

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ABRAHAM OMER : DETERMINATION
 : DTA NO. 822149
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, 1994 through February 28, 1995. :

Petitioner, Abraham Omer, 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, 1994 through February 28, 1995.

On July 16, 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 pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion were the affidavit of John E. Matthews, dated July 16, 2008, and annexed exhibits supporting the motion. Petitioner had until August 15, 2008 to file a response but failed to do so. Thus, that date commenced the 90-day period for the issuance of this determination. After due consideration of the submissions by the Division of Taxation and petitioner, Arthur S. Bray, Administrative Law Judge, renders the following determination.

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, such facts mandate a determination in its favor.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued three notices of determination, dated August 14, 1997, to petitioner, Abraham Omer, at 37 Lakeview Drive, Patchogue, New York 11772-1009. The notices assessed sales and use taxes as follows:

Assessment ID	Period Ended	Tax	Interest	Penalty	Balance Due
L-013991784-5	08/31/94	\$2,147.52	\$893.19	\$644.15	\$3,684.86
L-013991786-3	11/30/94	2,386.71	893.09	715.87	3,995.67
L-013991785-4	02/28/95	1,789.86	598.05	536.78	2,924.69

Petitioner protested the notices by his Request for Conciliation Conference, filed on February 5, 2008, with the Division's Bureau of Conciliation and Mediation Services (BCMS). The request was sent in an envelope with a metered mail postmark date of January 31, 2008.

2. On February 22, 2008, BCMS issued a Conciliation Order Dismissing Request to petitioner. That order determined that petitioner's protest of the subject notice was untimely and stated, in relevant part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on August 14, 1997, but the request was not received until February 5, 2008, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

Petitioner filed a timely protest to the Conciliation Order.

3. To show proof of proper mailing of the August 14, 1997 notices, the Division provided the following with its motion papers: (i) an affidavit, dated July 15, 2008, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated July 15, 2008, of James Steven VanDerZee, the mail

and supply supervisor of the staff of the Division's mail processing center; (iii) the "Certified Record for Non-Presort Mail" (CMR) postmarked August 14, 1997; and (iv) a transcript of petitioner's 1994 personal income tax return.

4. The affidavit of Patricia Finn Sears sets 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 18 of the 23-page CMR contains information on the particular notices in issue and lists an initial date of August 4, 1997. Following general practices, this date was manually changed to the actual mailing date of August 14, 1997. Taxpayer addresses, certified control numbers, and notice numbers assigned to each notice may be found under their respective columns on the CMR. The certified number and notice number appear on the corresponding notices and accompanying cover sheet, respectively, while the address appears on both. Page 18 of the CMR establishes that those notices with certified numbers P 911 204 978, P 911 204 979 and P 911 204 980 and notice numbers L 013991784, L 013991785 and L 013991786 were sent to petitioner at his Patchogue, New York, address.

5. 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. A Mailing Cover Sheet precedes each notice. A staff member retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and also performs a random review of up to 30 pieces of certified mail by checking the letters

against the information contained on the CMR. A staff member 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 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 confirmed that a USPS employee affixed a postmark to each page of the CMR and initialed the first and last pages of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the number 243. This number has a line placed through it. A short distance below this number is the handwritten number 242 which is circled and initialed confirming that 242 notices were received by the USPS. The USPS postmark on each page of the CMR is from the Colonie Center branch and bears the date August 14, 1997, confirming that the 242 notices were mailed on that date.¹

6. Petitioner's Patchogue, New York, address on the CMR and on the notices match the address listed on his New York State personal income tax return filed on September 19, 1995. This was the last return petitioner filed with the Division before issuance of the notices.

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]).

¹ One piece of certified mail, which is listed on page 20 of the CMR, was "pulled." After the statutory notice was pulled, a line was placed through the entry for this taxpayer. A piece may be pulled for a number of reasons including a discrepancy in a name or address. There is no indication of a deletion on or near a listing for petitioner.

B. Where the timeliness of a Request for Conciliation Conference or petition is at issue, as here, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To prove the fact and date of mailing 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 (*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 "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."

C. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notices on the day they were dated, August 14, 1997, to petitioner's last known address. The submitted affidavits establish the Division's standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the addresses on the notices, their cover sheet and the CMR conform with the address on the last return filed by petitioner before the notices were issued, thereby satisfying the "last known address" requirement in Tax Law § 1138(a)(1). Petitioner offered neither argument nor proof either disputing the evidence introduced by the Division or alleging nonreceipt. Therefore, it is concluded that the Division properly mailed the notices to petitioner's last known address, and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on August 14, 1997 (Tax Law § 170[3-a][a]; § 1138[a][1]).

D. Petitioner's Request for Conciliation Conference was received on February 5, 2008, a date far beyond the 90-day period for protesting the notice and, therefore, is untimely. Consequently, the Division of Tax Appeals has no jurisdiction to hear this matter (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005) and must grant summary determination in favor of the Division of Taxation.

E. Finally, it is observed that petitioner may not be without some remedy. It may pay the taxes and file a claim for refund (Tax Law § 1139[c]). 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][a]; § 1139).

F. The Division's motion for summary determination is granted, and the petition of Abraham Omer is dismissed.

DATED: Troy, New York
October 30, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE