

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VITALINA KOSTIUK	:	DETERMINATION
	:	DTA NO. 822729
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 March 1, 2005 through February 28, 2007.	:	

Petitioner, Vitalina Kostiuk, 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 March 1, 2005 through February 28, 2007.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated April 30, 2009, 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) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with other affidavits and exhibits in support of the motion. Petitioner, appearing by George Maiman, CPA, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination commenced on June 1, 2009. Based upon the motion papers, the affidavits and documents submitted therewith, the response of petitioner and all pleadings in connection with this matter, Brian L. Friedman, 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 (BCMS) or a petition with the Division of Tax Appeals within 90 days after the issuance of the statutory notices.

FINDINGS OF FACT

1. A Notice of Determination (Assessment ID No. L-029868325-1), dated April 24, 2008 was issued by the Division of Taxation (Division) to petitioner, Vitalina Kostiuk. The notice assessed sales and use taxes in the amount of \$50,800.69, plus penalty and interest, for a total amount due of \$87,454.46 for the period March 1, 2005 through February 28, 2007. The notice was issued because petitioner was determined to be an officer or responsible person of V&Z Deli, Inc.

2. On December 31, 2008, the Division of Tax Appeals received a petition, including various attachments, from petitioner. The petition was signed by petitioner's representative, George Maiman, CPA, and was dated "12/03/2008."

3. The Division filed an answer dated March 25, 2009. The Division subsequently brought this motion, dated April 30, 2009, 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 the issuance of the statutory notice.

4. 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 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” (CMR). The CMR lists each statutory notice in the order that it was generated in the batch. The certified control numbers, assessment numbers and names and addresses of the taxpayers appear on the CMR. Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

5. The CMR for the block of statutory notices issued on April 24, 2008, including the Notice of Determination issued to petitioner consists of 15 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 document is returned to CARTS.

With respect to the CMR for the statutory notices mailed by certified mail on April 24, 2008, each of the pages consists of 11 entries with the exception of page 6 (one of the 11 entries is crossed out) and page 15 which contains 6 entries.

In the upper left corner of each page of the CMR is the run number which signifies the date and time the CMR was produced. The CMR is printed approximately ten days in advance of the anticipated date of mailing. In the upper left corner of page one of the CMR, the date the notices were mailed, “4-24-08,” 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.

6. 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. The staff member in the Mail Processing Center weighs and seals each envelope and places postage and fee amounts on such envelope.

A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the 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 the envelopes is completed, a member of the Mail Processing Center staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area.

7. The postal service representative then affixes a U.S. postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR. In the case of the certified mail to be mailed on April 24, 2008, the USPS employee initialed or signed each page of the CMR, affixed a postmark dated April 24, 2008 to each page of the CMR and wrote the total number of pieces of certified mail received as 159 on page 15 of the CMR.

Page 15 of the CMR originally listed 160 pieces of mail; however, the number of pieces received at the post office indicates 159 in order to reflect the fact that one piece of certified mail had been “pulled” from the mailing record. A piece of mail may be pulled for any number of reasons, including, but not limited to, a discrepancy in a name or address.

A review of the CMR in this case indicates that a piece of mail listed on page six of the CMR was pulled. A line was appropriately placed through the entry for this taxpayer after the

statutory notice was pulled. This deletion is reflected in the change of the total pieces received at the post office on page 15 of the CMR.

8. The CMR is 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.

Page 7 of the CMR for April 24, 2008 indicates that a Notice of Determination with Notice No. L-029868325 was sent to “KOSTIUK-VITALINA, 162 68 ST., BROOKLYN, NY 11220-5101” by certified mail using certified control number 7104 1002 9730 0691 8763. A USPS postmark on each page of the CMR confirms that the Notice of Determination was sent on April 24, 2008.

9. 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.

10. The facts set forth in Findings of Fact 4 through 9 were established through affidavits of James Steven VanDerZee and Patricia Finn Sears. Mr. VanDerZee is employed as a Mail and Supply Supervisor in the Division’s Registry Unit. His duties included 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. Her duties include supervising the processing of notices of determination.

The procedures described in Mr. VanDerZee’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. Mr. VanDerZee stated that such procedures were followed on April 24, 2008 in mailing the pieces of certified mail described in his affidavit.

11. The address of petitioner to which the statutory notice was mailed is the same address listed on petitioner’s New York personal income tax return for 2007 which was signed and dated

February 22, 2008. Accompanying the return was a check, also dated February 22, 2008, to “NYS Income Tax” which also contained petitioner’s name and the same address.

12. As previously noted, petitioner did not respond to the Division’s motion.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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. 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 [1985], *citing Zuckerman v. City of New York* 49 NY2d 557, 562, 427 NYS2d 595 [1980]). 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, 94 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]). 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 [1960]).

“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 [1992], *citing Zuckerman v. City of New York*).

C. In the instant matter, petitioner did not respond to the Division’s motion; he is therefore deemed to have 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 Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, 326 [1984]). Moreover, petitioner presented no evidence to contest the facts asserted in the VanDerZee and Sears affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania* at 448, 449).

D. Tax Law § 1138(a)(1) authorizes the Division 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, file 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; 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. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

H. The CMR for April 24, 2008 provides sufficient documentary proof to establish that a Notice of Determination, dated April 24, 2008, was mailed by certified mail to petitioner at her last known address. The 15-page document originally listed 160 certified control numbers with corresponding names and addresses; subsequently, one piece of certified mail was pulled thereby leaving 159 certified control numbers on the CMR. Each page of the CMR bears a USPS postmark dated April 24, 2008 and the initials or signature of a USPS employee. The postal employee wrote the number “159” 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 to petitioner as claimed on April 24, 2008.

I. As noted above, petitioner's petition was dated December 3, 2008 and was received by the Division of Tax Appeals on December 31, 2008. In order to timely protest the Notice of Determination issued on April 24, 2008, petitioner was required to file a petition or a request for a conciliation conference within 90 days of April 24, 2008, i.e., on or before July 23, 2008. Therefore, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*) and the petition must, therefore, be dismissed.

J. The Division of Taxation's motion for summary determination is granted and the petition of Vitalina Kostiuk is dismissed with prejudice.

DATED: Troy, New York
August 6, 2009

/s/ Brian L. Friedman

ADMINISTRATIVE LAW JUDGE