

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
QUEENS MANOR, INC.	:	ORDER
	:	DTA NO. 823813
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, 2009 through	:	
November 30, 2009.	:	

Petitioner, Queens Manor, 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, 2009 through November 30, 2009.

On September 28, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. Petitioner, appearing by Norman A. Kaplan, Esq., and the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) submitted responses to the Notice of Intent to Dismiss Petition by December 16, 2010, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). After due consideration of the documents and arguments submitted by the parties and the pleadings and proceedings had herein, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the petition.

FINDINGS OF FACT

1. There are three notices of determination in issue in this proceeding. Each of the notices assessed a penalty in the amount of \$50.00 and was issued because the Division of Taxation's (Division) records indicated that petitioner did not file a tax return. The first notice bore assessment number L-032908530-1, was dated November 6, 2009, and assessed sales and use tax penalty for the period March 1, 2009 through May 31, 2009. The second notice bore assessment number L-033257456-2, was dated January 28, 2010, and assessed sales and use tax penalty for the period June 1, 2009 through August 31, 2009. The third notice bore assessment number L-033601081-1, was dated April 26, 2010, and assessed sales and use tax penalty for the period September 1, 2009 through November 30, 2009.

2. On August 11, 2010, the Division of Tax Appeals received an "Amended Petition," which challenged assessments numbered L-031991072-2, L-032908530-1, L-033257456-2 and L-033601081-1.

4. On September 28, 2010, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition, which was filed on August 11, 2010. The notice stated, in pertinent part, as follows:

Pursuant to § 2006.4 of the Tax Law, a petition must be filed within 90 days from the date a statutory notice is issued.

The Notices of Determination appear to have been issued on November 6, 2009, January 28, 2010 and April 26, 2010, but the petition was not filed until August 11, 2010 or two hundred seventy eight, one hundred ninety five and one hundred seven days later.

5. The last tax return filed by petitioner before the issuance of the notices of determination was a New York State and Local Quarterly Sales and Use Tax Return for the

period December 1, 2008 through February 28, 2009. The return listed petitioner's address as 79-17 Albion Ave., Elmhurst, New York 11373-3724.

6. In response to the issuance of the notice of intent to dismiss petition, the Division submitted proof of mailing and delivery of the notices regarding the three notices referred to in the notice of intent to dismiss petition. Petitioner submitted an affirmation in response. In order to address the issues presented, this motion will present the facts in the order in which the notices were issued.

Notice of November 6, 2009

7. The Division offered the affidavits of Patricia Finn Sears, Bruce Peltier and Heidi Corina, employees of the Division. The first two affidavits concerned the mailing procedures followed by the Division in mailing notices of determination. The last affidavit pertained to correspondence between Ms. Corina and the Postal Service. The Division also offered a copy of selected pages of the Certified Record for Presort Mail - Assessments Receivable (CMR) containing a list of the conciliation orders allegedly issued by the Division on November 6, 2009, including petitioner's.¹

8. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

¹ The certified mail record for November 6, 2009 consists of 2,742 pages containing 30,154 pieces of certified mail. Because of the size of the CMR and the fact that proof of delivery was provided, the proof of mailing consists of the first and last pages of the CMR and the page showing the entry for petitioner.

9. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A that was requested for petitioner regarding the notice mailed on November 6, 2009. This form requests information regarding a piece of mail bearing article number 7104 1002 9730 1661 4341² and addressed to petitioner at 7917 Albion Avenue, Elmhurst, NY 11373-3724. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated November 5, 2010. The letter refers to the certified mail number item and states in part: "The delivery record shows that this item was delivered on 11/09/2009 at 12:37 PM in ELMHURST, NY 11373." The letter also contains a scanned image of the signature of the recipient.

Notice of January 28, 2010.

10. The Division offered the same series of documents with respect to the notice of January 28, 2010 as it offered regarding the notice of November 6, 2009. That is, the Division offered the affidavits of Patricia Finn Sears, Bruce Peltier and Heidi Corina, employees of the Division. As stated earlier, the first two affidavits concerned the mailing procedures followed by the Division in mailing notices of determination. The last affidavit pertained to correspondence between Ms. Corina and the Postal Service. The Division also offered a copy of selected pages of the CMR containing a partial list of the conciliation orders allegedly issued by the Division on January 28, 2010, including petitioner's.³

² This is the same number as the certified number on the CMR corresponding with the mailing of the Notice of Determination to petitioner on November 6, 2009.

³ The CMR for January 28, 2010 consists of 2,752 pages containing 30,271 pieces of certified mail. Due to the size of the log and the fact that proof of delivery was provided, the proof of mailing consists of the first and last pages of the log along with the page containing the entry of the notice issued to petitioner.

11. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A that was requested for the notice mailed to petitioner on January 28, 2010. This form requests information regarding a piece of mail bearing article number 7104 1002 9730 1750 3378 ⁴ and addressed to petitioner at 7917 Albion Avenue, Elmhurst, NY 11373-3724. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated November 5, 2010. The letter refers to the certified mail number item and states in part: "The delivery record shows that this item was delivered on 02/01/2010 at 12:17 PM in ELMHURST, NY 11373." The letter also contains a scanned image of the signature of the recipient.

Notice of April 26, 2010

12. The Division offered the same series of documents with respect to the notice of April 26, 2010 as it offered regarding the prior notices. That is, the Division offered the affidavits of Patricia Finn Sears, Bruce Peltier and Heidi Corina, employees of the Division. As stated earlier, the first two affidavits concerned the mailing procedures followed by the Division in mailing notices of determination. The last affidavit pertained to correspondence between Ms. Corina and the Postal Service. The Division also offered a copy of selected pages of the CMR containing a partial list of the conciliation orders allegedly issued by the Division on April 26, 2010 including petitioner's.⁵

13. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A that was requested for the notice mailed to petitioner on April 26, 2010. This form requests information regarding a

⁴ This is the same number as the certified number on the CMR corresponding with the mailing of the Notice of Determination to petitioner on January 28, 2010.

⁵ The CMR for April 6, 2010 consists of 2,745 pages containing 30,190 pieces of certified mail. Due to the size of the log and the fact that proof of delivery was provided, the proof of mailing consists of the first and last pages of the log along with the page containing the entry of the notice issued to petitioner.

piece of mail bearing article number 7104 1002 9730 1858 6264⁶ and addressed to petitioner at 7917 Albion Avenue, Elmhurst, NY 11373-3724. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated November 5, 2010. The letter refers to the certified mail number item and states in part: "The delivery record shows that this item was delivered on 04/28/2010 at 11:44 AM in ELMHURST, NY 11373." The letter also contains a scanned image of the signature of the recipient.

14. In response to the Division's motion, petitioner submitted an affirmation with exhibits. In the affirmation, petitioner notes, among other things, that on or about June 1, 2009, the Division claims to have issued a Notice of Determination to petitioner for \$3,833,050.83 under assessment number L-031991072-2 for the tax periods ended August 31, 2004 through November 30, 2006. A conciliation conference was conducted on this notice and the request was denied by an order dated April 23, 2010.

15. On June 13, 2010, petitioner's representative requested copies of all notices of determination and conciliation orders for petitioner.

16. On June 17, 2010, petitioner filed a petition challenging assessment L-031991072, which assessed sales and use taxes for the period June 1, 2004 through November 30, 2006.

17. On August 6, 2010, petitioner filed an amended petition, which challenged assessments L-031991072-2, L-032908530-1, L-033257456-2 and L-033601081-1. That is, it challenged the original assessment for the period June 1, 2004 through November 30, 2006 plus the three assessments that were issued for the failure to file a tax return.

⁶ This is the same number as the certified number on the CMR corresponding with the mailing of the Notice of Determination to petitioner on April 26, 2010.

18. In a letter dated August 11, 2010, the Division of Tax Appeals advised petitioner's representative that the petition challenging assessment L-031991072 was in proper form, but there was an issue with respect to the timeliness of filing with respect to the challenge to the remaining assessments. On September 28, 2010, the Division issued the Notice of Intent to Dismiss petition referred to earlier.

19. Petitioner contends, among other things, that the affidavit of Heidi Corina is deficient because there is no description of what was mailed or an indication of the address to which the mail was delivered.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such notice "shall be an assessment of the amount of tax specified" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 90 days from the issuance of the subject notice of determination to file a request for a conciliation conference. If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Tax Law § 1147(a)(1) 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 [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.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

C. It is undisputed that at the time the notices of determination were issued, petitioner’s sales and use tax return for the period ended February 28, 2009 was the last return filed by it before the notices were issued. The address on the notices is the same address reported on the sales tax return. Thus, the notices were sent to petitioner’s last known address. Further, documentation from the USPS establishes that the notices were received at petitioner’s last known address on November 9, 2009, February 1, 2010 and April 28, 2010, respectively. It follows that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information and the USPS response that the notice was delivered to petitioner’s last known address. Petitioner’s argument that the document from the post office has no description of what was mailed or the address to which it was delivered is without any merit. In each instance, the response clearly lists the certified mail number of a particular document and the address to which the item of mail was delivered.

D. Based upon the receipt dates of the notices in issue on this motion, it is clear that the amended petition was not filed within 90 days of the issuance of the notices and, therefore, the challenge to notices L-032908530-1, L-033257456-2 and L-033601081-1 was untimely. Before concluding, certain points warrant attention. There is no contention that the initial petition challenging assessment L-031991072-2 was untimely. Therefore, in the absence of a settlement

between the parties or a withdrawal by petitioner, this petition will proceed through a hearing or submission process.

It is also noted that the conciliation conference only concerned assessment L-031991072-2. The other notices were not mentioned in the conciliation order. In essence, the difficulty presented here is that a party may not extend the 90-day period for filing a petition by filing an amended petition because such a practice would be contrary to Tax Law § 1138(a)(1), which imposes a strict 90-day time limit for filing a petition.

E. The amended petition of Queens Manor, Inc., dated August 6, 2010, is hereby dismissed.

DATED: Troy, New York
March 10, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE