

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DAVIDA T. DEUTSCH : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 817529
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period Ended June 25, 1998. :

Petitioner, Davida T. Deutsch, 205 West 57th Street, New York, New York 10019, 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 ended June 25, 1998.

The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated April 28, 2000 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not respond to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination commenced on May 28, 2000, the date petitioner's time to serve a response to the Division's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Davida T. Deutsch, a Notice of Determination dated April 5, 1999 and addressed to petitioner at “205 W 57th St., New York, NY 10019-2105.” The notice bears assessment identification number L-016175540-1 and asserts a total amount due of \$170.82. As indicated by the computation summary section of the notice, this amount consisted of sales and use tax assessed of \$134.47, plus interest and penalty, for the period ended June 25, 1998. The notice bears certified mail control number P 911 170 107.

2. On July 12, 1999, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the Notice of Determination dated April 5, 1999.

3. On November 5, 1999, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order states, in part:

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 April 5, 1999, but the request was not mailed until July 12, 1999, or in excess of 90 days, the request is late filed.

4. 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.

5. 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 1 of the CMR lists an initial date of March 26, 1999, which has been manually changed to April 5, 1999.

6. 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.

7. 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.

8. The CMR relevant to this case is a 57-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Presort Qualified Mail." This

CMR lists consecutive certified control numbers P 911 170 010 through P 911 170 635. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 57 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.

9. Information regarding the Notice of Determination issued to petitioner is contained on page 9 of the CMR. Specifically, corresponding to certified control number P 911 170 107 is notice number L 016175540, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Determination.

10. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated April 5, 1999.

11. The last page of the CMR, page 57, contains a pre-printed entry of 626 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. This same signature appears on page 1 of the CMR.

12. The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the "626" indicate that all 626 pieces listed on the CMR were received at the post office.

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

14. The facts set forth above in Findings of Fact "4" through "13" 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 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.

15. The address on the subject Notice of Determination is the same as the address given on petitioner's filed 1997 and 1998 resident income tax returns (Form IT-201), which were signed by petitioner and dated April 9, 1998 and April 3, 1999, respectively. Petitioner gave the same address on a United States Customs Service Customs Declaration dated June 25, 1998.

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. Here, petitioner did not respond to the Division's motion; she 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; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and pursuant to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where "a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient." This section further provides that such a

notice “shall 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.” In this case, the record is clear that the address listed on the subject Notice of Determination was petitioner’s last known address (*see*, Finding of Fact “15”).

D. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination (*see*, Tax Law §§ 1138[a][1]; 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to 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).

E. Where, as here, the timeliness of a taxpayer's protest against a notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. 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” (*see, 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 produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact “14”).

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination at issue was mailed to petitioner on April 5, 1999. Specifically, this 57-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 57 pages of the CMR bear a U.S. Postal Service postmark dated April 5, 1999. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee signed page 57 of the CMR and circled “626” on that page to indicate receipt by the post office of all 626 pieces of mail listed thereon (*cf.*, ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject Notice of Determination on April 5, 1999.

H. Petitioner’s request for conciliation conference was filed on July 12, 1999, or 98 days after the date of mailing of the subject Notice of Determination. The request was therefore untimely filed (*see*, Tax Law §§ 1138[a][1]; 170[3-a][a]; 20 NYCRR 3000.3[c]).

I. The petition of Davida T. Deutsch is dismissed.

DATED: Troy, New York
July 20, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE