

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MORRIS LIPKA : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 816817
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period June 1, 1988 through May 31, 1991. :

Petitioner, Morris Lipka, 8750 Azalea Court, Tamarac, Florida 33321, filed a petition 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 June 1, 1988 through May 31, 1991.

On April 6, 1999 and April 20, 1999, respectively, petitioner, appearing *pro se*, and the Division of Taxation, by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by September 2, 1999, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely protest challenging a Notice of Determination issued by the Division of Taxation.

FINDINGS OF FACT

1. The subject of this matter is a Notice of Determination and Demand For Payment of Sales and Use Taxes Due dated August 27, 1991 bearing Notice number S910827002L. Said notice is addressed to petitioner, Morris Lipka, “as president of General Sheet Metal Works Incorporated” at “62 Beverly Road, White Plains, NY 10605” and asserts sales and use taxes due in the amount of \$58,157.21, plus penalty of \$13,420.56 and interest of \$10,776.77, for a total amount due of \$82,354.54 for the period June 1, 1988 through May 31, 1991.

2. Petitioner filed a petition with the Division of Tax Appeals dated November 13, 1998 by United States Postal Service (“USPS”) First Class Certified Mail. The USPS postage-paid stamp is dated November 13, 1998. The petition was received by the Division of Tax Appeals on November 18, 1998.

The petition challenges the assessment of \$58,157.21 in sales and use taxes for the period June 1, 1988 through May 31, 1991. In his petition, petitioner requests “that all liens pertaining to the tax problem be removed so [he] can foreclose on the mortgage that [he is] holding with AS Realty Company. There is over \$130,000.00 due on this mortgage.” The attachments to the petition include miscellaneous pieces of correspondence to and from the Division of Taxation concerning the assessment in issue as well as other outstanding assessments. The attachments also include items which address the merits of petitioner’s case.

3. The Division of Taxation (“Division”), in its answer, denied the allegations contained in the attachment to item six of the petition. It further stated that: (1) a Notice of Determination and Demand For Payment of Sales and Use Taxes Due (Not. no. L 006584288, converted from S910827002L, dated August 27, 1991) was issued to petitioner pursuant to Articles 28 and 29 of the Tax Law; (2) Not. no. L 006584288 was received by petitioner on August 28, 1991 as

evidenced by the PS Form 3811 signed by petitioner; (3) the petition received on November 16, 1998 is petitioner's first and only request for a hearing; (4) pursuant to Tax Law § 1138(a)(1), a petition for a hearing must be filed within 90 days from the date of mailing of the Notice of Determination and Demand For Payment of Sales and Use Taxes Due; (5) therefore, petitioner is not entitled to a hearing on the merits, but rather only one which is confined to the issue of the timeliness of petitioner's protest. The answer also states that petitioner has the burden "to show that petitioner's protest was timely."

4. In its submissions, the Division filed the affidavits of Larry McMillan and Toni Francis; a copy of the Notice of Determination and Demand For Payment of Sales and Use Taxes Due (Notice number S910827002L) dated August 27, 1991; a copy of a page entitled "Outgoing Certified Mail Register;" part of the original PS Form 3800, the Certified Mail Receipt section; and the original PS Form 3811 Domestic Return Receipt card.

5. Larry McMillan is a Tax Auditor I in the Division's Audit Division and has held this position since 1970. Based on his "knowledge of the District Office's mailing procedures for certified mailings, as conducted in the regular course of business, in August of 1991," Mr. McMillan, in his affidavit, sets forth the steps taken in the preparation of the Notice of Determination and Demand For Payment of Sales and Use Taxes Due. (McMillan affidavit, ¶ 1.) He explained that:

the auditor first prepared an AU-243 Audit Division Sales Tax Audit worksheet. This AU-243 worksheet was then given to a clerk who, based upon the information in the worksheet, typed the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, along with PS Form 3811 and PS Form 3800, and returned them to the auditor. . . . Next the auditor reviewed the typed assessment and placed it in a windowed envelope. The auditor then attached PS Form [sic] 3811 and 3800 onto the envelope and placed the envelope into a wired bin designated for pick-up by a mailroom employee. (McMillan affidavit, ¶ 2.)

According to Mr. McMillan, the mailroom kept a log of all outgoing certified mail that was sent out. Mr. McMillan indicated that the mailroom procedures are set forth in Ms. Francis's affidavit. He further indicated that following delivery of the certified mail by the United States Postal Service, "PS Forms 3800 and 3811 are then returned to the originating auditor who retains them in the case file as proof of mailing." (McMillan affidavit, ¶ 3.) Based on his knowledge of the District Office's procedures for the preparation and mailing of notices, "as well as the fact that the returned postal cards were found in the case file for the petitioner herein, [Mr. McMillan] can determine that the proper procedures were followed in mailing the piece of certified mail" containing the Notice of Determination and Demand For Payment of Sales and Use Taxes Due (Notice No. S910827002L). (McMillan affidavit, ¶ 4.)

6. Attached to Mr. McMillan's affidavit as Exhibit "A" is a copy of the Notice of Determination and Demand For Payment of Sales and Use Taxes Due (Notice Number S910827002L) which he asserts was mailed by certified mail. The notice is addressed to: "LIPKA-MORRIS AS PRESIDENT OF GENERAL SHEET METAL WORKS INCORPORATED, 62 BEVERLY ROAD, WHITE PLAINS, NY 10605." Attached to Mr. McMillan's affidavit as Exhibit "B" is the original PS Form 3811, Domestic Return Receipt card ("green card"), Article Number P 702 502 203 and a copy of the back of this green card. Attached to the affidavit as Exhibit "C" is part of the original PS Form 3800, the Certified Mail Receipt section ("mail receipt"), Article Number P 702 502 203 and a copy of the front of the mail receipt.

Included as part of the McMillan affidavit is the original of the green card, as well as a copy of the back of this card. On the back of the green card, item 3, "Article Addressed to:", contains the typed entry "MORRIS LIPKA AS PRESIDENT OF GENERAL SHEET METAL

WORKS INC., 62 BEVERLY ROAD, WHITE PLAINS, NY 10605, S910827002L & 003L.”¹

Item 4, “Article Number,” has the typed entry “P 702 502 203.” “Type of Service” checked is “certified.” Item 5, “Signature - Addressee,” contains the legible signature “M Lipka.” Item 6, “Signature - Agent,” is blank, and item 7, “Date of Delivery,” contains the handwritten entry “8/28/91.”

Affixed to the front of the green card, in the sender’s name, address and zip code space, is a label containing the following typed address: “STATE OF NEW YORK, DEPT. OF TAXATION & FINANCE, 90 SOUTH RIDGE STREET, RYE BROOK, NY 10573-2800.” The stamped words “SALES TAX” appear to the left of the label and the words “ATTN. L. MCMILLAN” appear directly beneath the label. “RECEIVED, DEPARTMENT OF TAXATION AND FINANCE, AUG 29 1991, WESTCHESTER D.O.” is stamped in the space² directly above the sender’s name and address space.

Also attached to the McMillan affidavit is the original mail receipt, as well as a copy of the front of that receipt. Appearing at the top of the front side of the mail receipt are the typed numbers “S910827002L & 003L.” Directly beneath the typed numbers is the imprinted article number “P 702 502 203.” The words “SALES TAX” are stamped over the USPS eagle logo located in the upper left-hand side of the mail receipt. The typed word “MCMILLAN” appears after the printed phrase “(See Reverse)” in the upper right-hand side of the receipt. The mail receipt has separate sequential boxes labeled: “Sent to,” “Street & No.,” “P.O., State & ZIP CODE,” “Postage,” “Certified Fee,” “Special Delivery Fee,” “Restricted Delivery Fee,” “Return Receipt Showing to Whom & Date Delivered,” “Return Receipt Showing to Whom, Date, &

¹ The numbers S910827002L and 003L appear at the bottom of the Item 3 box.

² The space is to the left of the official imprinted “U.S. Mail” postal stamp.

Address of Delivery,” “TOTAL Postage & Fees,” and “Postmark or Date.” The following appears in the first three boxes as the name and address of the addressee: “MORRIS LIPKA AS PRESIDENT OF GENERAL SHEET METAL WORKS INC., 62 BEVERLY ROAD, WHITE PLAINS, NY 10605.”³ None of the remaining boxes relating to postal fees and the date contain any entries. “RECEIVED, DEPARTMENT OF TAXATION AND FINANCE, AUG 27 1991, WESTCHESTER D.O.” has been stamped on the lower half of the mail receipt over the postal fee boxes.

7. In further support of the mailing of the notice at issue, the Division offered the affidavit of Toni Francis, a Division employee since March 1973. Prior to August 1991, she worked as a Mail Clerk I in the Division’s Westchester District Office mailroom (“mailroom”). Ms. Francis’s affidavit is based upon her “knowledge of mailing procedures as they were prior to August of 1991, and [her] “knowledge that the procedures remained the same in August of 1991.” (Francis affidavit, ¶ 1.)

After a mailroom employee:

picked-up the mail from the designated wire bin in Audit, the mail clerk then verified that the auditor properly completed the certified mailing labels and sealed the envelopes. At that point the mail clerk then tore off the proper perforated section of the PS Form 3800 and recorded the pertinent information from the PS Form 3800 in a log book. (Francis affidavit, ¶ 2.)

After the entry was made in the log book, the mail clerk put rubber bands around the certified mail and then placed it into a mail bag to await pick-up by the USPS. According to Ms. Francis,

the USPS employee came directly into the mailroom to pick-up the mail bags containing the certified letters. Once the USPS delivered the mail, they returned the receipts, including PS Forms 3811, to the mailroom. A mailroom clerk then recorded the delivery date in the log book and returned the receipt(s) to the auditor

³ The name and address appearing in the spaces has been typewritten.

listed in the log book so that the auditor could associate the receipt(s) with the case file. (Francis affidavit, ¶ 4.)

8. The record contains a copy of a page from the log book.⁴ The page entitled “OUTGOING CERTIFIED MAIL REGISTER” lists in tabular form the date, name and address of the addressee, the name of the individual who is sending the piece of certified mail, the section in which that individual works, the “certified mail number” and the date on which the “receipt returned” to the mailroom. There are entries on all 21 lines of the page, the first entry is dated August 26, 1991, 4 entries are dated August 27, 1991, 15 entries are dated August 28, 1991 and the last entry is dated August 29, 1991.⁵ Line 2 contains the following entry: “8/27/91, General Sheet Metal Works, 62 Beverly RD. W. Plains NY 10605, McMillan, S.T., P 702 502 203, 8/29/91.” Ms. Francis, in her affidavit, asserts that the copy of the page of the mail log contains a record of the certified mail which was sent out on August 27, 1991. She further explained that “although the log indicates that the piece of mail in question was sent to General Sheet Metal Works, the certified number P 702 502 203 clearly indicates that the Notice was sent to Morris Lipka, as president of General Sheet Metal Works.” (Francis affidavit, ¶ 3.)

9. Petitioner, in his letter dated June 30, 1998, addressed to “New York State Tax Dept.,”⁶ acknowledged “receipt of tax statement dated 6/23/98” and set forth reasons why the Division’s request for payment of \$58,157.21 in sales and use taxes was not valid. In this letter, petitioner admitted that a withholding tax liability existed and that monies had been levied upon to satisfy

⁴ The handwritten number “125” appears in the upper right-hand corner of the page. The record is silent as to the significance of this number.

⁵ Portions of the mail log have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

⁶ The address to which this letter was sent is not part of the record.

outstanding tax liabilities. He further argued that a portion of the funds levied upon from Prudential Securities should be returned to him. If the Division could not do so, a hearing was requested.

10. Petitioner's July 13, 1998 letter to A. Domizio in the Division's Westchester District Office references four outstanding assessments including the Notice of Determination in issue and sets forth the bases for his objections to those assessments. In this letter, petitioner also stated that he had already written to Mr. Domizio requesting a hearing.⁷

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1)⁸ provides, in pertinent part, that:

[n]otice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing. . . .

As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services. The time period for filing such request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 1147(a)(1) provides that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last

⁷ The record does not include any earlier letter addressed to Mr. Domizio.

⁸ Tax Law § 1138(a)(1) has been amended since the years in question. Such amendments did not affect the 90-day requirement.

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.” This section further provides that the mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

C. Where the taxpayer files a petition or a request for a conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice in question (*see, Matter of T.J. Gulf, Inc. v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required is two-fold: first, there must be 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 second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

D. In the instant matter, the Division submitted the affidavits of Mr. McMillan and Ms. Francis; and a copy of a page of the mail log to prove the fact and date of mailing. I find the evidence submitted to be defective in many ways.

Neither the McMillan affidavit nor the Francis affidavit sets forth the standard procedures used by the Westchester District Office in August of 1991 for the generation and mailing of notices of determination. Rather, both affidavits explain the steps allegedly taken in the generation and mailing of the notice in issue. Therefore, it is impossible to determine whether standard procedures were followed in the preparation and mailing of the notice in issue. While Mr. McMillan in his affidavit did explain the steps taken in the generation of the notice, he failed

to identify the specific district office in which the notice was actually prepared. In addition, he failed to explain what his connection was, if any, to the actual preparation of the subject notice. Mr. McMillan also failed to state whether the date typed on the Notice of Determination was the same date on which the envelope containing the notice was picked-up by a mailroom employee. Although Mr. McMillan explained that the auditor placed the notice in issue in a window envelope and affixed the mail receipt and green card to that envelope, he failed to identify who affixed the postage and fee amounts to that envelope. The Francis affidavit also fails to identify who affixed the postage and fee amounts to the notice allegedly mailed to petitioner. As for the Division's reliance on the Francis affidavit to explain the procedures followed by the mailroom in mailing the subject notice, it is misplaced. Ms. Francis has no first-hand knowledge concerning the preparation of the mail log or the alleged mailing of the Notice of Determination to petitioner because she was not employed in the Westchester District Office's mailroom in August of 1991 (*see*, Finding of Fact "7").

The Division submitted a Westchester District Office mailroom generated document entitled "OUTGOING CERTIFIED MAIL REGISTER," described in the Francis affidavit as the mail log "kept as an ordinary business record in the mailroom," as further proof that the notice was mailed on August 27, 1991. (Francis affidavit, ¶ 3.) The mail log on which the Division relies as part of its proof does not constitute a proper certified mail record. It is deficient in several respects. The mail log contains entries for four different days including August 27, 1991 the day on which a piece of certified mail was allegedly mailed to petitioner. While a name and address, as well as a certified number do appear on line 2 of the mail log, the line purportedly containing information about the notice in issue, the named addressee is not petitioner. Further, while a properly completed postal form 3877 is considered "highly probative evidence," in part

because of the space it provides for the postal representative's signature verifying receipt (*see, United States v. Ahrens*, 530 F2d 781, 76-1 USTC ¶ 9241, at 83,511; *Cataldo v. Commissioner*, 60 TC 522, *affd* 499 F2d 550, 74-2 USTC ¶ 9533), the page of the mail log here does not provide an equivalent identified space indicating receipt (*see, Matter of Clark*, Tax Appeals Tribunal, June 18, 1992). Also, unlike form 3877, the page of the mail log submitted does not list all the documents received by the post office. Therefore, there is no way of knowing how many pieces of mail were actually received by a Postal Service representative (*Matter of Clark, supra; Matter of Katz, supra*). Finally, the page of the mail log lacks any postmark. Although the date 08/27/91 appears on the Notice of Determination addressed to petitioner, this in no way related to the date upon which the notice is alleged to have been mailed (*Matter of Clark, supra; Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

I find that the evidence submitted fails to satisfy the Division's burden that the notice was properly mailed to petitioner on August 27, 1991. As the Tribunal noted in *Matter of Katz (supra)*: "proof of mailing requires evidence of the ordinary issuance procedure as well as evidence of the fact that the procedure was actually followed in a particular case."

E. Where proper mailing cannot be proved, demonstration of receipt of the notice by the taxpayer allows for the statutory period to be measured from the date of receipt (*Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992; *Matter of Bryant Tool & Supply*, Tax Appeals Tribunal, July 30, 1992). In further support of its proof of mailing, the Division submitted the mail receipt (Article Number P 702 502 203) and the returned postal receipt PS form 3811 (green card) addressed to "Morris Lipka as President of General Sheet Metal Works Inc." (Article Number P 702 502 203) (*see*, Finding of Fact "6"). Here the Division has produced a returned green card which establishes receipt of a piece of certified mail by petitioner

on August 28, 1991. However; it does not establish that petitioner received any particular Notice of Determination and Demand For Payment of Sales and Use Taxes Due. This is the case because two assessment identification numbers (“S910827002L & 003L”) appear after petitioner’s name and address in the green card’s addressee address box (*see*, Finding of Fact “6”). No explanation of the two assessment numbers appears in the McMillan affidavit. Indeed, Mr. McMillan in his affidavit stated that only one notice, Notice number S910827002L, was placed in the piece of certified mail addressed to petitioner bearing certified mail number P 702 502 203 (*see*, Finding of Fact “5”). The Division has failed to prove that petitioner received the Notice of Determination in issue on August 28, 1991.

Since the Division has failed to establish mailing of the Notice of Determination and Demand For Payment of Sales and Use Taxes Due in question, I must dismiss this petition for lack of jurisdiction because the Division has not established the issuance of a valid notice (*Matter of Synder*, Tax Appeals Tribunal, December 11, 1997; *Matter of Malpica, supra*; *see also, Matter of Taylor*, Tax Appeals Tribunal, October 9, 1997).

F. The petition of Morris Lipka is hereby dismissed and the Notice of Determination and Demand For Payment of Sales and Use Taxes Due (Notice number S910827002L) was never validly issued.

DATED: Troy, New York
December 09, 1999

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE