

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BRYANT TOOL AND SUPPLY, INC. :
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, 1986 :
through August 31, 1988. :

In the Matter of the Petition :
of :
BRYCO SUPPLY, INC. :
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, 1986 :
through August 31, 1988. :

DETERMINATION
DTA NOS. 808417,
808496 and 808535

In the Matter of the Petition :
of :
EMIL DISIMONE :
OFFICER OF BRYANT TOOL AND SUPPLY, INC. :
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, 1986 :
through August 31, 1988. :

Petitioners, Bryant Tool and Supply, Inc., 3 Libby Drive, Glen Cove, New York 11542, Bryco Supply, Inc., 50-29 69 Place, Woodside, New York 11377, and Emil DiSimone, officer of Bryant Tool and Supply Inc., 3 Libby Drive, Glen Cove, New York 11542, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1986 through August 31, 1988.

On June 17, 1991 and July 2, 1991, respectively, petitioners by Albert Lemishow, C.P.A.,

and the Division of Taxation by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel) agreed to have the controversy determined on submission without a hearing, with all documents and briefs to be submitted by August 21, 1991. The Division submitted its documents (20 NYCRR 3000.8[b]) on July 10, 1991. Petitioners did not submit any additional documents or a brief. After due consideration of the record, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners timely filed requests for conciliation conferences within 90 days of the issuance of the notices of determination and demands for payment of sales and use taxes due.

FINDINGS OF FACT

The Division of Taxation ("Division") issued three notices of determination and demands for payment of sales and use taxes due, to wit, one to Bryco Supply, Inc., one to Bryant Tool and Supply, Inc. and one to Emil DiSimone as an officer of Bryant Tool and Supply, Inc. Each of these notices was dated November 28, 1989, each encompassed the period December 1, 1986 through August 31, 1988 and each assessed identical amounts: tax of \$75,766.14, penalty of \$21,629.98 and interest of \$20,507.55, for a total amount due of \$117,903.67. Three additional notices of determination were also issued, one to each of the named petitioners. Each of these additional notices covers the above-noted period (12/1/86 - 8/31/88), each is dated November 28, 1989, and each assesses "omnibus" penalty (only) in the amount of \$7,576.62 against each taxpayer.

Each of the named petitioners, by their representative, separately filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). These requests each bear the typewritten date February 26, 1990 next to the signature of petitioners' representative. Photocopies of the envelopes in which the requests for conference were mailed each bear a United States Postal Service postmark in which the month is not legible but in which "28" and "1990" are legible. The requests for conference, as well as

the envelope photocopies, each bear a March 7, 1990 BCMS indate receipt stamp.

BCMS denied the requests for conciliation conference, by identical orders dated May 4, 1990, for the following reason:

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on November 28, 1990, but the request was not mailed until February 28, 1990, or in excess of 90 days, the request is late filed."

On June 25, 1990 (for Emil DiSimone and Bryco Supply, Inc.) and on June 26, 1990 (for Bryant Tool and Supply, Inc.) the Division of Tax Appeals received separate petitions from each of the named taxpayers contesting the conciliation orders described above. Each petition bears the typewritten date June 21, 1990 next to the signature of petitioners' representative.

All of the petitions and the requests for conference include identical claims for relief, as follows:

"Please be advised that these figures are based on estimated assessments. We would be glad to submit our records at your convenience for audit."

Petitioners provided no evidence or argument surrounding the mailing of the requests for conference, or even alleging the same were timely filed, in response to the Division's position that such requests were not timely filed. In support of its position, the Division submitted affidavits from Ronald Malchiodi, a sales tax auditor in the Division's Queens District Office, and Gladys Belsky, an administrative services manager in the Division's Queens District Office.

The Malchiodi affidavit details the regular procedures of the Queens District Office vis-a-vis the preparation and mailing of notices of determination. The affidavit includes attached exhibits supporting the affiant's explanation of how each of the notices at issue herein was prepared and mailed, on November 28, 1989 by certified mail, to each of the named taxpayers. Among the attached exhibits were Postal Service forms pertaining to each such taxpayer, including Forms PS 3800 ("Receipt for Certified Mail") indicating a mailing date of November 28, 1989, and corresponding Forms PS 3811 ("Domestic Return Receipt") indicating (inter alia) the delivery dates of the mailings to each of the taxpayers. In addition to the

foregoing, the Belsky affidavit provides further detail as to the physical acts of date stamping, affixing postage and actual transfer of the documents from the Division of Taxation to the United States Postal Service.

CONCLUSIONS OF LAW

A. Tax Law § 170.3-a(a) provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed." (Emphasis added.)

Tax Law § 1138(a)(1) provides that a notice of determination "given to the person liable for the collection or payment of the tax...shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing...." Thus, the "time to petition for such a hearing" language of Tax Law § 170.3-a(a) imposes the statutory 90-day petition time period upon the request for conciliation conference. The timely filing of a written request, and one conformed copy, with the BCMS "suspends the running of the period of limitations for the filing of a petition for a hearing" (20 NYCRR 4000.3[c]).

B. Tax Law § 1147(a)(1) provides that "[a] notice of determination shall be mailed promptly by registered or certified mail." Any decision concerning the timeliness of a request for conciliation conference must necessarily begin with an evidentiary showing of the date and manner of mailing of the Division's statutory notice determining tax due (Matter of Robert G. Wilson & GSA Corporation, Tax Appeals Tribunal, July 13, 1989). In order to establish that the notices of determination were properly mailed, the Division must present affidavits or testimony as to its normal course of business or office practices which would tend to prove that the instant mailings were, in fact, effected (McLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111). Additionally, "[t]he presumption of receipt arises upon the presentation of proof by the sender that it has a routine office practice and procedure for mailing the notices which

demonstrates that the notices were in fact properly addressed and mailed" (T.J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97, 98). Here, the Division submitted as evidence the six notices of determination, and the affidavits describing the regular office procedures of its Queens District Office regarding the preparation and mailing of notices of determination, together with certified mailing documents specifically relating to the notices in question from which the affiant drew his stated conclusion that each of the notices in question was mailed to each of the named taxpayers by certified mail on November 28, 1989. Based on review of this evidence submitted, it is concluded that the Division has substantiated its claim that the notices in question were properly mailed, by certified mail, on November 28, 1989.

C. In order to be considered timely filed, petitioners' requests for conciliation conference were required to have been filed within 90 days of the November 28, 1989 date of mailing of the notices (Tax Law §§ 170.3-a(a); 1138(a); see Conclusion of Law "A"). Such 90-day period ran through February 26, 1990, a Monday. In this case, the evidence shows that the requests for conference were dated as having been signed by petitioners' representative on February 26, 1990. However, the evidence also shows that such requests were not mailed until February 28, 1990, as is borne out by the postmark on the envelope in which each was mailed,¹ and were not received until March 7, 1990, as is shown by the BCMS indated receipt stamp on each request and envelope. There being no evidence or even any argument that mailing or other filing by or on behalf of petitioners occurred on or before the February 28, 1990 mailing date, it is concluded that such was the first date upon which a request for conference was made. Unfortunately this date falls beyond the statutory 90-day period within which such a request may be made, the requests herein were thus not timely filed, there exists no jurisdiction to entertain such requests and the notices of determination have become fixed and irrevocable

¹While the month on each such postmark is illegible, the logical conclusion is that such was February since the requests could not have been mailed before they were signed (i.e., February 26, 1990) nor mailed after they were received by BCMS (i.e., March 7, 1990).

(Tax Law § 1138[a]).

D. The petitions of Bryant Tool and Supply, Inc., Bryco Supply, Inc. and Emil DiSimone, officer of Bryant Tool and Supply, Inc., are hereby dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE