

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TERRALYN GOUGER : DETERMINATION
 : DTA NO. 817872
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, 1998 through August 31, 1998. :

Petitioner, Terralyn Gouger, 114 Hayes Circle, Barneveld, New York 13304, 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 March 1, 1998 through August 31, 1998.

On October 17, 2000, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing within 90 days of the mailing of a notice of determination issued pursuant to Articles 28 and 29 of the Tax Law. Petitioner filed a response to the motion on November 13, 2000 which date began the 90-day period for the issuance of this determination. Petitioner appears by Brian Michael Miga, Esq. The Division of Taxation appears by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel). After due consideration of the documents and arguments submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Division of Taxation following the issuance of notices of determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Terralyn Gouger, two notices of determination, both dated November 18, 1999 and addressed to petitioner at 114 Hayes Circle, Barneveld, New York 13304-2500. One notice bears assessment identification number L-017198878-4 and asserts a total amount due of \$17,594.79. Certified mail control number P 911 205 111 is printed at the top of the notice. The second notice bears assessment identification number L-017198880-3 and asserts a total amount due of \$20,909.94. Certified mail control number P 911 205 113 is printed at the top of this notice. Each notice bears the following statement in bold type. “Note: You must file the Request for Conciliation Conference or Petition For a Tax Appeals Hearing by 02/16/00.”

2. On April 27, 2000, the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) received a letter written on petitioner’s behalf by her attorney, Brian Michael Miga, protesting the notices of determination and requesting a conference. This letter had been mailed to the Division’s Tax Compliance Division in Utica, New York on April 18, 2000.

3. BCMS issued a Conciliation Order, dated May 19, 2000, to petitioner denying her request for a conciliation conference on the ground that the request was not filed within 90 days of the issuance of the notices of determination.

4. Notices of determination, such as the ones at issue here, are computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of statutory 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 notice, a separate certified control number. The CMR is a fan-folded,

multi-page document. The pages remain connected to each other from the time the CMR is submitted to the United States Postal Service (“USPS”) until the CMR is returned 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 mail control number. This number is recorded on the CMR under the heading “Certified No.” The CMR lists an initial date (the date of its print) in its upper left hand corner. This date 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 fees. The initial (printing) date on the CMR is manually changed by Division personnel at the time of mailing to conform to the actual date of mailing of the notices. In this case, page one of the CMR lists a print date of November 8, 1999, which has been manually changed to November 19, 1999.

6. After notices of determination are 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. A Mail Processing Center clerk then counts the envelopes and verifies, by a random review of 30 or fewer pieces of mail, that the names and certified mail numbers on the notices correspond with the names, addresses and certified mail numbers on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the United States Postal Service (“USPS”) where a postal employee accepts the envelopes into the custody of the USPS 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 (in this case, CARTS Control) within the Division.

8. The CMR evidencing the mailing of notices of determination to petitioner is a 19-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip+4 Minimum Discount Mail." This CMR lists consecutive certified mail control numbers P 911 204 947 through P 911 205 153. There are no deletions. Each item of mail listed on the 19 pages of the CMR is assigned a certified control number. A notice number, the name and address of the addressee, and postage and fee amounts are listed with the corresponding certified mail control number.

9. The notices of determination issued to petitioner are listed on pages 15 and 16 of the CMR. Notice number L-017198878 is listed on page 15 with the corresponding certified mail control number P 911 205 111 and petitioner's name and an address. These entries are identical to those that appear on the notice of determination bearing the same notice number. The same is true for notice number L-01719880 which appears on page 16 along with certified mail control number P 911 205 113 and petitioner's name and address as they appear on the notice of determination.

10. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated November 19, 1999.

11. The last page of the CMR, page 19, contains a pre-printed entry of 207 next to the legend "Total Pieces and Amounts Listed." There is no entry next to the pre-printed statement, Total Pieces Received at Post Office, and no other indication made by the USPS to show the

number of pieces of mail actually received at the post office. The CMR was not signed or initialed by a USPS employee.

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

13. The facts set forth in Findings of Fact "4" through "12" 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 USPS.

14. The addresses on the notices of determination in issue are the same as the address shown on the joint 1998 resident income tax return filed by petitioner with her spouse (Form IT-201). The IT-201 was signed by petitioner and dated February 25, 1999.

15. Bruce Peltier of the Division's Registry Unit obtained evidence that the notices of determination were actually delivered to petitioner on November 22, 1999. That evidence consists of a properly completed USPS Form 3811-A. The purpose of the form is to provide evidence of actual delivery of registered or certified mail where the sender did not previously request a return receipt.

16. Mr. Peltier completed a separate Form 3811-A for each item of certified mail addressed to petitioner showing petitioner's name and address as it appears on the notices of determination, Gouger, Terralyn, 114 Hayes Cr., Barneveld, NY 13304. The certified mail number for each article of mail, P 911 205 111 and P 911 205 113, was also entered on the form.

He sent these forms to the USPS office, Barneveld, New York. The USPS completed each form by placing a Barneveld, New York postmark of September 8, 2000 in the indicated area, entering the name and address of petitioner as the individual to whom delivery was made, indicating with a checkmark that delivery of the item was made and initialing the document in the appropriate box.¹

17. Both notices of determination indicate that they were issued based upon sales tax returns which were filed without remittance of the tax shown as due on the return. In both cases, the amounts assessed are identical to the amount of tax due reported by the taxpayer.

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.” The address listed on the notices of determination was petitioner’s last known address.

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).

¹ Mr. Peltier originally sent two forms which were received by the Barneveld office of the USPS on July 7, 2000. They were returned to the Division without the initials of a postal clerk in the box provided for that entry. He then sent two new forms, and these were returned with the required initials.

C. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice creates a presumption that the notice was delivered 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.*). Here, the Division was unable to meet this burden. Although the Division offered evidence of its standard mailing procedure, the CMR offered as evidence of actual mailing did not prove that the standard procedure was followed in this case. Because the CMR did not bear any entry made by the USPS to indicate the actual number of pieces of mail received at the post office, the CMR cannot serve as proof that the items addressed to petitioner were actually mailed to her on November 19, 1999 (*Matter of Cal-Al Burrito*, Tax Appeals Tribunal, July 30, 1998).

D. Although the Division did not prove the date of mailing of the notices, the delivery receipts establish that the two notices of determination were received by petitioner on November 22, 1999. As long as a notice of determination is received by the taxpayer in sufficient time to file a petition, the notice is valid (*Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, 229, *lv denied* 79 NY2d 759, 584 NYS2d 447), and the 90-day period to petition begins to run from the date of receipt (*see, Matter of Greene Valley Liquors*, Tax Appeals Tribunal, November 25, 1992).

E. Petitioner had 90 days to file a request for a conference or a petition for a hearing. The 90th day, counting from November 22, 1999, is February 20, 2000. Since this date is a Sunday, petitioner had until February 21, 2000 to file a petition or request for conference. Petitioner did

not mail a request for conference until April 18, 2000, 148 days after receipt of the statutory notices. Therefore, the statute of limitations expired well before the request was mailed.

F. Petitioner argues that the notices are defective because they do not contain notice of the 90-day period for filing a request for conference or petition. Tax Law § 1138(a)(2) provides as follows:

Whenever [the sales] tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within 90 days.

The tax assessed against petitioner was not estimated; therefore, the requirements of this provision were not triggered. Moreover, the Division did inform petitioner that she had until February 16, 2000 to file a challenge to the notices. The extension of this date to February 21, 2000 because the Division was unable to prove the exact date of mailing of the notices did not prejudice petitioner in any way and, in fact, provided her with additional time to respond to the notices. Since petitioner was not prejudiced by the information provided to her, the notices of determination are not defective. Petitioner's contention that the Division shortened the 90-day filing period by not allowing time for mailing the request for conference is without merit. Tax Law § 1138(a)(1) states that "[a]fter ninety days from *the mailing* of a notice of determination, such notice shall be an assessment" of the tax, penalty and interest shown in the notice unless application for a conference or a hearing is made "within such ninety day period (emphasis added)."

G. The petition of Terralyn Gouger is dismissed with prejudice.

DATED: Troy, New York
December 28, 2000

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE