

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NAGEEB ALGUHIEM : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 822904
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 2004 through May 31, 2007. :

Petitioner, Nageeb Alguhiem, 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 December 1, 2004 through May 31, 2007.

On July 13, 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 July 13, 2009, and annexed exhibits supporting the motion. Petitioner, appearing by Gopaljee Jaiswal, Esq., did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this order commenced on August 12, 2009, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavits and documents presented by the Division of Taxation, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because petitioner failed to file a petition or a request for conciliation conference within 90 days of the issuance of the Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Nageeb Alguhiem, at his New York, New York, address, a Notice of Determination number L-029802558-6, dated April 3, 2008, asserting sales and use taxes due in the amount of \$131,257.56, plus penalty and interest, for the period December 1, 2004 through May 31, 2007.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) on November 18, 2008. This request was signed by Abdo Al-Yousefy, as petitioner's representative. The envelope in which the request was sent bears a United States Postal Service (USPS) postmark of November 18, 2008, and a Bronx, New York, return address. The request lists petitioner's address as Bronx, New York, and Mr. Al-Yousefy's address as the same Bronx, New York, address.

3. On December 5, 2008, 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 of the statutory notice. Since the notice(s) was issued on April 3, 2008, but the request was not received until November 21, 2008, or in excess of 90 days, the request is late filed.

4. In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals. The Division subsequently brought this motion, dated July 13, 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.

5. In support of its motion for summary determination, the Division submitted: copies of the petition and the envelope in which it was sent by certified mail; copies of the Request for Conciliation Conference dated November 18, 2008 and the envelope bearing the USPS postmark, dated November 18, 2008, in which the request was mailed; a copy of the Conciliation Order Dismissing Request; a copy of the New York State Resident Income Tax Return (form IT-201) filed by petitioner and his wife, Wafa A. Algumai, for the year 2006 on March 8, 2007, which was the last personal income tax return filed prior to the issuance of the Notice of Determination; a copy of the "Certified Record for Presort Mail - Assessment Receivable" (CMR) postmarked April 3, 2008; copies of the Notice of Determination and the accompanying Mailing Cover Sheet; the affidavit of John E. Matthews, Esq., the Division's representative; and the affidavits of James Steven VanDerZee and Patricia Finn Sears, employees of the Division.

6. Patricia Finn Sears is employed as a supervisor in the Division's Case and Resource Tracking System (CARTS) Control Unit. Her duties include supervising the processing of notices of determination such as the one at issue herein. Ms. Sears's affidavit describes 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. In the upper left corner of each page of the CMR contains the date and time the entire CMR was printed. Following the Division's general practice, this date is manually changed on page 1 of the CMR to reflect the actual mailing date.

Each notice is assigned a certified control number. The certified control 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, the assessment numbers, and the names and addresses of the recipients appear on the CMR. Each CMR and associated batch of statutory notices is forwarded to the Division's Mail Processing Center together.

7. Attached as an exhibit to Ms. Sears's affidavit is the 36-page CMR listing the notice at issue herein. The CMR lists 386 certified control numbers, which were each assigned to an item of mail listed on the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR is manually dated April 3, 2008.

8. On page 2 of the 36-page CMR, corresponding to certified control number 7104 1002 9730 0682, is notice number L-029802558, followed by petitioner's name and address, which is identical to that listed on the subject notice of determination, on the joint 2006 New York State personal income tax return filed by petitioner and his wife on March 8, 2007 (i.e., the last return filed prior to the issuance of the subject notice of determination), and on the petition.

9. James Steven VanDerZee is employed as a mail and supply supervisor in the Division's Mail Processing Center. His duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the United States Postal Service. The Mail Processing Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mail Covering Sheet. A staff member retrieves the notices and 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. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and the associated CMR to one of the various branch offices of the USPS located in the Albany, New York, area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his or her signature or initials to the CMR. The USPS has also been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

10. In this particular instance, the postal employee affixed a postmark dated April 3, 2008 to each page of the 36-page CMR. On page 36, there is a preprinted entry of "386" corresponding to the heading "Total Pieces and Amounts Listed." This entry has been manually circled and the initials of a Postal Service employee appear below it. The USPS postmark on each page of the CMR is from the Colonie Center branch and bears the date April 3, 2008, confirming that 386 notices were mailed on this date.

11. The Conciliation Order Dismissing Request was sent to petitioner at the Bronx, New York, address listed on the Request for Conciliation Conference. A copy of the dismissal order was also sent to Abdo Al-Yousefy at the same Bronx, New York, address. A copy of the power of attorney appointing Mr. Al-Yousefy as petitioner's representative is not part of the record.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

B. In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall be granted if, upon all the 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]).

C. In the instant matter, petitioner did not respond to the Division's motion, and therefore, petitioner 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]). In addition, 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 set forth below.

D. Tax Law § 1138(a)(1) authorizes the Division of Taxation 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 a revision of such determination, or alternatively, 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). The filing of a

petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

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" (*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 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 (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In this case, the Division has 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 notices of determination.

The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notice of determination was mailed as addressed to petitioner on April 3, 2008. Each page of this 36-page document bears a U.S. Postal Service postmark dated April 3, 2008. A postal service employee circled the preprinted entry of "386" corresponding to the "Total Pieces

and Amounts Listed” heading and initialed the last page directly below the circled number, thereby indicating that all 386 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 386 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

G. Tax Law §1138(a)(1) provides that a 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.” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given on the last return filed by him pursuant to the provisions of [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*).

H. Here, petitioner’s joint personal income tax return for the year 2006, filed on March 8, 2007, listed petitioner’s address as New York, New York. Petitioner did not file any personal income or sales tax return after this date and before the issuance of the subject Notice of Determination. Accordingly, the Division has shown that the subject Notice of Determination was properly mailed to petitioner at his last known address on April 3, 2008.

I. Petitioner’s Request for Conciliation Conference was mailed November 18, 2008, a date beyond the 90-day period 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) and must grant summary determination in favor of the Division of Taxation.

J. 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 claim for refund 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).

K. The Division of Taxation's motion for summary determination is granted, and the petition of Nageeb Alguhiem is dismissed.

DATED: Troy, New York
November 5, 2009

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE