

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AYMAN SABI</b>	:	ORDER
	:	DTA NO. 823212
for Revision of Determinations 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 29, 2008.	:	

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Petitioner, Ayman Sabi, filed a petition for revision of determinations 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 29, 2008.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition, dated August 26, 2009, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was untimely filed. The Division of Taxation, by its representative, Daniel Smirlock, Esq., (John E. Matthews, Esq., of counsel) submitted papers dated September 21, 2009 in support of the proposed dismissal. Petitioner, appearing by Goldstein Jones LLP (Richard W. Goldstein, Esq., of counsel), submitted a response dated October 22, 2009 in opposition to the proposed dismissal.<sup>1</sup> Based upon the pleadings in this matter, the affidavits and documents included in the Division's response, and petitioner's response, Arthur S. Bray, Administrative Law Judge, renders the following order.

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<sup>1</sup> Petitioner was granted an extension of time to respond until October 26, 2009.

***ISSUE***

Whether petitioner timely protested notices of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Ayman Sabi, at his Pompano Beach, Florida, address, two notices of determination, dated August 4, 2008, which collectively assessed sales and use taxes for the period March 1, 2005 through February 29, 2008. One notice, L-030497219-2, assessed tax for the period March 1, 2005 through November 30, 2007 in the amount of \$51,494.82 plus penalty and interest for a balance due of \$84,752.84. The remaining notice assessed tax for the period September 1, 2007 through February 29, 2008 in the amount of \$2,491.79 plus penalty and interest for a balance due of \$3,334.90. Each of the notices stated that petitioner was an officer or responsible person of Roadhouse Grill, Inc. (Roadhouse Grill).

2. On February 22, 2009, petitioner mailed a petition via Federal Express. The petition was dated August 21, 2009 and was received by the Division of Tax Appeals on August 24, 2009. It states that petitioner filed a timely request for a conciliation conference but received no response. It also asserts: that the Division failed to notify petitioner's duly appointed representative and therefore the 90-day period for filing a petition has not expired; that petitioner resigned from the Roadhouse Grill effective May 31, 2007 and therefore he could not be a responsible officer for use tax for a subsequent period of time; that when petitioner received a notice of tax levy in August 2009, he spoke with employees of the Division who indicated that they were amenable to resolving the liability without enforcement of the tax levy; that petitioner always fully cooperated with the audit process; and, that the Roadhouse Grill was not subject to

significant adjustments for use tax. The petition includes a power of attorney form appointing Richard W. Goldstein, Esq., to appear on behalf of petitioner. The signatures of the witnesses and the representative are dated August 22, 2009.

3. To show proof of proper mailing of the notices dated August 4, 2008, the Division provided the following: (i) an affidavit, dated September 18, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated September 16, 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 August 4, 2008; and (iv) a copy of a computer file from the Division's Empire System which shows that the address to which the notices were mailed was the same address as that placed on the notices and the petition.

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 six-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 "8/4/08," 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, the assessment numbers and the names and addresses of the recipients are listed on the CMR. The sixth page of the CMR contains

information on the subject notice and establishes that on August 4, 2008 notices with the control numbers 7104 1002 9730 0787 2460 and 7104 1002 9730 0787 2477 and assessment numbers L 030497219 and L 030497220, respectively, were sent to petitioner at his Pompano Beach, Florida, 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 63. A line was placed through this number and the number 62 was handwritten reflecting the fact that one

of the entries was crossed out. The number 62 is circled and the page is initialed, confirming that 62 notices were received. The USPS postmark is from the Colonie Center branch and bears the date August 4, 2008, confirming that the notices were mailed on that date.

6. Petitioner's Pompano Beach, Florida, address on the CMR and Mailing Cover Sheet matches the address listed on the Division's Empire system. This is also the address on the petition and petitioner has not denied timely receipt of the notices.

7. The CMR does not show a mailing to a representative of petitioner, the Roadhouse Grill or a representative of the Roadhouse Grill.

8. The Division's motion papers include a copy of a facsimile of a power of attorney form which appoints Marc A. Simonetti, Esq., to appear on behalf of Roadhouse Grill, Inc. The portion of the form for listing tax matters was not completed. The form bears a facsimile date of February 15, 2007. The space for the taxpayer's signature is completed and dated. The date is not clearly written; however, it appears to be February 15, 2007. The box for the representative's signature was completed by Mr. Simonetti and dated February 12, 2007. The motion papers also include correspondence from Mr. Simonetti stating that his firm was counsel to the Roadhouse Grill for New York State tax matters for the period September 2004 through February 2007. According to Mr. Simonetti, he is listed as one of the representatives of record and that to the best of his knowledge his law firm has not received any notices relating to Roadhouse Grill since May 2007.

9. The Division's motion papers also contain a United States Securities and Exchange Commission Form 8-K of Roadhouse Grill dated April 10, 2007 which was signed by petitioner as president and chief executive officer.

***SUMMARY OF PETITIONER'S POSITION***

10. In response to the motion to dismiss, petitioner's representative submitted a letter stating that an officer's liability is derivative of the related corporation's tax assessment and that the Division has the burden of proving that a timely assessment has been issued against the Roadhouse Grill. According to petitioner, the Division cannot collect tax from an alleged responsible officer in an instance where a tax assessment has not been issued against the related corporation. According to petitioner, the mailing documents do not have any proof of a timely assessment against Roadhouse Grill or its legal representative or the bankruptcy trustee.<sup>2</sup> Petitioner also contends that, on its face, the assessment is barred by the statute of limitations with respect to periods prior to August 4, 2005. Lastly, petitioner maintains that he resigned his position with the Roadhouse Grill on May 31, 2007 and cannot be a responsible officer after this date.

***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. 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 &*

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<sup>2</sup> The Roadhouse Grill has been in bankruptcy since October 8, 2007.

*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.”

C. 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., August 4, 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 Dewese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conform with the address listed on the petition. 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 August 4, 2008 (Tax Law § 170[3-a][a]; § 1138[a][1]).

D. The documents show that the notice was mailed on August 4, 2008, but the petition was not mailed until February 22, 2009, which is well 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].) It is recognized that the petition alleges that petitioner filed a timely request for a conciliation conference but did not receive any response from the Bureau of Conciliation and Mediation Services (BCMS). This allegation is rejected because the record is devoid of any evidence, such as a receipt for certified mail, to show that there was a timely mailing of a request to BCMS.

E. Relying upon *Matter of Mackiewicz, Jr.* (Tax Appeals Tribunal, June 7, 2007), petitioner argues that any proof of a timely assessment must include proof of timely mailing of a notice of determination to Roadhouse Grill and its legal representative. This argument is without merit. *Mackiewicz* stands for the proposition that when the corporation's liability is determined or redetermined, then the liability of a responsible officer must be similarly adjusted. To the extent pertinent to the issue presented here, it is critical to note that the findings of fact in *Mackiewicz* clearly state that each petitioner, i.e., the corporation and the alleged responsible officer, filed a timely petition with the Division of Tax Appeals challenging their respective notices. Upon noting that the jurisdictional prerequisite of a timely petition was satisfied, the Tribunal proceeded to address the merits of Mr. Mackiewicz, Jr.'s argument. Thus, reliance upon *Mackiewicz* is misplaced inasmuch as it does not resolve the issue of whether petitioner filed a timely petition in the first instance.

F. The petition in this matter also alleges that the Division failed to notify petitioner's duly appointed representative and therefore the 90-day period for filing a petition has not expired. This argument is also without merit.



G. The law is well settled that once counsel has made an appearance, a time requirement does not run until that counsel has been served with the determination or order sought to be reviewed (*Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29 [1977]; *Matter of Multi Trucking, Inc.*, Tax Appeals Tribunal, October 6, 1988). Therefore, the question becomes whether counsel for petitioner made an appearance before the notices were issued. Here, the only power of attorney form in the record appointing a representative to appear on petitioner's behalf was executed in August 2009. This is after the notices of determination were issued. Since there is no evidence that a representative for petitioner made an appearance prior to the mailing of the notices of determination, the 90-day period for filing a petition or a request for a conciliation conference was not tolled for the failure to serve a representative of petitioner.

H. Since the Division of Tax Appeals has no jurisdiction over this matter, the arguments that a portion of the assessment is barred by the statute of limitations or that Mr. Sabi resigned his position with the Road House Grill before the end of the audit period have not been addressed.

I. 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).

J. The Division's motion for summary determination is granted, and the petition of Ayman Sabi is dismissed.

DATED: Troy, New York  
January 21, 2010

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE