

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRIGHT-SHORE WINES & LIQUORS, LTD.	:	
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 September 1, 2000 through May 31, 2003.	:	DETERMINATION DTA NO. 821004

Petitioner, Bright-Shore Wines & Liquors, Ltd., 273 West Main Street, Bay Shore, New York 11706, 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 September 1, 2000 through May 31, 2003. The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated June 19, 2006, seeking summary determination in this matter pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b) or in the alternative pursuant to Tax Law § 2006(5) and 20 NYCRR 3000.9(a) for an order dismissing the petition on the ground that petitioner failed to file a timely petition contesting the statutory notice at issue. Pursuant to 20 NYCRR 3000.5(b), petitioner's response¹ to the motion was due by July 19, 2006, which date commenced the 90-day period for issuance of this determination. After due consideration of the affidavits and documents presented by the Division of Taxation, Frank W. Barrie, Administrative Law Judge, renders the following determination.

¹ Petitioner did not file a response to the motion.

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 a Notice of Determination dated August 24, 2005² against petitioner, Bright-Shore Wines & Liquors, Ltd. (Assessment ID# L-025934396), asserting a total amount due of \$98,459.82 for the period September 1, 2000 through May 31, 2003, consisting of tax due of \$51,058.88 plus interest of \$27,431.18 and penalty of \$19,969.76. The Division, with its motion papers, provided proof of mailing on August 24, 2005 of this Notice of Determination consisting of (i) an affidavit dated June 19, 2006 of Bruce Peltier, the mail and supply supervisor of the staff of the Division’s mail processing center, and (ii) an affidavit dated June 15, 2006 of Patricia Finn Sears, the supervisor of the control unit of the Division’s Case and Resource Tracking System (“CARTS”).

2. The affidavit of Patricia Finn Sears sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS (i) a “certified mail record” consisting of a computer printout entitled “Certified Record for Presort Mail-Assessments Receivable” and (ii) corresponding notices. The notices are predated with the anticipated date of mailing. Each notice is assigned a “certified control number” which is recorded on a separate on-page “Mailing Cover Sheet” which also bears a bar code, the taxpayer’s mailing address and a Departmental return address on the front and taxpayer assistance information on the back. The “certified control number” is also listed on the certified

² The affidavit of the Division’s attorney incorrectly stated that the Notice of Determination at issue was issued on August 12, 2005.

mail record under the first heading entitled “Certified No.” The assessment numbers are listed under the second heading entitled “Reference No.” The names and addresses of the taxpayers are listed under the third heading, entitled “Name of Addressee, Street and PO Address.” Ms. Sears examined the certified mail record issued by the Department of Taxation and Finance on August 24, 2005 which establishes that a Notice of Determination with “Notice Number L-025934396” was sent to “Bright Shores Wines & Liquors, Ltd.,³ 273 W. Main St., Bay Shore, NY 11706-8319,” by certified mail using control number 7104 1002 9730 0826 6961 and that a copy of the Notice of Determination with “Notice Number L-025934396” was also sent to petitioner’s representative, “Richard Shulman, CPA, 99 Powerhouse Rd. 206, Roslyn Heights, NY 11577-2039,” by certified mail using control number 7104 1002 9730 0826 6923. The United States postmark on each page of the certified mail record, including page three of the certified mail record on which the Notice of Determination at issue appears, confirms that such notice was sent on August 24, 2005 to petitioner and a copy to its representative. The control number 7104 1002 9730 0826 6961 appears on the mailing cover sheet for Notice Number L-025934396 issued against petitioner, and that the control number 7104 1002 9730 0826 6923 appears on the mailing cover sheet for the copy of Notice Number L-025934396 mailed to petitioner’s representative.

3. The affidavit of Bruce Peltier, the mail and supply supervisor in the Division’s mail processing center, describes the operations and procedures followed by the mail processing center. Mr. Peltier states that the notices are received by the mail processing center in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a Mailing Cover Sheet. A

³The correct name for petitioner according to the mailing records and other documents in the file is Bright-Shore Wines & Liquors, Ltd.

member of his staff retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope so that the address and certified number from the Mailing Cover Sheet show through the window. The staff member then weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to one of the various branch offices of the U.S. Postal Service ("USPS") located in the Albany, New York area. A postal employee affixes a postmark and also may place his or her signature on the certified mail record indicating receipt by the post office. The USPS has further been requested by the mail processing center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. A review of the certified mail record listing the pieces of certified mail delivered to the USPS by the mail processing center staff on August 24, 2005 confirms that a USPS employee initialed pages 1 through 4 of the certified mail record, affixed a postmark to each page of the certified mail record, and wrote 37 as the total number of pieces of certified mail received.

4. Petitioner's Request for Conciliation Conference dated November 28, 2005 was mailed on November 28, 2005 as indicated by the postal markings on the envelope in which the request was mailed, and it was received by the Division's Bureau of Conciliation and Mediation Services on December 1, 2005. Ninety days from August 24, 2005, the date of mailing of the notice of determination at issue, is November 22, 2005. The request for conciliation conference mailed on November 28, 2005 was therefore mailed six days late.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a notice of determination of additional sales tax due shall be an assessment of the liability determined after 90 days from the mailing of the notice “except only for any such tax . . . as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing” In lieu of an application to the Division of Tax Appeals for a hearing, the taxpayer has the alternative of filing a request for a conciliation conference since, under Tax Law § 170(3-a)(b), “A request for a conciliation conference . . . shall suspend the running of the period of limitations for the filing of a petition protesting such notice and requesting a hearing.” Consequently, a notice of determination of additional sales tax due does not become an assessment of the liability determined if the taxpayer within 90 days from the mailing of the notice files a request for conciliation conference. If a taxpayer fails to file a timely challenge by requesting a conciliation conference or a hearing within 90 days of the mailing of the notice of determination, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (*see, Matter of Rotondi Industries Corp.*, Tax Appeals Tribunal, July 6, 2006).

B. Here, the Division has offered adequate proof, as detailed in Findings of Fact “2” and “3”, to establish the mailing of the statutory notice on the same date that it was dated, i.e., August 24, 2005. The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see, Matter of Deweese*, Tax Appeals Tribunal, June 20, 2002). Given the postmark on petitioner’s request for a conciliation conference, it may be concluded that it was mailed six days late, as detailed in Finding of Fact “4”. Consequently, the Division of Tax Appeals has no jurisdiction over this matter (*see, Matter*

of Rotondi Industries Corp., supra). Even *one* day late precludes a taxpayer from having a petition heard since deadlines for filing petitions are strictly enforced (*see, Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996).

C. 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 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]).

Petitioner's lack of a response to the Division's motion is properly deemed a concession that no question of fact exists which would require a hearing to resolve (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942). Further, as noted in Conclusion of Law "B", petitioner failed to timely file a request for a conciliation conference. As a result, pursuant to Tax Law § 1138(a)(1), as detailed in Conclusion of Law "A", the notice of determination dated August 24, 2005 has become an assessment of the liability determined. Therefore, the Division's motion for summary determination, on the basis that the Division of Tax Appeals has no jurisdiction over this matter because petitioner failed to file a timely request for a conciliation conference, is properly granted.

D. Finally, it is observed that with the 1996 amendment to Tax Law § 1138(a)(1), effective on or after January 1, 1997, the notice of determination at issue here is no longer treated as "finally and irrevocably fixing the tax" so that petitioner is not without some remedy (*see, L 1996, ch 267*). It may pay the tax and file a claim for refund. If the refund claim is disallowed, it may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance.

E. The Division's motion for summary determination is granted, and the petition of Bright-Shore Wines & Liquors, Ltd. is dismissed.

DATED: Troy, New York
October 12, 2006

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE