

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JAMES W. KLEIN : DETERMINATION
DTA NO. 818181

for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 1992 through August 31, 1998. :

Petitioner, James W. Klein, 623 Caldwell Hill Road, Lisle, New York 13797, 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 period June 1, 1992 through August 31, 1998.

On February 28, 2001, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel) filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals for an administrative hearing within 90 days of the issuance of a Notice of Determination to petitioner. Petitioner, appearing *pro se*, did not respond to the motion. Accordingly, the 90-day period for the issuance of this determination commenced on March 30, 2001, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in

connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of notices of determination to petitioner.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to James W. Klein (“petitioner”), four notices of determination, each dated March 23, 2000, which were addressed to this petitioner at “623 Caldwell Hill Rd, Lisle, NY 13797-1914.” The notices bear assessment identification numbers L-017517816-5, L-017517817-4, L-017517818-3 and L-017517819-2. The notices cumulatively assessed a total amount of \$176,070.97 which consisted of tax due in the amount of \$99,590.38, plus interest of \$46,262.59 and penalty of \$30,218.00.

2. In support of its motion for summary determination, the Division submitted: its answer to the petition; an affidavit of its representative, Michael P. McKinley, Esq.; affidavits of Geraldine Mahon, James Baisley and Mary Sauter, employees of the Division; a copy of the Division’s certified mail record for March 23, 2000; copies of the notices of determination issued to petitioner; copies of United States Postal Service (“USPS”) forms 3811-A; a copy of the first two pages of petitioner’s 1998 New York State personal income tax return; a copy of the petition which was received by the Division of Tax Appeals on November 29, 2000; a copy of the envelope postmarked July 29, 2000 which was used to mail petitioner’s Request for Conciliation Conference; and a copy of a Conciliation Order Dismissing Request dated August 4, 2000.

3. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

Ms. Mahon receives a computer printout or certified mail record ("CMR") and the corresponding statutory notices, each predated with the anticipated date of mailing and each notice assigned a certified control number. The CMR for the block of notices issued on March 23, 2000, including the notices issued to petitioner, consisted of 26 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service ("USPS"). The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on March 23, 2000, including the notices of determination issued to petitioner, bears certified control numbers which run consecutively. Each page contains 11 entries, with the exception of the last page (page 26) which contains 9 entries.

In the upper left hand corner of page 1 of the CMR, the date "03/13/00" was manually changed to "3-23-00." The original date of 03/13/00 was the date that the entire CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from 03/13/00 to 3-23-00 was made by personnel in the Division's Mail Processing Center. The change was made to ensure that the date

on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative affixed a postmark to each page of the CMR. Pursuant to the CMR, the total number of statutory notices mailed on March 23, 2000 was 284.

Pages 21 and 22 of the CMR indicate that four notices of determination, with notice numbers L 017517816, L 017517817, L 017517818 and L 017517819, were sent to "KLEIN, JAMES W., 623 Caldwell Hill Rd., Lisle, NY 13797-1914" by certified mail using control numbers P 911 002 988, P 911 002 989, P 911 002 990 and P 911 002 991. A U.S. postmark on each page of the CMR confirms that the notices of determination were sent on March 23, 2000.

In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on March 23, 2000.

4. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center. He supervises the entire Mail Processing Center staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and

places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. As a matter of standard procedure, the CMR is left overnight at the post office to enable the postal employee to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS post office on the following day by a member of the staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

A USPS employee affixed a postmark to each page of the CMR. The last page of the CMR, page 26, indicates that 284 pieces were delivered to the USPS; however, "Total Pieces Received at Post Office" is not filled in on the CMR and there is no signature or initials of the USPS employee who received the pieces of mail.

5. Mary Sauter is employed as a Legal Assistant 1 in the Division's Office of Counsel. As part of her duties, she prepares USPS form 3811-A for mailing. This form is used by the mailer to request return receipts after mailing and can be used for registered, certified, insured and express mail. Form 3811-A is sent to the U.S. post office where the piece of mail in question was delivered. The USPS employee at that post office fills in form 3811-A based upon delivery records with the name of the individual or organization that received the piece of mail in box 8

and the delivery date of the piece of mail in box 9. In item 12 of form 3811-A are the initials of the USPS postal clerk who recorded the information on the form. The postmark of the delivery post office is located in item 7. Form 3811-A does not provide the mailer with either the recipient's signature or the delivery address.

For petitioner, James W. Klein, Ms. Sauter prepared four forms 3811-A, Request for Return Receipt. Based upon information provided to her by the Office of Counsel, she filled out item numbers 3, 4 and 5 on the forms. In item 3, she wrote "James W. Klein, 623 Caldwell Hill Rd., Lisle, NY 13797-1914"; in item 4, she wrote the certified mail numbers "P 911 002 988," "P 911 002 989," "P 911 002 990" or "P 911 002 991"; and in item 5, she wrote the mailing date of "3/23/00." She also placed an "x" in the box for item 1 "Return Receipt WAS NOT paid for at time of mailing" and placed an "x" next to "certified" in item 6.

Ms. Sauter mailed the forms 3811-A and received the forms back from the post office with the delivering post office's stamp in item 7, "Klein" or "James Klein" handwritten in item 8 ("Delivered to the following individual, company, or organization:") and "3/25/00" handwritten in item 9. The USPS clerk's initials were placed in item 12 and the clerk also placed an "x" in the box in item 11 of the forms indicating that delivery was made.

6. Attached to the Division's motion papers was a copy of the first two pages of petitioner's 1998 resident income tax return (form IT-201) which indicates that his address was 623 Caldwell Hill Rd., Lisle, NY 13797-1914. This return was signed by petitioner on April 8, 1999.

7. On November 29, 2000, the Division of Tax Appeals received a petition from petitioner. The petition was dated November 24, 2000, was signed by petitioner and contained the following allegation:

The conciliation order says I did not mail a request until 8/4/00. On that date, I sent back a response to payment requests, with copies of requests for a conference I had mailed in June, which I believe was within the required time period.

8. Attached to the Division's motion papers is a copy of a Request for Conciliation Conference, dated June 10, 2000, which was received by the Division's Bureau of Conciliation and Mediation Services ("BCMS") on August 10, 2000. Also attached to the motion papers is a copy of the envelope in which the Request for Conciliation Conference was mailed which bears a USPS postmark of August 4, 2000.

9. The Division's answer, in paragraphs 13 and 18 thereof, affirmatively states that on August 10, 2000, BCMS received a request for a conciliation conference and that petitioner did not file a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of the mailing of the notices of determination which were mailed to petitioner on March 23, 2000.

10. On September 1, 2000, BCMS issued a Conciliation Order Dismissing Request (CMS No. 182308) which stated: "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on March 23, 2000, but the request was not mailed until August 4, 2000, or in excess of ninety days, the request is late filed." Accordingly, the order denied petitioner's request for a conciliation conference.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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]).

B. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed or if a return when filed is incorrect or insufficient. Pursuant to such section, such determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. 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 a 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).

C. 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 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.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*) The evidence in this record indicates that the notices of determination were sent to petitioner at the address indicated on the return filed by him during the year in which the notices were issued. In his petition filed with the Division of Tax Appeals, petitioner did not contend that the address to which the notices of determination were sent was incorrect or that he did not receive the notices. It must be found, therefore, that the Division complied with the provisions of Tax Law § 1147(a)(1) since there is no evidence that, subsequent to his filing of

his return for 1998, petitioner ever notified the Division of a different address to which statutory notices or other correspondence should be sent.

D. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required of the Division 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*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon (Principal Clerk of the CARTS Control Unit) and James Baisley (Chief Mail Processing Clerk in the Division's Mail Processing Center) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the notices of determination and the certified mail record submitted as evidence of actual mailing of the notices to petitioner. However, because the CMR was not signed or initialed by the USPS employee, and the total number of pieces of certified mail received by the USPS was not entered on the CMR, these documents and affidavits do not establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notices issued to petitioner.

While the Division has, therefore, failed to establish the actual date of mailing, it has satisfactorily proven when the notices were received. The affidavits of a Division employee, Mary Sauter, along with the forms 3811-A, establish that each of the four notices of determination was received by petitioner on March 25, 2000. Where the exact date of mailing cannot be proved but receipt can be, the statutory period begins to run from the date of receipt (*Matter of Green Valley Liquors*, Tax Appeals Tribunal, November 25, 1992). Since it is hereby determined that the 90-day period commenced with the receipt of the notices of determination on March 25, 2000, official notice is taken that such period expired on June 23, 2000.

E. As indicated in Finding of Fact “8”, the Request for Conciliation Conference, while dated June 10, 2000, was not mailed until August 4, 2000, a date which is 42 days after the expiration of the 90-day period for the filing of a request for a conciliation conference or a petition for an administrative hearing. The 90-day period for filing the petition is absolute and there is no provision in the Tax Law for waiver or extension of such period (*see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, 661-662, *lv denied and appeal dismissed* 72 NY2d 938, 532 NYS2d 845; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Despite the fact that the Division’s answer clearly raised the issue that petitioner had failed to file a request for a conciliation conference or file a petition with the Division of Tax Appeals within 90 days after the issuance of the notices of determination and, accordingly, that the Division of Tax Appeals had no jurisdiction over this matter, petitioner failed to respond to the Division’s motion or provide any evidence to controvert the Division’s position. Since petitioner did not respond to the Division’s motion, he is deemed to have conceded that no question of fact

exists which would require a hearing (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325).

F. The Division of Taxation's motion for summary determination is granted and the petition of James W. Klein is hereby dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE