

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PROPERTY CONSTRUCTION SERVICES, LLC : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 823628
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2005 through August 31, 2008. :

Petitioner, Property Construction Services, LLC, 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 August 31, 2008.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion on October 7, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on November 8, 2010, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, 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 September 14, 2009 and bearing assessment identification number L-032500225-6. The notice is addressed to petitioner, Property Construction Services, LLC, at 829 Phillips Rd, Victor, NY 14564-9417.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the September 14, 2009 Notice of Determination. The request was mailed in an envelope bearing an office metered mail postmark dated January 15, 2010 and was received by BCMS on January 19, 2010.

3. On February 5, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination 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 September 14, 2009, but the request was not received until January 19, 2010, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the September 14, 2009 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated September 29, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated October 5, 2010, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 14, 2009; (iv) an affidavit, dated October 5, 2010, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery

information; (v) two Postal Service forms 3811-A (Request for Delivery Information/Return Receipt after Mailing) and United States Postal Service responses to such requests dated July 14, 2010; and (vi) petitioner's quarterly sales tax return for the period ended May 31, 2009, dated June 12, 2009, which was the last return filed by petitioner prior to the issuance of the September 14, 2009 Notice of Determination at issue and which lists the same address for petitioner as that listed on the subject 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, page 17 of the 18-page CMR contains information on the particular notice in issue and indicates an initial date of September 4, 2009.¹ Following general practices, this date was manually changed to the actual mailing date of "9/14/09." Taxpayer addresses, certified control numbers, and reference (assessment ID) numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and the accompanying mailing cover sheet, respectively, while the address appears on both.

6. Page 17 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1514 4948 and assessment ID number L-032500225 was mailed to petitioner at the Victor, New York, address listed on the subject notice of determination. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted.

¹ The CMR specifically states "20092471700" or year 2009, day 247 at 5:00 P.M.

7. Page 17 of the CMR also indicates that a notice of determination with certified control number 7104 1002 9730 1514 4962 and assessment ID number L-032500225 was mailed to petitioner's representative in this matter, Gerald W. Dibble, at 55 Canterbury Rd., Rochester, NY 14607-3436. The corresponding mailing cover sheet bears this certified control number and lists Mr. Dibble's name and address as noted.

8. The affidavit of Bruce Peltier describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A Mailing Cover Sheet precedes each notice. A staff member retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces 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 postmarked and initialed pages 1 through 18 of the CMR. The postmarks are dated September 14, 2009. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 193, which has not been circled. Below the total pieces entry there is a heading "Total Pieces Received at Post Office," which is blank.

9. According to the Peltier affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 193 articles of mail listed on the CMR, including the articles

addressed to petitioner and his representative, were received by the USPS on September 14, 2009.

10. According to both the Sears and Mr. Peltier affidavits, based on their respective knowledge of the Division's standard mailing procedures and a review of the CMR, a copy of the subject notice was mailed to petitioner and to its representative on September 14, 2009, as claimed.

11. The affidavit of Heidi Corina describes the Division's requests to the Postal Service for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-A the Division requested delivery information with respect to articles of mail bearing certified control numbers 7104 1002 9730 1514 4948 and 7104 1002 9730 1514 4962. The USPS responses to such requests indicate that the article bearing certified control number 7104 1002 9730 1514 4948 was delivered as addressed to petitioner at 829 Phillips Rd., Victor, NY 14564 on September 16, 2009 and that the article bearing certified control number 7104 1002 9730 1514 4962 was delivered as addressed to petitioner's representative at 55 Canterbury Rd., Rochester, NY 14607 also on September 16, 2009.

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. Petitioner did not respond to the Division's motion; it is therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assocs. v. Standard*

Metals, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1980]). Petitioner has thus presented no evidence to contest the facts alleged in the Sears, Peltier and Corina affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

C. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the 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).

D. Here, the Sears and Peltier affidavits establish the Division's standard mailing procedure. These affidavits, along with other documentary evidence in the record, also show that this standard procedure was followed in the present matter and thus show that copies of the subject Notice of Determination were mailed as addressed to petitioner and its representative, respectively, on September 14, 2009. Specifically, both the Sears and Peltier affidavits conclude, based on the respective affiant's knowledge of the Division's standard mailing procedures and a review of the CMR, that the subject notices were mailed as claimed on September 14, 2009. The CMR lists certified control numbers associated with the articles of mail addressed to petitioner and its former representative. This document also bears USPS postmarks dated September 14, 2009 and a USPS employee's initials on each page thereof. Such postmarks and employee's initials indicate that all 193 articles of mail listed on the CMR were received by the USPS on

September 14, 2009 (*see* Finding of Fact 9). Additionally, the delivery information provided to the Division by the USPS shows delivery of the subject notices to both petitioner and its representative on September 16, 2009, further supporting the claim of a September 14, 2009 mailing date. Accordingly, notwithstanding that the USPS employee did not either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR in accordance with the Division's standard request (*see* Finding of Fact 8), the evidence presented is nonetheless sufficient to establish that the notices at issue were mailed as claimed on September 14, 2009.

E. Petitioner's Request for Conciliation Conference was filed on January 19, 2010. 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]). The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005).

F. It is observed that, even if the Division failed to establish mailing of the subject notice on September 14, 2009, it has clearly established, through the USPS delivery documentation, receipt by both petitioner and its representative on September 16, 2009. Where the Division fails to establish proper mailing of a statutory notice, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Accordingly, in the present matter, even if the 90-day period was deemed to commence on September 16, 2009, the January 19, 2010 filing date remains untimely.

G. The Division of Taxation's motion for summary determination is granted, and the petition of Property Construction Services, LLC, is dismissed.

DATED: Troy, New York
January 27, 2011

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE