

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MARBLE TECHNIQUES, INC. : DECISION
for Revision of a Determination or for Refund of Sales and : DTA NO. 823581
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2001 through February 28, 2007. :

Petitioner, Marble Techniques, Inc., filed an exception to the determination of the Administrative Law Judge issued on December 2, 2010. Petitioner appeared by Stewart Buxbaum, CPA and Michael Buxbaum, CPA. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its 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.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "6," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division on Taxation (Division) issued to petitioner, Marble Techniques, Inc., at its Astoria, New York, address, a Notice of Determination number L-032025904-1, dated June 8, 2009, asserting sales and use taxes due in the amount of \$209,497.48, plus interest, for the period March 1, 2001 through February 28, 2007.

Petitioner filed a Request for Conciliation Conference, dated January 14, 2010, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the Notice of Determination. The request was received by BCMS on January 19, 2010. Petitioner's current representative, Stewart Buxbaum, CPA, signed this request, which alleged, among other things, that neither petitioner nor its representative during the audit, Daniel A. Castellano, CPA, received the Notice of Determination. The request lists petitioner's address as 15-30 131st Street, College Point, New York 11356-2423.

On February 5, 2010, 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 June 8, 2009, but the request was not received until January 19, 2010, or in excess of 90 days, the request is late filed.

In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals. The petition lists petitioner's address as the College Point, New York, address. The Division subsequently brought this motion, dated September 13, 2009, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction over 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.

In support of its motion for summary determination, the Division submitted: copies of the petition and the envelope in which it was sent via UPS Next Day Air; a copy of the Request for Conciliation Conference dated January 14, 2010; a copy of the Conciliation Order Dismissing Request; a copy of petitioner's New York State and Local Quarterly Sales and Use Tax Return (ST-100) for the period December 1, 2008 through February 28, 2009 filed on March 20, 2009, which was the last sales and use tax return filed by petitioner prior to the issuance of the Notice of Determination; a copy of the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 8, 2009; copies of the Notice of Determination and the accompanying mailing cover sheets; the affidavit of John E. Matthews, Esq., the Division's representative; and the affidavits of James Steven VanDerZee and Patricia Finn Sears, employees of the Division.

We have modified finding of fact "6" of the Administrative Law Judge's determination to read as follows:

Patricia Finn Sears is employed as a supervisor in the Division's Case and Resource Tracking System (CARTS) Control Unit. Her duties include supervising the processing of notices of determination such as the one at issue herein. Ms. Sears's affidavit sets 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 predated with the anticipated date of mailing. Here, each page of the 16-page CMR lists an initial date which 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 "6/8/09," 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 numbers, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. The third page of the CMR contains information on the subject notice and establishes that on June 8, 2009 a notice with the control number 7104 1002 9730 1349 4847 was sent to petitioner at its Astoria, New

York, address. The tenth page of the CMR also contains information on the subject notice and establishes that on June 8, 2009, a notice with the control number 7104 1002 9730 1349 5530 was sent to petitioner's former representative, Daniel A. Castellano, at 313 W. Old Country Road, Hicksville, New York 11801.

The CMR for the block of statutory notices issued on June 8, 2009, including the Notice of Determination issued to petitioner and its representative, consists of 16 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.¹

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 the mail and supply supervisor, he supervises the Center's staff. The Mail Processing 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 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 information contained on the CMR. A member of the Mail Processing 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 initials on each page of the CMR and a dated postmark on every page of the CMR, except for page 13. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 174 and to "Total Pieces Received at Post Office" is the circled handwritten number 174, and the page is initialed, confirming that all notices were

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

received. The USPS postmark is from the Colonie Center branch and bears the date June 8, 2009, confirming that the notices were mailed on that date.

Petitioner's Astoria, New York, address on the CMR and the Mailing Cover Sheet matches the address listed on its sales and use tax return for the quarter ending February 28, 2009.

The record includes a copy of the Power of Attorney form (POA form) appointing Daniel A. Castellano, CPA, as petitioner's representative in May 2007. This POA form lists Mr. Castellano's address as Castellano, Korenberg & Co., CPA's, 313 W. Old Country Road, Hicksville, New York 11801.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted 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 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 June 8, 2009, was mailed as addressed to petitioner. The Administrative Law Judge pointed out that with the exception of page 13, each page of the 16-page document bore a USPS postmark dated June 8, 2009. The Administrative Law Judge concluded that the postal service employee handwrote and circled the number "174" corresponding to the "Total Pieces Received At Post Office" heading and initialed the last page next to the circled number, indicating that all 174 pieces listed on the CMR were received at the post office.

The Administrative Law Judge found that the Division had offered proof sufficient to establish the mailing of the statutory notice on June 8, 2009, to petitioner's last known address and to his representative. As a result, the Administrative Law Judge found that the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on June 8, 2009. Accordingly, the Administrative Law Judge determined that the Division of Tax Appeals lacks jurisdiction to address the merits of

petitioner's petition. The Administrative Law Judge granted summary determination in favor of the Division and dismissed the petition.

The Administrative Law Judge pointed out that petitioner is not entirely without recourse. Petitioner may pay the tax assessment and file a claim for refund. If the claim for refund is disallowed, petitioner may 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 argues that: (1) the Notice of Determination does not meet the standard of mailing as described; (2) neither petitioner nor its representative received the Notice of Determination at their last known addresses.

The Division contends that the Administrative Law Judge correctly decided the relevant issues and the determination should be affirmed.

OPINION

We affirm the determination of the Administrative Law Judge.

Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that a motion for summary determination shall be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Section 3000.9(c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact

from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

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.

Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it mailed the notice of deficiency at issue to the taxpayer at its last known address (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The Division must prove both the fact and date of mailing of the notice at issue (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the postal service for mailing (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

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” (*Matter of Katz, supra*). 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 matter, we agree with the Administrative Law Judge that the Division presented a *prima facie* case warranting summary determination in its favor. The Division’s proof in this case consists of the affidavits of James VanDerZee and Patricia Finn Sears, which were offered to establish the general procedure for the mailing of notices of deficiency and notices of

determination pursuant to Tax Law § 1138 and compliance with that general procedure for mailing the notices at issue herein. Exhibit “A” of the VanDerZee and Sears affidavits (collectively referred to hereinafter as “exhibit ‘A’”) contains a total of 16 pages of a CMR. This CMR was offered to establish that the Division’s mailing procedure was followed in this particular instance and is a crucial piece of evidence in this proceeding.

We conclude that exhibit “A” of the VanDerZee and Sears affidavits shows that the procedure articulated by the Division’s affiants was followed. The Division’s affiants describe a procedure that allows each page of the CMR to be associated with the other pages: the pages are connected when they are delivered to the USPS and remain connected when they are returned to the unit that generated the CMR (the CARTS Control Unit) and the certified mail numbers run consecutively from page to page. Moreover, the number of pieces of mail listed on the CMR is totaled at the bottom of the last page and a postal employee enters the actual number of items received by the USPS and signs or initials the CMR. The entries at the end of the CMR demonstrate that each item listed on the CMR was delivered to the custody of the USPS on the date stamped on the CMR.

This procedure, as described by the Division’s affiants, seeks to establish that the Division has a method “to ensure that the integrity of the certified mail record is maintained from the time that the document is generated, delivered to the Postal Service and returned to the custody of the Division” (*Matter of Greene Valley Liqs.*, Tax Appeals Tribunal, November 25, 1992).

The 16 pages of exhibit “A” of the VanDerZee and Sears affidavit appear to be physically connected and the pages are consecutively numbered. As a result, it can be inferred that pages numbered 1 through 16 of the CMR are from the same CMR. Further, we conclude that page 3 of the CMR where petitioner’s name appears and page 10 of the CMR where petitioner’s

representative appears both have the date stamp of June 8, 2009 and the post office employee's initials. Accordingly, it can be concluded that the Notice of Determination was mailed to petitioner and a copy to its representative on June 8, 2009.

Delivery of a particular item listed in the CMR is proven when an employee of the USPS acknowledges receipt of the items listed by completing the form as it is designed; i.e., by entering the number of pieces of mail received in the space provided for that entry. A USPS date stamp alone placed on one or more pages of the CMR is not sufficient (*see Matter of Cal-Al Burrito Co.*, Tax Appeals Tribunal, July 30, 1998; *see also, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995). Contrary to petitioner's position, omission of a single USPS stamp constitutes harmless error when the CMR is otherwise complete, including a proper mail count, as well as stamps and initials on the last and relevant pages (*see e.g. Matter of Titanium Construction Corp.*, Tax Appeals Tribunal, May 5, 2011; *Matter Montesanto*, Tax Appeals Tribunal, March 31, 1994).

In this case, a postal service employee handwrote and circled the number "174" corresponding to the "Total Pieces Received At Post Office" heading and initialed the last page next to the circled number, indicating that all 174 pieces were received at the post office. Accordingly, we agree with the Administrative Law Judge that the CMR has been properly completed and constitutes documentary evidence of both the fact and date of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

We next address petitioner's argument that it and its representative never received the Notice of Determination at their last known addresses. 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.” We agree with the Administrative Law Judge that the last sales and use tax return, filed on March 20, 2009, listed petitioner’s address as Astoria, New York. As such, the Division has shown that the Notice of Determination was properly mailed to petitioner at its last known address on June 8, 2009. We also agree with the Administrative Law Judge that the Notice of Determination was mailed by certified mail to Mr. Castellano, petitioner’s appointed representative, at his last known address on June 8, 2009. Petitioner offers only bare assertions that are insufficient to rebut the presumption of receipt (*Matter of T.J. Gulf v. State Tax Commn.*, 124 AD2d 314 [1986]).

As petitioner’s request for a conciliation conference was not filed until January 19, 2010, which was beyond the 90-day period, we find that the Division of Tax Appeals has no jurisdiction to entertain the petition in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Marble Techniques, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Marble Techniques, Inc. is dismissed.

DATED: Troy, New York
September 15, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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