

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RANDY ORLANDO : DETERMINATION
 : DTA NO. 821028
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, 2001 through May 31, 2004. :

Petitioner, Randy Orlando, 4 Chevhill Circle, Penfield, New York 14526, 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, 2001 through May 31, 2004.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed August 18, 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)(i) and 3000.9(b). Petitioner, who appeared *pro se*, had 30 days, or until September 18, 2006, to respond to the motion but did not do so. Thus, September 18, 2006 began the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner, Randy Orlando, filed a timely petition with the Division of Tax Appeals protesting a notice of determination issued to him for additional sales and use taxes for the period September 1, 2001 through May 31, 2004.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Randy Orlando, a Notice of Determination, dated August 1, 2005, and addressed to petitioner at “1508-East Ave, Rochester, NY 14610-1620,” indicating his responsibility as an officer or responsible person of PJR Enterprises, LLC. The notice bore assessment identification number L-025872554-2 and asserted sales and use taxes due totaling \$51,417.31, plus interest and penalty in the amounts of \$19,136.54 and \$19,940.22, respectively, for the period September 1, 2001 through May 31, 2004.

2. Petitioner filed a Request for Conciliation Conference on December 16, 2005, which was denied as untimely by Conciliation Order Dismissing Request (CMS No. 212327), dated January 6, 2006, stating:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on August 1, 2005, but the request was not received until December 16, 2005, or in excess of 90 days, the request is late filed.

3. On March 17, 2006, petitioner filed a petition with the Division of Tax Appeals in which he protested Notice of Determination L-025872554-2, on the basis that “the sales tax was all handled by Patrick DiMarzo” and “only Patrick DeMarco knows the actual amount that should have been paid. He has only turned over spotty records to us.” Petitioner also protested the estimated assessment as overstated.

4. In response to the petition, the Division filed an answer dated May 24, 2006, asserting the lack of a timely filed petition. The Division subsequently brought this motion, dated August 18, 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 because petitioner's protest of the statutory notice was filed more than 90 days from the date of issuance of the statutory notice.

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 the Notice of Determination; a copy of the certified mail record ("CMR") containing a reference to the statutory notice allegedly issued by the Division on August 1, 2005; the Conciliation Order Dismissing Request; the affidavits of John E. Matthews, Esq., the Division's representative, as well as affidavits of Patricia Finn Sears and Bruce Peltier, employees of the Division; and the Division's computer record entitled "Individual Taxpayer Profile Inquiry-Address Summary."

5. Notices of determination, such as the one 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.

6. The CMR for the block of statutory notices issued on August 1, 2005, including the Notice of Determination issued to petitioner, consists of 37 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 August 1, 2005, each of the pages consists of 11 entries with the exception of the last page, page 37, which contains 4 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, day of the year and military time of day. The original date and time of “20052021700” was the date and time 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, processed for postage, etc., by the Division’s Mail Processing Center. In the upper left corner of page 1 of the CMR, the date that the notices were mailed, “8-1-05” 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.

7. Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative. The postal 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 representative affixed a postmark to each page of the CMR, circled “400” on page 37 of the CMR and initialed page 37 of the CMR, next to the circled “400.” Pursuant to the CMR, the total number of statutory notices mailed was 400.

8. Page 35 of the CMR indicates that a Notice of Determination with Notice No. L-025872554 was sent to “ORLANDO-RANDY, 1508-EAST AVE, ROCHESTER, NY 14610-1620” by certified mail using control number “7104 1002 9730 0759 6366.” A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on August 1, 2005.

The copy of the Notice of Determination shows that the document bears the assessment identification number of “L-025872554-2” and the certified control number of “7104 1002 9730 0759 6366” which are the identical numbers that appear on the CMR.

9. 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 address 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.

10. 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. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

11. The facts set forth in Findings of Fact "5" through "10" were established through the affidavits of Patricia Finn Sears and Bruce Peltier. Ms. Finn Sears is the supervisor of the Division's CARTS Control Unit, the Division's computer system for generating documents that include, but are not limited to, notices of determination issued to taxpayers. 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. The procedures described in the aforesaid affidavits are the regular procedures followed by the CARTS Control Unit and the Mail Processing Center, respectively, and Ms. Finn Sears and Mr. Peltier stated that such procedures were followed in preparing and mailing the Notice of Determination at issue herein.

12. The Division further submitted a computer record it maintains entitled "Individual Taxpayer Profile Inquiry-Address Summary." This record showed that petitioner's address of record on the date of the alleged mailing of the Notice of Determination was 1508 East Avenue, Rochester, NY 14610.

CONCLUSIONS OF LAW

A. A motion to dismiss may be granted if a defense is founded on documentary evidence (20 NYCRR 3000.9[a][1][i]).

B. 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]).

C. 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).

D. 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).

E. 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 the particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.* , Tax Appeals Tribunal, May 23, 1991).

F. 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.

G. The CMR provides sufficient documentary proof to establish that the Notice of Determination dated August 1, 2005 was mailed, by certified mail, to petitioner at his last known address. The 37-page document listed 400 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated August 1, 2005. The postal employee also wrote the number 400 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 Notice of Determination as claimed on August 1, 2005.

H. As previously noted, petitioner's letter requesting a conciliation conference was mailed on December 16, 2005. In order to timely protest the Notice of Determination, petitioner was required to file a petition or request a conciliation conference within 90 days of August 1, 2005. Therefore, it is clear that petitioner requested a conciliation conference 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.

I. The Division of Taxation's motion for summary determination is granted and the petition of Randy Orlando is dismissed with prejudice.

DATED: Troy, New York
December 18, 2006

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE