

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| FOSSIL PARTNERS, LP | : | DETERMINATION |
| | | DTA NO. 822208 |
| 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, 2006. | : | |

Petitioner, Fossil Partners, LP, 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, 2006.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated August 20, 2008 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on September 19, 2008, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated August 23, 2007 and addressed to petitioner, Fossil Partners, LP, at 2323 N. Central Expressway, Richardson, TX 75080-2712.

2. The subject Notice of Determination assesses tax of \$23,921.85, plus interest, for the period December 1, 2002 through May 31, 2006. In explanation, the notice states that, "[b]ased on an audit, you owe an additional amount." The notice bears assessment identification number L-029079785-5 and the corresponding "Mailing Cover Sheet" bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 0271 2334.

3. On March 4, 2008, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the August 23, 2007 Notice of Determination.

4. On March 21, 2008, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on August 23, 2007, but the request was not received until March 4, 2008, or in excess of 90 days, the request is late filed.

5. To show proof of proper mailing of the August 23, 2007 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated August 15, 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 August 19, 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 - Assessments Receivable” (CMR) postmarked August 23, 2007; (iv) an affidavit, dated August 15, 2008, of Heidi Corina, a legal assistant in the Division’s Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Request for Delivery Information/Return Receipt after Mailing (PS Form 3811-A) and United States Postal Service response to such request dated July 10, 2008; and (vi) petitioner’s June 2007 part-quarterly sales tax return filed July 27, 2007, which was the last return filed by petitioner prior to the issuance of the Notice of Determination at issue and which lists the same address for petitioner as that listed on the subject notice.

6. 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 18 of the 18-page CMR contains information on the particular notice in issue and indicates an initial date of August 13, 2007.¹ Following general practices, this date was manually changed to the actual mailing date of “8/23/07.” Taxpayer addresses, certified control numbers, and reference numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and accompanying cover sheet, respectively, while the address appears on both. Page 18 of the CMR establishes that a Notice of Determination with certified control number 7104 1002 9730 0271 2334 and assessment ID number L-029079785 was mailed to petitioner at the Richardson, Texas, address.

¹ The CMR specifically states “20072251701” or year 2007, day 225 at 5:01 P.M.

7. 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 retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various 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 confirms that a USPS employee postmarked and initialed pages 1 through 18 of the CMR. The postmarks are dated August 23, 2007. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 192, which has been manually crossed out. Below the total pieces entry there is a heading "Total Pieces Received at Post Office," next to which the number "191" has been manually written. This indicates that one piece of mail was pulled from the mailing record and, as a result 191 pieces were delivered to the post office. The pulled item, which is unrelated to the subject notice, appears on page four of the CMR and its status is shown by a line through this entry. The affixation of the postmarks, the indication that 191 pieces were received, and the postal service employee's initials confirm that the Notice of Determination at issue was received by the USPS on August 23, 2007.

8. The affidavit of Heidi Corina describes the Division's request to the Postal Service for delivery information on the subject Notice of Determination. Specifically, the PS Form 3811-A requests delivery information with respect to an article of mail bearing certified control number 7104 1002 9730 0271 2334. The USPS response dated July 10, 2008 indicates that such article was delivered as addressed to petitioner at 2323 N. Central Expressway, Richardson, TX 75080-2712 on August 27, 2007.

9. In its petition, petitioner contends that, on July 25, 2007, it responded to a Statement of Proposed Audit Change for Sales and Use Tax dated June 21, 2007 indicating that it disagreed with one audit issue and agreed to the balance of the assessment. Petitioner asserts that it was under the impression that such response was sufficient to achieve a conciliation conference.

10. The August 23, 2008 Notice of Determination clearly advises of the need to timely respond in order to challenge the tax due.

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. 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 Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984]). Petitioner has thus 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*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

C. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, 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 meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notice at issue on August 23, 2007 to petitioner's last known address. The submitted affidavits establish the Division's standard mailing procedure and that, in this case, the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the notices, the corresponding mail cover sheets and the CMR conforms with the address listed on the last New York sales tax return filed by petitioner prior to the issuance of the subject statutory notice, thereby satisfying the "last known address" requirement in Tax Law § 1138(a)(1). Finally, the Division has established that the subject notice was actually delivered to petitioner on August 27, 2002. It is concluded, therefore, that the Division properly mailed the August 23, 2007 notice 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 that date (Tax Law § 170[3-a][a]; § 1138[a][1]).

E. Petitioner's Request for Conciliation Conference was filed on March 4, 2008. This date falls well after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1], § 170[3-a][b]).

The Division of Tax Appeals thus lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005).

F. Petitioner's explanation for its failure to timely file a protest to the notice, i.e., its impression that its response to the Statement of Audit Change was sufficient, is without merit. It is further observed that the Notice of Determination clearly advised petitioner of the requirement to timely file a petition or request a conciliation conference.

G. Petitioner may not be without some remedy, for it may pay the tax and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, petitioner 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 of Taxation's motion for summary determination is granted, and the petition of Fossil Partners, LP is dismissed with prejudice.

DATED: Troy, New York
November 26, 2008

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE