

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MENG XIA CHEN	:	ORDER
		DTA NO. 822138
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, 2000 through May 31, 2003.	:	

Petitioner, Meng Xia Chen, 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, 2000 through May 31, 2003.

On March 4, 2008, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On March 17, 2008 and on April 3, 2008, petitioner, appearing by Miu & Co., CPAs (Louis Miu, CPA), filed letters and documents in opposition to dismissal. On March 26, 2008, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.9(a)(4), the 90-day period for issuance of this order commenced on April 3, 2008. After due consideration of the documents and arguments submitted herein, Brian L. Friedman, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Determination to petitioner, Meng Xia Chen, dated February 24, 2006 and addressed to petitioner at 25-34 76th Street, East Elmhurst, New York 11370-1426. The notice bears assessment identification number L-026641261-6 and assesses tax in the amount of \$305,876.40, plus penalty and interest, for a total amount due of \$651,708.22 for the period June 1, 2000 through May 31, 2003.

2. On February 20, 2008, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination dated February 24, 2006.

3. On March 4, 2008, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition states that “[t]he Notice of Determination appears to have been issued on February 24, 2006, and it appears that the petition was not filed until February 20, 2008 or more than seven hundred days later.”

4. Notices of determination, such as the one at issue herein, are computer-generated by the Division’s 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. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service (USPS) through return of the CMR to the CARTS Control Unit.

5. 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 under the heading “Certified No.” The CMR lists an initial date (the date of its printing) in its upper left corner which is approximately 10 days in advance of the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review, processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices.

In the present matter, the original date and time of “20060451700” signifies the year, ordinal day of the year and military time of day on which the CMR was produced. On page one of the CMR, the date has been manually changed to “2/24/06.”

6. After a notice of determination is placed in an area designated by the Division’s Mail Processing Center for Outgoing Certified Mail, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies 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 delivers the stamped envelopes and associated CMR to a branch office of the USPS located in the Albany, New York area. In this case, the stamped envelopes and CMR were delivered to the Colonie Center branch. A postal employee then accepts the envelopes into the custody of the USPS and affixes a dated postmark and his or her initials or signature to the CMR.

7. 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 originating office (CARTS Control Unit) within the Division.

8. The CMR pertaining to this matter is a 16-page, fan-folded (connected) computer-generated document entitled “Certified Record for Presort Mail - Assessments Receivable.”

Each of the pages consists of 11 entries with the exception of page 16 which contains 5 entries. There are no deletions from the list of entries on this CMR. A certified control number is assigned to each item of mail listed on the 16 pages of the CMR.

9. Information regarding the Notice of Determination issued to petitioner is contained on page 9 of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1152 1804 is notice number L 026641261, along with petitioner's name and address which are identical to that which is listed on the subject Notice of Determination.

10. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated February 24, 2006.

11. The last page of the CMR, page 16, contains a preprinted entry of 170, corresponding to the heading "Total Pieces and Amounts." Beneath this preprinted entry is a handwritten "170" and next to the handwritten number are the initials of the USPS employee.

12. The affixation of the USPS postmarks, the initials of the postal employee and the handwritten "170" indicate that all 170 pieces listed on the CMR were received at the post office.

13. The Division generally does not request, demand or retain return receipts from certified or registered mail.

14. The procedures followed and described herein were the normal and regular procedures of the Division's CARTS Control Unit and Mail Processing Center, and such procedures were followed in the issuance and mailing of the pieces of certified mail on February 24, 2006.

15. The facts set forth in Findings of Fact 4 through 14 were established through the affidavits of Patricia Finn Sears and James Steven VanDerzee. Ms. Sears is employed as a Tax Processing Specialist 2 and Supervisor of the Refunds, Deposits, Overpayments and Control Units which includes the CARTS Control Unit. As part of her regular duties, Ms. Sears

supervises the processing of notices of deficiency and determination prior to their shipment to the Division's Mail Processing Center for mailing. Mr. VanDerzee is employed as a Principal Mail and Supply Supervisor in the Division's Registry Unit and his duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

16. Petitioner's 2004 New York State Resident Income Tax Return (form IT-201) was filed on June 27, 2005. This return was the last return filed by petitioner prior to the issuance of the subject Notice of Determination by the Division. Petitioner's address, as set forth on the return, was 25-34 76th Street, East Elmhurst, New York 11370. This address is the same address to which the Notice of Determination was sent by the Division (*see* Findings of Fact 1 and 9).

17. In response to the Notice of Intent to Dismiss Petition, petitioner's representative submitted a letter dated March 7, 2008 in which he contends that "the Notice of Determination issued on February 24, 2006 was not sent to the correct address and the taxpayer never received it." The letter states that petitioner's correct address is "4 Queens Street, Syosset, NY 11791." In support of this contention, petitioner's representative attached to his letter a copy of petitioner's driver's license and copies of bank statements for periods from November 2005 through December 2006.

In a subsequent letter from petitioner's representative dated April 3, 2008, he asserts that the fact that the Division does not request, demand or retain return receipts from certified or registered mail does not relieve the Division of its burden of proof. In addition, he attached a traffic ticket summons from the New York City Department of Finance, dated March 31, 2006, which was addressed to petitioner at 4 Queens Street, Syosset, New York 11791-3004.

18. Attached to petitioner's petition filed with the Division of Tax Appeals on February 20, 2008 is a copy of a Collection Notice which is dated June 4, 2007. The Collection Notice, in

section A thereof, informed petitioner of the assessment which is the subject of this proceeding (Assessment No. L-026641261-6 in the amount of \$305,876.40, plus penalty and interest). The Collection Notice was sent to petitioner's new address, i.e., 4 Queens Street, Syosset, NY 11791-3004.

By virtue of the fact that the Collection Notice was attached to petitioner's petition, it is clear that petitioner actually received the notice and was, therefore, made aware of the existence of the assessment at issue herein. However, it cannot be ascertained as to the date on which petitioner received the Collection Notice and was made aware of the assessment.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where "a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient." This statute further provides that such a 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."

B. Tax Law § 1147(a)(1) provides, in relevant part, as follows:

Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article 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. A notice of determination shall be mailed promptly by registered or certified mail.

C. In the present matter, the record reflects that the last return filed by petitioner prior to the issuance of the Notice of Determination was her New York State personal income tax return for the year 2004 which was filed on June 27, 2005. This return listed petitioner's address as 25-34 76th Street, East Elmhurst, New York 11370, which was the address to which the Division

issued the Notice of Determination. While petitioner presented documentary evidence (copies of her driver's license, various bank statements and a traffic ticket summons) which indicates that her correct address was 4 Queens Street, Syosset, New York 11791, there has been no proof presented to show that she ever advised the Division of a change of address. Since the Division mailed the Notice of Determination by certified mail to the address given in the last return filed by petitioner, it is clear that the Division complied with the provisions of Tax Law § 1138(a)(1) and § 1147(a)(1).

D. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of a determination within 90 days of the mailing of the Notice of Determination (*see* Tax Law § 1138[a][1]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely petition protesting 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 Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the timeliness of a taxpayer's protest of a statutory notice is in question, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerzee, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination.

G. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination at issue was mailed to petitioner on February 24, 2006. Specifically, the 16-page document lists the names and addresses (redacted to comply with the secrecy provisions of the Tax Law) and the corresponding certified control numbers for all taxpayers to whom statutory notices were issued on February 24, 2006. All 16 pages of the CMR bear a USPS postmark dated February 24, 2006. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee initialed the last page of the CMR and wrote “170” on that page to indicate receipt by the post office of all 170 pieces of mail listed on the CMR. This evidence is sufficient to establish that the Division mailed, by certified mail, the subject Notice of Determination on February 24, 2006.

H. As previously noted, Tax Law § 1147(a) provides that “[t]he mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.” However, this presumption may be rebutted with proof that the notice was never received (*see Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945 [1984], *affd* 64 NY2d 688, 485 NYS2d 517 [1984]). Where the presumption of receipt is successfully rebutted, the 90-day period for requesting a hearing under section 1138 of the Tax Law is not triggered and petitioner is entitled to a hearing.

While a taxpayer has the right to rebut the presumption of receipt, the rebuttal must consist of more than a mere denial of receipt (*Matter of American Cars ‘R’ Us v. Chu*, 147 AD2d 797,

537 NYS2d 672 [1989]). In the present matter, petitioner has presented documentary proof that, at or about the time that the Notice of Determination was issued by the Division, she no longer resided at 25-34 76th Street, East Elmhurst, New York, the address to which the Notice of Determination was mailed. This evidence constitutes more than a mere denial of receipt (*see Matter of T.J. Gulf, Inc. v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97 [1986]) and establishes a material issue of fact as to whether petitioner did or did not receive the Notice of Determination. This issue, if resolved in petitioner's favor, would rebut the statutory presumption of receipt of the February 24, 2006 Notice of Determination.

I. While it is clear that petitioner actually received notice of the assessment from the Collection Notice (*see* Finding of Fact 18), the record does not contain any evidence as to the date on which petitioner received notice. In *Matter of Astoria Leasing Corp.* (Tax Appeals Tribunal, May 27, 1999), the Tribunal stated as follows:

While we agree that Astoria, at some point, had actual notice of the assessments in question by virtue of the events recited above [Astoria admitted receiving a Notice and Demand and a portion of the taxes were paid by levy upon its bank accounts], that is not sufficient to meet the Division's burden here. The Division has brought this motion either for dismissal of the petition or for summary determination, based on its assertion that the petition is untimely. To prevail on either motion, the Division was required to offer some proof of a date certain when Astoria received actual or presumptive notice of the determination of tax due [citations omitted].

J Since the granting of a Notice of Intent to Dismiss Petition is essentially the equivalent of the granting of a motion to dismiss or, after issue has been joined, a motion for summary determination dismissing a petition for failure to have timely filed such petition, its impact has serious consequences, i.e., the preclusion of a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), such a motion "shall 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.”

Having found at least one such issue herein, i.e., whether petitioner received the Notice of Determination, the Notice of Intent to Dismiss Petition must be withdrawn.

K. The Notice of Intent to Dismiss Petition, dated March 4, 2008, is hereby withdrawn and the Division of Taxation shall have 75 days from the date of this order to file an answer to petitioner’s petition.

DATED: Troy, New York
June 19, 2008

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE