

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DEREK G. ROGA : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NO. 820965
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2002 through August 31, 2004. :

Petitioner, Derek G. Roga, 5 Bridle Way, Branchburg, New Jersey 08876, 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, 2002 through August 31, 2004.

The Division of Taxation, appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed June 22, 2006, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and (b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached thereto in support of the motion. Petitioner, appearing by Hodgson Russ, LLP (Jack Trachtenberg, Esq., of counsel), did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on July 24, 2006, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed either a Request for a Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals following the issuance of notices of determination for the period June 1, 2002 through August 31, 2004.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation ("Division") is the timeliness of petitioner's petition filed in response to nine notices of determination dated July 18, 2005 and addressed to petitioner, Derek G. Deanaroga,¹ at 5 Bridle Way, Branchburg, NJ 08876-7434.

2. The notices of determination collectively assess additional sales and use taxes in the amount of \$276,100.45, plus penalty and interest, for the period June 1, 2002 through August 31, 2004. The notices bear assessment identification numbers L-025773129-9, L-025773130-9, L-025773131-8, L-025773132-7, L-025773133-6, L-025773134-5, L-025773135-4, L-025773136-3 and L-025773137-2 and the corresponding mailing cover sheets (form DTF-997) bear petitioner's name and address as listed above and certified mail control numbers 7104 1002 9730 0739 1510, 7104 1002 9730 0739 1527, 7104 1002 9730 0739 1534, 7104 1002 9730 0739 1541, 7104 1002 9730 0739 1558, 7104 1002 9730 0739 1565, 7104 1002 9730 0739 1572, 7104 1002 9730 0739 1589 and 7104 1002 9730 0739 1596.

3. Petitioner filed a petition seeking administrative review which was signed by petitioner's representative, Jack Trachtenberg, Esq., of Hodgson Russ LLP, and was dated January 27, 2006. The mailing envelope containing the petition indicates that it was mailed on

¹ The notices of determination are addressed to Derek G. *Deanaroga* while the petition is in the name of Derek G. *Roga*. The record does not contain an explanation for the discrepancy nor does petitioner contest that the notices of determination were erroneously issued.

January 28, 2006, and it was received by the Division of Tax Appeals on February 6, 2006 as evidenced by the indated stamp.

4. In response to the petition, the Division filed an answer dated April 19, 2006. The Division subsequently brought this motion, dated June 20, 2006, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter on the basis that petitioner's protest of the statutory notices was filed more than 90 days from the date of issuance of the statutory notices.

5. In support of its motion for summary determination, the Division submitted: the petition filed with the Division of Tax Appeals; the answer of the Division; a copy of each of the notices of determination; a copy of the certified mail record ("CMR") containing a list of statutory notices allegedly issued by the Division on July 18, 2005; copies of United States Postal Service form 3811-A requesting return receipts for the mailing of the notices of determination; copies of the delivery information received from the United States Postal Service relating to the notices of determination; and the affidavit of John E. Matthews, Esq., the Division's representative, as well as affidavits of Bruce Peltier, Patricia Finn Sears and Heidi Corina, employees of the Division.

6. Notices of determination, such as the ones at issue, are computer-generated by the Division's Case and Resource Tracking System ("CARTS"). The notices are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code and the taxpayer's mailing address.

Each batch of statutory notices is accompanied by a computer printout entitled “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE” (hereinafter “certified mail record” or “CMR”). The CMR lists each statutory notice in the order that it is generated in the batch. The certified control numbers appear on the CMR under the first heading, entitled “CERTIFIED NO.” The assessment numbers are listed under the second heading, entitled “REFERENCE NO.” Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

7. The CMR for the block of statutory notices issued on July 18, 2005, including the 9 notices of determination issued to petitioner, Derek G. Roga, consists of 11 connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service (“USPS”) and the pages remain connected when the postmarked document is returned to CARTS.

With respect to the CMR prepared for the statutory notices mailed by certified mail on July 18, 2005, each of the pages consists of 11 entries with the exception of page 9, which contains 10 entries, and page 11, which contains 8 entries.

In the upper left corner of each page of the CMR is a “run” date which signifies the date and time the CMR was produced by year, Julian day of the year and military time of day. The original date and time of “20051871700” was the date and time that the entire CMR was printed. The CMR is printed approximately ten 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, processed for postage, etc., by the Division’s Mail Processing Center. In the upper left corner of page one of the CMR, the date that the notices were mailed, “7-18-05,” was handwritten by personnel in the Mail Processing Center. This change was made

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

8. Statutory notices that are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for "Outgoing Certified Mail." Each notice in the batch is preceded by a Mailing Cover Sheet and accompanied by any required enclosures. A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the Mail Processing Center staff operates a machine that puts each statutory notice and the associated documents into a windowed envelope so that the addresses and certified number from the Mailing Cover Sheet show through the windows. The staff member then weighs and seals each envelope and places postage and fee amounts on such envelope.

A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against information contained on the CMR. The clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Once the review of the CMR and envelopes is completed, a member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area.

9. The Postal Service representative then affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this case, the Postal Service representative initialed or signed each page of the CMR, affixed a postmark of the Colonie Center Branch of the USPS dated July 18, 2005 to each page of the CMR and wrote the total number of certified mail received. Page 11 of the CMR originally listed 118 pieces of mail; however, the number of pieces received at the post office shows 117 in order to reflect the fact that one piece of certified

mail had been “pulled” from the mailing record of that page. Therefore, page 11 of the CMR now indicates that a total of 117 pieces of mail listed were delivered to the USPS.

10. A piece of mail may be pulled for any number of reasons, including but not limited to, a discrepancy in a name or address. Any piece of mail so pulled will be segregated from the remaining group of statutory notices for correction and issuance at another time.

A review of the certified mail record in this case reflects that one piece of mail was pulled. The piece that was pulled is listed on page nine of the certified mail record. The piece of mail had been assigned certified control number 7104 1002 9730 0739 2326. A line was appropriately placed through the entry for this taxpayer after the statutory notice was pulled. This deletion is reflected in the change of total pieces received at the post office on page 11 of the certified mail record. It is noted that no such mark is made on or near the listings for petitioner.

11. As a matter of standard procedure, to ensure accountability, the CMR may be left overnight at the USPS to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff whereupon it is delivered to the CARTS Control Unit.

12. Pages one and two of the CMR indicate that nine notices of determination with Notice Nos. L-025773129-9, L-025773130-9, L-025773131-8, L-025773132-7, L-025773133-6, L-025773134-5, L-025773135-4, L-025773136-3 and L-025773137-2 were sent to “Deanaroga - Derek G, 5 Bridle Way, Branchburg, NJ 18876 - 7434” by certified mail using control numbers 7104 1002 9730 0739 1510, 7104 1002 9730 0739 1527, 7104 1002 9730 0739 1534, 7104 1002

9730 0739 1541, 7104 1002 9730 0739 1558, 7104 1002 9730 0739 1565, 7104 1002 9730 0739 1572, 7104 1002 9730 0739 1589 and 7104 1002 9730 0739 1596.

A USPS postmark on each page of the CMR confirms that the notices of determination were sent on July 18, 2005.

13. 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.

14. The Division sent nine requests for delivery information/return receipt after mailing forms (USPS Form 3811-A) to the Claims and Inquiry office of the USPS - Albany General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, requesting delivery information on the nine notices of determination described above. The Division received nine responses from the USPS which stated that certified mail numbers 7104 1002 9730 0739 1510, 7104 1002 9730 0739 1527, 7104 1002 9730 0739 1534, 7104 1002 9730 0739 1541, 7104 1002 9730 0739 1558, 7104 1002 9730 0739 1565, 7104 1002 9730 0739 1572, 7104 1002 9730 0739 1589 and 7104 1002 9730 0739 1596 were delivered on July 20, 2005 in Sommerville, New Jersey 08876.

Each response also shows the scanned signature image of the recipient as "D. Roga" above the handwritten name "D. Roga" and the address of the recipient has been written in as "5 Bridle Way."

15. The facts set forth in Findings of Fact "6" through "14" were established through affidavits of Bruce Peltier, Patricia Finn Sears and Heidi Corina. Mr. Peltier is employed as a Mail and Supply Supervisor in the Division's Registry Unit. Mr. Peltier's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS. Ms. Sears is employed as the Supervisor of the Division's CARTS Control Unit. Ms.

Sears's duties include supervising the processing of notices of determination. Ms. Corina is a Legal Assistant 2 in the Office of Counsel. Ms. Corina's duties include the preparation of USPS Form 3811-A. The procedures described in Mr. Peltier's affidavit are the regular procedures followed by Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and Mr. Peltier stated that such procedures were followed on July 18, 2005 in mailing the pieces of certified mail described in his affidavit.

16. The fact that the Postal Service employee wrote the number "117" and circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Peltier. Mr. Peltier's knowledge is based upon his familiarity with the fact that the Mail Processing Center has requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing such number on the CMR.

17. The address of petitioner to which the notices of determination were mailed is the same address listed on the petition filed in this matter.

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. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal

provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New*

York Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

“To defeat a motion for summary judgment, the opponent must produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, petitioner did not respond to the Division’s motion; he is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Peltier, Sears and Corina affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania, supra*).

D. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination or,

alternatively, a request for conciliation conference with BCMS *within 90 days of the mailing of the notice of determination* (*see*, Tax Law § 1138[a][1]; § 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance 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).

F. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

H. The CMR provides sufficient documentary proof to establish that the notices of determination dated July 18, 2005 were mailed, by certified mail, to petitioner at his last known address. The 11-page document originally listed 118 certified control numbers with corresponding names and addresses. One piece of mail was pulled on page 9, leaving 117 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated July 18, 2005 and the initials of a Postal Service employee. The postal employee also wrote and circled the number “117” on the last page of the CMR to indicate the number of pieces of certified mail received at the post office. Accordingly, the Division has established that it mailed the notices of determination as claimed on July 18, 2005.

The Division has also introduced adequate proof through the affidavit of Ms. Corina, the Requests for Delivery Information/Return Receipt After Mailing forms and the USPS responses that the notices of determination were delivered to petitioner at his address.

I. As previously noted, petitioner’s petition was mailed on January 28, 2006. In order to timely protest the notices of determination, petitioner was required to file a petition within 90 days of July 18, 2005. Therefore, it is clear that petitioner filed his petition beyond the statutory 90-day period. As a result, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner’s protest (*Matter of Sak Smoke Shop, supra*) and the petition must, therefore, be dismissed.

J. The Division of Taxation’s motion for summary determination is granted and the petition of Derek G. Roga is dismissed with prejudice.

DATED: Troy, New York
October 12, 2006

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE