

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEFFREY SMITH	:	DETERMINATION
	:	DTA NO. 822878
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, 2004 through	:	
February 28, 2007.	:	

Petitioner, Jeffrey Smith, 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, 2004 through February 28, 2007.

On June 1, 2009, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking 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 June 1, 2009, and annexed exhibits supporting the motion. Petitioner's response to the motion was due by July 1, 2009, 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, Arthur S. Bray, Administrative Law Judge, renders the following determination.

¹Petitioner did not file a response to the motion.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Jeffrey Smith, at his Rensselaer, New York, address, a Notice of Determination, dated July 28, 2008, which assessed sales and use taxes, for the period March 1, 2004 through February 28, 2007, in the amount of \$62,287.18 plus penalty and interest for a balance due of \$114,027.01. By his Request for Conciliation Conference, dated October 20, 2008, petitioner protested the notice, numbered L-030487333-6.

2. On November 14, 2008, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, in 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 July 28, 2008, but the request was not mailed until October 28, 2008, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the notice dated July 28, 2008, the Division provided the following: (i) an affidavit, dated May 29, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated May 27, 2009, 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) postmarked July 28, 2008; and (iv) and a copy of petitioner's personal income tax return for the year 2006, which was the last filing from petitioner prior to the issuance of the notice.

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, each page of the five-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "7-28-08," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page "Mailing Cover Sheet," 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 fourth page of the CMR contains information on the subject notice and establishes that on July 28, 2008 a notice with the control number 7104 1002 9730 0784 3576 was sent to petitioner at his Rensselaer, New York, address.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. 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 first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by

checking the envelopes against the information contained on 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 places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail 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 affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 54.² This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date July 28, 2008, confirming that the notices were mailed on that date.

6. Petitioner's Rensselaer, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his personal income tax return for 2006. This is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

7. The envelope used to mail the request was sent via United States mail and bore a return address in Rensselaer, New York. The postage stamp on the envelope was cancelled by the Postal Service on October 28, 2008. A stamp shows that the request was received by BCMS on October 30, 2008.

² The affidavit of Ms. Sears states that "In this case, the Postal Service representative affixed a postmark to each page of the certified mail record, circled on *Page 54* of the certified mail record, and initialed or signed *Page 5* of the certified mail record. The total number of statutory notices mailed pursuant to Exhibit 'A' [the CMR] was 5" (Emphasis supplied). An examination of the CMR establishes that the italicized portions were obviously typographical errors and will be disregarded.

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]). Moreover, petitioner has submitted no evidence to contest the facts alleged by the VanDerZee and Sears affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division's motion will be granted for the reasons discussed below.

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 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., July 28, 2008, 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 Deweese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on his personal income tax return for 2006 which satisfies the “last known address” requirement in Tax Law § 1138(a)(1). It is concluded that the notice was properly mailed 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 July 28, 2008 (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. The documents show that the notice was mailed on July 28, 2008, but the Request was not mailed until October 28, 2008, which is two days beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*See Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

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

G. The Division's motion for summary determination is granted, and the petition of Jeffrey Smith is dismissed.

DATED: Troy, New York
September 24, 2009

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE