

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RUPERT A. CLARKE D/B/A	:	
TOMMY'S DELI	:	DETERMINATION
	:	DTA NO. 821023
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 March 1, 2001 through August 31,	:	
2004.	:	

Petitioner, Rupert A. Clarke d/b/a Tommy's Deli, 89 Franklin Street, Kingston, New York 12401, 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 March 1, 2001 through August 31, 2004.

On August 21, 2006, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to it on the ground that there is no material issue of fact and that the facts mandate a determination in its favor. Petitioner responded on November 20, 2006, which commenced the 90-day period for issuance of this determination. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel). Petitioner appeared by David N. Goldin, Esq. Based upon the pleadings and motion papers, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Rupert A. Clarke d/b/a Tommy’s Deli, a Notice of Determination dated August 22, 2005. The notice was addressed to petitioner at “89 Franklin St. Kingston, NY 12401-4905” and bore assessment identification number L-025981587-4. The notice asserted additional sales and use taxes due in the amount of \$61,209.19, plus interest of \$10,581.07, for a total amount due of \$71,790.26.

2. Petitioner mailed a Request for Conciliation Conference to the Bureau of Conciliation and Mediation Services (“BCMS”) in an envelope bearing a United States Postal Service postmark date of January 17, 2006, which was received by BCMS on January 19, 2006.

3. On February 3, 2006, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on August 22, 2005, but the request was not mailed until January 17, 2006, or in excess of 90 days, the request is late filed.

4. In support of its motion to dismiss, the Division submitted the affidavits of Bruce Peltier and Patricia Finn Sears. The Division also submitted a copy of the subject Notice of Determination, a copy of the certified mail record (“CMR”) containing a list of the notices allegedly issued by the Division on August 22, 2005 and a copy of petitioner’s New York State

and Local Quarterly Sales and Use tax return for the period June 1, 2004 through August 31, 2004.

5. Notices of determination, such as the one at issue herein, were computer-generated by the Division's computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also included the preparation of a CMR. The CMR listed those taxpayers to whom notices of determination were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained 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. CARTS also generated a Mailing Cover Sheet with the corresponding certified number for each notice. The Mailing Cover Sheet contained a bar code, the taxpayer's mailing address, the Division's return address and taxpayer assistance information.

6. Each computer-generated notice of determination was predated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date, the date of its printing, in its upper left corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the CMR was 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 one of the CMR listed an initial

date and time of “20052231700.”¹ The date the notices were mailed, that is, August 22, 2005, was handwritten by personnel in the Division’s Mail Processing Center as “8/22.”

7. After a notice of determination was placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer placed the statutory notice and associated documents into a windowed envelope, weighed and sealed each envelope, affixed postage and placed fee amounts thereon. A Mail Processing Center clerk then checked the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and verified by a random review the names and certified mail numbers of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark and his initials to the CMR.

8. In the ordinary course of business, a Mail Processing Center employee picked up the CMR from the post office on the following day and returns it to the CARTS Control unit.

9. In the instant case, the CMR was a 32-page, fan-folded (connected) computer-generated document entitled “CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE.” All pages were connected when the postmarked document was returned after mailing. This CMR listed 346 control numbers. Each such certified control number was assigned to an item of mail listed on the 32 pages of the CMR. Specifically, corresponding to

¹ This number signifies the date and time the CMR was produced by year, ordinal day of the year and military time of the day. Here the number indicates that the CMR was produced on August 11, 2005 at 5:00 P.M.

each listed certified control number was a notice number and the name and address of the addressee.

10. Information regarding the Notice of Determination issued to petitioner was contained on page 25 of the CMR. Corresponding to certified control number 7104 1002 9730 0824 0299 was notice number L 025981587, along with Mr. Clarke's name and an address identical to that listed on the subject Notice of Determination.

11. Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated August 22, 2005, and the initials of the postal employee, verifying receipt of the items.

12. The last page of the CMR, page 32, contained a printed entry of "346" corresponding to the statement "Total Pieces and Amounts" and was circled. The number "346" was also handwritten at the bottom of the page. The postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee also appeared on the page.

13. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, the handwritten number "346" and the circling of the printed "346" indicated that all 346 pieces listed on the CMR were received at the post office.

14. The fact that the Postal Service employee circled the printed number of pieces and wrote the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Bruce Peltier. The basis of Mr. Peltier's knowledge of this fact was that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

15. In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact “5” through “15” were established through the affidavits of Patricia Finn Sears and Bruce Peltier. Ms. Sears was employed as the Supervisor of the CARTS Control Unit. Ms. Sears’s duties included supervising the processing of notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Division’s Registry Unit. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

17. Petitioner’s New York State and Local Quarterly Sales and Use Tax Return for the period ended August 31, 2004 listed his address as “89 Franklin St. Kingston, NY 12401.” The return was dated September 20, 2004. Similarly, on January 17, 2006, petitioner wrote “89 Franklin St., Kingston” as his return address on the envelope containing the Request for Conciliation Conference, confirming the preprinted address on the request itself. Lastly, the same address appears on the petition filed with the Division of Tax Appeals on March 3, 2006. All of these addresses are consistent with the address on the Notice of Determination.

18. In response to the Division’s motion, petitioner submitted his own affidavit, sworn to November 20, 2006. Although petitioner asserted that he dated and mailed his request for a conciliation conference on September 9, 2005, he conceded he had no proof to substantiate the claim. In addition, petitioner averred that he had several telephone conversations with unidentified Division personnel after December 9, 2005, and that these Division employees informed him that his petition had been received timely and that this fact was noted on the Division’s computer system. Petitioner conceded that he had no proof of these statements.

19. Petitioner's representative, David N. Goldin, Esq., filed an affirmation dated November 20, 2006 in opposition to the Division's motion, in which he averred, without elaborating, that the Division did not establish that it had mailed the Notice of Determination to petitioner through the proof submitted, i.e., the affidavits of Ms. Sears and Mr. Peltier.

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. Petitioner's affidavit and the affirmation of his representative did not deny the facts alleged by the Division in the affidavits of Ms. Sears and Mr. Peltier. At best, the affirmation merely questioned the adequacy of the facts to establish proper mailing to petitioner. Consequently, petitioner is deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see, Matter of Dooley*, Tax Appeals Tribunal, March 21, 2002). However, the evidence must be viewed in a manner most favorable to the party opposing the motion (*id.*).

C. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a notice of determination to a taxpayer where the Division determines that there is a deficiency of sales and use tax. This section further provides that such 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." Petitioner did not contend that the Notice of Determination was sent to an incorrect address. The evidence in this record shows that the address listed on the Notice of Determination was the address which was provided by petitioner on the tax return filed

for the quarter ended August 31, 2004, the last quarter in the audit period and the same address listed by petitioner on the request for BCMS conference filed on January 17, 2006 and on the petition filed in the Division of Tax Appeals on March 3, 2006.

D. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of a determination or, in the alternative, may file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services within 90 days of the mailing of the notice of determination (*see*, Tax Law § 1138[a][1].) The filing of a petition or a request for a conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 2, 1996).

E. When the timeliness of a request for a conciliation conference or a petition is at issue, 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). 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 the statutory notice 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*).

F. In the present matter, the affidavits of the two Division employees, Patricia Finn Sears (Supervisor of the CARTS Control Unit) and Bruce Peltier (Mail and Supply Supervisor in the Division's Registry Unit) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copies of the

notice of determination and the certified mail record submitted by the Division as evidence of actual mailing of the notice to petitioner. The documents and affidavits also establish that the general mailing procedures described by Ms. Sears and Mr. Peltier were followed with respect to the notice at issue in this matter.

G. Petitioner's name and address appear on page 25 of the CMR which bears a USPS postmark of August 22, 2005. There are 346 certified control numbers listed on the 32 pages of the CMR. There were no deletions. Therefore, the total number of items for mailing was 346 and the USPS employee who initialed the CMR on the last page thereof indicated that he or she received 346 items for mailing. The Division has, therefore, established that it mailed the Notice of Determination to petitioner, by certified mail, on August 22, 2005. The 90-day period is measured from the date of mailing and the 90-day period for filing a petition or request for a conciliation conference expired on November 20, 2005. The postmark on the envelope containing the Request for Conciliation Conference indicated a mailing or filing date of January 17, 2006. Therefore, petitioner's request was untimely and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case. Nevertheless, petitioner may obtain review of his position by paying the tax and filing a claim for refund within the prescribed period (Tax Law § 1139[c]).

H. The motion of the Division of Taxation for an order dismissing the petition of Rupert A. Clarke d/b/a/ Tommy's Deli and granting summary determination to the Division of Taxation is granted.

DATED: Troy, New York
January 25, 2007

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE