

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RESTAURANT EQUIPMENT & DESIGN : **DETERMINATION**
SOLUTIONS, INC. : **DTA NO. 823846**
: :
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, 2004 through February 28, 2007. :
:

Petitioner, Restaurant Equipment & Design Solutions, 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, 2004 through February 28, 2007.

On March 15, 2011, the Division of Taxation, by its representative, Mark F. Volk, 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 (b). Accompanying the motion was the affidavit of John E. Matthews, dated March 15, 2011, and annexed exhibits supporting the motion. Petitioner, appearing by its president, Christopher Geraci, was granted an extension of time to respond until May 31, 2011. On that date, petitioner filed its opposition to dismissal with the Division of Tax Appeals. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced May 31, 2011. After due consideration of the affidavits and documents presented, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference 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 Notice of Determination number L-033358820-9, dated February 23, 2010 and addressed to petitioner, Restaurant Equipment & Design Solutions, Inc., at "2 Whitecap Court, Lloyd Neck, NY 11743-9793." The notice asserted New York State sales and use tax for the period June 1, 2004 through February 28, 2007 in the amount of \$48,855.51, plus interest. The Division asserts that it also sent a copy of the subject notice to petitioner's then representative, Paul J. Leventhal, at "15 Remsen Ave, Roslyn, NY 11576-2102." Petitioner protested the notice by filing a request for conciliation conference on July 22, 2010.

2. On August 13, 2010, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice 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 February 23, 2010, but the request was not mailed until July 22, 2010, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the February 23, 2010 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated February 25, 2011, of Patricia Finn Sears, a supervisor in the Division's Case and Resource Tracking System (CARTS); (ii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 23, 2010; (iii) an affidavit, dated February 28, 2011, of Bruce Peltier, a

mail and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit, dated February 28, 2011, 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 the USPS responses to such requests dated November 22, 2010; (vi) two copies of the February 23, 2010 Notice of Determination with the associated mailing cover sheets; and (vii) a departmental computer record entitled "NYS Department of Taxation and Finance Sales Tax Header Inquiry," which lists the same address for petitioner as that listed on the subject notice.

4. 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. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing to allow for manual review and processing. Following the Division's general practice, this date was manually changed on the first page of the CMR in the present case to the actual mailing date of "2/23/10." The page numbers of the CMR run consecutively, starting with "PAGE 1," and are noted in the upper right corner of each page.

5. 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 CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and P.O. Address."

6. According to the Sears affidavit, the CMR in the present matter consists of 14 pages and lists 151 certified control numbers along with corresponding assessment numbers, names and addresses. There are no deletions from the list. Ms. Sears notes that the CMR attached to her affidavit contains portions that have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR, and initialed or signed page 14.

7. Attached to the Sears affidavit, as exhibit "A," is a copy of the CMR issued by the Division on February 23, 2010. The document consists of 14 pages. Pages 1 and 14 have a handwritten entry of "2/23/10" in the top left corner.

8. Page 8 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1781 2470 and assessment ID number L-033358820 was mailed to "Restaurant Equipment & Design Solutions," at "2 Whitecap Court, Lloyd Neck, NY, 11743-9793," the same 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.

9. Page 6 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1781 2289 and assessment number L-033358820 was mailed to petitioner's representative at the time, Paul J. Leventhal, at "15 Remsen Ave, Roslyn, NY 11576-2102." The corresponding mailing cover sheet bears this certified control number and lists Mr. Leventhal's name and address as noted.¹

¹ The address on the mailing cover sheet includes Mr. Leventhal's firm's name "Leventhal & Co., LLP," but is otherwise identical to the address in the CMR.

10. The affidavit of Bruce Peltier describes the Mail Processing 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.

11. A review of the CMR submitted by the Division confirms that a USPS employee postmarked and initialed pages 1 through 14 of the CMR. The postmarks that are legible are dated February 23, 2010. The date in the postmark on page 7 of the CMR (a page which does not contain any information concerning petitioner) is too faint to be read, however. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 151, which has not been circled. Below the total pieces entry there is a heading "Total Pieces Received at Post Office," which is blank.

12. According to the Peltier affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 151 articles of mail listed on the CMR, including the articles addressed to petitioner and its representative, were received by the USPS on February 23, 2010.

13. According to both the Sears and 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 its representative on February 23, 2010, as claimed.

14. 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 1781 2470 and 7104 1002 9730 1781 2289. The USPS responses to such requests indicate that the article bearing certified control number 7104 1002 9730 1781 2470 was delivered as addressed to petitioner at 2 Whitecap Ct., Huntington,² New York 11743, on February 25, 2010 and that the article bearing certified control number 7104 1002 9730 1781 2289 was also delivered on February 25, 2010 in Roslyn, New York 11576. Ms. Corina states in her affidavit that both USPS responses bear the signature and address of the recipient.

15. Attached to the Matthews affidavit is a departmental computer record from petitioner's sales tax file listing an address of 2 Whitecap Court, Lloyd Neck, New York 11743. According to the Matthews affidavit, this was petitioner's last known address when the subject notice was issued.

16. On May 31, 2011, petitioner faxed to the Division of Tax Appeals an unsworn letter in response to the Division's motion. Although the letter references "enclosed documents," none were attached. Petitioner did not provide any response to the instant motion by United States mail, courier, delivery, messenger, or similar service.

²Lloyd Neck is a part of the Town of Huntington, New York. (*Lloyd Harbor - A Brief History*, http://www.lloydharbor.org/village/brief_history.htm)

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. 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).

C. Here, the Sears and Peltier affidavits establish the Division's standard mailing procedure. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address indicated thereon and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, however, such a properly completed CMR is missing from the record. On the final page of the CMR, corresponding to "Total Pieces and Amounts," is the preprinted number 151, which has not been circled. Below the total pieces entry there is a heading "Total Pieces Received at Post Office," which is blank. Consequently, under existing precedent, the CMR submitted as exhibit "A" of the Sears affidavit does not alone establish that

the articulated procedure was followed in this case (*see Matter of Rakusin; Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

D. Such a flaw may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the USPS delivery information accompanying the Corina affidavit shows that a copy of the notice at issue, addressed to petitioner, which was also listed on the CMR, was delivered as addressed on February 25, 2010. Similarly, the Corina affidavit and accompanying documents evidence delivery of a copy of the subject notice to petitioner's representative on the same date. This other evidence establishes the fact of receipt of the subject notice, as claimed, on February 25, 2010 (*see Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010). Additionally, petitioner does not contest receipt of the notice.

E. 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]). Here, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., February 25, 2010, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *rev'd* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Thus, petitioner had until May 26, 2010 to file a timely protest. Petitioner's request for conciliation conference was not filed until

July 22, 2010, however, a date which falls beyond the required statutory period. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest, including consideration of the reason stated in its petition for the admitted late filing³ (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

F. It should be noted that despite extension, petitioner's sole response to the Division's motion was a letter faxed to the Division of Tax Appeals on May 31, 2011. A mailed or hand-delivered copy was never received. The Tribunal's Rules of Practice and Procedure describe the requirements for timely filing a response to a motion before the Division of Tax Appeals (*see* 20 NYCRR 3000.5, 3000.22). A faxed copy of a letter, without accompanying timely mailing or hand-delivery, as is the case here, does not meet those requirements. Hence, petitioner did not properly file a response to the Division's motion and its faxed letter of May 31, 2011 must be disregarded. Because of petitioner's failure to file a response to the motion as required, 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 Corp.*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1980]). Petitioner has presented no evidence to contest the facts alleged in the Sears, Peltier, Matthews 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]).

³As explanation in its petition for the late filing, petitioner states that "the reason for this situation was my loss of representation when I severed ties with my accountant."

G. The Division of Taxation's motion for summary determination is granted, and the petition of Restaurant Equipment & Design, Inc., is dismissed.

DATED: Troy, New York
June 30, 2011

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE