STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **EVA TACZANOWSKI** for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 2001 through August 31, 2004.	DETERMINATION DTA NO. 821740

Petitioner, Eva Taczanowski, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2001 through August 31, 2004.

On May 20, 2008, the Division of Taxation, appearing by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel), and petitioner, appearing by Lawrence R. Cole, CPA, waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by December 18, 2008, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether, under the facts and circumstances herein, petitioner's application for refund of sales tax should be granted.

FINDINGS OF FACT

1. The Division of Taxation (Division) performed a sales tax field audit for the period September 1, 2001 through August 31, 2004 of the business operation of Amy Liquors, Inc., a retail liquor store located in Middle Island, New York. Gross and taxable sales were computed based upon third-party verification of purchases and multiplied by a markup percentage based upon store shelf prices and actual purchase prices as indicated on the purchase invoices. The audit resulted in additional taxable sales of $826,688.15 and additional tax due of $68,006.90. A Notice of Determination of additional sales tax due, plus penalty and interest, was issued to the corporation (notice number L-024842890). The original amount of tax assessed was $63,698.20, which was subsequently reduced to tax due of $53,676.70, plus penalty and interest, following a Bureau of Conciliation and Mediation Services (BCMS) conference.

2. On December 13, 2004, the Division created a Notice of Determination addressed to petitioner, Eva Taczanowski, at a post office box in Pompano Beach. The notice, which bore assessment identification number L-024846307, asserted additional sales and use taxes due for the period December 1, 2001 through August 31, 2004 in the amount of $53,509.05, plus penalty and interest. Petitioner was assessed as an office or responsible person of Amy Liquors, Inc. The parties dispute whether this notice was properly issued.

On the same date, the Division issued to Joseph Chaikel, as an officer or responsible person of Amy Liquors, Inc., a Notice of Determination assessing the same amount of tax, penalty and interest for the same period.

3. On February 14, 2005, the Division created two additional notices of determination addressed to petitioner, Eva Taczanowski, at the same post office box in Pompano Beach, Florida. The notices, which bore assessment identification numbers L-025031894 and L-

025033055, asserted additional sales and use taxes due for the period September 1, 2001 through November 30, 2001 and for the period September 1, 2001 through August 31, 2004 in the amounts of $10,189.15 and $4,308.68, respectively, plus penalty and interest. Again, petitioner was assessed as an officer or responsible person of Amy Liquors, Inc. The parties dispute whether these notices were properly issued.

On the same date, the Division issued to Joseph Chaikel, as an officer or responsible person of Amy Liquors, Inc., a Notice of Determination assessing sales tax due for the period September 1, 2001 through November 30, 2001 in the amount of $4,308.68, plus penalty and interest.

4. Petitioner did not protest any of the notices of determination within 90 days of the dates listed thereon.

5. In addition to the assessments issued to Amy Liquors, Inc., Joseph Chaikel and petitioner, a Notice of Determination was issued to Podniesinski Family, Inc., for the unpaid sales tax liability of Amy Liquors, Inc., as a purchaser in a bulk sales transaction which failed to comply with the requirements of Tax Law § 1141(c). Podniesinski Family, Inc., had purchased the business operation from Joseph Chaikel.

6. For the period December 1, 2001 through August 31, 2002, the New York State and local quarterly sales and use tax returns, Form ST-100, of Amy Liquors, Inc., were signed by petitioner. The sales and use tax returns for the period September 1, 2002 through February 28, 2003 were signed by Joseph Chaikel, as president.

7. The tax year 2001 U.S. Income Tax Return for an S Corporation, Form 1120S, of Amy Liquors, Inc., indicates on the Shareholder's Share of Income, Credits, Deductions, etc., Schedule K-1, that petitioner's share of stock ownership was 100 percent. For the tax years 2002 and

2003, Schedule K-1 indicates that Joseph Chaikel owned 100 percent of the stock of Amy Liquors, Inc.

8. On February 19, 2003, the New York State Liquor Authority, Division of Alcoholic Beverage Control, approved a change in the ownership of Amy Liquors, Inc., in which Joseph Chaikel became president and 100 percent owner of the shares of the corporation.

9. On November 15, 2005, Amy Liquors, Inc., by its representative Roy S. Nilsson, CPA, executed a BCMS consent in which the corporation agreed that Notice of Determination L–24842890 be recomputed to sales tax due of $53,676.71, plus penalty and interest. The total amount of sales tax due from petitioner, Joseph Chaikel and Podniesinski Family, Inc., was reduced accordingly.

10. On September 6, 2006, the Tax Compliance Division of the Department of Taxation and Finance docketed a warrant (ID # E-413710573-W002-3) in the County of Suffolk, New York, against Eva Taczanowski in the amount of $48,743.47. On November 10, 2006, the Tax Compliance Division issued a tax compliance levy (Levy ID# E-413710573-L003-2) against a bank account of petitioner maintained at the Wachovia Bank in the amount of $49,514.39. Tax compliance levy ID E-413710573-L003-2 was closed by the Tax Compliance Division on December 12, 2006 because petitioner did not have an account with the Wachovia Bank at the time the levy was served.

11. Ms. Mary Lee C. Kiernan is employed in the Department of Taxation and Finance's Protest & Exception Bureau (PERB), Individual Exception Resolution Unit. Ms. Kiernan has been trained to receive telephone calls placed to the Individual Exception Resolution Unit by taxpayers. It is Ms. Kiernan's practice upon receipt of a telephone call to verify the individual she is speaking to by obtaining the caller's name, address, date of birth and social security

number. During a conversation, she will enter relevant information into her computer as well as take handwritten notes as required.

On April 6, 2007, Ms. Kiernan received a telephone call from Joseph Chaikel regarding Amy Liquors, Inc. Mr. Chaikel indicated that he wanted to pay in full the notices of determination issued to Eva Taczanowski, as a responsible officer of Amy Liquors, Inc. Ms. Kiernan noted in the case contact information sheet that as of April 6, 2007, the payout figure for the assessments issued to petitioner was $51,178.92. Mr. Chaikel stated during the conversation that he would call back to obtain the revised pay out figure as he would be taking out a loan to pay the sales tax obligations. He also stated that he did not want petitioner to have an income execution levied against her.

On April 9, 2007, Ms. Kiernan received a follow-up telephone call from Joseph Chaikel. During the conversation, Mr. Chaikel stated that he would be remitting payment in the amount of $51,260.54 in certified funds to pay in full the assessments issued to petitioner. Ms. Kiernan indicated in this case contact information entry that the payment would also pay in full the notices of determination issued to Mr. Chaikel as well.

12. According to the Division's Case and Resource Tracking System (CARTS), three payments were received by the Department of Taxation and Finance to satisfy Notice of Determination L-024842890 issued to Amy Liquors, Inc. The payments were applied on January 30, 2006 in the amount of $57,380.12, April 26, 2006 in the amount of $1,356.80 and April 9, 2007 in the amount of $51,260.54. The first two payments were made on behalf of Podniesinski Family, Inc., as indicated on the reference line of the checks presented to and cashed by the Department. The third payment was made by a treasurer's check issued by the Mercantile Peninsula Bank of Princess Anne, Maryland. It references the identification number (ID # E-

413710573-W002-3) of the warrant docketed by the Tax Compliance Division on September 6, 2006 in Suffolk County, New York, against petitioner.

13. The payment of $51,206.54 was also applied to the notices of determination issued to petitioner as follows:

ASSESSMENT ID #	AMOUNT APPLIED
L-024846307	$30,685.37
L-025031894	12,417.98
L-025033055	8,110.52

There was an overpayment in the amount of $46.67.

14. On June 8, 2007, the Division received from petitioner an Application for Credit or Refund of Sales or Use Tax. The claim requested a refund of $60,000.00 for the period 2001 through 2005. The refund claim stated that the notices of determination were never received by petitioner, that there was no basis for the officer responsibility assessments and that the sales tax assessed, if determined to be due, should be allocated between petitioner and Joseph Chaikel as the business changed hands during the audit period.

15. The Division issued to petitioner, on July 2, 2007, a letter denying the refund claim in full. The letter stated, in part, as follows:

> According to Article 28 of the tax law, section 1139(c), ". . . No refund or credit shall be made of a tax, interest or penalty paid after a determination by the commissioner made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the division of tax appeals pursuant to article 40 of this chapter or by the commissioner of his own motion, or in a proceeding for judicial review provided for in section two thousand sixteen of this chapter, in which event a refund or credit shall be made of the tax, interest or penalty found to have been overpaid."

16. On June 22, 2007, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition on the basis that the petition was filed more than 90 days after the issuance of the notices of determination. A copy of the Notice of Intent to Dismiss Petition was sent to the Division of Taxation's representative. In response, on July 25, 2007, the Division's attorney informed the Petition Intake Unit that the Division did not have any documentation to submit on the issue raised in the Notice of Intent to Dismiss. On August 22, 2007, the Petition Intake Unit informed petitioner that the Notice of Intent to Dismiss Petition had been rescinded and this matter would be heard on the merits.

17. In her petition, petitioner contests the appropriateness of the Division's issuance of the notices of determination, claiming she never received the notices and thus was unable to timely file a protest to them.

SUMMARY OF THE PARTIES' POSITIONS

18. Petitioner contends that the Division has the burden of proving proper mailing of the notices of determination to petitioner and that the Division failed to meet that burden. Petitioner notes that the Division failed to produce any evidence relating to the mailing of the notices. Accordingly, petitioner contends, since the subject assessments did not become fixed and final and were not subject to collection, the Division improperly seized her bank account, and consequently, petitioner is entitled to a refund.

19. Petitioner also argues that the Division did not issue the notices within the period of limitations provided for by Tax Law §§ 1138 and 1147, because petitioner did not receive the notices, and the three-year statute of limitations for the audit period has now expired.

20. The Division contends that the issuance of the notices of determination was proper and that therefore the tax became fixed and final. The Division asserts that petitioner failed to

establish that she did not receive the notices, and that even if petitioner did not receive the notices, the proper remedy under such circumstances is a hearing on the merits. The Division further asserts that not all of the requirements imposed on the Division to prove mailing where the Division contests the timeliness of a petition should apply where, as here, the timeliness of the petition is not at issue. More specifically, the Division asserts that since petitioner is asserting the right to a refund, petitioner must prove that the subject notice was not properly mailed. The Division contends that petitioner has failed to make such a showing.

21. The Division further asserts that a tax is not erroneously, illegally or unconstitutionally paid if at the time the taxes were paid they were due and owing. In this case, the Division asserts, the assessments had become fixed and final at the time of payment, thus the tax at issue was due and owing. Hence no refund is allowable.

22. With respect to the allegation that the statute of limitations for assessment has expired, the Division contends a defense based upon the expiration of a period of limitations is an affirmative defense that must be raised and proven by the taxpayer. Only after the taxpayer has established the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice after the limitation period does the burden of going forward with evidence to demonstrate that the bar of the statute is not applicable shift to the Division.

CONCLUSIONS OF LAW

A. Where the timeliness of a petition or request for a conciliation conference is at issue, it is well established that the Division has the burden to show that it properly mailed the subject statutory notice and when such notice was mailed (***see e.g***. ***Matter of Novar TV & Air Conditioner Sales & Service, Inc***., Tax Appeals Tribunal, May 23, 1991). The rationale for the

imposition of this burden on the Division is that evidence of mailing is within its knowledge and, implicitly, not within the knowledge of the taxpayer (***see Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). The same rationale applies in the instant matter. Although the timeliness of petitioner's protests of the refund claim denials is not at issue, petitioner explicitly raised the issue of the proper issuance of the subject notices of determination in her refund application, petition and amended petition. As noted above, since evidence of proper issuance of the notices is within the Division's knowledge, the Division properly has the burden of proof on this issue.

The Division contends that since petitioner is seeking a refund or is raising a defense based on nonreceipt, petitioner has the burden to show nonreceipt of the notice, following which the Division would have the burden of going forward to show proper issuance. In support of this proposition, the Division cites cases where petitioners raised a statute of limitations defense to a Notice of Determination (***Matter of Pittman***, Tax Appeals Tribunal, February 20, 1992; ***Matter of Jencon***, Tax Appeals Tribunal, December 20, 1990). This contention is rejected. Where a taxpayer raises a statute of limitations defense to an assessment, the taxpayer has the burden of making a prima facie showing of when the limitations period commenced, when it expired and the mailing or receipt of a statutory notice after the running of the period. Where the taxpayer meets this burden, the Division then has the burden of going forward to show that the statutory bar does not apply (***see e.g. Matter of Pittman***). Since evidence as to when a limitations period commenced (such as the date of filing a return) and evidence as to the date of receipt of a statutory notice is ordinarily within the knowledge of the taxpayer, it is appropriate that the taxpayer bear the burden of establishing a prima facie case in order to avail herself of the statute of limitations defense. Here, however, the question presented is whether the statutory notice was

properly issued. As discussed, such evidence is not within the knowledge of the taxpayer and the burden of proving proper mailing rests with the Division.

B. 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). 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***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***). The Division must prove both the fact and date of mailing of the notice at issue (***see Matter of Katz***).

Upon review of the record it is clear that the Division has failed to meet its burden to prove the fact and date of mailing of the notices of determination. There is no evidence in the record regarding the Division's standard mailing procedures; indeed, there is no evidence in the record from anyone familiar with such procedures. Although the Division did introduce into the record copies of the three notices at issue herein and envelopes marked "return to sender," these documents have not been authenticated, identified or explained in any way by anyone familiar with the Division's mailing procedures and are thus of little probative value. The Division itself admitted in response to the Notice of Intent to Dismiss, based upon the apparent failure of petitioner to file her petition within 90 days of the issuance of the notices, that it did not have any documentation to submit on this issue.

C. The Division's failure to prove the fact and date of mailing compels the conclusion that the subject notices of determination were improperly issued and therefore cannot serve as the basis for a valid assessment (***see Matter of Malpica***; ***Matter of Taylor***, Tax Appeals Tribunal,

October 9, 1997; ***Matter of Snyder***, Tax Appeals Tribunal, December 11, 1997). Furthermore, if the notices of determination were not valid assessments, petitioner's liability was not fixed and final, and was therefore not subject to collection (***see*** Tax Law §1138[a][1]). Therefore, any amounts paid by petitioner on the purported assessments were erroneously collected and must be refunded.

D. The Division asserts that the proper remedy for any failure to prove mailing is a hearing on the merits of the assessments. This contention is rejected.

In cases where the timeliness of a petition or request for conciliation conference is at issue, a hearing on the merits of the protest is the proper remedy where the fact of mailing is established, but where the Division has failed to prove the date of mailing of a statutory notice (***see Matter of Novar TV & Air Conditioner Sales & Serv.***). In the instant matter, as noted previously, the Division has failed to prove both the fact and date of mailing. Under such circumstances, again in cases where the timeliness of a protest is at issue, the Tax Appeals Tribunal has dismissed the petition for lack of jurisdiction and cancelled the statutory notice (***see Matter of Malpica***; ***Matter of Taylor***).

E. Tax Law § 1139(a) provides in relevant part:

> In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission . . . or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article . . . .

As is clear from the statute set forth above, actual payment of sales tax is a prerequisite to entitlement to a refund under Tax Law § 1139. Petitioner claimed that the Division seized a bank

account which she maintained at Wachovia Bank pursuant to a warrant docketed in Suffolk County and a tax compliance levy served on the bank. However, the Division established through its Case and Resource Tracking System (CARTS) and an affidavit of a Tax Compliance Bureau employee that the Tax Compliance levy issued to the Wachovia Bank was closed without payment as petitioner did not have an account with the bank at the time the levy was served.

In addition, the Division established through an affidavit of Ms. Kiernan, and the records she kept during two telephone conversations with Joseph Chaikel, that Mr. Chaikel telephoned the Department of Taxation and Finance's Protest & Exception Bureau (PERB), Individual Exception Resolution Unit regarding Amy Liquors, Inc. During that conversation, Mr. Chaikel indicated that he wanted to pay in full the notices of determination issued to petitioner, and that he would call back to obtain the revised payout figure as he would be taking out a loan to pay the sales tax obligations. In a second telephone call, on April 9, 2007, Mr. Chaikel obtained the payout figure and stated that he would be remitting payment in the amount of $51,260.54 in certified funds to pay in full the assessments issued to petitioner. On the same day, the Division received from Mr. Chaikel payment in the amount of $51,260.54.

F. Here, the record is clear that petitioner did not pay the taxes which are the subject of the refund claim. It is also clear that it was Mr. Chaikel, also responsible for the collection and remittance of the corporation's sales tax since there is clear statutory language creating joint and several liability (***see*** Tax Law § 1133(a); ***Matter of Martin v. Commissioner of Taxation***, 162 AD2d 890, 558 NYS2d 239 [1990]; ***Matter of Bailey***, Tax Appeals Tribunal, November 24, 1993), who made the payment which is the subject of the claim for refund. Therefore, as petitioner did not make the payment of the taxes at issue, petitioner's refund claim must be denied.

G. The petition of Eva Taczanowski is denied, and the Division of Taxation's denial of petitioner's claim for refund is sustained.

DATED: Troy, New York
May 21, 2009

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE