pieces and initial confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date of September 4, 2007, confirming that the notices were mailed on that date. Handwritten initials appear next to the stamp.

With respect to the mailing on December 6, 2007, page 23 of the 53 page CMR establishes that the notice with certified number 7104 1002 9730 0518 4350 and notice number L029482823 was sent to petitioner at his Brooklyn, New York, address. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark on each of the 53 pages of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the printed number 579. To the lower left of this number is a handwritten number 579 and

initials. Adjacent to the number is a stamp which directed the post office to write the total number of pieces and initial confirming that all notices were received. The USPS postmark is from the Troy, New York, branch and bears the date of December 6, 2007, confirming that the notices were mailed on that date.

Petitioner's Brooklyn, New York, address on the CMR, Mailing Cover Sheets, notices and petition matches the address listed on his New York State personal income tax return, form IT-201, for 2006. This is the last item that petitioner filed with the Division before the issuance of the subject notices of determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that, pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal, a motion for summary determination shall be granted if the Administrative Law Judge finds that no material and triable issue of fact is presented and that the Administrative Law Judge can, as a matter of law, issue a determination in favor of any party. The Administrative Law Judge cited applicable case law which provides that since petitioner failed to respond to the Division's motion, he has conceded that no question of fact requiring a hearing exists. Further, the Administrative Law Judge found that since petitioner submitted no evidence to contest the facts alleged by the Division's affidavits, those facts may be deemed admitted.

The Administrative Law Judge cited applicable case law which provides that where the timeliness of a petition or request for conciliation conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of the notices at issue to petitioner's last known address. In order to prove the fact and the date of

mailing of the subject notices, the Division must show a standard procedure used for the issuance of the statutory notices by one with knowledge of the relevant procedures, and proof that the standard procedure was followed in the particular instance in question. The Administrative Law Judge also noted that Tax Law § 1138(a)(1) requires that the 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.”

The Administrative Law Judge found that the Division offered proof sufficient to establish the mailing of the statutory notices on the same date that they were dated, i.e., September 4, 2007 and December 6, 2007, respectively, to petitioner’s last known address. He concluded that the affidavits submitted by the Division adequately described the Division’s general mailing procedure as well as the relevant mailing record and thereby established that the general mailing procedure was followed in this case. Therefore, the Administrative Law Judge held that as the notices were properly mailed, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on September 4, 2007 and December 6, 2007, respectively.

The Administrative Law Judge found that since petitioner’s request for conciliation conference was mailed on May 15, 2008, a date well beyond the 90-day period for protesting the notices, the Division of Tax Appeals had no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. The Administrative Law Judge advised petitioner that he was not entirely without recourse, as he could pay the tax assessment and file a claim for refund. If the refund claim was disallowed, he could then request a

conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance.

ARGUMENTS ON EXCEPTION

On exception, petitioner presents arguments relative to the merits of his protest of the notices of determination at issue but fails to address the mailing of the notices of determination, the timeliness of his request for conciliation conference or the Administrative Law Judge's determination to grant the Division's motion for summary determination in its favor.

OPINION

The Division filed a motion for summary determination seeking dismissal of this matter for lack of jurisdiction. The Division's motion was supported by the detailed affidavits of its employees showing proper mailing of the Notices of Determination to petitioner's last known address on September 4, 2007 and December 6, 2007, respectively. To prevail, petitioner was required to come forward with facts and documentation to defeat the Division's motion (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Petitioner provided no response to the Division's motion.

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 demonstrates that the Administrative Law Judge's determination is incorrect. Petitioner's attempt to raise substantive issues is precluded by his failure to establish that he timely filed a petition that would confer jurisdiction on the Division of Tax Appeals to address such issues. As a result, we affirm the determination of the Administrative Law Judge for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Zohir Laham is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Zohir Laham is dismissed with prejudice.

DATED:Troy, New York

July 1, 2010

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner