

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GANIN TIRE COMPANY, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 823541
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 2003 through November 30, 2008. :

Petitioner, Ganin Tire Company, 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, 2003 through November 30, 2008.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 5, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5; 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, dated August 5, 2010, and annexed exhibits supporting the motion. In opposition to the Division's motion, petitioner's representative, Allan Povol, CPA, filed an affidavit, dated September 1, 2010, with attached exhibits. The 90-day period for the issuance of this determination began on September 7, 2010, the filing date of petitioner's response. After due consideration of the affidavits and exhibits submitted, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed 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 subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated April 1, 2009. The notice is addressed to petitioner and bears assessment identification number L-031733400.

2. On November 25, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the Notice of Determination dated April 1, 2009.

3. On December 18, 2009, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order, bearing CMS number 236206, determined that petitioner's protest of the Notice of Determination dated April 1, 2009 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 was issued on April 1, 2009, but the request was not mailed until November 25, 2009, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the Notice of Determination dated April 1, 2009, the Division provided the following: (i) an affidavit, dated July 30, 2010, of Dean Badar, a tax auditor in the Division's Field Audit Management Unit (FAM); (ii) a Certified Mail Record (CMR) postmarked April 1, 2009; (iii) a copy of a United States Postal Service (USPS) receipt dated April 1, 2009, indicating payment of certified mail postage, and a certified mail receipt; (iv) an affidavit, dated August 2, 2010, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the USPS for delivery information; (v) a Request for

Delivery Information/Return Receipt after Mailing (PS Form 3811-A); and (vi) the USPS response to such request dated July 15, 2010.

5. The affidavit of Dean Badar states that in April 2009 it was the practice of the Division, under certain circumstances, to pull notices of determination for manual review and to prepare CMRs for such notices. Notices so selected were sent to FAM by the Division's Case and Resource Tracking System control unit (CARTS). The notice at issue, bearing assessment identification number L-031733400, was a notice selected for such manual review. As part of the standard procedure when a notice is pulled for manual review, Mr. Badar personally prepared a CMR. The CMR is a listing of taxpayers and representatives to whom statutory notices are sent by certified mail on a particular day. The CMR relevant to this matter, as prepared by Mr. Badar, is a facsimile of USPS Form 3877 and consists of two pages. The first page contains three entries, with a separate certified mail control number assigned to each, listing three addresses to which a copy of Notice L-031733400 was to be mailed. The second page of the CMR contains a handwritten number "3" under the heading "Total Number of Pieces List [*sic*] by Sender" and a handwritten and circled "3" under the heading "Total Number of Pieces Received at Post Office." Next to those entries under the heading "Postmaster, Per (Name of receiving employee)" are the handwritten initials of a Postal Service employee. Both pages of the CMR bear the stamp of the Stuyvesant Plaza branch of the USPS, located in Albany, New York, dated April 1, 2009.

6. Two of the three entries on the CMR list petitioner as the addressee, one with a Brooklyn, New York, street address and the other a Bronx, New York, street address. The Brooklyn street address is the address listed on petitioner's sales and use tax return for the

quarter ended May 31, 2007. This was the last return filed by petitioner prior to the mailing of the subject notice. The Bronx street address was used by petitioner on earlier sales tax returns.

7. The remaining entry on the CMR lists an address for petitioner's representative as follows: Paul Feldman, Povol and Feldman, CPA, P.C., 1981 Marcus Ave., Ste. C100, New Hyde Park, NY, 11042-1032.

8. Mr. Badar personally inserted a copy of the subject notice along with a cover letter into envelopes bearing each of the three addresses noted above and the certified control number assigned to each such address.

9. Mr. Badar personally hand-delivered the sealed envelopes and the CMR to the Stuyvesant Plaza branch of the USPS on April 1, 2009. At that point a Postal Service employee affixed the date stamp, entered the total number of pieces received number and wrote his or her initials in the appropriate space as described above (*see* Finding of Fact 5). Postal fees were paid at that time and Mr. Badar received a receipt dated April 1, 2009 indicating payment for certified mail postage in respect of three articles of mail bearing the three certified control numbers listed on the CMR.

10. The affidavit of Heidi Corina describes the Division's request to the Postal Service for delivery information on the April 1, 2009 Notice of Determination addressed to petitioner's representative. Specifically, the Division used a PS Form 3811-A to request delivery information with respect to an article of mail bearing the certified control number associated with the notice addressed to petitioner's representative (*see* Finding of Fact 7). The USPS response, dated July 15, 2010, indicates that such article was delivered, as addressed, to 1981 Marcus Ave, Ste. C100, New Hyde Park, NY 11042, on April 3, 2009.

11. Petitioner filed a timely Request for Conciliation Conference with BCMS in connection with a sales and use tax matter involving the period December 1, 2003 through May 31, 2008. BCMS assigned this matter CMS number 233283.

12. A workpaper transmitted by the Division's Metro Audit Group to petitioner's representative on June 30, 2010, details a sales tax error rate and projection of additional tax due from petitioner for the period December 1, 2003 through November 30, 2008.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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]).

B. Where, as here, the timeliness of a Request for Conciliation Conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

C. Here, the Division clearly established proper mailing of the subject Notice of Determination to petitioner's last known address on April 1, 2009 as claimed. The affidavit of Dean Badar, established the Division's mailing procedure where, as here, a notice of determination is pulled for manual review. Additionally, the Badar affidavit, together with the

properly completed CMR, further established that such procedure was followed in the present matter. Specifically, the affidavit, as corroborated by the CMR, established that Mr. Badar personally inserted copies of the subject notice into envelopes addressed as indicated on the CMR and personally delivered the sealed envelopes to the USPS on April 1, 2009. Moreover, it is observed that the CMR in this matter is properly completed and as such constitutes highly probative documentary evidence of the mailing of the subject notice to the addresses listed thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The Division has thus established that it mailed copies of the subject notice to the addresses listed on the CMR on April 1, 2009. Additionally, petitioner's Brooklyn, New York, street address as listed on the CMR and on the notice itself conforms with the address reported on the last New York sales tax return filed by petitioner prior to the issuance of the subject statutory notice, thereby satisfying the "last known address" requirement in Tax Law § 1138(a)(1). Finally, the Division has also established that a copy of the subject notice was properly mailed to petitioner's representative on April 1, 2009 as required pursuant to Tribunal decisions (*see e.g. Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988) and that such notice was delivered to such representative's mailing address on April 3, 2009.

D. As the Division has established that it properly mailed the subject Notice of Determination on April 1, 2009, 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 that date (Tax Law § 170[3-a][a]; § 1138[a][1]). Petitioner's Request for Conciliation Conference was filed on November 25, 2009. This date falls well after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]). As a result, the Division of Tax Appeals lacks

jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

E. Petitioner contends that the April 1, 2009 Notice of Determination, which is the subject of the present matter, overlaps and duplicates a prior notice of determination that is currently pending at BCMS (CMS 233283). Petitioner asserts that the subject notice should be remanded to BCMS to be consolidated with and processed with such other pending matter. Alternatively, petitioner proposes that the instant matter be suspended pending resolution of CMS 233283.

Absent a timely filed protest of the April 1, 2009 notice, however, as noted above, the Division of Tax Appeals is without jurisdiction over that notice and therefore lacks authority to remand or suspend the present matter as petitioner requests. Additionally, it is noted that the record is inconclusive as to whether the April 1, 2009 notice is duplicative as there is no copy of the prior notice of determination in the record.

F. The Division of Taxation's motion for summary determination is granted, and the petition of Ganin Tire Company, Inc. is dismissed.

DATED: Troy, New York
November 24, 2010

/s/ Timothy Alston

ADMINISTRATIVE LAW JUDGE