

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MERRITT FINE : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 821667
of Sales and Use Taxes under Articles 28 and :
29 of the Tax Law for the Period March 1, 2003 :
through May 31, 2006. :
:

Petitioner, Merritt Fine, 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, 2003 through May 31, 2006.

The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, received on September 20, 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 20, 2007, to respond to the motion, and the 90-day period for issuance of this determination commenced on October 20, 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, Merritt Fine, 13 requests for conciliation conference (requests). The requests, which were dated January 23, 2007, identify petitioner by name and list his address as 19 Rolling Drive, Brookville, NY 11545-2612. The envelopes containing the requests bore a metered postmark of January 23, 2007. However, they also had a United States Postal Service postmark date of February 15, 2007 and were stamped received by BCMS on February 22, 2007.

2. The documents challenged by the requests are 13 statutory notices of determination addressed to petitioner at “19 Rolling Drive, Brookville, NY 11545-2612.” The notices were dated October 30, 2006 and asserted that sales and use taxes were due from petitioner as follows:

Assessment ID	Period Ended	Tax	Interest	Penalty	Balance Due
L027841809	05/31/06	\$20,839.09	\$1,352.88	\$3,145.08	\$25,337.05
L02781810	02/28/06	\$20,369.87	\$2,063.07	\$3,665.84	\$26,098.78
L027841811	10/30/05	\$8,294.40	\$1,708.88	\$3,810.88	\$13,814.16
L027841812	08/31/05	\$7,267.97	\$1,430.52	\$3,422.49	\$12,120.98
L027841813	05/31/05	\$0.0	\$496.01	\$2,587.10	\$3,083.11 ¹
L027841814	02/28/05	\$350.77	\$849.65	\$2,482.00	\$3,682.42
L027841815	11/30/04	\$0.0	\$214.98	\$2,120.50	\$2,335.48
L027841816	08/31/04	\$13,599.21	\$1,751.74	\$3,007.88	\$4,770.30 ²
L027841817	05/31/04	\$14,502.06	\$4,559.20	\$4,598.75	\$17,949.67 ³

¹ Penalty and interest were assessed for late payments.

² The balance due reflects payments or credits of \$13,588.53.

³ The balance due reflects payments or credits of \$5,710.34.

L027841818	02/29/04	\$8,293.24	\$4,440.90	\$4,482.38	\$17,216.52
L027841819	08/31/03	\$40.61	\$1,143.57	\$2,406.49	\$3,590.67
L027841820	11/30/03	\$1,170.51	\$1,408.05	\$3,080.75	\$5,659.31
L027841821	05/31/03	\$34.52	\$1,432.33	\$2,997.06	\$4,463.91

In their explanation and instructions sections, the notices provided that a request for a conciliation conference or a petition for a hearing had to be filed by January 28, 2007 in order to have a timely protest.

3. In a Conciliation Order Dismissing Request (CMS No. 217957) dated March 9, 2007, BCMS advised petitioner that his requests for a conciliation conference were denied.

Specifically, the order stated that the notices were issued on October 30, 2006, but the requests were not mailed until February 15, 2007. Therefore, the requests were untimely since they were mailed more than 90 days after the issuance of the notices.

4. Petitioner challenged this denial by filing a petition, dated April 18, 2007, with the Division of Tax Appeals. The petition, which was received April 23, 2007, stated:

Petitioner contests the finding that his Request for Conciliation Conference was not timely filed. NY State law provides that a taxpayer who is aggrieved [sic] by a determination of tax, interest or penalty is entitled to the right of a hearing and may request an informal hearing with the Bureau of Conciliation and Mediation, within the Division of Taxation . . . Petitioner merely asks that his right to a hearing be respected.

5. Notices of determination, such as the ones at issue, 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 of printing listed on the CMR falls approximately 10 days earlier than the anticipated mailing date for the notices, with such period provided to allow sufficient time for manual review and processing of the notices, including the affixation of postage, and 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 Postal Service 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 mailing of the notices was documented on two separate CMR's.

First Mailing Log

11. The CMR listing assessment L-027841815 is a one-page computer-generated document entitled "Certified Record for Non-Presort Manual Mail - Assessments Receivable." All notices selected for manual review are printed in one run. This notice was selected for manual review by the Tax Compliance Division - Metropolitan District Office so that the certified mail could be pulled for manual review prior to mailing. However, a manual review did not occur.

12. The date the notice was mailed, October 30, 2006, was handwritten by personnel in the Division's Mail Processing Center. The new date was written in order that the date on the certified mail record coincided with the date that the statutory notice and CMR were delivered into the possession of the Postal Service.

13. The CMR lists one certified control number which was assigned to one item of mail. Corresponding to the certified control number was a notice number, the name and address of the addressee, and postage and fee amounts. 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 L-027841815.

14. The CMR bears two postmarks of the Colonie Center Branch of the USPS. One postmark bears the date of October 29, 2006 with a line drawn through the number 2. The second postmark bears a date in October 2006. The day of the month is not completely legible. The second digit of the day of the month is clearly zero. However, there is a space before the zero for a number which is illegible. The CMR contains a preprinted entry of "1" corresponding to the heading "Total Pieces and Amounts." Appearing beneath this preprinted entry and corresponding to the heading "Total Pieces Received at Post Office" is the handwritten number "1," which was circled, followed by the initials of the Postal Service employee accepting receipt of the items. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circled "1" and the hand writing of the number "1" indicate that the piece listed on the CMR was received at the post office.

Second Mailing Log

15. The CMR listing the remaining assessments is a 17-page computer-generated document entitled "Certified Record for Presort Mail - Assessments Receivable." The date the notice was mailed, October 30, 2006, was handwritten by personnel in the Division's Mail Processing Center. The new date was written in order that the date on the certified mail record coincided with the date that the statutory notices and the CMR were delivered into the possession of the Postal Service.

16. Each page of the second mailing log bears the postmark of the Colonie Center Branch of the USPS. On pages 1 through 15, the same problem with the postmark date on the first mailing log appears on this mailing log. That is, the second digit of the day of the month is clearly zero. However, there is a space before the zero which is illegible and as a result the date of the stamp is not discernable. On the last two pages of the CMR, the postmark is legible and it

shows a date of October 30, 2006. The CMR lists 180 certified control numbers. Each such certified control number was assigned to an item of mail listed on the 17 pages of the CMR. 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 eleven entries, with the exception of the last page which contains four entries.⁴

17. Information regarding the notices of determination issued to petitioner was contained on pages 13 and 14 of the CMR and lists the following certified numbers, reference numbers and names and addresses:

Certified Number	Reference Number	Name and Address
7104 1002 9730 1463 0824	L 027841809	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0831	L 027841810	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0848	L 027841811	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0855	L 027841812	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 8062	L 027841813	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0879	L 027841814	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612

⁴ 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.

Certified Number	Reference Number	Name and Address
7104 1002 9730 1463 0886	L 027841816	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0893	L 027841817	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0909	L 027841818	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0916	L 0278 41819	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0923	L 027841820	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612
7104 1002 9730 1463 0930	L 027841821	Fine- Merritt G 19 Rolling Drive Brookville NY 11545-2612

18. Each page of the CMR bears the initials of the postal employee verifying receipt of the items. The last page of the CMR contains a preprinted entry of “180” corresponding to “Total Pieces and Amounts.” On the last page of the CMR there is a stamp which states “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas.” Appearing beneath this preprinted entry and corresponding to the heading “Total Pieces Received at Post Office” is the handwritten number “180” followed by the initials of the Postal Service employee accepting receipt of the items. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the hand writing of the number “180” indicate that all 180 pieces listed on the CMR were received at the post office.

19. 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.

20. The facts set forth above in Findings of Fact "5" through "19" were established through the affidavits of Patricia Finn Sears and James Steven VanDerzee. Ms. Sears is employed as a Supervisor in the Division's CARTS Control Unit. Ms. Sears'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.

21. The addresses on the notices of determination were the same as the address given on petitioner's New York State Resident Income Tax Return for 2005. This return, dated February 21, 2006, was the last return filed by petitioner prior to the issuance of the subject notices.

22. 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; he 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 [1971]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Moreover, petitioner presented no evidence to contest the facts

alleged in the Sears and VanDerzee affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671 [1971]; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992]). 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 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 BCMS 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 notices of determination to file requests for 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 Ms. Sears 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 particular notices at issue were actually mailed to petitioner on October 30, 2007, the date appearing on the CMR's. 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 Sears and VanDerzee affidavits were followed with respect to the notices issued to petitioner.

On the first mailing log, petitioner's name and last known address at the time of mailing, as well as the Assessment ID number on the face of the notice in issue, appears on the CMR. Moreover, the Division wrote the date of October 30, 2006 to show the date that the notice was actually mailed. There was one certified control number on the CMR and the USPS employee who initialed the CMR indicated, by writing the number "1," that 1 item was received for mailing. In short, the Division established that it mailed the Notice of Determination to petitioner by certified mail on October 30, 2006.

Similarly, on the second mailing log the Division has offered sufficient proof to establish the fact that the remaining notices were actually mailed to petitioner on October 30, 2007, the date appearing on the CMR. 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 October 30, 2007. There were 180 certified control numbers on the CMR and the USPS employee who initialed the CMR indicated, by writing the number "180," that 180 pieces were received for mailing. Thus, the Division has shown that it mailed the remaining notices of determination to petitioner by certified mail on October 30, 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 requests for conciliation conferences on the basis that the requests were 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. Rather the United States postmarks on the envelopes show that the requests were not mailed until February 15, 2007. Since the requests were not timely filed (i.e., within 90 days after October 30, 2006), the same were untimely and there is no jurisdiction to proceed with this matter.

H. The petition of Merritt Fine is hereby dismissed.

DATED:Troy, New York
January 22, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE