

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SEYMOUR WEXLER** : ORDER  
 : DTA No. 821143  
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 1,1989 through February 28, :  
1993. :  
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Petitioner, Seymour Wexler, 11680 Cardenas Boulevard, Boynton Beach, Florida 33437, 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, 1989 through February 28, 1993.

On June 26, 2006, the Division of Tax Appeals issued to petitioner a Notice of Intent of Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Petitioner responded by letter from Hodgson Russ LLP (Alvan Bobrow, Esq., of counsel) dated July 17, 2006. By a letter dated July 26, 2006, the date by which the Division of Taxation could file a response to the Notice of Intent to Dismiss Petition was extended to August 25, 2006, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). On August 16, 2006, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) submitted affidavits and other documents in support of dismissal. Petitioner filed a reply to the Division's response on August 23, 2006. After due consideration of the documents and arguments submitted by the parties, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider the merits of the issues raised by petitioner in the petition filed herein.

***FINDINGS OF FACT***

1. A Notice of Determination, notice number L-007672373-9, dated August 9, 1993, was issued to Seymour Wexler by the Division of Taxation (“Division”) which assessed additional sales and use taxes in the amount of \$32,403.30, plus interest, for a total amount due of \$38,932.17 for the period September 1, 1989 through February 28, 1993. The Notice of Determination was mailed to petitioner at “3 Clemsford Dr., Wheatly Heights, NY 11798-1504.”

2. Petitioner filed a petition with respect to the assessment with the Division of Tax Appeals on June 7, 2006. No conference in the Bureau of Conciliation and Mediation Services was requested.

3. On June 26, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated as follows:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 1138(a)(1) of the Tax Law, a petition must be filed within ninety days from the date a Notice of Determination is issued.

It appears the Notice of Determination was issued on August 9, 1993, and it appears the petition was not filed until May 7, 2006 or over 12 years later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

4. In response to the issuance of the Notice of Intent to Dismiss Petition, the Division submitted the following: affidavits of four Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel; Bruce Peltier, the Mail and Supply Supervisor in the Division's Registry Unit; Patricia Finn Sears, the Supervisor of the Division's Case and Resource Tracking System ("CARTS") Control Unit; and Carl Moeske, Supervisor of Data Processing in the Enterprises Services Division of the Department of Taxation and Finance; a copy of the petition filed on June 7, 2006; a copy of the Division's certified mail records for August 9, 1993; a copy of the CARTS record of the Notice of Determination issued to petitioner on August 9, 1993; and a copy of the Division's computer record entitled "Individual Taxpayer Profile Inquiry," containing an "Address Summary" which indicated several addresses for petitioner including "3 Clemsford Dr., Wheatly Heights, NY 11798-1504" and "3 Chelmsford Dr., Wheatley Heights, NY 11798-1504."

5. In response to the Issuance of the Notice of Intent to Dismiss Petition, petitioner's representative, Alvan L. Bobrow, Esq., submitted a letter, dated July 24, 2006, which stated that petitioner never received a copy of the Notice of Determination and that the Division could not furnish him with a copy upon request in April and June 2005. Mr. Bobrow agreed that the filing of a petition within 90 days of the issuance of a notice is a prerequisite to the jurisdiction of the Division of Tax Appeals, but contends that the Division of Taxation has the burden of proving that it properly mailed the notice to the taxpayer. In a second letter, dated August 22, 2006, Mr. Bobrow addressed the Division's response to the Notice of Intent to Dismiss Petition, arguing that the Division's case is flawed because it cannot produce a copy of the Notice of Determination allegedly issued to petitioner; it has not produced individuals who can attest to

departmental procedures at the time the notice was issued; and the Department has not proved that it mailed anything to petitioner's last known address on August 9, 1993.

6. The affidavit of John E. Matthews, Esq. stated that the Division's record of petitioner's last known address was garnered from the Individual Taxpayer Profile Inquiry-Address Summary. That document indicated that petitioner's address on May 31, 1991 and May 30, 1991 was "3 Clemsford Dr., Wheatly Heights, NY, 11798-1504." However, that document contains unresolved ambiguities. There is a column entitled "Seq#" which runs parallel to the column entitled "Address" with numbers running in sequence from 001 through 016. Four of the sequential numbers were omitted without explanation and one of the omissions, Seq# 003, is in the range of the date the Notice of Determination was allegedly issued to petitioner. Further, there was no indication on the document or in any of the affidavits submitted by the Division of the origin of the addresses listed on the document.

The same document indicated that petitioner's address on April 15, 1994 was "3 Chelmsford Dr., Wheatley Heights, NY, 11798-1504."

7. The affidavits of Bruce Peltier, the Mail and Supply Supervisor in the Division's Registry Unit, Patricia Finn Sears, the Supervisor of the Division's Case and Resource Tracking System ("CARTS") Control Unit, and Carl Moeske, Supervisor of Data Processing in the Enterprises Services Division of the Department of Taxation and Finance were offered to establish the proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures and that the standard procedure was followed in this particular instance.

In addition, the Division offered the Certified Mail Record of items delivered to the United States Postal Service on August 9, 1993 for mailing. On page 27 of the Certified Mail

Record it indicated that one of the items sent, certified number P 911 005 399, containing Notice Number L007672373, was sent to petitioner at “3 Clemsford Dr, Wheatly Heights, NY 11798-1504.”

8. Petitioner stated in his affidavit that he never received the Notice of Determination described in Finding of Fact “7 ” and became aware of it when the Division began enforcement action with respect to the notice.

9. The August 22, 2006 letter of Alvan L. Bobrow, Esq. to the Division of Tax Appeals, submitted as a reply to the Division’s submission herein, alleged that petitioner’s address on August 9, 1993 was not “3 Clemsford Dr., Wheatly Heights, NY 11798-1504 ” but “3 Chelmsford Dr, Wheatley Heights, NY 11798-1504 ” and that the document submitted by the Division entitled “Individual Taxpayer Profile Inquiry-Address Summary” indicated petitioner’s address on August 9, 1993 was “3 Chelmsford Dr, Wheatley Heights, NY 11798-1504.”

#### ***CONCLUSIONS OF LAW***

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a person liable for the collection or payment of tax where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient.” The section further provides that such a notice “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

B. Tax Law § 1133(a) provides that “every person required to collect any tax imposed by this article shall be personally liable for the tax imposed . . . .” A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination, or alternatively, a

request for a conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination* (*see*, Tax Law § 1138[a][1]; 20 NYCRR 3000.3[c]).

C. If a taxpayer fails to file a petition (or request for a conciliation conference) timely protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*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 of Determination was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) 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" (*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. Here, because of the ambiguity surrounding petitioner's correct address on August 9, 1993, proper mailing has not been established and the Division may not benefit from any presumption of delivery of the notice nor does petitioner face the burden of rebutting such a presumption (until the ambiguity has been eliminated). (*Matter of Parisi*, Tax Appeals Tribunal, October 1, 1998.) This conclusion is reached without addressing any issues raised by petitioner with respect to the Division's other proof of mailing.

The “Individual Taxpayer Profile Inquiry-Address Summary” raises material and triable issues of fact that preclude dismissing the petition without affording petitioner a hearing. The Division has relied erroneously upon a document that requires a foundation and further explanation, while petitioner must be afforded an opportunity to provide evidence of his address as of August 9, 1993.

F. Since the granting of a Notice of Intent to Dismiss Petition is essentially the equivalent of the granting of a motion to dismiss or, after issue has been joined, a motion for summary determination dismissing a petition for failure to have timely filed such petition, its impact has serious consequences, i.e., the preclusion of a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), such a motion “shall 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.”

Having found at least one such issue herein, the Notice of Intent to Dismiss Petition must be withdrawn.

G. The Notice of Intent to Dismiss Petition, dated June 26, 2006, is hereby withdrawn and the Division of Taxation shall have 75 days from the date of this order to file an answer to petitioner’s petition.

DATED: Troy, New York  
November 16, 2006

/s/ Joseph W. Pinto  
ADMINISTRATIVE LAW JUDGE