

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ADELSON COLLADO :
D/B/A CALIDAD RESTAURANT : ORDER
 : DTA NO. 823893
for Revision of Determinations or for Refund of Sales and :
Use Tax under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2007 through August 31, 2009. :
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Petitioner, Adelson Collado d/b/a Calidad Restaurant, filed a petition for revision of determinations or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period June 1, 2007 through August 31, 2009.

On November 9, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4)(i). The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted an affidavit and supporting exhibits, dated January 10, 2010 in support of dismissal. Petitioner, appearing by David Rivas, EA, submitted two letters, dated November 30, 2010 and January 19, 2011, in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced on January 19, 2011. After due consideration of the documents submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition filed in this matter.

FINDINGS OF FACT

1. Petitioner, Adeldo Collado d/b/a Calidad Restaurant, filed a petition with the Division of Tax Appeals on October 1, 2010, protesting 20 notices of determination (one was repeated in error) and 5 warrants. However, even though instructed to attach copies of the notices and the conciliation order, petitioner attached only a list of 20 notices of determination and 5 warrants. In the petition's allegation of errors and assertion of facts, petitioner claimed that he was not an owner of the business, made no decisions on its behalf, signed no checks and had nothing to do with withholding taxes or sales tax. Petitioner alleged the business was a partnership and that he was neither an "official nor an investor."

2. Petitioner noted on his petition that a conciliation conference was requested (even though he checked a box that indicated to the contrary) "but [was] not scheduled because of lapse of time." This was petitioner's only reference to the issue of whether he filed timely a request for a conciliation conference in the Bureau of Conciliation and Mediation Services (BCMS).

3. On November 9, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss the petition. The notice of intent explained this action as follows:

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

The Notices of Determination appear to have been issued on April 19, 2010, but the petition was not filed until October 1, 2010 or one hundred sixty five days later.

4. The Notice of Intent to Dismiss did not delineate the notices that were petitioned, only that they “appear to have been issued on April 19, 2010.” In fact, the petition listed 20 notices with the following notice numbers: L-030000903, L-029157302-7, L-032388855-8, L-031833622-8, L-030606464-6, L-030000903-3, L-029693853-8, L-030096852-6, L-030096850-8, L-033553816-1, L-029164728-2, L-033074770-3, L-033074768-4, L-033074769-3, L-033074771-2, L-033074772-1, L-033074773-9, L-033074767-5¹ and L-033074766-6. In addition, petitioner protested five warrants with warrant numbers E-029164728-W001-3, E-013124974-W019-7, E-013124974-W020-3, E-013124974-W021-7 and E-013124974-W022-2.

5. Petitioner’s petition was filed on October 1, 2010 following the issuance of a conciliation order on August 13, 2010. That order addressed seven of the notices listed in the petition: L-033074766, L-033074767, L-033074768, L-033074769, L-033074770, L-033074771 and L-033074772. The order stated that the request for conference was untimely and was denied on that basis.

6. Even though the Notice of Intent to Dismiss specifically stated that dismissal of the petition was being considered due to its apparent untimely filing, petitioner, in his response, did not address the issue in either his November 30, 2010 or January 19, 2011 letters, but instead focused on his personal responsibility for the taxes asserted.

7. The Division of Taxation (Division) addressed ten of the notices referenced in the petition including the seven notices referenced in the conciliation order. For eight of the notices referenced in the petition, the Division submitted evidence of mailing to establish proper issuance.

¹This assessment was listed twice by petitioner in his petition. Therefore, although he listed 20 notices of determination there were, in fact, only 19.

8. Eight of the notices were dated November 30, 2009 and were addressed to petitioner, Adolfo Collado, at 506 Ft. Washington Avenue, 3E, New York, New York 10033-2081. The notices asserted additional sales and use tax for various periods between June 1, 2007 and May 31, 2009 and bore assessment numbers L-033074766-6, L-033074767-5, L-033074768-4, L-033074769-3, L-033074770-3, L-033074771-2, L-033074772-1 and L-033074773-9. The corresponding mailing cover sheets bore petitioner's name and the above-noted address and a certified mail control number assigned to the notice.

9. By letter, postmarked July 16, 2010, petitioner filed a Request for Conciliation Conference protesting the eight notices of determination described in Finding of Fact 8. The request also protested two additional notices, L-033553816 and L-029164728, which will be discussed below. As noted, a conciliation order dated August 13, 2010 dismissed the request for being filed in excess of 90 days after the issuance of the notices. As mentioned in Finding of Fact 5, the conciliation order addressed only seven of the notices.

10. To show proof of proper mailing of the eight notices dated November 30, 2009, the Division provided the following: (i) an affidavit, dated January 4, 2011, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated December 30, 2010, 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 November 30, 2009.

11. 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 notices dated November 30, 2009, each page of the 42-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 "11-30-09," to reflect the actual mailing date.

12. 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 Division's 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."

13. Page 10 of the November 30, 2009 CMR contains information on the notices bearing that date (L-033074766-6, L-033074767-5, L-033074768-4, L-033074769-3, L-033074770-3, L-033074771-2, L-033074772-1 and L-033074773-9). The control numbers, assessment identification numbers and petitioner's address as listed on the CMR all correspond to the information on the mailing cover sheets and the November 30, 2009 notices of determination.

14. The Peltier affidavit describes 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.

15. A review of the CMR submitted by the Division in respect of the November 30, 2009 notices of determination 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 456. In addition, the postal service employee initialed the page and wrote 456. The USPS postmarks are from the Colonie Center branch and each bears the date November 30, 2009. The affixation of the postmarks, the postal service employee's initials, and the writing of the number 456 indicating that all such pieces were received, confirm that the notices of determination dated November 30, 2009 were received by the USPS on that date.

16. Petitioner's 2008 New York resident income tax return, dated April 14, 2009, reported petitioner's address as 506 Ft Washington, 3E, New York, NY 10033. This was the last return filed by petitioner prior to the issuance of the subject notices.

17. With respect to notice number L-033553816, the Division submitted a printed case inquiry computer file record, which indicated that this notice had been protested by petitioner, that a conference had been conducted on November 10, 2010 and that as of November 12, 2010, no conciliation order had been rendered.

18. With respect to notice number L-029164728, the Division submitted a copy of petitioner's request for a conciliation conference, the conciliation order and a Notice of Withdrawal of Petition in the Division of Tax Appeals, on February 12, 2009, which discontinued the case with prejudice.

19. In its response to the Notice of Intent to Dismiss, the Division did not address the following notices that were protested in the petition: L-030000903, L-029157302-7, L-032388855-8, L-031833622-8, L-030606464-6, L-030000903-3, L-029693853-8, L-030096852-6 and L-030096850-8.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140 [1991]).

Accordingly, a party to a proceeding cannot confer jurisdiction on the Division of Tax Appeals to decide matters outside the scope of its authority (*see Strina v. Troiano*, 119 AD2d 566, 500 NYS2d 736 [1986] [subject matter jurisdiction cannot be conferred by consent or stipulation of the parties, and a defect in subject matter jurisdiction cannot be waived]).

B. Tax Law § 2008(1) provides:

All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.

C. Warrants are not notices that confer the right to a hearing in the Division of Tax Appeals as contemplated by Tax Law § 2008(1). Thus, to the extent the petition requests a hearing to decide matters associated with the five warrants, it must be dismissed.

D. With respect to notice number L-029164728, the records of the Division of Tax Appeals indicate that a petition was filed with respect to this notice on September 2, 2008 and

the matter was discontinued with prejudice pursuant to a Notice of Withdrawal of Petition on February 12, 2009. Thus, petitioner has exhausted all his administrative remedies with regard to this notice and his request for further relief is denied.

E. With respect to notice number L-033553816, the Division has submitted satisfactory proof that the matter was pending in the Bureau of Conciliation and Mediation Services when petitioner filed his petition, which included his claim for relief for the same notice.

Tax Law § 1138(a)(1) provides that a notice of determination shall be an assessment of the tax specified in the notice unless the taxpayer applies to the Division of Tax Appeals for a hearing. Tax Law § 170(3-a)(a) provides that within the Division of Taxation there shall be a BCMS which shall provide conferences at a taxpayer's option when said taxpayer receives a notice which gives rise to a right to a hearing. Tax Law § 170(3-a)(b) provides that a request for such a BCMS conference suspends the running of the period of limitations for filing a petition to protest the notice and request a hearing. The regulation at 20 NYCRR 4000.6(a) provides that at any time before the issuance of a conciliation order the requester may discontinue the conciliation conference. Once the discontinuance is filed with BCMS, the requester has 90 days to file a petition for a hearing in the Division of Tax Appeals. (20 NYCRR 4000.6[b].)

Since petitioner never discontinued the conciliation conference, his petition to the Division of Tax Appeals was premature. Petitioner's request for relief with respect to notice number L-033553816 is denied.

F. Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing

on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination.

G. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], citing *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879 [1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 448-449, 582 NYS2d 170, 173 [1992] citing *Zuckerman*). In order to decide whether such an issue exists herein, a discussion of the relevant substantive law is appropriate.

H. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a Notice of Determination (*see*

Tax Law § 170[3-a][a]: § 1138[a][1]). If a taxpayer fails to file a timely petition protesting 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 Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

I. 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).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Peltier and Ms. Sears, Division employees involved in and possessing knowledge of the process. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the eight notices of deficiency were mailed as addressed to petitioner on November 30, 2009. Specifically, this document lists certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated November 30, 2009. Additionally, a postal employee wrote "456" next to the total pieces received heading and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. Hence, the CMR was properly completed and constitutes documentary evidence of both the date and fact of mailing. (*See Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001.)

J. Tax Law § 1138(a)(1) requires that a notice of determination “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 in or out of this state.” Tax Law § 1147(a)(1) provides that notices required or authorized under Article 28 should be addressed to the person at the address given in the last return filed by him, application made or such address as may be obtainable.

K. Here, the record shows that petitioner’s address as listed on his 2008 personal income tax returns was 506 Ft Washington, 3E, New York, NY 10033. The 2008 return was filed on April 14, 2009. Thus his last known address prior to the issuance of the notices of determination on November 30, 2009 was that stated on the 2008 tax return.

Accordingly, the Division has shown that it properly mailed the subject notices of determination to petitioner at his last known address consistent with Tax Law § 1138(a)(1) and § 1147(a)(1). The mailing of such notice is presumptive evidence of the receipt of the notices by petitioner. (Tax Law § 1147[a][1].) Petitioner has neither challenged the proper mailing of the notices nor submitted evidence to rebut the presumption of their delivery to him in the normal course of the mail.

L. The Division has established that it properly mailed eight notices of determination to petitioner on November 30, 2009 and that the request for a conciliation conference, filed on July 16, 2010, and the petition for a hearing in the Division of Tax Appeals, filed on October 10, 2010, were not timely filed. Therefore, the Division of Tax Appeals does not have jurisdiction to hear this matter with regard to the eight notices.

M. The petition of Adeldo Collado d/b/a Calidad Restaurant is dismissed with respect to the five warrants and notice numbers L-033074766-6, L-033074767-5, L-033074768-4, L-033074769-3, L-033074770-3, L-033074771-2, L-033074772-1, L-033074773-9, L-033553816

and L-029164728. However, with respect to the nine notices of determination not addressed by the Division, notice numbers L-030000903, L-029157302-7, L-032388855-8, L-031833622-8, L-030606464-6, L-030000903-3, L-029693853-8, L-030096852-6 and L-030096850-8, the Notice of Intent to Dismiss Petition, dated November 9, 2010, is rescinded, and the Division of Taxation shall have 75 days from the date of this order to file an answer to petitioner's petition.

DATED: Troy, New York
April 7, 2011

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