

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANTHONY CAPECI : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 821673
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2002 through November 30, 2005. :

Petitioner, Anthony Capeci, 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 June 1, 2002 through November 30, 2005.

The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, received on August 2, 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 by Alvan L. Bobrow, Esq., had 30 days, or until September 3, 2007, to respond to the motion, and the 90-day period for issuance of this determination commenced on September 3, 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, Anthony Capeci, a Request for Conciliation Conference (Request). This Request identifies petitioner by name, lists his “current address” as 1160 East Jerico Turnpike, Suite 117, Huntington, New York 11743. A cover letter to the request was dated December 30, 2006. The envelope bearing the cover letter bore a metered postmark date of January 3, 2007. Both the cover letter and the Request were stamped received by BCMS on January 16, 2007.

2. The document challenged by the Request is a Notice of Determination addressed to petitioner at “8 Culver Court, Melville, NY, 11747-1624.”¹ The notice was dated October 5, 2006 and asserted that New York State sales and use taxes were due from petitioner for the period June 1, 2002 through November 30, 2005 in the amount of \$2,269,275.13 plus interest in the amount of \$939,142.70 and penalty in the amount of \$867,471.98 for a balance due of \$4,075,889.81. 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 January 3, 2007.

3. The last tax return filed by petitioner before the issuance of the Notice of Determination was a New York State personal income tax return for 2005 which was dated April 17, 2006. The return listed petitioner’s address as 8 Culver Court, Melville, New York 11747-1624.

4. In a Conciliation Order Dismissing Request (CMS No. 217363) dated February 2, 2007, BCMS advised petitioner that his request for a conciliation conference was denied. Specifically,

¹ The Request also challenged a notice issued to West 20th Enterprises Corp. (Notice Number L-027862534-9). The Division’s motion does not pertain to this aspect of the Request and will not be addressed.

the order stated that the notice was issued on October 5, 2006, but the request was not received until January 16, 2007. Therefore, the request was untimely since it was filed more than 90 days after the issuance of the notice.

5. Petitioner challenged this denial by filing a petition, dated April 24, 2007, with the Division of Tax Appeals. To the extent pertinent to this motion, the petition stated that on December 30, 2006 petitioner filed a timely request with BCMS on behalf of himself and “20 West.” Petitioner further averred that in a letter dated February 2, 2007, BCMS dismissed petitioner’s request on the basis that the request was not received until January 16, 2007 which was past the 90-day deadline for requesting a BCMS conference. Petitioner submitted that the Division erred in denying his request for a conciliation conference.

6. The Division offered the affidavits of Patricia Finn Sears, James Steven VanDerZee and Heidi Corina, employees of the Division. The first two affidavits concerned the mailing procedures followed by the Division in mailing notices of determination. The last affidavit pertained to correspondence between Ms. Corina and the postal service. The Division also offered a copy of petitioner’s Request for Conciliation Conference, a copy of the certified mailing record (CMR) containing a list of the conciliation orders allegedly issued by the Division on October 5, 2006, including petitioner’s, and a copy of the Conciliation Order Dismissing Request dated February 2, 2007.

7. Ms. Heidi Corina is a Legal Assistant 2 in the Division’s Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. The Postal Form 3811-A is a form used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

8. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A which was requested for petitioner herein. This form requests information regarding a piece of mail bearing article number 7104 1002 9730 1424 7107² and addressed to petitioner at 8 Culver Court, Melville, NY 11747-1624. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated May 25, 2007. The letter states in part: "The delivery record shows that this item was delivered on 10/07/2006 at 03:26 PM in MELVILLE, NY 11747." The letter also contains a scanned image of the recipient as "Rosalio Capeci" above the handwritten name "Rosalio Capeci." The address of the recipient was written is shown as "8 Culver."

9. 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 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Moreover, petitioner presented no evidence to contest the facts alleged in the Sears, VanDerZee and Corina 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 [1992]). Upon all of the proof presented, and for the

² This is the same number as the certified number on the CMR corresponding with the mailing of the Notice of Determination to petitioner on October 5, 2006.

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 undisputed that at the time the Notice of Determination was issued, petitioner's income tax return for 2005 was the last return filed by him before the notice was issued. The address on the notice is the same address reported on the 2005 income tax return. Thus, the notice was sent to petitioner's last known address. Further, documentation from the USPS establishes that the notice was received at petitioner's last known address on October 7, 2006. The Division has also introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information and the USPS response that the conciliation order was delivered to petitioner's last known address.

F. Based upon a receipt date of October 7, 2007, petitioner had 90 days or until January 5, 2007 to mail a request for a conciliation conference or mail a petition for a hearing. The envelope used to mail the request bore a machine metered date of January 3, 2007. Nevertheless, the request was not received by BCMS until January 16, 2007. It follows that the request was untimely pursuant to 20 NYCRR 4000.7(a)(2)(iii)(b) since the request was received beyond the period on which such mail would ordinarily be received if mailed on the date stamped.

G. The petition of Anthony Capeci is hereby dismissed.

DATED: Troy, New York
November 29, 2007

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE