

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANGEL SANCHEZ : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 817905
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1988 through May 2, 1990. :

Petitioner, Angel Sanchez, 990 Bronx Park South, #507, Bronx, New York 10460, 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, 1988 through May 2, 1990.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax Appeals within 90 days of the issuance of the notice of determination. The Division of Taxation submitted a Notice of Motion and the affidavit of Michael P. McKinley, Esq., with attachments, including the affidavits of Robert Keppel and James Baisley, in support of its motion. Petitioner did not respond to the motion as permitted by January 12, 2001, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, and the affidavits and documents submitted in support of the motion of the Division of Taxation, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation has shown entitlement to a determination granting summary determination in its favor on the ground that the material facts presented show petitioner's request for a conciliation conference with the Bureau of Conciliation and Medication Services was untimely.

FINDINGS OF FACT

1. The Division of Taxation ("Division") purportedly issued to petitioner, Angel Sanchez, a notice of determination dated August 1, 1990, identified by Assessment ID No. S900801713C(converted at a later time to L-004794649), bearing certified mail control number 499654. Such notice asserted additional sales and use taxes due for the period December 1, 1988 through May 2, 1990, in the amount of \$6,249.36, plus penalty and interest of \$1,189.64 and \$624.51, respectively, for a total amount due of \$8,063.51.

The notice of determination is addressed to petitioner as follows: "Angel Sanchez/Carmen Grocery, 210 Roebling St, Brooklyn, NY 11211" and has been made a part of the record herein. The notice indicates that "Because you did not file a return as required by section 1136 of the Tax Law, the following determination of tax is due in accordance with the provisions of section 1138 of the sales tax law."

2. Petitioner filed a Request for Conciliation Conference dated May 15, 2000 regarding assessment identification number L004794649-5, questioning the estimation of tax claimed due by the Division.

3. A Conciliation Order Dismissing Request, dated June 9, 2000, was issued by the Bureau of Conciliation and Mediation Services ("BCMS"), bearing the following explanation:

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 August 1, 1990, but the request was not mailed until May 15, 2000, or in excess of 90 days, the request is late filed.

Petitioner filed a petition with the Division of Tax Appeals in protest of the order on June 28, 2000. The petition addresses only the merits of the tax assessment, not the timeliness issue. 4. The Division submitted the affidavits of Robert Keppel, an employee of the Division familiar with the mailing of notices of determination by the Division's Central Office Audit Bureau, who describes the routine office procedures used by the Division to prepare such notices for mailing, and James Baisley, Chief Mail Processing Clerk of the Mail Processing Center of the Division since 1994, who was fully familiar with the operations and procedures of the Mail Room (now known as the Mail Processing Center), and whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notices in issue, and describe how such procedures were followed in this case.

5. The general process for issuing and mailing notices of determination and deficiency in 1990 began with the preparation of the notices of determination by the Stenographic Unit of the Audit Division, as well as a listing of taxpayers to whom notices of determination were sent by certified mail on a particular day, hereinafter referred to as the Certified Mail Record ("CMR"). A clerk in the Audit Division was responsible for the verification of names and addresses of taxpayers who were listed on the CMR and a certified control number was assigned to each notice and listed on the CMR. In this case, certified control number 499654 was used for the Notice of Determination mailed to Angel Sanchez/Carmen Grocery, and this number appears on both the CMR and the notice of determination.

The notices of determination were picked up by an employee of the Division's Mail Processing Center and delivered to a branch of the United States Postal Service ("USPS") in Albany, New York (in this case the Roessleville Branch of the USPS). Each page of the CMR is a separate and individual CMR for the items listed on that page only and contains spaces to record the "No. Listed by DTF," the "No. Rec'd USPS," and "Signature, USPS Rep." for the items on that page. The CMR for the notices of determination mailed on August 1, 1990 consisted of one page, and the notice mailed to petitioner at 210 Roebling St., Brooklyn, NY on August 1, 1990, was listed on this page. The other 31 items mailed were redacted except for a BSQ number, to preserve the confidentiality of information concerning other taxpayers. The total number of pieces listed was 32.

On the bottom of the CMR a postal employee affixed a USPS stamp from the Roessleville Branch of the USPS in Albany bearing a date of August 1, 1990, wrote the number of pieces received as "32," and initialed the CMR. The Division's employee specifically requested the postal employees to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record.

Mr. Keppel signed the affidavit of mailing which was printed on the lower half of the CMR. The Division's Mail Processing Center returned a copy of the CMR to the Division with a postmark affixed showing the date of mailing, which is retained as a permanent record. The CMR was kept by the Division in the regular course of its business.

6. The Division submitted as part of the record the first page of petitioner's Form ST-100 dated September 20, 1989 pertaining to the reporting period of September 1, 1988 through November 30, 1988. The ST-100 sets forth petitioner's address as 210 Roebling Street, Brooklyn, NY 11211.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner does not address the timeliness issue in any of his submitted documents and did not respond to the Division's motion for summary determination.

8. The Division simply argues that petitioner did not meet his burden of proof to show that his protest of the notice of determination by the filing of a request for a conciliation conference or a petition within the time period prescribed by the Tax Law was timely.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion shall 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of*

New York, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner failed to file a timely request for a conciliation conference or petition for a tax appeals hearing. The laws addressing the issuance and mailing of notices of determination and deficiency and the procedures to timely protest the same follow.

Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1), as in effect during the period in issue, such determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice.¹ As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

¹ Section 1138(a)(1), as amended by Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997, as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect (*see McKinney’s Cons Law of NY*, Book 1, Statutes § 51[b]). Since the assessments in this case pertain to the time period December 1, 1988 through May 2, 1990, the amendment to Tax Law § 1138(a)(1) does not apply.

C. Tax Law § 1147(a)(1) provides that a Notice of Determination shall 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.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*) 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. The Division bears the burden of proving both the date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). 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, supra*).

The required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Robert Keppel and James Baisley in support of its position that the notice of determination was issued to petitioner on August 1, 1990, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such notices (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a

certified control number is assigned to each. In the process, a certified mail record is generated which contains the names and addresses of the taxpayers to whom the notices were issued, the assessment numbers of the notices and the certified control numbers assigned to the notices.

Second, the Division established that the general issuance procedure was followed on August 1, 1990 in the generation and mailing of petitioner's notice dated that day. Specifically, the affidavits of Mr. Keppel and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmark on the CMR, in turn, shows the date of mailing as August 1, 1990 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

Finally, it is noted that the figure "32" on the bottom of the August 1, 1990 CMR, signifying the total number of pieces of mail involved, has been circled and a Postal Service employee has initialed next to the figure. As in *Matter of Roland (supra)*, the postal employee circled this figure to indicate the number of pieces of mail received by the USPS on August 1, 1990. In addition, and unlike the situation in *Roland*, the affiant, Mr. Baisley, states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has established that the notice of determination was mailed on August 1, 1990.

Furthermore, the Division has established that it mailed the notice to petitioner on August 1, 1990 at his last known address, which was acquired from Form ST-100, a Sales and Use Tax Return filed by petitioner, dated September 20, 1989.

Accordingly, petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of August 1, 1990, or no later than October 29, 1990. Since the request was not made until May 15, 2000, it is time barred.

D. Inasmuch as there are no material and triable issues of fact, and the Division has carried its burden of proving proper mailing, the Division of Taxation's motion for summary determination is granted as to Notice of Determination L004794649 (previously S900801713C) dated August 1, 1990.

E. Accordingly, the petition of Angel Sanchez is hereby dismissed.

DATED: Troy, New York
January 30, 2001

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE