

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PARKSIDE WHOLESALE, INC. : DETERMINATION
for Revision of a Determination or for Refund of Fuel : DTA NO. 819343
Use Tax under Article 21-A of the Tax Law for the :
Period October 1, 1997 to December 31, 2001. :

Petitioner, Parkside Wholesale, Inc., c/o Greg Scott, President, 94 Empress Avenue, Amherst, New York 14226, filed a petition for revision of a determination or for refund of fuel use tax under Article 21-A of the Tax Law for the period October 1, 1997 to December 31, 2001.

The Division of Taxation, by its representative Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated May 13, 2003, seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Pursuant to section 3000.5(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner had 30 days to file a response to the motion. Petitioner, appearing *pro se*, did not file a response. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules began on June 12, 2003. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation is entitled to summary determination in its favor because petitioner failed to file a petition or request for a conciliation conference within 90 days of the issuance of the notice of determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to Parkside Wholesale, Inc. (“petitioner”) a Notice of Determination dated July 22, 2002 (Assessment No. L-021321078-8) asserting additional fuel use tax due under Tax Law Article 21-A in the amount of \$9,242.00, plus penalty and interest, for a total assessment of \$12,923.86. The notice was addressed to petitioner at 94 Empress Ave., Amherst, NY 14226-1509. The mailing cover sheet which accompanied the notice bears certified control number 7104 1002 9739 0105 2739.

2. Petitioner filed a petition, dated December 8, 2002, with the Division of Tax Appeals. The U.S. Postal Service postage-paid stamp on the envelope which bore the petition was dated December 11, 2002. The petition was received by the Division of Tax Appeals on December 13, 2002. It lists petitioner’s address as 94 Empress Ave., Amherst, NY 14226.

3. In response to the petition, the Division filed a Motion for Summary Determination on the grounds that petitioner failed to file a request for a conciliation conference or file a petition for a hearing within 90 days of the issuance of the notice of determination.

4. In support of its position, the Division submitted into evidence the following: the Division’s answer to the petition; affidavits of Geraldine Mahon and Daniel LaFar, employees of the Division; copies of the Division’s certified mail record dated July 22, 2002; a copy of the notice of determination; a copy of the envelope containing petitioner’s petition; and a copy of a

Highway Use Tax Return for the period October 1, 2001 through December 31, 2001, filed by petitioner, dated January 1, 2002.

The affidavit of Geraldine Mahon attests to the regular procedures followed by the Division's Case and Resource Tracking System ("CARTS") with respect to the processing of statutory notices prior to their shipment to the Division's Mail Processing Center for mailing.

The affidavit of Daniel LaFar attests to the regular procedures followed by the Mail Processing Center for delivering outgoing certified mail to branches of the U.S. Postal Service.

5. Ms. Mahon, who is employed as the Principal Clerk in the CARTS Control Unit, has duties which include supervising the processing of notices of deficiency and determination such as the one at issue herein. Ms. Mahon describes the general or regular process involved in the computer generation of notices and the subsequent mailing of such notices, and more specifically, the computer preparation of notices of determination to include the simultaneous preparation of a certified mailing record. The certified mailing record is a computer-generated document entitled "Assessments Receivable, Certified Record for Non-Presort Mail" consisting, in this case, of 13 pages. The certified mailing record lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

6. Attached to Ms. Mahon's affidavit, as exhibit "A," is a copy of the original certified mail record issued by the Division on July 22, 2002. The certified mail record includes an entry on page 11 for notice L 021321078 issued to Parkside Wholesale. There are 11 entries on each page with the exception of page 13 which contains 2 entries. Portions of the certified mail record have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. The certified mail record has all pages connected when

the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon.

7. In the upper left hand corner of the first page of the certified mail record the date July 10, 2002 was manually changed to July 22, 2002. The original date of July 10, 2002 was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mail Processing Center. The handwritten change of the date from July 10, 2002 to July 22, 2002 was made by personnel in the Division's Mail Processing Center. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered to the U.S. Postal Service.

8. Each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this instance a Postal Service representative initialed or signed each page of the certified mail record and affixed a postmark to each of the 13 pages. In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail. The procedures followed and described are the normal and regular procedures of the CARTS control unit.

9. As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered the certified mail record and a copy of the notice. On its face, the information on the certified mail record corresponds with the description set forth in the affidavit. Among other things, the

certified mail record shows that the first sheet is labeled “NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR NON-PRESORT MAIL.” The upper right-hand corners of the pages are consecutively numbered. Certified numbers are listed in a vertical column on the left side of each page. Page 11 contains an entry which sets forth petitioner's name and address, notice number L 021321078 and certified control number 7104 1002 9739 0105 2739. The notice number corresponds with the one found on the notice of determination dated July 22, 2002, asserting a total amount due of \$12,923.86, issued to petitioner, attached to the affidavit of Ms. Mahon. On page 13, the “total pieces and amounts listed” is stated to be 134, which is circled. A stamp of “July 22, 2002” from the Colonie Center Branch of the United States Postal Service appears on each page of the certified mail record which accompanied the affidavit of Geraldine Mahon. Initials are handwritten near the stamp on each page.

10. The affidavit of Daniel B. LaFar, the Principal Mail and Supply Clerk in the Division’s mail and supply room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service (“USPS”). After the Mail Processing Center receives mail from an area designated for “Outgoing Certified Mail,” a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail room clerk checks the first and last pieces of certified mail set forth on the certified mail record against the information listed on the certified mail record. He also performs a random review of 30 or fewer pieces of certified mail by checking the envelopes against the information on the certified mail record. Upon completing the review of the certified mail record and envelopes, a member of the mail room staff delivers them to a branch of the USPS in the Albany, New York area. The postal

employee affixes a postmark and his or her signature or both to the certified mail record as an indication of receipt by the USPS. The certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail.

In this case a USPS employee initialed pages 1 through 13 of the certified mail record, affixed a postmark to each page of the certified mail record, and circled the total number of pieces of certified mail received. The Mail Processing Center has requested that the USPS "either circle the number of pieces received or indicate the number of pieces received by writing the number of pieces on the mail record." In the ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

11. Mr. LaFar reviewed the affidavit of Geraldine Mahon as well as the certified mail record and the notice of determination and could determine that, on July 22, 2002, an employee of the Mail Processing Center delivered one piece of mail addressed to Parkside Wholesale, Inc., 94 Empress Ave., Amherst, NY 14226-1509, to the USPS in Albany, New York in a sealed postpaid window envelope for delivery by certified mail. He could also determine that a member of the staff obtained a copy of the certified mail record with the postmark delivered to and accepted by the post office on July 22, 2002 for the records of the Division's CARTS Control Unit.

12. Petitioner did not submit a response to the Division's motion for summary determination.

CONCLUSIONS OF LAW

A. Tax Law § 510 authorizes the Division of Taxation to issue a notice of determination to a taxpayer where the Division determines that there is a deficiency of fuel use tax.¹ This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of same by the person to whom addressed." Additionally, the Tax Law provides that such a determination will conclusively fix such tax unless the taxpayer files a petition with the Division of Tax Appeals seeking revision of the determination within 30 days of the mailing of the notice of determination (Tax Law § 528). Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to this provision, then, petitioner had 30 days from the issuance of the subject notice to file either a request for a conciliation conference or a petition with the Division of Tax Appeals, which was the avenue selected by petitioner.

B. If the timeliness of a petition or a request for a conciliation conference is in issue, the Division bears the burden of establishing proper mailing of the notice of determination (*Matter of Katz*, Tax Appeals Tribunal, November 14, 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 such notices by one with knowledge of the relevant procedures, and there must be proof that the standard procedure was followed in the particular instance in question (*Matter of Katz, supra; see also, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals

¹ Pursuant to Tax Law § 528, Tax Law § 510 is incorporated by reference into Article 21-A, governing fuel use tax, to the extent it is not inconsistent with section 528.

Tribunal, May 23, 1991). Once this burden is met, a presumption of proper mailing arises (*Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112). If, on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed (*Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

C. The affidavits of two Division employees, Geraldine Mahon and Daniel LaFar, provide adequate proof of the Division's standard mailing procedure for the mailing of statutory notices like the one mailed to petitioner by certified mail. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the Notice of Determination and the Certified Mail Record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Mahon and LaFar affidavits were followed with respect to the Notice of Determination issued to petitioner. Petitioner's name and address appear on page 11 of the certified mail record which bears a USPS date stamp of July 22, 2002. There are 134 certified mail control numbers listed on the Certified Mail Record, and the USPS employee who initialed the same indicated that 134 items were received for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner by certified mail on July 22, 2002.

The envelope containing the petition bears a USPS postmark of December 11, 2002, which is deemed to be the date of filing (20 NYCRR 3000.22[a][2][iii]). Accordingly, it is found that the petition was filed more than 30 days after the mailing of the Notice of Determination.

D. Petitioner provides no argument to extend the strict statutory time period for filing a petition. Since the petition was not mailed to the Division of Tax Appeals within the statutory

30-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Notice of Determination.

E. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

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. 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.

F. Section 3000.9(c) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

G. Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

H. In the instant matter, there are no material issues of fact. Further, petitioner did not respond to the Division's motion for summary determination. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

I. The Division of Taxation's motion for summary determination is hereby granted and the petition of Parkside Wholesale, Inc. is dismissed.

DATED: Troy, New York
August 7, 2003

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE