

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ELOISE A. TOOMER : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 818485
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period September 1, 1993 through May 31, :
1996. :
:

Petitioner, Eloise A. Toomer, 220-30 Merrick Boulevard, Springfield Gardens, New York 11413, 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 September 1, 1993 through May 31, 1996.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 31, 2002 at 10:30 A.M., with all briefs to be submitted by August 8, 2002, which date commenced the six-month period for issuance of this determination. Petitioner appeared by Leonard Fein, C.P.A. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation mailed a Notice of Determination to petitioner at her last known address.

II. Whether, if she did not receive that Notice of Determination, the notice should be treated as a nullity.

III. Whether petitioner has established that the audit method was unreasonable or that the results were incorrect.

IV. Whether petitioner has proved that she was not a member of the partnership of Charles F. Toomer and Eloise A. Toomer during the audit period.

FINDINGS OF FACT

1. Petitioner, Eloise A. Toomer, was a partner in the partnership of Charles F. Toomer and Eloise A. Toomer d/b/a Toomer Liquors (both the business and the partnership will be referred to here as “Toomer Liquors” or “Toomer”). The only other partner was her husband, Charles F. Toomer. The liquor store operated by Toomer Liquors was located at 220-30 Merrick Boulevard, Springfield Gardens, New York 11413. On her 1993 New York State personal income tax return, petitioner reported her address as 220-30 Merrick Boulevard, Springfield Gardens, New York 11413.

2. In June 1996, the Division of Taxation (“Division”) began a sales tax field audit of Toomer Liquors. An appointment letter was mailed to it, dated June 25, 1996. The letter requested that all books and records pertaining to the sales tax liability of Toomer Liquors be made available on the appointment date, July 18, 1996.

3. An employee of Toomer Liquors, Sara, telephoned the auditor on July 8, 1996 to request rescheduling of the appointment date. Sara informed the auditor that Mr. and Mrs. Toomer were in the middle of a rancorous divorce. She also told the auditor that Mrs. Toomer had run the business from 1993 through 1995 and had failed to pay taxes, make mortgage payments or renew the liquor license. Sara also stated that Mr. Toomer was in charge of the business, and he had made arrangements with the Division's Tax Compliance Office to pay the back taxes due.

4. Very few sales records were made available to the auditor. Among the items requested and not made available were a general ledger, a sales journal, a cash receipts journal, sales invoices, a purchase journal, a check disbursements journal, cancelled checks, bank deposit slips and monthly bank statements.

5. Since few sales records were available, the auditor conducted a test period audit of purchases. The auditor mailed a letter to 60 liquor suppliers in the New York City area asking them to provide information regarding Toomer's purchases. Eight suppliers responded to this inquiry. For the period August 1, 1995 through December 31, 1995, the liquor suppliers reported sales to Toomer Liquors of \$61,250.00. Toomer's records showed purchases of \$42,856.00. For the period January 1, 1996 through May 31, 1996, the liquor suppliers reported sales to Toomer of \$72,988.00. The records of Toomer showed purchases for the same period of \$41,963.80. Because of the discrepancy between information provided by the liquor suppliers and Toomer's records, the auditor concluded that Toomer's records were unreliable. Consequently, she performed a purchase markup audit for the audit period.

6. Liquor suppliers reported total sales to Toomer of \$704,358.00 for the audit period. On its 1993 Federal partnership return, Toomer reported a gross profit of \$39,113.00 and cost of goods sold of \$159,161.00. Using these figures, the auditor calculated a 25 percent markup on liquor purchases. This markup was applied to audited purchases to calculate audited taxable sales of \$880,447.50 for the audit period. Reported taxable sales of \$312,786.00 were subtracted from audited taxable sales resulting in additional taxable sales of \$567,661.50 with a tax due of \$46,832.70.

7. The Division issued to Charles F. and Eloise A. Toomer, a Statement of Proposed Audit Adjustment, dated September 4, 1996, asserting sales tax due for the period September 1,

1993 through May 31, 1996 of \$46,832.09 plus interest. On September 12, 1996, Charles Toomer executed a consent agreeing to have sales tax due finally and irrevocably fixed in accordance with the calculations appearing on the Statement of Proposed Audit Adjustment.

8. As a result of the field audit, the Division issued to Charles F. Toomer and Eloise A. Toomer, Toomer Liquors, a Notice and Demand for Payment of Tax Due, dated December 3, 1996. The Notice and Demand was addressed to the Merrick Boulevard location. The Division issued a Notice of Determination, dated December 13, 1996, to petitioner assessing tax due of \$46,832.09 plus interest for the period under review here. The Notice of Determination was addressed to petitioner at the Merrick Boulevard location and mailed by certified mail.

9. On or about January 22, 2001, petitioner filed a request for a conciliation conference. The Bureau of Conciliation and Mediation Services dismissed the request on the ground that it was not made within 90 days of the mailing of the Notice of Determination.

10. Notices of determination, such as the one 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 document, and the pages remain connected to each other from the time the CMR is submitted to the United States Postal Service with the notices until the CMR is returned to the CARTS Control Unit.

11. 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. 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 mailing. 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 December 4, 1996, which has been manually changed to December 13, 1996.

12. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a Mail Processing Center staffer operates a machine that 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 and addresses 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.

13. 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.

14. The CMR evidencing the mailing of notices of determination to petitioner is a 5-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 911 205 580 through P 911 205 629. There are no deletions. Each item of mail listed on the five 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 control number.

15. The Notice of Determination issued to petitioner is listed on page 4 of the CMR. Notice number L-012988460 is listed on the page with the corresponding certified control number P 911 205 617 and petitioner's name and an address. The identical information is listed on the Notice of Determination issued to petitioner.

16. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated December 13, 1996.

17. The last page of the CMR, page 5, contains a pre-printed entry of "50" next to the legend "Total Pieces and Amounts Listed." The number "50" has been handwritten next to the statement: Total Pieces Received at Post Office. The number is circled and initials appear under the number.

18. The affixation of the Postal Service postmarks, and the entry indicating that 50 pieces of mail were received at the post office indicate that all 50 pieces listed on the CMR were received at the post office including the piece of mail addressed to petitioner.

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

20. The facts set forth above in Findings of Fact "10" through "19" were established through the affidavits of Geraldine Mahon and Daniel Lafar. 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. Lafar is employed as a Chief Mail Processing Clerk in the Division's Mail Processing Center. Mr. Lafar's duties include

supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

21. The Notice of Determination addressed to petitioner was returned to the Division. The envelope in which the notice was mailed bears a stamp which states: "Returned to Sender /Attempted Not Known" (original all in capital letters). It also bears a date stamp indicating its receipt by the Division on December 20, 1996.

22. Petitioner became aware of the existence of an outstanding Notice of Determination against her sometime in 1999. In a letter to the Tax Compliance Division, dated January 4, 2000, she stated that her husband was in charge of the store during the audit period and did not pay any taxes on the advice of his attorney. She also advised that she received the business and the property in a marital settlement sometime after the audit period. She stated that she was seeking a loan to pay the debt.

23. The address on the subject Notice of Determination is the same as the address given on petitioner's New York State personal income tax return for 1993. The Division conducted a search of its files for personal income tax returns filed by petitioner in 1994 and 1995 and was unable to locate any such returns. When asked under cross-examination whether she filed income tax returns for 1994 and 1995, petitioner at first replied, "I wasn't working" and later stated, "I'm not sure." (Transcript of hearing, pp. 103 - 104.)

24. The liquor store operated by Toomer Liquors and petitioner's residence were both located at 220-30 Merrick Boulevard in years prior to 1994.

25. As indicated, Mr. and Mrs. Toomer were in the middle of a bitter divorce during the period that the audit was being conducted. In August 1993, Mr. Toomer sought and was granted an Order of Protection from the Queens Family Court ordering petitioner to refrain from

assaulting, menacing or harassing Mr. Toomer and to refrain from making any telephone calls to Mr. Toomer. Mr. Toomer's address as shown on the Order of Protection was 118-10 196th St., St. Albans, NY 11412. Petitioner's address as shown on the Order of Protection was 220-30 Merrick Boulevard, Laurelton, New York 11432. Specifically excluded from the order were statements indicating that petitioner must stay away from Mr. Toomer's place of business and place of employment. Mr. Toomer presented petitioner with a petition for divorce late in 1993.

26. Mr. Toomer requested and was granted renewals of the Order of Protection. Orders dated January 17, 1996 and January 18, 1997 order petitioner to refrain from assaulting, harassing or menacing Mr. Toomer. Again, those provisions of these orders which would have ordered petitioner to stay away from Mr. Toomer's home or place of business have been struck out by the court. A petition for a court order signed by Mr. Toomer on November 16, 1995 shows petitioner's address as "unknown" and shows Mr. Toomer's address as St. Albans, NY. In or about November 1995, petitioner was arrested for violating an order of protection, but the charge was later dropped.

27. Petitioner moved out of the Merrick Boulevard residence sometime after her husband served her with divorce papers. She then resided at 209-36 46th Avenue in Bayside, Queens. Petitioner identified Sara, the woman who provided the auditor with information regarding petitioner, as Mr. Toomer's girlfriend.

28. Charles Toomer was granted a divorce by reason of the constructive abandonment of Mr. Toomer by petitioner. The divorce was filed on July 9, 1999. In connection with the divorce and a separation agreement entered into by the parties, the property located at 220-30 Merrick Boulevard was transferred to petitioner as of April 19, 1999. The Toomer Liquors partnership was dissolved, and petitioner was issued a Certificate of Discontinuance of Business

as Partners which was filed on August 19, 1999. Petitioner filed a certificate of doing business under the name Toomer Liquors certifying that she was the successor in interest to Charles F. Toomer and Eloise A. Toomer. The certificate of doing business was also filed on August 19, 1999. As noted, Toomer Liquors filed a 1993 Federal partnership return. Petitioner is shown as a partner on that return.

29. Petitioner signed several tax documents as the owner of Toomer Liquors in periods subsequent to the audit period. She signed and returned an audit appointment letter dated August 3, 1999; she signed a consent to extend the period of limitation for assessment of sales taxes on August 4, 1999; she signed a second consent on September 23, 1999; and she signed a power of attorney in connection with a sales tax and income tax audit on May 22, 2000.

30. Petitioner also signed eleven sales tax returns within the period March 1, 1990 through May 31, 1993.

31. Several documents filed during the audit period on behalf of Toomer Liquors bear the signature of Eloise Toomer. These include: (1) three sales tax returns for the quarterly periods ending May 31, 1994; November 30, 1994; and February 28, 1995; (2) a letter to the Division dated December 21, 1993; and (3) a Statement of Proposed Audit Adjustment for the period September 1, 1990 through May 31, 1993, dated December 27, 1993. The signatures as they appear on these documents are very similar to signatures appearing on documents filed with the Division for periods before and after the instant audit period.

SUMMARY OF THE PARTIES' POSITIONS

32. Petitioner claims that she never received the Notice of Determination because it was not mailed to her last known address, and, as a consequence, that the notice was not properly issued and should be cancelled. She maintains that the audit results were incorrect and argues

that the Division should have made allowances for breakage, theft and ending inventory. She alleges that she was precluded from participating in the business during the audit period by the orders of protection issued against her and the actions of her ex-husband, and for this reason she denies being a person responsible for collection of sales tax during the audit period. She claims that no real partnership existed during the audit period. Petitioner denies that the signatures on the sales tax returns filed during the audit period are hers. She also denies signing a Statement of Proposed Audit Adjustment, dated December 27, 1993, for a prior audit.

33. The Division acknowledges that petitioner never received the Notice of Determination, but argues that the proper remedy is to provide petitioner with a hearing and not to cancel the notice. The Division notes that the burden of proof is on petitioner to show any error in the audit, and it claims that petitioner failed in this burden of proof. The Division maintains that as a partner of Toomer Liquors she is liable for sales taxes due from the partnership regardless of whether she actively participated in the operation of the business during the audit period. Moreover, the Division argues that petitioner had actual authority to operate the business, noting that petitioner signed several sales tax documents during the audit period, and it argues that the evidence does not establish that the signatures on those documents are not petitioner's. The Division also maintains that petitioner's claim that she was seeking a loan to satisfy the sales tax assessment is an admission of liability.

CONCLUSIONS OF LAW

A. At the time the Notice of Determination in this matter was issued, December 13, 1996, section 1138(a)(1) of the Tax Law provided, as pertinent:

If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be

available. . . . Notice of such determination *shall be given* to the person liable for the collection or payment of the tax.¹ (Emphasis added.)

Tax Law § 1147(a)(1) provides:

Any notice authorized or required under the provisions of [Article 28] may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person *at the address given in the last return filed by him pursuant to the provisions of this article 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*. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice. (Emphasis added.)

These provisions of the Tax Law were construed by the Appellate Division, Third Department, in *Matter of Ruggerite, Inc. v. State Tax Commn.* (97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). The Court held that the proper mailing of a notice of determination to a taxpayer at his or her last known address creates a presumption of receipt which may be rebutted with proof that the notice was never received. Where the presumption of receipt is successfully rebutted, the 90-day time period for requesting a conference in the BCMS or a hearing under section 1138 of the Tax Law is not triggered, and a petitioner is entitled to a conference or a hearing (*Matter of Ruggerite, Inc. v. State Tax Commn, supra; Matter of Karolight, Ltd.*, Tax Appeals Tribunal, February 8, 1990).

B. It has been established that petitioner did not receive the Notice of Determination mailed to her on December 13, 1996. The only question is whether it was properly mailed to

¹ Tax Law § 1138(a)(1) has since been amended and now provides for the mailing, rather than the giving, of notice to persons liable for collection or payment of the tax at that person's last known address; in addition, such a notice becomes a fixed and final assessment unless a petition is filed within 90 days (L 1996, ch 267, §§ 1,3, applicable to tax years commencing on or after January 1, 1997). Thus, the presumption of receipt contained in Tax Law § 1147(a)(1) is now irrebutable.

petitioner's "last known address," and the evidence shows that it was. The notice was mailed to 220-30 Merrick Boulevard, Springfield Gardens, New York 11413. This is the address appearing on the sales tax returns filed for Toomer Liquors and also on petitioner's 1993 personal income tax return. The Division has no record of receipt of a personal income tax return for the years 1994 and 1995. Thus, the only address available to the Division was the Merrick Boulevard address.

Petitioner argues that the Division knew that she was no longer residing at the Merrick Boulevard address and should have conducted an investigation to obtain the location of petitioner's residence. I disagree. The burden was on petitioner to keep the Division apprised of her last known address; the Division had no obligation to conduct a private investigation.

Petitioner's claim that the Notice of Determination must be invalidated since petitioner never received it is rejected. In accordance with the decision in *Ruggerite*, the proper remedy under the circumstances that exist here is to treat the petition as a timely protest of the tax assessment and to provide a hearing on the merits of the case.

C. Once a notice of determination is issued, the burden of proof is on petitioner to demonstrate that the basis for assessment is unreasonable or that the amount of tax assessed is incorrect (*Matter of Micheli Contracting Corp. v. New York State Tax Commn.*, 109 AD2d 957, 486 NYS2d 448; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452). Here, petitioner has failed to establish any grounds for canceling or adjusting the Notice of Determination issued to her.

The books and records of Toomer Liquors were inadequate for the purpose of performing a detailed audit. "Every person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the

commissioner of taxation and finance may by regulation require” (Tax Law §1135[a][1]).

Toomer Liquors had no sales invoices, sales journals, general ledgers or cash receipts journals available on audit and, thus, there were no records of sales to audit. Since the books and records were inadequate to permit a computation of the sales and use taxes due, the Division was authorized to estimate the tax liability of Toomer Liquors using any audit methodology reasonably calculated to reflect the taxes due (Tax Law § 1138[a][1]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91). A test period purchase markup audit has been found to be a reasonable method of estimating sales (*see, Day Surgicals, Inc. v. State Tax Commn.*, 97 AD2d 865, 469 NYS2d 262).

Petitioner offered no evidence to rebut the presumption of correctness of the statutory notice. A taxpayer cannot meet his obligation to prove by clear and convincing evidence that an audit method was unreasonable or the results inaccurate merely by arguing that a different method would have yielded more accurate results (*see, Matter of Scholastic Specialty Corp. v. Tax Appeals Tribunal*, 198 AD2d 84, 603 NYS2d 357, *lv denied* 83 NY2d 751, 611 NYS2d 133; *Matter of Shukry v. Tax Appeals Tribunal*, 184 AD2d 874, 585 NYS2d 531). Thus, petitioner's arguments that the auditor should have made allowances for such things as breakage of bottles, theft and existing inventory are dismissed.

D. Tax Law § 1133(a) places personal liability for taxes imposed, collected or required to be collected under Article 28 upon a “person required to collect such tax.” Tax Law § 1131(1) defines “persons required to collect tax” to include any “officer, director or employee of a corporation . . . who as such officer, director, employee . . . is under a duty to act for such corporation . . . and *any member of a partnership*” (emphasis added). Therefore, petitioner's liability for taxes due from Toomer Liquors arises from her status as a partner and not as a result

of her participation in the business or her knowledge of the acts of any other partner (*Matter of National Urban Ventures, Inc., Partner of Wintergarden Inn Assocs.*, Tax Appeals Tribunal, January 16, 1997; *Matter of Ceglia*, State Tax Commn., October 15, 1986).

The evidence presented by petitioner fails to show that she was not a partner of Toomer Liquors during the audit period. Toomer Liquors filed a Federal partnership return for 1993 showing petitioner as a partner. Petitioner's own evidence establishes that the partnership was not dissolved until August 19, 1999. Therefore, I must conclude that the partnership existed throughout the audit period and that petitioner was a partner during that time. Documents signed by petitioner establish that she continued to act on behalf of the partnership throughout 1993. Sales tax returns bearing her signature were filed on behalf of the partnership in 1994 and 1995. Although petitioner denied signing those returns, the signatures on these documents appear similar to the signatures on documents she admits signing. Other than her own testimony, petitioner presented no evidence to show that these signatures were forgeries as she claims. Moreover, petitioner's testimony was lacking in credibility for several reasons. First, although petitioner forthrightly denied signing the sales tax returns, her testimony regarding the filing of, or failure to file, personal income tax returns in 1994 and 1995 was evasive. Although she claimed to have been ordered out of the premises occupied by Toomer Liquors by several orders of protection, those orders do not support her testimony. She was, apparently, ordered not to telephone Mr. Toomer or harass him in other ways, but the orders do not order her to stay away from the place of business. It would appear from the evidence that by November 1995, when Mr. Toomer filed a petition showing her address as "unknown," petitioner was no longer residing at the Merrick Boulevard address; however, this would not have prevented her from signing sales tax returns for the periods ending May 31, 1994; November 30, 1994; and February

28, 1995. In sum, I do not find that petitioner carried her burden of proof to show that the signatures appearing on any of the sales tax documents filed with the Division were forgeries.

Even if petitioner was prevented from entering the Merrick Boulevard premises by reason of the orders of protection, I know of no principle of law that would have caused the constructive dissolution of the partnership. Accordingly, pursuant to Tax Law § 1131(1), petitioner is deemed a person required to collect tax for Toomer Liquors during the audit period.

E. The petition of Eloise A. Toomer is denied, and the Notice of Determination issued on December 13, 1996 is sustained.

DATED: Troy, New York
September 26, 2002

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE