

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SWIATOSLAW KUZIW : ORDER
 : DTA NO. 817634
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 December 1, 1995 through February 28, 1998. :

Petitioner, Swiatoslaw Kuziw, 27 Woodshire Terrace, Towaco, New Jersey 07082-1457, 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 December 1, 1995 through February 28, 1998.

On April 7, 2000, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On April 20, 2000, petitioner, appearing by Michael Swaaley, Esq., filed a letter in opposition to dismissal. On April 25, 2000, the Division of Taxation, by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), submitted documents in support of dismissal, with such April 25, 2000 date commencing the 90-day period for issuance of this order. After due consideration of the documents and arguments submitted, Timothy J. Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Swiatoslaw Kuziw, a Notice of Determination dated March 18, 1999 and addressed to petitioner at “27 Woodshire Ter, Towaco, NJ 07082-1457.” The notice bears assessment identification number L-016078118-9 and asserts a total amount due of \$28,334.53. As indicated by the computation summary section of the notice, this amount consisted of sales and use taxes assessed of \$24,047.78, plus interest, for the period December 1, 1995 through February 28, 1998. The notice bore certified mail control number P 911 008 721.

2. On March 27, 2000, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination dated March 18, 1999.

3. On April 7, 2000, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the Notice of Determination in this matter was issued on March 18, 1999, but that the petition was not filed until March 27, 2000, or 375 days later.

4. Notices of determination, such as the one at issue herein, 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.

5. 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 one of the CMR lists an initial date of March 8, 1999, which has been manually changed to March 18, 1999.

6. After a notice of determination is placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center 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.

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

8. The CMR relevant to this case is an 85-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 911 008 650 through P 911 009 578. There are no deletions from the list. Each such certified control number is

assigned to an item of mail listed on the 85 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.

9. Information regarding the Notice of Determination issued to petitioner is contained on page seven of the CMR. Specifically, corresponding to certified control number P 911 008 721 is notice number L 016078118, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Determination.

10. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated March 18, 1999.

11. The last page of the CMR, page 85, contains a pre-printed entry of 929 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.

12. The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the "929" indicate that all 929 pieces listed on the CMR were received at the post office.

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

14. The facts set forth above in Findings of Fact "4" through "13" 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 deficiency and determination. 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.

15. The address on the subject Notice of Determination is the same as the address given on petitioner's filed 1997 and 1998 nonresident income tax returns (Form IT-203), which were signed by petitioner and dated April 1, 1998 and April 15, 1999, respectively.

16. In response to the Notice of Intent to Dismiss Petition, petitioner's representative submitted a letter dated April 18, 2000 which stated:

Based on prior correspondence with your office and the Office of Counsel on January 13, 2000 and January 25, 2000 it was conceded that the Division of Taxation cannot prove the date of mailing of the notice and demand to petitioner. Accordingly the previous intent to dismiss was denied and this one must also be denied.

In addition the initial notice and demand was to the corporation Brewsky's Goodtimes Corporation and not to Mr. Kuziw.

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." In this case, the record is clear that the address listed on the subject Notice of Determination was petitioner's last known address (*see*, Finding of Fact "15").

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 through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact “14”).

E. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination at issue was mailed to petitioner on March 18, 1999. Specifically, this 85-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 85 pages of the CMR bear a U.S. Postal Service postmark dated March 18, 1999. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 85 of the CMR and circled “929” on that page to indicate receipt by the post office of all 929 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 18, 1999.

F. Petitioner's petition was filed on March 27, 2000, or 375 days after the date of mailing of the subject Notice of Determination. The petition was therefore untimely filed (*see*, Tax Law § 1138[a][1]; 20 NYCRR 3000.3[c]).

G. The letter submitted by petitioner's representative in opposition to the notice of intent to dismiss provides no basis to conclude that the petition was timely filed. The letter refers to correspondence dated January 13, 2000 and January 25, 2000, but petitioner did not submit copies of such correspondence, and the file of the Division of Tax Appeals in this matter contains no such correspondence. Additionally, petitioner's letter states that such correspondence indicated that the Division of Taxation could not prove the date of mailing of a notice and demand. The statutory notice at issue, however, is a Notice of Determination and the Division has established the date of mailing of the subject notice. Furthermore, the fact that a previous notice of intent to dismiss was denied, as the letter claims, is irrelevant to the issue of the timeliness of the petition in this matter. Finally, petitioner's claim that "the initial notice and demand was to the corporation" is likewise irrelevant to the issue of the timeliness of the petition herein.

H. The petition of Swiatoslaw Kuziw is dismissed with prejudice.

DATED: Troy, New York
June 22, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE