

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANNA SILKOVIC-RECKOVIC : DETERMINATION
 : DTA NO. 822112
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, 1994 through November 30, 2004. :

Petitioner, Anna Silkovic-Reckovic, 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, 1994 through November 30, 2004.

On July 2, 2008, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking the dismissal of the petition or, in the alternative, summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated July 2, 2008, and annexed exhibits supporting the motion. Pursuant to an extension of time, petitioner filed a response on September 1, 2008. Thus, that date commenced the 90-day period for the issuance of this determination. After due consideration of the submissions by the Division of Taxation and petitioner, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because there are no disputed facts and, as a matter of law, such facts mandate a determination in its favor.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Determination, dated June 18, 2007, to petitioner, Anna Silkovic-Reckowic, at 2039 77 St., Brooklyn, NY 11214-1307. The notice assessed sales and use taxes for the period March 1, 2004 through November 30, 2004 in the amount of \$50,990.64 plus interest in the amount of \$23,991.98 and penalty in the amount of \$20,395.91 for a balance due of \$95,378.53. The notice asserted that petitioner was an officer or responsible person of Living Room Café Inc.

2. On February 7, 2008, the Division of Tax Appeals received a petition dated February 8, 2008 challenging the forgoing notice. Specifically, the petition challenged the conclusion that petitioner is a responsible officer of Living Room Café Inc. It also noted that the corporation is challenging the same tax liability. Lastly, the petition stated that the inaction of the corporation's prior accountant caused the assessment.

3. To show proof of proper mailing of the June 18, 2007 notice, the Division provided the following with its motion papers: (i) an affidavit, dated June 26, 2008, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (ii) an affidavit, dated July 1, 2008, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (iii) the "Certified Record for Presort Mail" (CMR) postmarked June 18, 2007; and (iv) a copy of petitioner's 2004 personal income tax return.

4. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, page 5 of the 10-page CMR contains information on the particular notice

in issue and lists an initial date, which signifies the date and time the CMR was produced. Following general practices, this date was manually changed to the actual mailing date of June 18, 2007. Taxpayer addresses, certified control numbers, and notice numbers assigned to each notice may be found under their respective columns on the CMR. The certified number and notice number appear on the corresponding notices and accompanying cover sheet, respectively, while the address appears on both. Page 5 of the CMR establishes that a notice with certified number P 7104 1002 9730 0068 9577 and notice number L 028756761 was sent to petitioner at her Brooklyn, New York, address.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. A Mailing Cover Sheet precedes each notice. A staff member operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. 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. A staff member then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirmed that a USPS employee affixed a postmark and initialed each page of the CMR. On the final page, corresponding to "Total Pieces

and Amounts,” is the number 107. This number has a line placed through it. A short distance below this number is the handwritten number 106 which is circled confirming that 106 notices were received by the USPS. The USPS postmark on each page of the CMR is from the Colonie Center branch and bears the date June 18, 2007, confirming that the 106 notices were mailed on that date.¹

6. Petitioner’s Brooklyn, New York, address on the CMR and on the notices match the address listed on her New York State personal income tax return filed for the year 2004. This was the last return petitioner filed with the Division before issuance of the notice.

7. In separate correspondence, which is referenced in the petition, petitioner’s representative posits that his client is committed to be cooperative and to have a fair and proper resolution of this matter. It is also maintained that petitioner failed to directly respond to the notice because she relied on her prior accountant to perform this task. Petitioner’s representative also asserts that there is reasonable cause for the delay in filing because if there had been proper representation, there would not have been a need for a hearing. It is submitted that the assessment of tax is excessive and capricious. Petitioner’s representative further contends that the correspondence from the Division which referred to an extended audit period of March 1, 2006 through November 30, 2006 and stated that the period in issue is still under consideration, is inconsistent with the position that petitioner did not submit a timely response.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

¹ One piece of certified mail, which is listed on the first page of the CMR, was “pulled.” After the statutory notice was pulled, a line was placed through the entry for this taxpayer. There is no indication of a deletion on or near a listing for petitioner.

if, upon all 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 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*, 30 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *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. Where the timeliness of a request for conciliation conference or petition is at issue, as here, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To prove the fact and date of mailing 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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*). Additionally, Tax Law § 1138(a)(1) requires that the 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."

D. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notices on the day they were dated, June 18, 2007, to petitioner's last known address. The submitted affidavits establish the Division's standard mailing procedure and that the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

Further, the addresses on the notices, their cover sheet and the CMR conform with the address on the last return filed by petitioner before the notices were issued, thereby satisfying the “last known address” requirement in Tax Law § 1138(a)(1). Petitioner offered neither argument nor proof either disputing the evidence introduced by the Division or alleging nonreceipt. Therefore, it is concluded that the Division properly mailed the notices to petitioner’s last known address, and thus, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on June 18, 2007 (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. The petition for a hearing was received on February 7, 2008, a date far beyond the 90-day period for protesting the notice and, therefore, is untimely. Consequently, the Division of Tax Appeals has no jurisdiction to hear this matter (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005) and must grant summary determination in favor of the Division of Taxation.

F. It is unfortunate that petitioner relied upon a representative who did not file a timely request for a conciliation conference or a petition for a hearing. Further it is noteworthy that petitioner has not claimed that the correspondence from the Division misled petitioner into filing an untimely petition for hearing. Therefore, there is no basis for raising an estoppel. The outcome here is governed by the rule that the Division of Tax Appeals has no authority to consider an untimely protest to a notice (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*).

G. Finally, it is observed that petitioner may not be without some remedy. She may pay the taxes and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, she

may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).

H. The Division's motion for summary determination is granted, and the petition of Anna Silkovic-Reckovic is dismissed.

DATED: Troy, New York
November 26, 2008

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE