

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
166-02 TAVERN CORP. : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 821796
Sales and Use Taxes Under Articles 28 and 29 of :
the Tax Law for the Period June 1, 2003 through :
February 28, 2006 :
:

Petitioner, 166-02 Tavern, Corp., 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, 2003 through February 28, 2006.

On April 24, 2008, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking the dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated April 24, 2008, and annexed exhibits supporting the motion. Petitioner's response to the motion was due by May 23, 2008, which date commenced the 90-day period for issuance of this determination.¹ After due consideration of the affidavits and documents presented by the Division of Taxation, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

¹Petitioner did not file a response to the motion.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because there are no disputed facts and, as a matter of law, the facts mandate a determination in its favor.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, 166-02 Tavern Corp., at its Flushing, New York, address, a Notice of Determination (Notice) dated January 8, 2007 and bearing the Assessment Number L-028062993. The Notice asserts a total amount due of \$39,791.83 for the period June 1, 2003 through February 28, 2006, consisting of \$24,011.85 in sales and use taxes due, plus \$8,911.54 in interest and \$6,868.44 in penalty.

2. With its motion papers, the Division provided proof of proper mailing on January 8, 2007, consisting of the following: (i) an affidavit, dated April 22, 2008 of James Steven VanDerzee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated April 21, 2008, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) from January 9, 2007; and (iv) petitioner's sales tax return for the quarter ending November 20, 2006, filed December 28, 2006.

3. The affidavit of Patricia Finn Sears set forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, page four of the CMR contains information on the subject notice and lists an initial date of December 29, 2006 ("20063631701" referring to 5:01 P.M. on the 363rd day of

2006). Following the general practice, this date was manually changed to “1-8-07,” or January 8, 2007, to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a Mailing Cover Sheet, a separate page which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled “Certified No.” The assessment numbers are listed under the heading entitled “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street and PO Address.” The CMR issued by the Division on January 8, 2007 establishes that a notice with the control number 7104 1002 9730 1691 0733 and assessment number L-028062993 was sent to petitioner at its Flushing, New York, address.²

4. The affidavit of James Steven VanDerzee, the mail and supply supervisor in the Division’s Mail Processing Center (Center), describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also

²Page three of the CMR shows that, on the same date, a notice bearing the control number 7104 1002 9730 1691 0849 as well as the same assessment number (indicating that the notice was a copy) was sent to petitioner’s representative, Stuart Goldenstein, at his Great Neck address. The Mailing Cover Sheet bears the same control number, and the address listed for the representative is the same as listed on the Request.

places his or her signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee marked pages 1 through 11 and affixed postage to each piece of the CMR. On the final page, corresponding to “Total Pieces and Amounts” is the number 113. Beneath this is a handwritten number 113, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date January 8, 2007, confirming that the notices were mailed on that date.

5. Petitioner’s Flushing, New York, address on the CMR matches the address listed on its sales and use tax return for the quarter ending November 30, 2006, which was filed on December 28, 2006. This was the last filed return before the issuance of the Notice of Determination.

6. Since the notice was issued on January 8, 2007, petitioner had 90 days from that date, or until April 9, 2007, to file a Request for Conciliation Conference with BCMS. The postmark on the request petitioner filed was May 21, 2007, which is 42 days late.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all 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 and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539,

544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Accordingly, summary determination may be granted in this matter, and for the reasons discussed below, the Division's motion will be granted.

C. Where the timeliness of a petition or request for conciliation conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (Tax Law § 1147(a)(1); *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of the mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*)

Additionally, Tax Law § 1138(a)(1) requires that the Notice of Determination "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."

D. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., January 8, 2007, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conform with the return filed

by petitioner on December 28, 2006, which satisfies the requirement in Tax Law § 1138(a)(1). It is concluded that the notice was properly mailed and presumed that petitioner received it. Thus, the statutory 90-day time limit to file a petition commenced on January 8, 2007.

E. From the postmark on petitioner's request for conference, it is concluded that it was mailed on May 21, 2007, or 42 days past April 9, 2007, the due date for protesting the notice. Consequently, the Division of Tax Appeals has no jurisdiction over this matter (*see Matter of Rotondi Industries Corp.* Tax Appeals Tribunal, July 6, 2006). Even one day late precludes a taxpayer from having a petition heard since deadlines for filing petitions are strictly enforced (*see Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996). For this reason, the Division of Tax Appeals may not hear this matter and must grant summary determination to the Division of Taxation.

F. Finally, it is observed that petitioner is not without some remedy. It may pay the tax and file a claim for refund. If the refund claim is disallowed, it may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170 [3-a]; § 1139).

G. The Division's motion for summary determination is granted, and the petition of 166-02 Tavern Corp. is dismissed.

DATED: Troy, New York
July 10, 2008

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE