

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ASHWOOD STOVE & FIREPLACE CO., INC. : DETERMINATION
DTA NO. 825236
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 May 31, 2009. :
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Petitioner, Ashwood Stove & Fireplace Co., 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 May 31, 2009.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel), brought a motion dated February 28, 2014 seeking an order dismissing the petition or, in the alternative, summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and (vii) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In a letter dated April 4, 2014, petitioner requested an additional 30 days or until May 5, 2014 to respond. Petitioner's request was granted and the 90-day period for the issuance of this order thus began on May 5, 2014. Petitioner, appearing by Silberling & Silberling (Stephen P. Silberling, Esq., of counsel), filed a response to the Division of Taxation's motion on May 5, 2014. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition 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 a Notice of Determination, dated May 15, 2012, bearing assessment identification number L-037851082-7. The notice is addressed to petitioner, Ashwood Stove & Fire Place Co., Inc., at "1075 7 PORTION RD, FARMINGVILLE, NY 11738-2256." It assesses sales and use taxes for the period March 1, 2009 through May 31, 2009 in the amount of \$17,902.33 plus penalty and interest. The notice explained that petitioner must file a request for a conciliation conference or a petition for a hearing by August 13, 2012.

2. In support of its motion and to prove mailing of the Notice of Determination under protest, the Division submitted, among other documents, the following: (i) the petition of Ashwood Stove & Fireplace Co., Inc., dated September 10, 2012, that was stamped received by the Division of Tax Appeals on September 13, 2012, (ii) the Notice of Determination issued to Ashwood Stove & Fireplace Co., Inc., dated May 15, 2012, (iii) an affidavit, dated February 21, 2014, of Daniel A. Maney, Manager of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the Case and Resource Tracking System (CARTS) Control Unit; (iv) an affidavit, dated February 24, 2014, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division's mail room; (v) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 15, 2012; and (vi) a copy of petitioner's sales and use tax returns (Form ST-100) for the periods March 1, 2010 through May 31, 2010, December 1, 2011 through February 29, 2012 and September 1, 2012 through November 30, 2012.

3. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney 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. 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 "5/15/12." In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

4. 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."

5. According to the Maney affidavit, the CMR in the present matter consists of eight pages. Mr. Maney notes that the entire CMR is attached to his affidavit, and that portions have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each

page of the CMR, and initialed or signed page eight. He adds that the total number of statutory notices mailed pursuant to the CMR was 77.

6. Attached to the Maney affidavit, as exhibit "A," is a copy of the eight pages of the CMR.

7. Page four of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1109 7774 and assessment ID number L-037851082 was mailed to petitioner at the Farmingville, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

8. Page five of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1109 7811 and assessment ID number L-037851082 was sent to Stephen P. Silberling, 300 Rabro Drive, Suite 12B, Hauppauge, N.Y. 11788. An enclosure with the notice states that a copy of the notice was forwarded to Mr. Silberling because the Division's records indicate that a power of attorney is on file for the tax matters at issue in the notice

9. The affidavit of Bruce Peltier describes the Division's Mail Processing Center's (Center) general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The certified control numbers are 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. Each page of the CMR in exhibit "A" of the Maney affidavit contains a USPS postmark of May 15, 2012. On page 8, corresponding to "Total Pieces and Amounts," is the preprinted number 77, which is circled. There is a set of initials or a signature near the circled number of pieces.

10. The Maney affidavit explains that the affixation of the postmarks and the Postal Service employee's initials show that 77 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on May 15, 2012.

11. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner and petitioner's representative on May 15, 2012 as claimed.

12. The sales and use tax return for the period ending February 29, 2012 was filed on March 22, 2012. This was the last return filed before the Notice was issued. The address shown on this return corresponds with the address appearing on the Notice and the CMR.¹

CONCLUSIONS OF LAW

A. As noted, the Division brings a motion to dismiss the petition under section 3000.9(a) of the Rules of Practice and Procedure (Rules) or, in the alternative, a motion for summary determination under section 3000.9(b). The first issue to resolve is whether the Division of Tax Appeals has jurisdiction over the petition because if the petition was untimely filed it must be dismissed for lack of jurisdiction. Accordingly, a motion to dismiss under section 3000.9(a)(1)(ii) of the Rules is the proper vehicle to consider the timeliness of the petition for a hearing. This determination shall address the instant motion as such.

¹ It is recognized that there is a slight difference in the addresses insofar as the address on the sales tax returns states, in pertinent part, "1075 Portion RD. Unit #7" whereas the words Unit #7 were not included on the Notice of Determination. There is no claim that this difference was of any consequence.

B. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (Tax Law § 1138[a][1]). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170[3-a][a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, a notice of determination becomes a fixed and final assessment and, consequently, the Division of Tax Appeals is without jurisdiction to consider the merits of the protest (*see* Tax Law § 1138[a][1]; *Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner’s last known address (Tax Law § 1138[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). 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 has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., May 15, 2012, to petitioner's last known address. The CMR has been properly completed and therefore constitutes highly probative documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant CMR and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's sales and use tax return (Form ST-100) for the period March 1, 2012 through May 31, 2012, which satisfies the "last known address" requirement in Tax Law § 1138(a)(1). The notice was thus properly mailed to petitioner on May 15, 2012.

E. Case law has established that the 90-day period for filing a petition or a request for a conciliation conference is tolled if the taxpayer's representative is not also served with a copy of the statutory notice (*see Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). In this instance however, for the same reason that the evidence supports the date and fact of a mailing to petitioner, the evidence also supports the date and fact of a mailing to petitioner's representative on May 15, 2012.

F. In response to the motion to dismiss the petition, petitioner's representative submitted an affirmation, which stated that he has represented the taxpayer for years and that he has always protested and appealed all assessments. He further states that, with regard to the quarter ending May 31, 2009, he did not receive the Notice of Determination. However, in early September 2012, he received a Notice and Demand for Payment of Tax Due for this quarter and immediately wrote a letter to the auditor since he assumed this was a mistake by the Division. Petitioner's

representative also states that he received a letter dated July 17, 2012 from the auditor that referred to an audit period of December 1, 2006 through November 30, 2011 giving him 30 days to provide additional information or an assessment would be issued. On August 14, 2012, he provided the additional information. As of the date of the affirmation, December 7, 2012, no assessment has been issued for the period June 1, 2009 through November 30, 2011. On the basis of the forgoing, petitioner's representative submits that he should have the right to a hearing because he never received the Notice of Determination and because he reasonably believed that the quarter ending May 31, 2009 was included in the audit for the period December 1, 2006 through November 30, 2011 for which no assessment has been issued.

G. As noted, petitioner contends that it never received the Notice of Determination. Whether petitioner's argument is successful depends upon whether the Division can demonstrate that the notice was properly mailed (*see Matter of Blau Par Corporation*, Tax Appeals Tribunal, May 21, 1992). The demonstration of a proper mailing leads to the conclusion that the request for a hearing was untimely (*id*; Tax Law § 1138[a][1]). As set forth above, the Division's evidence is sufficient to support its assertion that the notice was properly mailed, and the claim by petitioner and its representative that they did not receive the notice is not sufficient to rebut the Division's evidence of mailing (Tax Law § 1147[a][1]; *see Matter of American Cars 'R' Us v. Chu*, 147 AD2d 797 [3d Dept 1989]).²

H. Petitioner also submits that it reasonably thought that the quarter ending May 31, 2009 was included in the audit for the period December 1, 2006 through November 30, 2011. Obviously, the single sales tax quarter May 31, 2009 falls within the broader audit period.

² In reaching this conclusion, it is recognized that the letter from petitioner's representative of August 14, 2012 requesting that the Division not issue a notice of determination lends some credibility to petitioner's representative's claim that he never received the notice.

However, in view of the statement in the affirmation that it never received the Notice of Determination, it is unclear why the issuance of the notice for one quarter would have created any confusion. Further, the Division is not prohibited by the Tax Law from issuing an assessment for one quarterly period and it is clear that a notice that is not timely challenged becomes an assessment (Tax Law § 1138[a][1]).

I. In a separate affirmation, petitioner's representative contends that the Division did not oppose his affirmation, agreed to accept his petition as being in proper form and added the audit period in issue to the audit for the period December 1, 2006 through November 30, 2011. The forgoing arguments do not warrant a different result. Although the Division may not have specifically opposed petitioner's affirmation, it is well established that subject matter jurisdiction may not be conferred by the consent of the parties (*Matter of Plymouth Tower Associates*, Tax Appeals Tribunal, December 27, 1991). In addition, the acknowledgment that a petition is in proper form has no bearing on whether there is subject matter jurisdiction. Lastly, the inclusion of the audit period at issue here in the broader audit does not eliminate the statutory directive that a notice becomes an assessment if it is not challenged within the requisite period of time (Tax Law § 1138[a][1]).

J. It is noted that although the Division of Tax Appeals lacks subject matter jurisdiction, petitioner has the option of paying the tax and, within two years of the payment, filing a claim for refund (Tax Law § 1139[c]). If the claim for refund is disallowed, petitioner may request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of the notice of disallowance to contest such disallowance (Tax Law §§ 170[3-a][a]; 1139[b]).

K. The Division's motion to dismiss the petition is granted.

DATED: Albany, New York
July 10, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE