

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**VITALINA KOSTIUK** : DECISION  
 : DTA NO. 822729  
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 March 1, 2005 through February 28, 2007. :

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Petitioner, Vitalina Kostiuk, filed an exception to the determination of the Administrative Law Judge issued on August 6, 2009. Petitioner appeared by George Maiman, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief on exception. 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 decision.

***ISSUE***

Whether summary determination was properly granted to the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") or a petition with the Division of Tax Appeals within 90 days after the issuance of the statutory notice.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "2," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

A Notice of Determination (Assessment ID No. L-029868325-1), dated April 24, 2008, was issued by the Division of Taxation (“Division”) to petitioner, Vitalina Kostiuk. The notice assessed sales and use taxes in the amount of \$50,800.69, plus penalty and interest, for a total amount due of \$87,454.46 for the period March 1, 2005 through February 28, 2007. The notice was issued because petitioner was determined to be an officer or responsible person of V & Z Deli, Inc.

We modify finding of fact "2" of the Administrative Law Judge’s determination to read as follows:

On December 31, 2008, the Division of Tax Appeals received a petition, including various attachments, from petitioner. The envelope containing the petition bore a postmark of the United States Postal Service but the date of the postmark was illegible. The petition was signed by petitioner’s representative, George Maiman, CPA, and was dated “12/03/2008.”<sup>1</sup>

The Division filed an answer dated March 25, 2009. The Division subsequently brought this motion, dated April 30, 2009, seeking dismissal of the petition or, in the alternative, for summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner’s protest of the statutory notice was filed more than 90 days from the date of the issuance of the statutory notice.

Notices of determination, such as the one at issue, are computer-generated by the Division’s Case and Resource Tracking System (“CARTS”). The notices are predated with the anticipated date of mailing and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page “Mailing Cover Sheet” that is generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code and the taxpayer’s mailing address.

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<sup>1</sup> We modified this fact to more accurately reflect the record.

Each batch of statutory notices is accompanied by a computer printout entitled “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE” (“CMR”). The CMR lists each statutory notice in the order that it was generated in the batch. The certified control numbers, assessment numbers and names and addresses of the taxpayers appear on the CMR. Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

The CMR for the block of statutory notices issued on April 24, 2008, including the Notice of Determination issued to petitioner, consists of 15 connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service (“USPS”) and the pages remain connected when the document is returned to CARTS.

With respect to the CMR for the statutory notices mailed by certified mail on April 24, 2008, each of the pages consists of 11 entries with the exception of page 6 (one of the 11 entries is crossed out) and page 15, which contains 6 entries.

In the upper left corner of each page of the CMR is the run number, which signifies the date and time the CMR was produced. The CMR is printed approximately ten days in advance of the anticipated date of mailing. In the upper left corner of page one of the CMR, the date the notices were mailed, “4-24-08,” was handwritten by personnel in the Mail Processing Center. This change was made in order to ensure that the date on the CMR conformed with the actual date that the statutory notices and CMR were delivered into the possession of the USPS.

Statutory notices that are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for “Outgoing Certified Mail.” Each notice in the batch is preceded by a Mailing Cover Sheet and accompanied by any required enclosures. A CMR is also received by the Mail Processing Center for each batch of statutory notices. The staff member in the Mail

Processing Center weighs and seals each envelope and places postage and fee amounts on such envelope.

A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Once the review of the CMR and the envelopes is completed, a member of the Mail Processing Center staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area.

The postal service representative then affixes a USPS postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR. In the case of the certified mail to be mailed on April 24, 2008, the USPS employee initialed or signed each page of the CMR, affixed a postmark dated April 24, 2008 to each page of the CMR and wrote the total number of pieces of certified mail received as 159 on page 15 of the CMR.

Page 15 of the CMR originally listed 160 pieces of mail; however, the number of pieces received at the post office indicates 159 in order to reflect the fact that one piece of certified mail had been "pulled" from the mailing record. A piece of mail may be pulled for any number of reasons, including, but not limited to, a discrepancy in a name or address.

A review of the CMR in this case indicates that a piece of mail listed on page six of the CMR was pulled. A line was appropriately placed through the entry for this taxpayer after the statutory notice was pulled. This deletion is reflected in the change of the total pieces received at the post office on page 15 of the CMR.

The CMR is picked up at the USPS the following day by a member of the Mail Processing Center staff, whereupon it is delivered to the CARTS Control Unit.

Page 7 of the CMR for April 24, 2008 indicates that a Notice of Determination with Notice No. L-029868325 was sent to “KOSTIUK-VITALINA, 162 68 ST., BROOKLYN, NY 11220-5101” by certified mail using certified control number 7104 1002 9730 0691 8763. A USPS postmark on each page of the CMR confirms that the Notice of Determination was sent on April 24, 2008.

In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

The facts set forth above were established through affidavits of James Steven VanDerZee and Patricia Finn Sears. Mr. VanDerZee is employed as a Mail and Supply Supervisor in the Division’s Registry Unit. His duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

Ms. Sears is employed as the supervisor of the Division’s CARTS Control Unit. Her duties include supervising the processing of notices of determination.

The procedures described in Mr. VanDerZee’s affidavit are the regular procedures followed by Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail. Mr. VanDerZee stated that such procedures were followed on April 24, 2008 in mailing the pieces of certified mail described in his affidavit.

The address of petitioner to which the statutory notice was mailed is the same address listed on petitioner’s New York personal income tax return for 2007, which was signed and dated February 22, 2008. Accompanying the return was a check, also dated February 22, 2008, to “NYS Income Tax,” which also contained petitioner’s name and the same address.

As previously noted, petitioner did not respond to the Division’s motion.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that the Rules of Practice and Procedure of the Tax Appeals Tribunal provide that a motion for summary determination may be granted if it has been sufficiently established 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 pointed out that pursuant to the Tribunal's Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. The Administrative Law Judge cited relevant case law concerning the level of proof required to obtain summary judgment.

The Administrative Law Judge found that as petitioner did not respond to the Division's motion, she was deemed to have conceded that no question of fact requiring a hearing existed. Since petitioner provided no evidence to contest the facts asserted in the VanDerZee and Sears affidavits, the Administrative Law Judge concluded that those facts may be deemed admitted.

The Administrative Law Judge noted that Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination for additional tax or penalties due under Articles 28 and 29. Further, the Administrative Law Judge pointed out that a taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination or, alternatively, file a request for conciliation conference with BCMS within 90 days of the mailing of the notice of determination. The Administrative Law Judge observed that the Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit.

Where timeliness of the petition is at issue, the Administrative Law Judge noted that the initial inquiry must focus on the issuance of the notice. The Administrative Law Judge observed that the burden of demonstrating proper mailing rests with the Division. Where a notice is found

to have been properly mailed, the Administrative Law Judge noted that a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. The Administrative Law Judge cited case law that established that the Division may meet its burden of showing proper mailing by producing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing of the notice at issue.

The Administrative Law Judge found that the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerZee. Further, the Administrative Law Judge concluded that the Division provided sufficient documentary proof to establish that a Notice of Determination, dated April 24, 2008, was mailed by certified mail to petitioner at her last known address.

The Administrative Law Judge found that in order to timely protest the Notice of Determination issued on April 24, 2008, petitioner was required to have filed a petition or requested a conciliation conference within 90 days of April 24, 2008; i.e., on or before July 23, 2008. As petitioner's petition was dated December 3, 2008 and was received by the Division of Tax Appeals on December 31, 2008, the Administrative Law Judge concluded that the Division of Tax Appeals was without jurisdiction to address the merits of petitioner's protest and the petition must, therefore, be dismissed.

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner presents arguments concerning the merits of her challenge to the Notice of Determination at issue, but does not address the timeliness of her petition.

#### ***OPINION***

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to the person liable for the collection or payment of sales and use tax, which will become an assessment

unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Pursuant to Tax Law § 1147(a)(1), a notice of determination is to 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 [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 is presumptive evidence of its receipt. The taxpayer has the right to rebut this presumption (*see, Matter of Ruggerite v. State Tax Commn.*, 64 NY2d 688 [1984]).

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" (*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 has been proffered (*see, Matter of MacLean v. Procaccino*, 53 AD2d 965 [1976]).

In this case, the Administrative Law Judge determined that the Division had proven both the fact and date of mailing of the Notice of Determination dated April 24, 2008 for the tax period March 1, 2005 through February 28, 2007. Based upon our review of the record herein, we agree with his conclusion. Petitioner's attempt to raise substantive issues is precluded by her failure to establish that she timely filed a petition that would confer jurisdiction on the Division of Tax Appeals to deal with such issues. Since the Administrative Law Judge adequately and correctly addressed the issue presented to him, we sustain the order for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED:Troy, New York  
March 18, 2010

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

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