

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DRAGO PAINTING : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 817649
of Sales and Use Taxes Under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1994 :
through February 28, 1999. :
:

Petitioner, Drago Painting, 38 Oslo Drive, Yorktown Heights, New York 10598-3348, 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 December 1, 1994 through February 28, 1999.

The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated July 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 August 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, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for a 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, Drago Painting, a Notice of Determination dated July 8, 1999. It was addressed to petitioner at “38 OSLO DR, YORKTOWN HGTS, NY 10598-3348.” The notice bears assessment identification number L-016678526-3 and asserts a total amount due of \$10,000.00. As indicated by the computation summary section of the notice, the amount due consisted of penalty for the period ended February 28, 1999. The penalty was imposed for failure to register within 20 days prior to taking possession of, or paying for, business assets or for operating a business while unregistered. The notice bears certified mail control number P 911 003 062.

2. On February 16, 2000, 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 July 8, 1999.

3. On March 17, 2000, 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 July 8, 1999, but the request was not mailed until February 16, 2000, 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 June 28, 1999 which has been manually changed to July 8, 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 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 and his initials or signature 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 Unit) within the Division.

8. The CMR relevant to this case is a 28-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 911 002 907 through P 911 003 211. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 28 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 15 of the CMR. Specifically, corresponding to certified control number P 911 003 062 is notice number L 016678526, 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 July 8, 1999.

11. The last page of the CMR, page 28, contains a preprinted entry of 305 corresponding to the heading "Total Pieces and Amounts Listed." The number 305 has been handwritten on the last page and the initials of a Postal Service employee appear adjacent to the number.

12. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the handwritten 305 indicate that all 305 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.

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; it 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, 326). 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).

C. Tax Law § 1147(a)(1) provides as follows:

Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by

him pursuant to the provisions of this article 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 *notice of determination* shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice (emphasis added).

Pursuant to Tax Law § 1138(a)(1), a notice of determination:

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 . . . *After ninety days* from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing, or unless the commissioner of his own motion shall redetermine the same (emphasis added).

Upon receipt of the notice of determination, a taxpayer has the option of requesting a conciliation conference with BCMS, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the period of limitations for the filing of a petition (Tax Law § 170[3-a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a petition or a request for a conciliation conference protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Where the taxpayer files a petition or a request for a conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice in question (*see, Matter of T. J. Gulf, Inc. v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals

Tribunal, May 23, 1991). The mailing evidence required of the Division is twofold: first, there must be proof of a standard procedure used by the Division for the issuance of notices 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 (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

D. Through the affidavits of James Baisley and Geraldine Mahon and the pages of the certified mailing record, the Division has established its standard procedure for issuing notices of deficiency and determination. The affidavits show that when notices of determination are generated a certified control number is assigned to each notice. Thereafter, a certified mail record is created which sets forth, among other things, whom the notice is issued to and the taxpayer's name and address, the assessment number and the certified control number assigned to that notice. The affidavits and pages of the certified control record establish that notices were issued to petitioner. This is confirmed by the fact that the certified control numbers at the top of the notices correspond with the certified mailing record (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

In this case, petitioner has not offered any evidence to show that the mailing did not occur as claimed by the Division or that the Division failed to follow its procedures. Further, 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 notices of determination (*see, Finding of Fact "14"*).

E. 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 July 8, 1999. Specifically, this 28-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 28 pages of the CMR bear a U.S. Postal Service postmark dated July 8, 1999. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee initialed page 28 of the CMR and wrote 305 on that page to indicate receipt by the post office of all 305 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 July 8, 1999.

F. Petitioner's request for conciliation conference was filed on February 16, 2000 which was well beyond the 90-day period which commenced with the 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]). It should be noted, however, that petitioner is not without recourse here, for it may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 1139[c]). If its request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 170[3-a][a]; 1138[a][1]).

G. The petition of Drago Painting is dismissed.

DATED: Troy, New York
October 19, 2000

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE