

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AQUATICS BY DESIGN, INC.	:	ORDER
	:	DTA NO. 823410
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 June 1, 2003 through	:	
February 28, 2006.	:	

Petitioner, Aquatics by Design, 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 June 1, 2003 through February 28, 2006.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition, dated March 12, 2010, 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 April 9, 2010 in support of the proposed dismissal. Petitioner, appearing by James P. Napolitano, CPA, PC, submitted a response on March 13, 2010 in opposition to the proposed dismissal.¹ After due consideration of the record in this matter, Arthur S. Bray, Administrative Law Judge, renders the following order.

¹ Petitioner was subsequently granted until May 3, 2010 to file an additional response.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Aquatics By Design, Inc., at its Middle Village, New York, address a notice of determination, dated January 2, 2009, which assessed sales and use taxes for the period June 1, 2003 through February 28, 2006. Notice, L-031403214-4, assessed tax in the amount of \$40,581.22, plus penalty and interest, for a balance due of \$85,355.43. On the same date, the Division also issued a notice of determination to petitioner's representative at his Hicksville, New York, address.

2. On December 16, 2009, petitioner mailed a petition via the United States Postal Service, dated November 4, 2009 and received by the Division of Tax Appeals on December 18, 2009. According to the petition, petitioner filed a request for a conciliation conference. However, the petition does not indicate an outcome of the conference. It also asserts that "[t]he company is [a] fabricator, manufacturer and seller of capital improvement equipment . . . that have tanks designed . . . [t]here is not a retail store"

3. To show proof of proper mailing of the notice dated January 2, 2009, the Division provided the following: (i) an affidavit, dated April 5, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated April 5, 2010, 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 January 2, 2009; and (iv) and a copy of petitioner's sales tax return for the period ending November 30, 2008.

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 15-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 "1/02/09," 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 ninth page of the CMR contains information on the subject notice and establishes that on January 2, 2009 a notice with control number 7104 1002 9730 1101 0261 and assessment number L 031403214 was sent to petitioner at its Middle Village, New York, address. The tenth page of the CMR shows that on January 2, 2009 a notice with control number 7104 1002 9730 1101 0308 and assessment number L 031403214 was sent to petitioner's representative at his Hicksville, 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 159. The number 159 is circled and the page is initialed, confirming that 159 notices were received. The USPS postmark is from the Colonie Center branch and bears the date January 2, 2009, confirming that the notices were mailed on that date.

6. Petitioner's Middle Village, New York, address on the CMR and Mailing Cover Sheet matches the address listed on petitioner's sales tax return for the period ending November 30, 2008. This is also the address on the petition.

7. The Division's motion papers include a New York State and Local Quarterly Sales and Use Tax Return of Aquatics By Design, Inc., for the period September 1, 2008 through November 30, 2008. This return shows the same address as that used on the certified mailing log and the notice of determination that was mailed to petitioner. This was the last return filed prior to issuance of the notice.

SUMMARY OF PETITIONER'S POSITION

8. In response to the motion to dismiss, petitioner's representative submitted a letter stating that as of the date of his letter, that is, March 13, 2010, he had not received any final report on the audit; that he was never allowed the right of a conference and, if it had been allowed the liability in issue would have been resolved; that he had not received correspondence regarding the issues; and that petitioner requests a fair and just conference to present a case so if, in fact, there is any liability, it can be resolved.

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 & 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., January 2, 2009, 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 conform with the address listed on the last return filed by petitioner prior to the issuance of the notice. It is concluded that the notice was properly mailed to petitioner and its representative, and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on January 2, 2009 (Tax Law § 170[3-a][a]; § 1138[a][1]).

D. The documents show that the notice was mailed on January 2, 2009, but the petition was not mailed until December 16, 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].)

E. It is recognized that the petition alleges that petitioner filed a request for a conciliation conference but did not receive any response from the 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. The remaining assertions by petitioner have no bearing upon the timeliness of the petition and will not be considered.

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 Aquatics by Design, Inc. is dismissed.

DATED: Troy, New York
July 22, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE