

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SWIATOSLAW KUZIW :

DECISION
DTA NO. 817634

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 December 1, 1995 through February 28, 1998. :

Petitioner Swiatoslaw Kuziw, 27 Woodshire Terrace, Towaco, New Jersey 07082-1457,
filed an exception to the order of the Administrative Law Judge issued on June 22, 2000.

Petitioner appeared by Michael Swaaley, Esq. The Division of Taxation appeared by Barbara G.
Billet, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief on exception. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the
following decision.

ISSUE

Whether petitioner filed a timely petition for a hearing before the Division of Tax Appeals
within 90 days of the issuance of the notice of determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth
below.

The Division of Taxation (“Division”) issued to petitioner, Swiatoslaw Kuziw, a Notice of Determination dated March 18, 1999 and addressed to petitioner at “27 Woodshire Ter, Towaco, NJ 07082-1457.” The notice bears assessment identification number L-016078118-9 and asserts a total amount due of \$28,334.53. As indicated by the computation summary section of the notice, this amount consisted of sales and use taxes assessed of \$24,047.78, plus interest, for the period December 1, 1995 through February 28, 1998. The notice bore certified mail control number P 911 008 721.

On March 27, 2000, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination dated March 18, 1999.

On April 7, 2000, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the Notice of Determination in this matter was issued on March 18, 1999, but that the petition was not filed until March 27, 2000, or 375 days later.

Notices of determination, such as the one at issue herein, are computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record (“CMR”). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR

under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page one of the CMR lists an initial date of March 8, 1999, which has been manually changed to March 18, 1999.

After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

The CMR relevant to this case is an 85-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip+4 Minimum Discount Mail." This CMR lists consecutive certified control numbers P 911 008 650 through P 911 009

578. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 85 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

Information regarding the Notice of Determination issued to petitioner is contained on page seven of the CMR. Specifically, corresponding to certified control number P 911 008 721 is notice number L 016078118, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Determination.

Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated March 18, 1999.

The last page of the CMR, page 85, contains a pre-printed entry of 929 corresponding to the heading "Total Pieces and Amounts Listed." This pre-printed entry has been manually circled and beneath it is the signature of a Postal Service employee.

The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the "929" indicate that all 929 pieces listed on the CMR were received at the post office.

The Division generally does not request, demand or retain return receipts from certified or registered mail.

Several of the facts set forth above were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of deficiency and determination. Mr. Baisley is employed as a Chief Mail Processing Clerk in the

Division's Mail Processing Center. Mr. Baisley's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

The address on the subject Notice of Determination is the same as the address given on petitioner's filed 1997 and 1998 nonresident income tax returns (Form IT-203), which were signed by petitioner and dated April 1, 1998 and April 15, 1999, respectively.

In response to the Notice of Intent to Dismiss Petition, petitioner's representative submitted a letter dated April 18, 2000 which stated:

Based on prior correspondence with your office and the Office of Counsel on January 13, 2000 and January 25, 2000 it was conceded that the Division of Taxation cannot prove the date of mailing of the notice and demand to petitioner. Accordingly the previous intent to dismiss was denied and this one must also be denied.

In addition the initial notice and demand was to the corporation Brewsky's Goodtimes Corporation and not to Mr. Kuziw.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

In his order, the Administrative Law Judge noted that pursuant to Tax Law § 1138(a)(1), a notice of determination of sales and use tax shall become an assessment of the amount specified in such notice unless the person against whom it is assessed either requests a conciliation conference with Bureau of Conciliation and Mediation Services ("BCMS") or files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. The notice of determination must 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. The Administrative Law Judge noted that the filing of a petition within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals.

Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Administrative Law Judge pointed out that the Division has the burden of proving proper mailing of the notice in question.

The Administrative Law Judge noted that in order to prove the proper mailing of a notice, the Division bears the burden of showing its standard procedure for the issuance of notices by one with knowledge of the relevant procedures. The Division must also show that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge concluded, based on affidavits of the Division's employees submitted in support of the Notice of Intent to Dismiss Petition, that the Division had presented sufficient proof to establish its standard procedure for issuing notices of determination. Further, the Division had established that the subject notices were mailed to petitioner on March 18, 1999. As petitioner's petition was filed on March 27, 2000, such petition was not filed within 90 days of the mailing date as required. Thus, the Administrative Law Judge concluded that the petition was not timely filed and the Division of Tax Appeals was without jurisdiction to entertain the merits of the notice.

ARGUMENTS ON EXCEPTION

Although petitioner failed to file a brief in support of his exception, such exception notes that the Administrative Law Judge made several erroneous conclusions in his order. Primarily, petitioner takes issue with the stated tax period under review. Petitioner argues that his petition sets forth the tax period involved in this dispute as September 1, 1993 through February 28, 1998 and he alleges that the Administrative Law Judge concluded that the period at issue was December 1, 1995 through February 28, 1998. Therefore, petitioner alleges that the

determination made by the Administrative Law Judge could not be properly rendered after due deliberation of the evidence since the appropriate tax period was not evaluated. Additionally, petitioner asserts that the issue of timeliness is overly narrow and does not address the ultimate issue of whether the Division conducted a proper audit in his case.

With respect to the Division's proof of mailing, petitioner states that the Administrative Law Judge determined his facts based upon the affidavits submitted by Division employees. Petitioner claims that he has no basis or expertise to contest the CARTS computer system described in the affidavits. Moreover, petitioner argues that the Division has not met its burden of demonstrating that he received the notice and on what date he received the notice of determination.

Lastly, petitioner claims that the Administrative Law Judge determined that the notice at issue was mailed on March 18, 1999. However, petitioner alleges that the notice was actually dated February 22, 1999 and had a payment due date of March 15, 1999. Petitioner asserts that these conflicting dates undermine the conclusion that the notice was actually mailed on March 18, 1999. Therefore, since the Division has not met its burden of proof in this matter, petitioner argues that he is entitled to a hearing on the merits.

OPINION

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to the person liable for the collection or payment of sales and use tax which will become an assessment unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Pursuant to Tax Law § 1147(a)(1), a notice of

determination is to 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." The mailing of such notice is presumptive evidence of its receipt. The taxpayer has the right to rebut this presumption (*Matter of Ruggerite, Inc. v. State Tax Commn.*, 64 NY2d 688, 485 NYS2d 517).

Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (*see, Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111).

In this case, the Administrative Law Judge determined that the Division had proven both the fact and date of mailing of the Notice of Determination dated March 18, 1999 for the tax period December 1, 1995 through February 28, 1998. Based upon our review of the record herein, we agree with his conclusion. Petitioner's attempt to raise substantive issues is precluded by his failure to establish his timely filing of the petition which would confer jurisdiction on the Division of Tax Appeals to deal with such issues. Since the Administrative Law Judge adequately and correctly addressed the issue presented to him, we sustain the order for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Swiatoslaw Kuziw is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The petition of Swiatoslaw Kuziw is dismissed with prejudice.

DATED: Troy, New York
March 15, 2001

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner