

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION
SHOP SMART OF SHIRLEY, INC.	:	DTA NO. 821188
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law	:	
for the Period Ended April 25, 2005.	:	

Petitioner, Shop Smart of Shirley, Inc., c/o Asif M. Sheikh, 646 Route 112, Patchogue, New York 11772, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended April 25, 2005.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed December 15, 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); (b). Petitioner did not submit any response to the Division's motion, although permitted to do so by January 15, 2007. Thus, the 90-day period for issuance of this determination began on January 15, 2007. After due consideration of the documents and arguments presented, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Shop Smart of Shirley, Inc., a Notice of Determination, dated September 8, 2005, addressed to petitioner in care of Dollar Point, 248 Moriches Middle Island Road, Manorville, NY 11949-2056. The notice bore assessment identification number L-026057280-7 and asserted penalty due of \$2,000.00 for the period ended April 25, 2005.

2. On March 14, 2006, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”), protesting the Notice of Determination, dated September 8, 2005, stating that it did not owe the penalty asserted because it did not sell cigarettes at any time. Further, petitioner stated that it vacated the premises at 248 Moriches Middle Island Road in Manorville, New York on or about April 30, 2005 and did not receive the Notice of Determination sent to that address on September 8, 2005. Attached to the petition was a statement from the landlord at 248 Moriches Middle Island Road in Manorville, New York which confirmed petitioner’s vacating of the premises on or about April 30, 2005.

3. Petitioner filed its final New York State and Local Quarterly Sales and Use Tax Return, for the quarter ended May 31, 2005, on or about June 10, 2005. On said return it listed its address as c/o Dollar Point, 248 Moriches Middle Island Road, Manorville, NY 11949.

4. On March 31, 2006, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

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 September 8, 2005, but the request was not mailed until March 14, 2006, or in excess of 90 days, the request is late filed.

5. Notices of determination, such as the one at issue herein, were computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also included the preparation of a certified mail record ("CMR"). The CMR listed those taxpayers to whom notices of determination were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service ("USPS") through return of the CMR to the CARTS Control Unit.

6. Each computer-generated notice of determination was predated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "CERTIFIED NO." The CMR listed an initial date (the date of its printing) in its upper left corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR stated an initial date of August 29, 2005 ("20052411700," referring to the 241st day of the year and time of day expressed on a 24-hour basis, or 5:00 P.M.) which was manually changed to "9-8-05," or September 8, 2005.

7. After a notice of determination was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighed and sealed each envelope and affixed postage and fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing

Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the USPS and affixed a dated postmark or his signature or initials, or both, to the CMR.

8. In the ordinary course of business, a Mail Processing Center employee picked up the CMR from the USPS on the following day and returned it to the CARTS Control Unit.

9. In the instant case, the CMR was a 16-page, fan-folded (connected) computer-generated document entitled “Certified Record for Presort Mail-Assessments Receivable.” All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR listed 167 control numbers. Each such certified control number was assigned to an item of mail listed on the 16 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

10. Information regarding the Notice of Determination issued to petitioner was contained on page 13 of the CMR. Corresponding to certified control number 7104 1002 9730 0841 5482 was notice number L-026057280, along with petitioner’s name and address, which was identical to that listed on the subject Notice of Determination.¹

11. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated September 8, 2005, and the initials of the postal employee, verifying receipt of the items.

¹The name “Dollar Point,” although not reflected on the CMR, did appear on the Notice of Determination and on the cover sheet which accompanied the notice (form DTF-997), appeared through the window in the envelope, and also contained the certified control number matching that listed for petitioner on the CMR.

12. The last page of the CMR, page 16, contained a preprinted entry of “167” corresponding to the heading “Total Pieces and Amounts Listed.” Below this preprinted entry was a handwritten “167,” and beneath it were the aforementioned initials of a Postal Service employee and, to the right, a postmark of the Colonie Center Branch of the USPS bearing the date “September 8, 2005.” These same initials appeared on each page of the CMR.

13. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the manual writing of the number “167” indicated that all 167 pieces listed on the CMR were received at the post office.

14. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

15. The facts set forth above in Findings of Fact “5” through “14” were established through the affidavits of Patricia Finn Sears, sworn on December 7, 2006, and Bruce Peltier, sworn on December 14, 2006. Ms. Sears was employed as the Supervisor of the Division’s CARTS Control Unit. Ms. Sears’s duties included supervising the processing of notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Division’s Registry Unit. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

16. The address of petitioner on the subject Notice of Determination, c/o Dollar Point, 248 Moriches Middle Island Road, Manorville, NY 11949-2056, was the same as the address provided on petitioner’s final New York State and Local Quarterly Sales and Use Tax Return for the quarter ended May 31, 2005, filed on June 10, 2005, the last return filed before the notice herein was issued on September 8, 2005, less than three months later.

CONCLUSIONS OF LAW

A. A motion for summary determination 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 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. Here, petitioner did not respond to the Division's motion. In its petition it merely asserted that the business had closed on or about April 30, 2005 and it never received the Notice of Determination. However, since petitioner did not appear on this motion and presented no evidence to contest the facts alleged in the Sears and Peltier affidavits, those facts are deemed admitted (*see, Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Whelan v. GTE Sylvania, Inc.*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer subject to tax under Article 20 of the Tax Law if a return required under Article 20 is incorrect or insufficient. Pursuant to such section, the determination "shall finally and irrevocably fix the tax" assessed by such notice, unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS, with the time period for filing such a request also being 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conciliation conference within the 90-day period is a jurisdictional prerequisite

which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

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 (i.e., mailing) of the notice, and the Division bears the burden of proving both the fact and date of mailing (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice is found to have been properly mailed by the Division, a presumption arises that the notice was received by the person to whom it was addressed. However, the "presumption of receipt" does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of demonstrating proper mailing rests with the Division (*see, e.g., Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). In turn, the mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of 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 Novar TV & Air Conditioner Sales & Serv., supra*).

E. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Peltier, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination, and that said procedures were followed in this case. Further, the record is clear that the address listed on the subject Notice of Determination was petitioners's last known

address as indicated by the address provided on the New York State and Local Quarterly Sales and Use Tax Return for the quarter ended May 31, 2005, filed on June 10, 2005, less than three months before the Notice of Determination was issued.

F. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination in issue was mailed to petitioner on September 8, 2005. Specifically, this 16-page document listed certified control numbers with corresponding names and addresses, including petitioner's control number, notice of determination number, name and address. As stated in the facts above, the name "Dollar Point" was dropped from the address on the CMR, but it appeared on the Notice of Determination and the cover sheet accompanying the Notice, form DTF-997, the latter of which contained the certified control number appearing on the CMR. Therefore, considered in light of all the evidence, the absence of the words "Dollar Point" on the CMR was immaterial and is considered inconsequential. (*See, Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892.)

All 16 pages of the CMR bore a Postal Service postmark dated September 8, 2005. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee initialed each page of the CMR and wrote "167" by hand on the last page to indicate receipt by the USPS of all 167 pieces of mail listed thereon (*cf., Matter of Roland, supra*). This evidence is sufficient to establish that the Division mailed the subject Notice of Determination on September 8, 2005.

G. Petitioner's request for conciliation conference was filed on March 14, 2006, over six months after the date of mailing of the Notice of Determination. The request was therefore untimely filed (*see*, Tax Law § 478).

H. The Division of Taxation's Motion for Summary Determination is granted, and the petition of Shop Smart of Shirley Inc. is dismissed.

DATED: Troy, New York
April 5, 2007

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE