

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WINNERS GARAGE, INC. :
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 :
August 31, 2007. :

ORDER
DTA NOS. 823312 AND
823313

In the Matter of the Petition :
of :
LEV WOLKOWICKI :
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, 2005 through :
August 31, 2007. :

Petitioner Winners Garage, Inc., 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 August 31, 2007.

Petitioner Lev Wolkowicki 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, 2005 through August 31, 2007.

On November 5, 2009, the Division of Tax Appeals issued to petitioners notices of intent to dismiss petition pursuant to 20 NYCRR 3000.9(a)(4). On November 19, 2009, the Division of

Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. On December 10, 2009, petitioner Lev Wolkowicki, appearing pro se and on behalf of the corporation, having been granted an extension of time, submitted documentation in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced December 10, 2009. After due consideration of the documents submitted, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed timely petitions with the Division of Tax Appeals following the issuance of notices of determination.

FINDINGS OF FACT

Lev Wolkowicki

1. The Division of Taxation issued to petitioner Lev Wolkowicki at his Valley Stream, New York, address a Notice of Determination, dated February 20, 2009, which assessed sales and use taxes for the period December 1, 2005 through August 31, 2007 in the amount of \$134,290.09, plus penalty and interest. An explanation in the notice stated that it must be challenged by filing a request for conciliation conference or a petition for a Division of Tax Appeals hearing by May 21, 2009.

2. On October 12, 2009, Mr. Wolkowicki filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination issued on February 20, 2009. The petition was delivered to the Division of Tax Appeals by FedEx Express and was dated October 12, 2009.

3. On November 5, 2009, the Petition Intake Unit of the Division of Tax Appeals issued to Mr. Wolkowicki a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the Notice of Determination appeared to have been issued on February 20, 2009 and the petition appeared to have been filed on October 12, 2009, or 234 days later.

4. To show proof of proper mailing of the notice dated February 20, 2009, the Division provided the following: (i) an affidavit, dated November 12, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated November 10, 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 February 20, 2009; and (iv) and a copy of petitioner's New York State Resident Income Tax Return, Form IT-201, for the tax year 2007 which was the last filing from petitioner prior to the issuance of the notice.

5. 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, the one-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, a new date of "2/20/09" was written on the first page 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 CMR contains information on the subject notice and establishes that

on February 20, 2009 a notice with the control number 7104 1002 9730 1206 0456 was sent to Mr. Wolkowicki at his Valley Stream, New York address.

6. 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 review of the 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 to the CMR. Corresponding to "Total Pieces and Amounts," is the preprinted number 102. This number is circled and the page is initialed, confirming that the notices were received. The USPS postmark is from the Colonie Center branch and bears the date February 20, 2009, confirming that the notices were mailed on that date.

7. Petitioner's Valley Stream, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his resident income tax return for the tax year 2007. This is the last

return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

Winners Garage, Inc.

8. The Division of Taxation (Division) issued to petitioner Winners Garage, Inc., of Woodside, New York, a Notice of Determination, assessment no. L-031573327, dated February 19, 2009, which assessed sales and use taxes for the period December 1, 2004 through August 31, 2007 in the amount of \$211,907.10, plus penalty and interest. An explanation in the notice stated that it must be challenged by filing a request for conciliation conference or a petition for a Division of Tax Appeals hearing by May 20, 2009. The Mailing Cover Sheet of the Notice of Determination issued to Winners Garage, Inc., contains the certified control number 7104 1002 9730 1205 2888.

9. The last tax return filed by Winners Garage before the issuance of the Notice of Determination was a New York State and Local Quarterly Sales and Use Tax Return for the period September 1, 2008 through November 30, 2008. The return listed its address as Woodside, New York.

10. On October 12, 2009, Winners Garage filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination issued on February 19, 2009. The petition was delivered to the Division of Tax Appeals by FedEx Express and was dated October 12, 2009.

11. On November 5, 2009, the Petition Intake Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The Notice of Intent to Dismiss Petition indicates that the Notice of Determination appeared to have been issued on February 19, 2009 and the petition appeared to have been filed on October 12, 2009, or 235 days later.

12. The Division offered the affidavits of Patricia Finn Sears, James Steven VanDerZee and Heidi Corina, employees of the Division. The first two affidavits concerned the mailing procedures followed by the Division in mailing notices of determination and were nearly identical to those for Mr. Wolkowicki. The last affidavit pertained to correspondence between Ms. Corina and the U.S. Postal Service (USPS). The Division also offered a copy of portions of the certified mailing record (CMR) containing a list of the notices of determination allegedly issued by the Division on February 19, 2009, including petitioner's, and a copy of the petition dated October 12, 2009. The CMR indicates a Notice of Determination, number L-031573327, was issued to Winners Garage by certified mail with the certified number noted above. However, the postmarks on the CMR were too faint to determine a mailing date.

13. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

14. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A which was requested for petitioner. This form requests information regarding a piece of mail bearing certified control number 7104 1002 9730 1205 2888 and addressed to Winners Garage at its Woodside, New York, address. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated November 6, 2009. The letter states in part: "The delivery record shows that this item was delivered on 02/23/2009 at 11:06 AM in WOODSIDE, NY 11377." The letter also contains a scanned image of the

recipient as “Renee Perlman” above the handwritten name “Renee Perlman.” The address of the recipient is shown as the address on Winners Garage’s last return filed before the issuance date.

15. The envelope used to mail the two petitions was sent via FedEx Express and bore the sender’s name “Lev Wolkowicki,” the company name “Winners Garage, Inc.” and the address in Woodside, New York. The date on the envelope is October 12, 2009, and the petitions were received by the Division of Tax Appeals on October 13, 2009.

16. Petitioners requested a conciliation conference on February 11, 2009 following the issuance by the Division of a Statement of Proposed Audit Changes for Sales and Use Tax, dated January 13, 2009. Petitioners claim that such a request was timely and should entitle them to a hearing on the notices of determination at issue herein.

CONCLUSIONS OF LAW

Winners Garage, Inc.

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such notice “shall be an assessment of the amount of tax specified” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005;

Matter of DeWeese, Tax Appeals Tribunal, June 20, 2002; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Tax Law § 1147(a)(1) 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 in the last return filed by him pursuant to [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.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

C. It is undisputed that at the time the Notice of Determination was issued, Winners Garage’s sales and use tax return for the quarter ended November 30, 2008 was the last return filed by it before the notice was issued. The address on the Mailing Cover Sheet and the notice is the same address reported on the sales tax return. Thus, the notice was sent to petitioner’s last known address. Although an exact mailing date cannot be established, further documentation from the USPS establishes that the notice was received at Winners Garage’s last known address on February 23, 2009. It follows that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information and the USPS response that the notice was delivered to petitioner’s last known address.

D. Based upon a receipt date of February 23, 2009, Winners Garage had 90 days or until May 26, 2009¹ to mail a request for a conciliation conference or mail a petition for a hearing. The envelope used to mail the petition was mailed by FedEx Express on October 12, 2009 and received by the Division of Tax Appeals on October 13, 2009. It follows that the request was

¹ The 90th day, May 24, 2009, was a Sunday and the 91st day, May 25, 2009, was a legal holiday, Memorial Day, so petitioner had until May 26, 2009 to file its petition.

untimely and the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Cato; Matter of DeWeese; Matter of Sak Smoke Shop*).

Lev Wolkowicki

E. 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."

F. 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., February 20, 2009, to Mr. Wolkowicki'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 matches the address listed on Mr. Wolkowicki's New York State Resident Income Tax Return for the tax

year 2007, 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 February 20, 2009 (Tax Law § 170[3-a][a]; § 1138[a][1]).

G. The documents show that the notice was mailed on February 20, 2009 but the petition was not mailed until October 12, 2009 which is 234 days beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction to hear and determine this matter (*see Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003).

H. It is noted that petitioners’ arguments have been considered and rejected. Any request for a conference or hearing which was filed prior to the issuance of the notices of determination was premature and invalid (*see Matter of West Mountain v. Dept. of Taxation & Fin.*, 105 AD2d 989 [1984], *affd* 64 NY2d 991 [1985]). Furthermore, petitioners, Winners Garage, Inc., and Lev Wolkowicki, were clearly notified by an explanation contained in each of the notices of determination that the notices must be challenged by filing a request for conciliation conference or a petition for a Division of Tax Appeals hearing by May 20, 2009 or May 21, 2009, respectively.

I. The petitions of Winners Garage, Inc. and Lev Wolkowicki are dismissed.

DATED: Troy, New York
January 7, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE