

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
IRON KING CONSTRUCTION, INC.	:	DETERMINATION
		DTA NO. 823840
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, 2006 through May 31, 2009.	:	

Petitioner, Iron King Construction, 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 June 1, 2006 through May 31, 2009.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated March 15, 2011 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, Esq., sworn to March 15, 2011, and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond to the motion. The 90-day period for the issuance of this order began on April 15, 2011, the date petitioner's response to the motion was due. After due consideration of the affidavit of Mr. Matthews and the exhibits annexed thereto, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., 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 the 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, notice number L-033389046-6, dated March 1 2010.

2. Said notice was addressed to petitioner, Iron King Construction, Inc., at 270 Randolph St., Brooklyn, New York 11237-1317. The notice asserted additional sales and use taxes due for the period June 1, 2006 through May 31, 2009. The corresponding mailing cover sheet, more fully described below in Finding of Fact 8, bore petitioner's name and the above-noted address and a certified mail control number assigned to the notice.

3. 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 described above. The request was dated June 8, 2010 and was received by BCMS on June 10, 2010. The request was sent by United Parcel Service.

4. On June 24, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination, notice number L-033389046-6, 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 March 1, 2010, but the request was not received until June 10, 2010, or in excess of 90 days, the request is late filed.

5. To show proof of proper mailing of the notice dated March 1, 2010, the Division provided the following: (i) an affidavit, dated February 28, 2011, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated February 25, 2011, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); and (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked March 1, 2010.

6. The affidavit of Patricia Finn Sears set forth the Division's general practice and procedure for processing statutory notices. The notices are predated with the anticipated date of mailing. With respect to the notice in issue, each page of the 26-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 "3-1-10," to reflect the actual mailing date.

7. All notices are assigned a certified control number. The certified control 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 number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

8. Page 14 of the CMR contains information on the notice bearing the date March 1, 2010 (L-033389046-6). The control number, assessment identification number and petitioner's address as listed on the CMR all correspond to the information on the mailing cover sheet and the March 1, 2010 Notice of Determination.

9. The Peltier affidavit described the general operations and procedures of the Division's Mail Processing Center. 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 and mailing cover sheet into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail 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 the information contained on the CMR. 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.

10. A review of the CMR submitted by the Division in respect of the March 1, 2010 notice confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 285. In addition, the postal service employee initialed the page and wrote 285 and circled it. The USPS postmarks are from the Colonie Center branch and each bears the date March 1, 2010. The affixation of the postmarks, the postal service employee's initials, and the circling of the number 285 indicating that all such pieces were received, confirm that the Notice of Determination dated March 1, 2010 was received by the USPS on that date.

11. Petitioner's sales and use tax return for the quarter ended May 31, 2008, dated June 19, 2008, which was the last return filed before the Notice of Determination was issued, stated

that petitioner's address was 270 Randolph Street, Brooklyn, NY 11237, the same address appearing on the Notice of Determination in issue, the request for conciliation conference and the petition.

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. Accordingly, it is 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 [1984]). Petitioner has thus presented no evidence to contest the facts alleged in the Sears and Peltier 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 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).

D. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notice at issue to petitioner's last known address on the date claimed. The submitted affidavits and CMR establish the Division's standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address on the notice, the corresponding mail cover sheet and the CMR conforms with the address petitioner reported on its sales and use tax return for the quarter ended May 31, 2008, dated June 19, 2008, which was the last return filed before the Notice of Determination was issued, thereby satisfying the "last known address" requirement in Tax Law § 1138(a)(1). Thus, it is concluded that the Division properly mailed the notice on March 1, 2010 and 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]).

E. Petitioner's Request for Conciliation Conference was filed on June 10, 2010. This date falls 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]). Thus, 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, 2005).

F. The petition of Iron King Construction, Inc. is hereby dismissed.

DATED: Troy, New York
May 26, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE