

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ENFIN CAFÉ CORP.	:	DETERMINATION DTA NO. 821588
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, 2002 through May 31, 2005.	:	

Petitioner, Enfin Café Corp., 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, 2002 through May 31, 2005.

The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, received on September 19, 2007, seeking dismissal of the petition or, in the alternative, summary determination in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i);(b). Petitioner, appearing pro se, had 30 days, or until October 19, 2007, to respond to the motion, and the 90-day period for issuance of this determination commenced on October 19, 2007. After due consideration of the documents and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was filed in a timely manner.

FINDINGS OF FACT

1. The Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division) received from petitioner, Enfin Café Corp. (Enfin), a Request for Conciliation Conference (Request). This Request states that the name on the notice or assessment was Shohil Chowdhory and lists the current address as 48-32 46 Street, Woodside, New York. Neither that name nor that address was on the notice; however, no further explanation was provided. The Request references assessment L-026744193-4 and states that the address on the notice was 61 Lexington Ave., New York, New York 10010. The envelope bearing the Request had a U.S. Postal Service postmark of December 21, 2006. Both the envelope and the Request were stamped received by BCMS on December 26, 2006.

2. The document challenged by the Request is a Notice of Determination addressed to Enfin at 61 Lexington Ave. Ground Floor, New York, NY 10010-1832. The notice was dated April 14, 2006, bore assessment identification number L-026744193-4 and asserted that New York State sales and use taxes were due from petitioner for the period December 1, 2002 through May 31, 2005, in the amount of \$65,913.62, plus interest in the amount of \$20,673.49 and penalty in the amount of \$20,223.27, for a balance due of \$106,810.38. The notice provided, in its explanation and instructions section, that to protest the notice a Request for Conciliation Conference or a petition for a tax appeals hearing had to be filed by July 13, 2006.

3. In a Conciliation Order Dismissing Request (CMS No. 217104), dated January 12, 2007, BCMS advised petitioner that its request for a conciliation conference was denied. Specifically, the order stated that the notice was issued on April 14, 2006, but the request was not mailed until December 21, 2006. Therefore, the request was untimely since it was filed more than 90 days after the issuance of the notice.

4. Petitioner filed a petition, dated February 28, 2007, with the Division of Tax Appeals. The petition stated that the assessment was made without an audit and was based on completely unrealistic estimates.

5. 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.

6. Each computer-generated notice of determination is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR. The CMR also lists the assessment number assigned to each notice listed on the CMR, the names and addresses of the taxpayers to whom the notices are being issued, and the postage and fee amounts for the notices being mailed. The CMR also lists the date of its printing. The date the notices were mailed was handwritten in the upper left side of page one by personnel in the Division's mail processing center, in order to conform to the actual date of mailing.

7. The certified control number assigned to each notice, as appearing on the CMR, also appears on the front of a separate one-page "Mailing Cover Sheet" (Form DTF-997) that is generated by CARTS for each notice. Each Mailing Cover Sheet also bears, on its front, a bar code, the taxpayer's mailing address and a return address for the Division. The reverse side of each such Mailing Cover Sheet carries taxpayer assistance information. CARTS also generates any enclosures referenced within the body of each notice. Ultimately, each notice, accompanied by its Mailing Cover Sheet and any appropriate enclosures, is a discrete unit with the batch of notices, with the mailing cover sheet being the first sheet in such unit.

8. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staff member in the Mail Processing Center weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and also performs a random review of up to 30 pieces of certified mail by checking the letters against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the United States Postal Service (USPS) located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the USPS and affixes a dated postmark and his signature or initials to the CMR.

9. 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 CARTS Control unit.

10. In the instant case, the CMR is a nine-page computer-generated document entitled "Certified Record for Presort Mail-Assessments Receivable." The CMR lists 88 certified control numbers. Each such certified control number was assigned to an item of mail listed on the nine pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts. Each of the pages of the CMR contains 11 entries, with the exception of the last page (page 9), which does not contain any entries.¹

¹ The names, addresses and other identifying information with regard to taxpayers other than petitioner have been redacted from the CMR so as to preserve the confidentiality of the information relating to such other taxpayers.

11. Information regarding the notices issued to petitioner was contained on page two of the CMR and lists certified number 7104 1002 9730 1172 9842, reference number L-026744193 and the following name and address: “ENFIN CAFÉ CORP., 61 LEXINGTON AVE GROUND FL, NEW YORK, NY 10010-1832.”

12. The Certified Number and the Reference Number match the Certified Mailing Number and the Assessment ID Number set forth on the Mailing Cover Sheet and the Notice of Determination at issue herein.

13. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated April 14, 2006, and the initials of the postal employee verifying receipt of the items. The last page of the CMR contains a printed entry of “88” corresponding to the heading “Total Pieces and Amounts.” The total number of pieces was also handwritten. The initials of the Postal Service employee appear next to the postmark of the Colonie Center Branch of the USPS dated April 14, 2006.

14. In the ordinary course of business, the CMR is returned to the Division’s CARTS unit, and the Division generally does not request, demand or retain return receipts from certified or registered mail.

15. The facts set forth above in Findings of Fact “5” through “14” were established through the affidavits of Brad Bernadt and James Steven VanDerzee. Mr. Bernadt is employed as a Tax Processing Manager III and Section Head of the Office of Processing & Taxpayer Services - Returns, Deposits, Overpayments and Control Bureau - Business/Miscellaneous Tax and Control Section, which includes the CARTS Control Unit. Mr. Bernadt’s duties include supervising the processing of notices of determination. Mr. VanDerzee is employed as a Mail and Supply Supervisor in the Division’s Mail Processing Center. Mr. VanDerzee’s duties

include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

16. The address on the Notice of Determination was the same as the address given on petitioner's New York State and Local Quarterly Sales and Use Tax Return for the quarterly period ended February 28, 2005. This return, dated March 5, 2005, was the last return filed before the issuance of the subject notice.

17. Petitioner did not respond to the Division's motion.

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). Moreover, petitioner presented no evidence to contest the facts alleged in the Bernadt and VanDerzee affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. 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) such a 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. 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 90 days from the issuance of the subject Notice of Determination to file a request for a conciliation conference. If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. 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.*)

E. It is the mailing date of the statutory notice which triggers the 90-day period within which a protest must be filed. Where, as here, a taxpayer files a request, but the timeliness of the request is at issue, the Division bears the burden of proving proper mailing of the statutory notice (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A statutory notice is mailed

when it is delivered into the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice of determination is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, that notice is valid and petitioner bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The mailing evidence required of the Division in order to establish proper mailing 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 this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. Bernadt and Mr. VanDerzee, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing statutory notices. Furthermore, the Division has offered adequate proof to establish the fact that the notice at issue was actually mailed to petitioner on April 14, 2007, the date appearing on the CMR. 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 notices and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Bernadt and VanDerzee affidavits were followed with respect to the notices issued to petitioner. Petitioner's name and last known address at the time of mailing, as well as the Assessment ID numbers on the face of the notices in issue, appear on the CMR, which bears a USPS date stamp of April 14, 2006. There are 88 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by writing the

number “88,” that 88 items were received for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner by certified mail on April 14, 2006 (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). In turn, in order to be considered timely, any protest against the notices had to have been filed within 90 days thereafter.

G. The Conciliation Order denied petitioner’s request for a conciliation conference on the basis that the request was not filed within 90 days after the issuance of the notices. Petitioner did not provide any documents or other evidence to establish that any protest occurred within the requisite 90-day time period. The USPS postmark on the envelope shows that the request was not mailed until December 21, 2006. Since the Request was not timely filed (i.e., within 90 days after April 14, 2006), the same was untimely and there is no jurisdiction to proceed with this matter.

H. The petition of Enfin Café Corp. is hereby dismissed.

DATED: Troy, New York
January 10, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE