

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SCOTT M. MATUKAS : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 823503
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2005 through February 29, 2008. :

Petitioner, Scott M. Matukas, 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, 2005 through February 29, 2008.

On June 17, 2010, 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)(i) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated June 17, 2010, and annexed exhibits supporting the motion. Petitioner, appearing by Hiscock & Barclay, LLP (David G. Burch, Jr., Esq., and Kevin R. McAuliffe, Esq., of counsel), did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on October 16, 2010,¹ 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

¹ Petitioner was granted extensions of time to respond until October 16, 2010.

and documents presented by the Division of Taxation, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner file a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Scott M. Matukas, at his Syracuse, New York, address, a Notice of Determination, number L-032028580-7, dated June 8, 2009, asserting sales and use taxes due in the amount of \$104,567.32, plus penalty and interest, for the period June 1, 2005 through February 29, 2008.

2. On October 29, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). The envelope in which the request was sent by certified mail bears a machine metered (Pitney Bowes) postmark dated October 29, 2009. This request, signed by petitioner's representative on October 22, 2009, listed petitioner's address as Syracuse, New York. A copy of the Notice of Determination being protested was not attached to the request because petitioner allegedly never received it.

3. On November 20, 2009, 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 June 8, 2009, but the request was not received until November 2, 2009, 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 petition lists petitioner's address again as Syracuse, New York. The Division subsequently brought this motion, dated June 17, 2010, 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 October 22, 2009 and the envelope bearing the machine metered postmark dated October 29, 2009, in which the request was mailed; a copy of the Conciliation Order Dismissing Request; a transcript of the joint New York State Resident Income Tax Return (form IT-201) for the year 2007 electronically filed by petitioner and his wife on March 13, 2008, which was the last 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 June 8, 2009; 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 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 16-page CMR lists an

initial date that 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 "6/8/09," 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 numbers, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. The thirteenth page of the CMR contains information on the subject notice and establishes that on June 8, 2009 a notice with the control number 7104 1002 9730 1349 5882 was sent to petitioner at his Syracuse, New York, address.

7. 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 Mail Processing 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 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 information contained on the CMR. A member of the Mail Processing 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 174 and to “Total Pieces Received at Post Office” is the circled handwritten number 174, and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date June 8, 2009, confirming that the notices were mailed on that date.

8. Petitioner’s Syracuse, New York, address on the CMR and the Mailing Cover Sheet matches the address listed on the joint 2007 New York State personal income tax return electronically filed by petitioner and his wife on March 13, 2008.

9. The Request for Conciliation Conference and the petition each bore petitioner’s address in Syracuse, New York.

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 the 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 providing 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 June 8, 2009. Each page of this 16-page document bears a U.S. Postal Service postmark dated June 8, 2009. A postal service employee handwrote and circled the number “174” corresponding to the “Total Pieces Received at Post Office” heading and initialed the last page next to the circled number, thereby indicating that all 174 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 174 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 in 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 2007, electronically filed on March 13, 2008, listed petitioner’s address as Syracuse, New York. Petitioner did not file any tax return after this date and before the issuance of the subject Notice of Determination. Accordingly, the Division has shown that the Notice of Determination was properly mailed to petitioner at his last known address on June 8, 2009.

I. Petitioner’s Request for Conciliation Conference was mailed October 29, 2009, 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 Scott M. Matukas is dismissed.

DATED: Troy, New York
December 2, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE