

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AL SUTTER'S INC.	:	DETERMINATION
	:	DTA NO. 821131
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 June 1, 2002 through August 31, 2005.	:	

Petitioner, Al Sutter's Inc., c/o Richard Pagano, President, 83 Drexhall Lane, Rochester, New York 14612, 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 June 1, 2002 through August 31, 2005.

The Division of Taxation, appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated October 16, 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 Stanley I. Dobromil, P.A., responded to the motion of the Division of Taxation in a letter dated November 14, 2006, and received by the Division of Tax Appeals on November 16, 2006. Accordingly, the 90-day period for issuance of this determination commenced on November 16, 2006, the date on which petitioner served its response. After due consideration of the documents and arguments presented, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation ("Division") is the timeliness of petitioner's Request for Conciliation Conference filed in response to a Notice of Determination dated November 21, 2005 and addressed to petitioner, Al Sutter's Inc., Curley's Saloon, 511 E. Ridge Rd., Rochester, New York 14621-1203.

2. The Notice of Determination assessed additional sales and use taxes in the amount of \$34,055.69, plus interest and penalties, for a total amount due of \$55,740.95 for the period June 1, 2002 through August 31, 2005. The notice bears assessment identification number L-026349515-9 and the corresponding mailing cover sheet (form DTF-997) bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 1067 3085.

3. Petitioner filed a Request for Conciliation Conference which was signed by its representative, Stanley I. Dobromil, and was dated March 17, 2006. The mailing envelope containing the Request for Conciliation Conference bore a metered postmark of March 17, 2006, and the Request for Conciliation Conference was received by the Division's Bureau of Conciliation and Mediation Services ("BCMS") on March 29, 2006, as evidenced by the indented stamp of BCMS.

4. On April 14, 2006, BCMS issued a Conciliation Order Dismissing Request (CMS No. 213490) which denied petitioner's request for a conciliation conference, 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

November 21, 2005, but the request was not mailed until March 17, 2006, or in excess of 90 days, the request is late filed.

5. A petition seeking administrative review, signed and dated by petitioner's representative, Stanley I. Dobromil, on May 15, 2006, was received by the Division of Tax Appeals on May 22, 2006.

6. In response to the petition, the Division filed an answer dated August 9, 2006. The Division subsequently brought this motion, dated October 16, 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; copies of the Notice of Determination allegedly sent to petitioner and petitioner's representative; a copy of the certified mail record ("CMR") containing a list of statutory notices allegedly issued by the Division on November 21, 2005; a copy of the Request for Conciliation Conference filed by petitioner including the envelope in which it was mailed; the Conciliation Order Dismissing Request; a copy of petitioner's quarterly sales and use tax return for the period June 1, 2005 through August 31, 2005, dated September 20, 2005; and 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.

7. 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.

8. The CMR for the block of statutory notices issued on November 21, 2005, including the Notice of Determination issued to petitioner, consists of five 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 November 21, 2005, each of the pages consists of 11 entries with the exception of the last page, page 5, which contains 6 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, ordinal date, and military time of day. The original date and time of "20053151700" 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 one of the CMR, the date that the notices were mailed, “11-21-05,” 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.

9. 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 “50” on page five of the CMR, and initialed or signed pages one through five of the CMR. Pursuant to the CMR, the total number of statutory notices mailed was 50.

10. Page five of the CMR indicates that a Notice of Determination with Notice No. L-026349515 was sent to “AL SUTTERS INC, 511 E RIDGE RD, ROCHESTER, NY 14621-1203” by certified mail using control number “7104 1002 9730 1067 3085.” A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on November 21, 2005.

The copy of the corresponding Notice of Determination bears the assessment identification number of “L-026349515-9” and the certified control number of “7104 1002 9730 1067 3085,” which are the identical numbers that appear on the CMR.

11. Page five of the CMR also indicates that a Notice of Determination with Notice L-026349515 was sent to “STANLEY DOBROMIL, 260 E FIRST STREET, CORNING, NY 14830” by certified mail using control number “7104 1002 9730 1067 3115.” A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on November 21, 2005.

The corresponding copy of the Notice of Determination bears the assessment identification number of “L-026349515-9” and the certified control number of “7104 1002 9730 1067 3115,” which are the identical numbers that appear on the CMR.

12. 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 window. 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.

13. 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.

14. The facts set forth in Findings of Fact “7” through “13” were established through the affidavits of Patricia Finn Sears and Bruce Peltier. Ms. 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. Sears and Mr. Peltier stated that such procedures were followed in preparing and mailing the Notice of Determination at issue herein.

15. Petitioner’s New York State sales and use tax return (form ST-100), signed by petitioner on September 20, 2005, and signed by petitioner’s representative on September 12, 2005, was the last return filed by petitioner prior to the issuance of the Notice of Determination on November 21, 2005. This return indicated that petitioner’s address was Curley’s Saloon, 511 E. Ridge Road, Rochester, New York 14621-1203.

16. Neither petitioner’s petition seeking administrative review of the Conciliation Order Dismissing Request nor petitioner’s response to the Division’s motion for summary determination contested the Division’s assertions as to when the Division mailed its Notice of Determination to petitioner or as to when petitioner filed its Request for Conciliation Conference. Nor does petitioner allege that the Division mailed its Notice of Determination to an incorrect address.

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, 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 if 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 presented no evidence to contest the facts alleged in the Sears and Peltier affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 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).

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 November 21, 2005 was mailed by certified mail: one copy to petitioner at its last known address, and one copy to petitioner's representative. The five-page document lists 50 certified control numbers with corresponding names and addresses and there are no deletions from those listed thereon. Each page of the CMR bears a USPS postmark dated November 21, 2005, and pages two through five also bear the initials or signature of a postal service employee. The postal employee also circled the entry "50" 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 both copies of the Notice of Determination as claimed on November 21, 2005.

H. As previously noted, petitioner's Request for a Conciliation Conference was mailed on March 17, 2006 and was received by the Division on March 29, 2006. In order to timely protest the Notice of Determination, petitioner was required to file the Request for Conciliation Conference within 90 days of November 17, 2005, i.e., on or before February 16, 2006. Therefore, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest (*see, 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 Al Sutters Inc. is dismissed with prejudice.

DATED: Troy, New York
February 8, 2007

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE