

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

3152 RESTAURANT, INC. :

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 September 1, 2004 through :
May 31, 2008. :

In the Matter of the Petition :

of :

ON THE BOARDWALK CAFE, INC. : ORDER
DTA NOS. 823676, 823677

for Revision of a Determination or for Refund of : AND 823709
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period March 1, 2004 through :
May 31, 2008. :

In the Matter of the Petition :

of :

LEV BLINDER :

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 March 1, 2004 through :
May 31, 2008. :

Petitioner 3152 Restaurant, 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 September 1, 2004 through May 31, 2008.

Petitioner On the Boardwalk Cafe, 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 March 1, 2004 through May 31, 2008.

Petitioner Lev Blinder 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 March 1, 2004 through May 31, 2008.

On November 22 and 24, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed motions seeking dismissal of the petitions 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 motions were the affidavits of John E. Matthews, Esq., dated November 22 and 24, 2010, and annexed exhibits supporting the motion. Petitioners, appearing by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel), filed notices of objection in opposition to the Division's motions to dismiss on December 21, 2010, which date began the 90-day period for the issuance of this order. After due consideration of the affidavit and documents submitted, and all pleadings filed in this matter, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioners filed timely requests 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 3152 Restaurant, Inc., at its Brooklyn, New York, address a Notice of Determination, dated February 22, 2010, which assessed sales and use taxes for the period September 1, 2004 through May 31, 2008 (Notice No. L-033348694-9). The notice assessed tax in the amount of \$1,355,937.44, plus penalty and interest, for a balance due of \$3,356,438.21. The notice stated that fraud penalty of 50% of the tax owed, plus 50% of the statutory interest, was added pursuant to section 1145 of the Tax Law.

The Division issued to petitioner On the Boardwalk Cafe, Inc., at its Brooklyn, New York, address a Notice of Determination, dated February 22, 2010, which assessed sales and use taxes for the period March 1, 2004 through May 31, 2008 (Notice No. L-033349400-4). The notice assessed tax in the amount of \$331,322.74, plus penalty and interest, for a balance due of \$862,078.83. The notice stated that fraud penalty of 50% of the tax owed, plus 50% of the statutory interest, was added pursuant to section 1145 of the Tax Law.

2. On May 7, 2010, petitioners 3152 Restaurant, Inc., and On the Boardwalk Cafe, Inc., mailed requests for conciliation conferences. They were received by the Bureau of Conciliation and Mediation Services (BCMS) on May 10, 2010. BCMS issued to each petitioner, on May 27, 2010, a Conciliation Order Dismissing Request that stated that as the requests were filed in excess of 30 days from the date of the receipt of the statutory notices, the requests were late filed and were therefore denied.

3. To show proof of proper mailing of the notice issued to petitioner 3152 Restaurant, Inc., dated February 22, 2010, the Division provided the following: (i) an affidavit, dated November 17, 2010, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated November 16, 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) ; and (iv) and a copy of petitioner's New York State and Local Sales and Use Tax Return for the month of January 2010. The return bears the signature of petitioner's vice-president and is dated February 8, 2010. No documentation was provided by the Division as to the date of receipt of the notice by petitioner.

To show proof of proper mailing of the notice issued to petitioner On the Boardwalk Cafe, Inc., dated February 22, 2010, the Division provided the following: (i) an affidavit, dated November 18, 2010, of Bruce Peltier; (ii) an affidavit, dated November 16, 2010, of Patricia Finn Sears; (iii) the CMR; and (iv) and a copy of petitioner's New York State and Local Sales and Use Tax Return for the month of January 2010. The return bears the signature of petitioner's vice-president and is dated February 8, 2010. No documentation was provided by the Division as to the date of receipt of the notice by petitioner.

4. The affidavits of Patricia Finn Sears set forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMRs and the corresponding notices. The CMRs with the accompanying notices are forwarded to the Division's Mail Processing Center (the Center).

5. The affidavits of Bruce Peltier describe 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. 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 the one page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number four. The number four is handwritten and circled and the page is initialed, confirming that four notices were received. The USPS postmark is from the Colonie Center branch, but the date on the postmark is illegible.

6. Petitioners' Brooklyn, New York, addresses on the CMR and Mailing Cover Sheet match the addresses listed on petitioners' New York State and local sales and use tax returns for the month of January 2010. This is also the address on the requests for conference and petitions.

7. The Division issued to petitioner Lev Blinder at his Brooklyn, New York, address two notices of determination, both dated February 23, 2010, which assessed sales and use taxes for the period March 1, 2004 through May 31, 2008 (Notice Nos. L-033368792-9 and L-033368794-

7). The notices assessed tax in the amount of \$1,355,937.44 and \$331,322.74, plus penalty and interest. The notices stated that petitioner was being assessed as a responsible person of 3152 Restaurant, Inc., and On The Boardwalk Café, Inc., pursuant to Tax Law § 1138(a); § 1131(1) and § 1133.

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. Tax Law § 1138(a)(1) authorizes the Division to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29. Penalties asserted may include a fraud penalty pursuant to Tax Law § 1145(a)(2). 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 30 days of the receipt of the notice of determination (*see* Tax Law former § 2008[2][a]; former § 170[3-a][h]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 30-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. 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 petitioners' 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). In addition, the Division must prove the date of receipt of the notices by petitioners to establish the date that the 30-day time limit commenced. 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*).

D. The Division's proof in this case consists of the affidavits of Patricia Finn Sears and Bruce Peltier, which were offered to establish the general procedure for generating and issuing (mailing) notices of determination pursuant to Tax Law § 1138(a)(1), and the one-page computer-generated CMR, which was offered to establish that the procedure was followed in these instances. The Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Peltier, employees of the Division who are involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination. The proof offered establishes that the notices of determination were mailed to petitioners.

However, the CMR submitted by the Division contains a flaw. The date of the Postal Service postmark is not legible on the one page of the certified mail record (*see* Finding of Fact 5). Therefore, the Division has not established the date on which the notices of determination were mailed to petitioners. In addition, the Division has failed to introduce any evidence as to the date of receipt of the notices of determination, and therefore the 30-day filing period was never triggered (*Matter of Auto Parts Center, Inc.*, Tax Appeals Tribunal, February 9, 1995; Tax Law former § 170[3-a][h]). Accordingly, summary determination is not warranted in favor of the Division with regard to petitioners 3152 Restaurant, Inc. and On the Boardwalk Cafe, Inc.

E. Tax Law § 1138(a)(3)(B) provides, in relevant part, that:

If such determination is identical to or arises out of a previously issued determination of tax of the corporation . . . for which such person is under a duty to act, an application filed with the division of tax appeals on behalf of the corporation . . . shall be deemed to include any and all subsequently issued personal determinations and a separate application to the division of tax appeals for a hearing shall not be required.

Since Tax Law § 1138(a)(3)(B) provides that a corporate petition shall be deemed to include any and all subsequently issued responsible officer determinations, summary determination is not warranted with regard to petitioner Lev Blinder.

F. The Division of Taxation's motions for summary determination are denied, and the matters will be scheduled for hearing in due course.

DATED: Troy, New York
March 10, 2011

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE