

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BETTY M. CHUNG : DETERMINATION
for Revision of Determinations or for Refund of Sales and : DTA NO. 823675
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods June 1, 2008 through November 30, 2008 and :
March 1, 2009 through May 31, 2009. :
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Petitioner, Betty M. Chung, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 2008 through November 30, 2008 and March 1, 2009 through May 31, 2009.

On November 1, 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) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated October 29, 2010, and annexed exhibits supporting the motion. Petitioner, appearing by Barry Leibowicz, Esq., submitted an affirmation of Barry Leibowicz, dated November 23, 2010, and annexed exhibits in opposition by November 29, 2010, which date commenced the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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 notices of determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Betty M. Chung, at her Douglaston, New York, address, three notices of determination, each dated November 19, 2009. The first, Notice of Determination number L-033020398-4, asserts sales and use taxes due in the amount of \$34,567.57, plus penalty and interest, less assessment payments/credits of \$249.00, for the period June 1, 2008 through August 31, 2008. The second, Notice of Determination number L-033020397-5, asserts sales and use taxes due in the amount of \$64,233.65, plus penalty and interest, for the period September 1, 2008 through November 30, 2008. The third, Notice of Determination number L-033020396-6, asserts sales and use taxes due in the amount of \$45,206.08, plus penalty and interest, for the period March 1, 2009 through May 31, 2009.

2. On March 30, 2010, 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 March 30, 2010. This unsigned request listed all three notices of determination at issue and petitioner's address as Douglaston, New York.

3. On April 16, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notices 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 November 19, 2009, but

the request was not received until April 1, 2010, 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 Douglaston, New York. The Division subsequently brought this motion, dated October 29, 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 notices was filed more than 90 days from their date of issuance.

5. In support of its motion for summary determination, the Division submitted: copies of the petition, the amended petition and the envelope in which the amended petition was sent by certified mail; copies of an undated Request for Conciliation Conference received by BCMS on April 1, 2010 and the envelope bearing the machine metered postmark dated March 30, 2010, 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 her husband on October 3, 2008, which was the last tax return filed prior to the issuance of the notices of determination; a copy of the "Certified Record for Presort Mail - Assessment Receivable" (CMR) postmarked November 19, 2009; copies of the notices of determination and the accompanying mailing cover sheets; the affidavit of John E. Matthews, Esq., the Division's representative; and the affidavits of Bruce Peltier 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 ones 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 20-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 "11/19/09," to reflect the actual mailing date. In addition, the initial date on the last page was also manually changed to "11/19/09." 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 tenth page of the CMR contains information on the subject notices and establishes that on November 19, 2009 three notices of determination, bearing notice numbers L-033020396, L-033020397 and L-033020398 and control numbers 7104 1002 9730 1686 3275, 7104 1002 9730 1686 3282 and 7104 1002 9730 1686 3299, respectively, were sent to petitioner at her Douglaston, New York, address.

7. The affidavit of Bruce Peltier, a mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As a 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 and associated documents 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. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and the associated CMR to one of the various branch offices of the USPS located in the Albany, New York, area. The USPS has also been requested by the Mail Processing Center to either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

8. The postal service representative then affixes a U.S. postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR. In the case of the certified mail to be mailed on November 19, 2009, the USPS employee initialed or signed each page of the CMR, affixed a postmark dated November 19, 2009 to each page of the CMR and wrote and underlined the total number of pieces of certified mail received as 210 on page 20 of the CMR. Page 20 of the CMR originally listed 211 pieces of mail; however, the number of pieces received at the post office indicates 210 in order to reflect the fact that one piece of certified mail had been “pulled” from the mailing record. A piece of mail may be pulled for any number of reasons, including, but not limited to, a discrepancy in a name or address. Any pulled piece of mail is segregated from the remaining group of statutory notices for correction and issuance at another time. A review of the CMR in this case indicates that a piece of mail listed on page 19 of the CMR was pulled. A line was appropriately placed through the entry for this taxpayer after the statutory notice was pulled. This deletion is reflected in the change of the total pieces received at the post office on page 20 of the CMR. The USPS postmark on each page of

the CMR is from the Colonie Center branch and bears the date November 19, 2009, confirming that 210 notices were mailed on that date.

9. Petitioner's Douglaston, New York, address on the CMR and the mailing cover sheets matches the address listed on the joint 2007 New York State personal income tax return electronically filed by petitioner and her husband on October 3, 2008 (i.e., the last return filed prior to the issuance of the subject notices of determination), on the Request for Conciliation Conference, and on the petition.

10. The Request for Conciliation Conference and the petition each bore petitioner's address in Douglaston, 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 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. 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).

C. 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 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).

D. 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). The United States Tax Court, interpreting provisions of the Internal Revenue Code analogous to those at issue herein, has decided that a properly completed Postal Service Form 3877 or its counterpart "represents direct documentary evidence of the date and fact of mailing" of the assessment (*Wheat v. Commr.*, 63 TCM 2955, 2957 [1992] *citing Magazine v. Commissioner*, 89 TC 321, 324 [1987]). "Exact compliance with the Form 3877 mailing procedures raises a presumption of official regularity in favor of [the Internal Revenue Service]" (*Wheat v. Commr.*, 63 TCM at 2958, *citing United States v. Zolla*, 724 F2d 808, 810, 84-1 US Tax Cas ¶ 9175 [9th Cir. 1984], *cert denied* 469 US

830, 83 L Ed 2d 59 [1984]). When the Internal Revenue Service (IRS) is entitled to a presumption of official regularity, the burden of going forward is shifted to the taxpayers, and to prevail, they must affirmatively show that the IRS failed to follow its established procedures. If there is no fully completed Form 3877, the IRS may still prove, by documentary or direct evidence, the fact and date of mailing. However, it would not be entitled to the presumption of official regularity.

The Tax Appeals Tribunal has also held that a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). As with the IRS, a failure to comply precisely with the Form 3877 mailing procedure need not be fatal to the Division's case "if the evidence adduced is otherwise sufficient to prove mailing" (*Coleman v. Commr.*, 94 TC 82, 91 [1990]). Further, the Tax Appeals Tribunal has found that a properly completed certified mail record is substantively the same as the Post Service Form 3877 (*see Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

F. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notices of determination were mailed as addressed to petitioner on November 19, 2009. Specifically, each page of this 20-page document lists certified control numbers with corresponding notice numbers, names and addresses and bears a U.S. Postal Service postmark dated November 19, 2009. A postal service employee handwrote and

underlined the number “210” near the “Total Pieces Received at Post Office” heading and initialed the last page near the underlined number, thereby indicating that all 210 pieces listed on the CMR were received at the post office. The notices addressed to petitioner were among the 210 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 on 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 October 3, 2008, listed petitioner’s address as Douglaston, New York. Petitioner did not file any tax return after this date or before the issuance of the subject notices of determination. Accordingly, the Division has shown that the notices of determination were properly mailed to petitioner at her last known address on November 19, 2009.

I. Petitioner contends that the CMR is defective because only 210 of the 211 listed pieces of mail were received at the post office. Petitioner further contends that the affidavits of Ms. Sears and Mr. Peltier fail to explain that glaring defect in the CMR. She maintains that the Peltier and Sears affidavits do not set forth an established procedure governing when and how a

piece of mail is allegedly pulled from the batch, and also lack personal knowledge of the circumstances under which the item of mail was pulled from the CMR. Petitioner further maintains that Mr. Peltier's allegation, in his affidavit, regarding an envelope pulled from the mailing record and the listing crossed out on page 10 of the CMR is false and inconsistent with the CMR itself. Because of the defects in both the affidavits and the CMR, petitioner claims the Division failed to establish proper mailing of the notices at issue.

J. Petitioner's arguments are without merit. The Tax Appeals Tribunal has held that the Division must provide evidence as to its general mailing procedure and evidence that this procedure was adhered to with respect to the notices in question (*Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*) but has never required that such evidence be the testimony of one who has actually participated in mailing the notices at issue (*Matter of Perk*, Tax Appeals Tribunal, December 13, 2001). In this case, the general procedures for generating and issuing notices of determination were set forth in the affidavits of Ms. Sears and Mr. Peltier. In addition, Mr. Peltier's affidavit set forth the general procedure followed when a piece of certified mail is pulled from the mailing record. As petitioner correctly pointed out, there is an erroneous allegation in Mr. Peltier's affidavit regarding a piece of certified mail pulled from the mailing record and the page on which the listing was crossed out on the certified mail record. While this erroneous allegation clearly indicates a lack of care in both the preparation and Mr. Peltier's review of his affidavit prior to execution, it does not support a finding that the CMR at issue is defective. The USPS employee initialed or signed each page of this 20-page CMR including page 19, the page on which a piece of listed certified mail was crossed out. The USPS employee also affixed a postmark dated November 19, 2009 to each page of the CMR and wrote and underlined the total number of pieces of certified mail received as 210 on page 20 of the

CMR. The entries at the end of the certified mail record demonstrate that each item listed on the certified mail record was delivered to the custody of the USPS on the date stamped on the certified mail record (*see Matter of Rakusin*). Accordingly, the Division has established that the notices of determination were mailed to petitioner at her last known address on November 19, 2009.

K. Petitioner's Request for Conciliation Conference was mailed March 30, 2010, a date beyond the 90-day period for protesting the notices. 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.

L. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the tax assessments and file claims for refund (Tax Law § 1139[c]). If the claims for refund are disallowed, she may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowances (Tax Law § 170[3-a][a]; § 1139).

M. The Division of Taxation's motion for summary determination is granted, and the petition of Betty M. Chung is dismissed.

DATED: Troy, New York
February 24, 2011

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE