

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SANDRA FOX : DETERMINATION
for Revision of Determinations or for Refund of Sales and : DTA NO. 817347
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods June 1, 1978 through May 31, 1988 and :
June 1, 1988 through August 31, 1990.

Petitioner, Sandra Fox, 324 Roosevelt Avenue, Freeport, New York 11520, 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 periods June 1, 1978 through May 31, 1988 and June 1, 1988 through August 31, 1990.

On May 2, 2000 and May 30, 2000, respectively, petitioner, appearing by Angela J. Cowan, CPA, and the Division of Taxation, by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs submitted by August 30, 2000, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

1988 Notices of Determination

1. At issue in this matter is the timeliness of petitioner’s protest of four notices of determination and demands for payment of sales and use taxes due dated October 4, 1988 and addressed to petitioner, Sandra Fox, as follows:

Sandra Fox, Officer of
Esoteric Press, Inc.
116-23 Jamaica Avenue
Richmond Hill, NY 11418

2. Each of the four notices of determination bore a notice number and asserted a total amount due as follows:

<i>Notice Number</i>	<i>Tax Period</i>	<i>Total Amount Due</i>
S881004254C	6/1/78 - 11/30/81	\$152,664.86
S881004255C	12/1/81 - 5/31/85	110,121.53
S881004256C	6/1/85 - 5/31/88	67,622.86
S881004257C	6/1/85 - 5/31/88	4,532.48

3. During 1988, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued by the Division of Taxation’s (“Division”) District Office Audit Bureau was identified by a notice number that consisted of an “S,” a nine digit number, and the letter “C.” The “S” stands for sales tax. The first six digits record the date of issuance of the notice. The last three digits uniquely identify each notice. The letter “C” indicates that the notice was issued from the Division’s offices at the State Campus in Albany.

4. As part of the process of generating and issuing such notices of determination during 1988, the Division created a “Mailing Record - Notice of Determination” (Form AU-372.1) for

each group of notices which were to be mailed on a particular day. In this case such mailing record is dated October 4, 1988 and lists a notice number, identification number, name and total amount with respect to each of the notices of determination listed thereon. The four notices dated October 4, 1988 and addressed to petitioner are among the 31 notices listed on the mailing record relevant to this case. The information on the mailing record regarding the four notices addressed to petitioner corresponds to information contained on the four notices of determination.

5. The reverse side of the Form AU-372.1 contains two signed statements made by Division employees. The first states that, on October 4, 1988, the employee delivered all of the notices listed on the mailing record to the Division's Mail and Supply section; that the employee witnessed the sealing and stamping of the envelopes in which the notices were enclosed; and that the notices were enclosed in envelopes addressed to each taxpayer listed thereon at the address shown on the notice. The second statement provides that, on October 4, 1988, the employee deposited the notices listed on the Form AU-372.1 in a branch of the United States Postal Service and that all were enclosed in sealed postpaid envelopes.

6. Also as part of its standard procedures in issuing notices of determination in 1988, the Division completed a United States Postal Service Form 3877 (PS Form 3877) as a record of its certified mailing of the notices of determination. In this case, the Form 3877 lists 15 articles sequentially numbered under the heading "Number of Article." There are no deletions from the list. In addition, corresponding to each such number is a name and address and postage and fee amounts. There is also a column headed "Due Sender if C.O.D." It was the Division's practice to write in this column the last three digits of the notice number or if more than one notice was in the envelope, the last three digits of the first notice and a dash and the last digit of the last notice

to show the series of notices enclosed in the envelope. It was the Division's policy to mail out all notices of determination issued to the same taxpayer on the same day at the same address by certified mail in one envelope.

7. Information regarding the notices dated October 4, 1988 and addressed to petitioner is contained on the Form 3877. Specifically, corresponding to Number of Article P28043 is petitioner's name and an address which is identical to that listed on the subject notices of determination. The column "Due Sender if C.O.D." contains the notation "254-7."

8. The Form 3877 bears the postmark of the Roessleville branch of the U.S. Postal Service in Albany, New York, dated October 4, 1988. The form also contains a handwritten "15" under the heading "Total Number of Pieces Listed by Sender" and a handwritten "15" under the heading "Total Number of Pieces Received at Post Office." The form also contains the signature of a Postal Service employee under the heading "Postmaster, Per (Name of Receiving Employee)."

9. During 1988, the Division did not require return receipts from certified or registered mail.

10. As a result of a change in the Division's computer system, notice numbers S881004254C, S881004255C, S881004256C, and S881004257C were changed to assessment identification numbers L006573028, L006573029, L006573030, and L006573031.

11. The facts set forth above in Findings of Fact "3" through "10" were established through the affidavits of Norman W. Ayers and James Baisley. Mr. Ayers has been employed by the Division since 1970. Since 1994 he has been the program manager for Sales Tax Field Audit Management of the Division's District Office Audit Bureau. Mr. Ayers is familiar with the procedures used by the Division in issuing notices of determination in 1988 and the records

maintained by the Division. Mr. Baisley has been employed as a Chief Mail Processing Clerk in the Division's Mail Processing Center since 1994. Mr. Baisley's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service. In 1988 he was employed as Head Mail Processing Clerk. Mr. Baisley had held that title since 1976. He is familiar with the operations and procedures of the Mail and Supply Section on October 4, 1988.

1993 Notice of Determination

12. Also at issue in this matter is the timeliness of petitioner's protest of a Notice of Determination dated March 15, 1993 and addressed to petitioner at "116 23 Jamaica Ave Richmond Hill, NY 11418-2433." This notice bears assessment identification number L-007076021-1 and asserts a total amount due of \$39,787.13. As indicated by the computation summary section of the notice, this amount consists of sales and use tax, interest and penalty for the period June 1, 1988 through August 31, 1990. The notice bears certified mail control number P 911 002 506.

13. Notices of determination, such as the March 15, 1993 notice, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

14. Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the

CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page 1 of the CMR lists an initial date of March 4, 1993, which has been manually changed to March 15, 1993.

15. Each notice of determination is placed in an envelope by Division personnel. Thereafter, a Division employee delivers the stamped envelopes and associated CMR to the Roessleville branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

16. In the ordinary course of business a Division employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control Unit) within the Division.

17. The CMR relevant to the March 15, 1993 notice is a 38-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip + 4 Minimum Discount Mail." This CMR lists consecutive certified control numbers P 911 002 406 through P 911 002 812. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 38 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

18. Information regarding the Notice of Determination dated March 15, 1993 is contained on page 10 of the CMR. Specifically, corresponding to certified control number P 911 002 506 is notice number L 007076021, along with petitioner's name and an address, which is identical to that listed on the Notice of Determination dated March 15, 1993.

19. Each page of the CMR bears the postmark of the Roesseville Branch of the U.S. Postal Service, dated March 15, 1993.

20. The last page of the CMR, page 38, contains a pre-printed entry of 407 corresponding to the heading "Total Pieces and Amounts Listed." This pre-printed entry has been manually circled and beneath it is the signature of a Postal Service employee.

21. The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the "407" indicate that all 407 pieces listed on the CMR were received at the post office.

22. The Division generally does not request, demand or retain return receipts from certified or registered mail.

23. The facts set forth above in Findings of Fact "13" through "22" were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination. As previously noted, Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division's Mail Processing Center. Mr. Baisley's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

24. Petitioner filed a petition with the Division of Tax Appeals on August 6, 1999 in protest of the five assessments referred to herein.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient.” This section further provides that such a notice “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.”

B. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the Notice of Determination (*see*, Tax Law § 1138[a][1]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely petition protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. 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 produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

D. In this case, the Division introduced adequate proof of its standard mailing procedures in both 1988 and 1993 through the affidavits of Mr. Ayers, Ms. Mahon and Mr. Baisley. These Division employees were involved in and possess knowledge of the Division's process of generating and issuing (mailing) notices of determination when the subject notices were issued (*see*, Findings of Fact "11" and "23").

E. The Division presented sufficient documentary proof in the form of the Postal Service Form 3877 to establish that the four notices of determination and demands for sales and use taxes due dated October 4, 1988 were mailed to petitioner on that date. "A properly completed Form 3877 is highly probative evidence that the notice was sent to the address specified because it contains on one page the name and address of the taxpayer, . . . the date, postmark and the signature of a Postal Service employee acknowledging receipt" (*Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). In this case, the one-page Form 3877 lists petitioner's name and address; it bears a U.S. Postal Service postmark dated October 4, 1988; and it contains handwritten entries and the signature of a Postal Service employee indicating that all 15 articles listed thereon were received at the post office (*see*, Finding of Fact "8"). Further, the Form 3877 contains a notation indicating that the four notices were mailed to petitioner in a single envelope, consistent with the Division's practice at that time (*see*, Findings of Fact "6" and "7"). This evidence establishes that the Division mailed the four notices of determination dated October 4, 1988 to petitioner on that date.

F. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination dated March 15, 1993 was mailed to petitioner on that date. Specifically, this 38-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 38 pages of the CMR bear a U.S. Postal Service

postmark dated March 15, 1993. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 38 of the CMR and circled “407” on that page to indicate receipt by the post office of all 407 pieces of mail listed thereon (*cf.*, *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject Notice of Determination on March 15, 1993.

G. The petition in this matter was filed on August 6, 1999, well beyond the 90-day period of limitations for the filing of a petition, and was therefore untimely filed (*see*, Tax Law § 1138[a][1]; 20 NYCRR 3000.3[c]).

H. Petitioner requested that an Offer in Compromise submitted by her to the Division “be considered in order to close this case.” As noted previously, absent a timely filed petition, the Division of Tax Appeals has no jurisdiction over the case (*see, Matter of Sak Smoke Shop, supra*). Petitioner submitted no evidence to show either improper mailing of the notices in question or timely filing of the petition. In any event, even if the petition was timely, the Division of Tax Appeals has no statutory authority to consider an Offer in Compromise (*see, Matter of Williams*, Tax Appeals Tribunal, September 1, 1994).

I. The petition of Sandra Fox is dismissed.

DATED: Troy, New York
November 2, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE