

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
M.L. & A. DINER CORPORATION	:	DETERMINATION
		DTA NO. 821147
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 December 1, 1999 through August 31,	:	
2002.	:	

Petitioner, M.L. & A. Diner Corporation, 42 Jerusalem Avenue, Hicksville, New York 11801, 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 December 1, 1999 through August 31, 2002.

The Division of Taxation, appearing by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed September 19, 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 Stephen P. Sophir, CPA, did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on October 20, 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, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (the “Division”) is the timeliness of petitioner’s Request for Conciliation Conference filed in response to a Notice of Determination dated February 9, 2004 and addressed to petitioner, M.L. & A. Diner Corp., Empire Diner, at 42 Jerusalem Ave., Hicksville, NY 11801-4935.

The Notice of Determination assesses additional sales and use taxes in the amount of \$81,255.22, plus penalty and interest, for a total amount due of \$142,903.97 for the period December 1, 1999 through August 31, 2002. The notice bears assessment identification number L-023517754-1 and the corresponding mailing cover sheet (form DTF-997) bears petitioner’s name and address as listed above and certified control number 7104 1002 9730 0389 8105. A copy of the Notice of Determination was mailed to petitioner’s representative at the time, Steven Soumakis. The corresponding mailing cover sheet bears Mr. Soumakis’s address, 9933 Third Ave., Brooklyn, NY 11209 and certified control number 7104 1002 9730 0389 7320.

3. Petitioner filed a Request for Conciliation Conference which was signed by petitioner’s representative, Stephen P. Sophir, and was dated February 27, 2006. The mailing envelope containing the Request for Conciliation Conference indicates that it was mailed on February 28, 2006 and it was received by the Bureau of Conciliation and Mediation Services on March 2,

2006 as evidenced by the indated stamp. There is no evidence in the record that petitioner submitted any earlier request for a conciliation conference.

4. On March 17, 2006, the Bureau of Conciliation and Mediation Services issued to petitioner a Conciliation Order Dismissing Request which stated:

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 February 9, 2004, but the request was not mailed until February 28, 2006, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

5. In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals, to which the Division filed an answer dated August 9, 2006. The Division subsequently brought this motion, dated September 19, 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.

6. In support of its motion for summary determination, the Division submitted: the Request for Conciliation Conference dated February 27, 2006; the Conciliation Order Dismissing Request; 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 sales and use tax return filed by petitioner for the period September 1, 2003 through November 30, 2003; a copy of the certified mail record ("CMR") containing a list of statutory notices allegedly issued by the Division on February 9, 2004; and the affidavit of John E. Matthews, Esq., the Division's representative, as well as affidavits of Bruce Peltier and Patricia Finn Sears, 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 control 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." The names and addresses of the taxpayers are listed under the third heading, entitled "NAME OF ADDRESSEE, STREET AND PO ADDRESS." 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 on February 9, 2004, including the Notice of Determination issued to petitioner, M.L. & A. Diner Corp., consists of 17 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 February 9, 2004, each of the pages consists of 11 entries with the exception of page 17, which contains 10 entries.

In the upper left corner of each page of the CMR is the Run which signifies the date and time the CMR was produced by year, the ordinal day of the year and military time of day. The

original date and time of “20040301733” 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 the notices were mailed, “2/9/04,” 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. 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 the 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. The Postal Service representative then affixes a U.S. postmark and/or his or her initials or signature to a page or pages of the CMR. In this case, the Postal Service representative initialed or signed all 17 pages of the CMR, affixed a postmark of the Colonie Center Branch of the USPS dated February 9, 2004 to each page of the CMR and wrote and circled the total number of pieces of certified mail received as 186 pieces on page 17 of the CMR.

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. Page 15 of the CMR indicates that a Notice of Determination with Notice No. L-023517754 was sent to "M.L. & A. DINER CORP., 42 JERUSALEM AVE, HICKSVILLE, NY 11801-4935" by certified mail using certified control number 7104 1002 9730 0389 8105. Page seven of the CMR also indicates that the same Notice of Determination was sent to "STEVEN SOUMAKIS, 9933 THIRD AVE, BROOKLYN, NY 11209" by certified mail using certified control number 7104 1002 9730 0389 7320.

A USPS postmark on each page of the CMR confirms that the Notice of Determination was sent on February 9, 2004.

13. In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

14. The facts set forth in Findings of Fact "7" through "13" were established through affidavits of Bruce Peltier and Patricia Finn Sears. 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. 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 February 9, 2004 in mailing the pieces of certified mail described in his affidavit.

15. The fact that the Postal Service employee wrote and circled the number "186" on the last page of the CMR to indicate that this was the number of pieces received was also 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.

16. The address of petitioner to which the Notice of Determination was mailed is the same address listed on petitioner's sales and use tax return for the period September 1, 2003 through November 30, 2003, which was the last return filed prior to the issuance of the Notice of Determination.

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, 562, 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, 179). 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, 881).

“To defeat a motion for summary judgment, the opponent must also 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; it is therefore deemed to have conceded that no question of fact requiring a hearing exist (*Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Peltier and Sears 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 the 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 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 Notice of Determination dated February 9, 2004 was mailed, by certified mail, to petitioner at its last known address. The 17-page document listed 186 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated February 9, 2004. The postal employee also wrote and circled the number “186” 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 February 9, 2004.

I. As noted above, petitioner’s Request for Conciliation Conference was mailed on February 28, 2006. In order to timely protest the Notice of Determination, petitioner was required to file a petition or a request for a conciliation conference within 90 days of February 9, 2004. Therefore, it is clear that petitioner filed its petition or requested a conciliation conference well 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 denied.

J. The Division of Taxation's motion for summary determination is granted and the petition of M.L. & A. Diner Corporation is dismissed with prejudice.

DATED: Troy, New York
January 18, 2007

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE