

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
	:	
JEFFREY SMITH	:	DECISION
	:	DTA NO. 822878
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, 2004 through	:	
February 28, 2007.	:	

Petitioner, Jeffrey Smith, filed an exception to the determination of the Administrative Law Judge issued on September 24, 2009. Petitioner appeared *pro se*. 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 Division of Taxation was entitled to summary determination dismissing the petition herein for lack of subject matter jurisdiction.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except finding of fact "1," "3" and "7," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact “1” of the Administrative Law Judge’s determination to read as follows:

The Division of Taxation (Division) issued a Notice of Determination, numbered L-030487333-6, addressed to petitioner at 13 Justine Court, Rensselaer, New York 12144 and dated July 28, 2008, which assessed sales and use taxes for the period March 1, 2004 through February 28, 2007 in the amount of \$62,287.18 plus penalty and interest, for a balance due of \$114,027.01. By his Request for Conciliation Conference, dated October 20, 2008, petitioner protested the notice.¹

On November 14, 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 notice 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 July 28, 2008, but the request was not mailed until October 28, 2008, or in excess of 90 days, the request is late filed.

We modify finding of fact “3” of the Administrative Law Judge’s determination to read as follows:

Petitioner filed a timely petition with the Division of Tax Appeals and on June 1, 2009, the Division filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor. To show proof of proper mailing of the notice dated July 28, 2008, the Division provided the following in support of its motion: (i) an affidavit, dated May 29, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division’s mail processing center; (ii) an affidavit, dated May 27, 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 July 28, 2008; and (iv) a copy of petitioner’s personal income tax return for the year 2006, which was the last filing from petitioner prior to the issuance of the notice. Petitioner did not respond to the motion.²

¹ We modify this fact to more accurately reflect the record.

² We modify this fact to more accurately reflect the record.

The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices, as follows. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the five-page 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 page to "7-28-08," 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 fourth page of the CMR contains information on the subject notice and establishes that on July 28, 2008 a notice with the control number 7104 1002 9730 0784 3576 was sent to petitioner at his Rensselaer, New York, address.

The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures, as follows. 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 first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a

random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on 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 initials or 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. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to “Total Pieces and Amounts,” is the preprinted number 54.³ This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date July 28, 2008, confirming that the notices were mailed on that date.

Petitioner’s Rensselaer, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his personal income tax return for 2006. This is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

We modify finding of fact “7” of the Administrative Law Judge’s determination to read as follows:

The envelope used to mail petitioner’s request for conciliation conference was sent via United States mail and bore a return address in Rensselaer, New York. The postage stamp on the envelope was cancelled by the Postal Service on

³ The affidavit of Ms. Sears states that “In this case, the Postal Service representative affixed a postmark to each page of the certified mail record, circled on *Page 54* of the certified mail record, and initialed or signed *Page 5* of the certified mail record. The total number of statutory notices mailed pursuant to Exhibit ‘A’ [the CMR] was 5” (emphasis supplied). An examination of the CMR establishes that the italicized portions were obviously typographical errors and will be disregarded.

October 28, 2008. A stamp shows that the request was received by BCMS on October 30, 2008.⁴

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination shall be granted if it is established that no material and triable issue of fact is presented and that a determination can be issued, as a matter of law, in favor of any party. The Administrative Law Judge concluded that since petitioner did not respond to the Division's motion, he had conceded that the facts alleged by the Division's affidavits may be deemed admitted and no question of fact requiring a hearing existed.

The Administrative Law Judge pointed out that where the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of the notice to petitioner's last known address pursuant to Tax Law § 1147(a)(1). To prove the fact and the date of mailing of the subject notice, the Administrative Law Judge noted that the Division must provide proof of a standard procedure used by the Division for the issuance of the statutory notice 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 found that the Division had offered proof sufficient to establish the mailing of the statutory notice on July 28, 2008 to petitioner's last known address. As a result, the Administrative Law Judge found that the statutory 90-day time limit to file either a

⁴ We modify this fact to more accurately reflect the record.

request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on July 28, 2008.

The Administrative Law Judge found that the request for conciliation conference was not mailed until October 28, 2008, which was two days beyond the 90-day period. The Administrative Law Judge concluded that the Division of Tax Appeals had no jurisdiction over this matter, granted summary determination in favor of the Division of Taxation and dismissed the petition.

The Administrative Law Judge observed that petitioner was not entirely without recourse: if petitioner paid the tax assessment, he could file a claim for refund. If the refund claim was disallowed, petitioner 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 maintains that his request for a conciliation conference was dated within the 90-day limit for timely filing and it was mailed on October 28, 2009, which was exactly three months from the date of the notice. Petitioner asserts that his request for conciliation conference was timely filed.

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 Notice of Determination to petitioner's last known address on July 28, 2008. 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 has fully and correctly addressed each of the issues raised in this matter 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.

We note that although the Administrative Law Judge concluded that petitioner's request for conciliation conference was filed two days late, in fact, it was filed only one day late. October 26, 2008, the 90th day from July 28, 2009, was a Sunday. Pursuant to General Construction Law § 25-a, when a period of time, computed from a certain day, within which an act is required to be done ends on a Sunday, such act may be done on the next succeeding business day. As a result, petitioner's request for conciliation conference was due no later than Monday, October 27, 2009. However, as we held in *Matter of American Woodcraft* (Tax Appeals Tribunal, May 15, 2003), "[d]espite the fact that the petition was filed only one day late, the law requires that a petition be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the petition."

As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jeffrey Smith is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Jeffrey Smith is dismissed.

DATED: Troy, New York
April 22, 2010

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

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