

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
TITANIUM CONSTRUCTION CORP.	:	DETERMINATION
	:	DTA NO. 823183
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, 2000	:	
through November 30, 2005.	:	

Petitioner, Titanium Construction Corp., 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, 2000 through November 30, 2005.

On February 18, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, Esq., dated February 18, 2010, and annexed exhibits supporting the motion. Petitioner, appearing by Mark A. Samuel, Esq., submitted opposing affidavits with supporting documentation on May 5, 2010.¹ Accordingly, the 90-day period for the issuance of this determination commenced on May 5, 2010, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavits, annexed exhibits, and all pleadings and proceedings had herein, Arthur S. Bray, renders the following determination.

¹ Petitioner was granted an extension of time to respond until May 5, 2010.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Titanium Construction Corp., a Notice of Determination, dated February 2, 2009, which assessed sales and use taxes for the period December 1, 2000 through November 30, 2005, in the amount of \$1,112,769.01 plus penalty and interest for a balance due of \$2,822,016.64. The notice was mailed to 305 Madison Avenue, suite 1523, New York, New York 10165-1532.

2. Petitioner filed a Request for a Conciliation Conference, dated June 8, 2009, which asserted that petitioner did commercial work and that sales tax is not collected on such work. Petitioner also stated that it had records to prove its assertion. The request was sent via the United States Postal Service in an envelope that bore a postmark dated June 19, 2009.

3. The Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request, dated July 10, 2009, which denied the request for a conciliation conference. The order stated, in pertinent part: “[s]ince the notice(s) was issued on February 9, 2009,² but the request was not mailed until June 19, 2009, or in excess of 90 days, the request is late filed.”

4. On August 3, 2009, the Division of Tax Appeals received the petition in this matter. Petitioner’s address is listed on the petition as 305 Madison Avenue, #1523, New York, New York 10165.

² This appears to be a typographical error because the certified mailing log clearly shows that the notices were mailed on February 2, 2009.

5. To show proof of proper mailing of the notices dated February 2, 2009, the Division provided the following: (i) an affidavit, dated February 12, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated February 9, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 2, 2009; and (iv) a copy of portions of an audit report pertaining to the assessment in issue.

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, each page of the 36-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing.³ Following the Division's general practice, this date was manually changed on the first page to "2-2-09," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." The fourth page of the CMR contains information on the subject notice and

³ Ms. Sears affidavit states that the CMR consists of 25 pages. This appears to be an inconsequential typographical error.

establishes that on February 2, 2009 a notice with the control number 7104 1002 9730 1144 4028 and assessment number L 031537900, was sent to petitioner at its Madison Avenue, New York, address. A copy of the notice with control number 7104 1002 9730 1144 4011 was sent to petitioner's representative, John Dash, III, at 60 E. 42nd Street, Suite 1523, New York, N.Y. 10165.⁴

7. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center 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 initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail 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 affixed a dated postmark and initials on each page of the CMR. On the

⁴ This is also the same address as on the petition filed with the Division of Tax Appeals.

final page, corresponding to “Total Pieces and Amounts,” is the preprinted number 387. Here, the Postal Service representative wrote 387 on page 36 of the certified mail record and added his initial or signature on each page of the CMR, confirming that 387 notices were received. The USPS postmark on each page of the certified mailing record is from the Colonie Center branch and bears the date February 2, 2009, confirming that the notices were mailed on that date.

8. At the time of the assessment, petitioner had not filed any tax returns. However, the address appearing on the audit report is 305 Madison Avenue, Suite 1523, New York, N.Y., 10165. This is the same address appearing on the Notice of Determination, the request, the mailing cover sheet and the petition.⁵

9. In response to the Division’s motion, petitioner submitted an affidavit by Anthony O’Donnell, who was petitioner’s chief executive officer. It was Mr. O’Donnell’s understanding that petitioner was a commercial construction corporation that was not required to collect or remit sales tax. In or about 2005, petitioner ceased doing business. According to Mr. O’Donnell, petitioner paid sales tax on the supplies that it purchased and never resold or used for its own purposes. Mr. O’Donnell further explains that all supplies were delivered to the job site for which they were purchased. It is submitted that petitioner has invoices that reflect the amount of sales taxes paid to its suppliers but, because of the period of time that petitioner has been inactive, it needs additional time to locate and submit them. Mr. O’Donnell does not recall when he received the Notice of Determination but contends that it was received at his home address in Staten Island, New York.

⁵ Petitioner included sales tax returns for the period in issue with its motion. These returns also show petitioner’s Madison Avenue, New York, address.

10. Petitioner also submitted the affidavit of Mr. John Dash, who was petitioner's accountant. To the extent pertinent, Mr. Dash states that his office did not receive the Notice of Determination that was sent on February 2, 2009. It is the standard procedure for Mr. Dash's receptionist and office manager to deliver any mail from the taxing authorities directly to him. Mr. Dash contends that his receptionist did not receive a copy of the Notice of Determination. He also maintains that on or about March 26, 2009, Mr. O'Donnell brought the Notice of Determination to his office at 60 East 42nd Street, Suite 1523, New York, New York 10165, for his review. According to Mr. Dash, on June 1, 2009 he sent a letter to the Division that stated that petitioner engaged in commercial construction work and has not been in operation since 2005. The remainder of his affidavit is repetitive of facts which have already been stated.

SUMMARY OF THE PARTIES' POSITIONS

11. Mr. Dash asserts that his request for a conciliation conference was timely because it was mailed within 30 days of his receipt of the Notice of Determination from Mr. O'Donnell who, in turn, received the notice at his home and not at the address set forth in the notice. It is also noted that he mailed the petition to the Division of Tax Appeals within 20 days of the date he received the order denying the request for a conciliation conference. Mr. Dash states that there are issues of fact as to whether the Division has established proper mailing of the notice and whether petitioner owes any sales and use tax.

12. In a separate affirmation, petitioner's representative argues that the Division's motion does not contain a Postal Service Form 3877, which is used to confirm that a Notice of Determination was delivered to the United States Postal Service. Further, Mr. Samuel states that he received the notice at his home address whereas Mr. Matthews states that the notice was sent

to petitioner at its last known address. According to petitioner's representative, the presumption that the notice was properly mailed was rebutted by the absence of Form 3877 and the conflicting information regarding where the notices were mailed citing *Matter of Ruggerite v. State Tax Commn.* (97 AD2d 634 [3d Dept 1984], *affd* 64 NY2d 688 [1984]).

13. Petitioner's papers also include copies of sales and use tax returns stating that no tax was due during the period in issue.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

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. Where the timeliness of a petition or Request for Conciliation Conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*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 of Determination "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."

C. The record shows that petitioner filed a request for a conciliation conference and, in an order dated July 10, 2009, the Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request. The record also shows that the Division has offered sufficient proof to establish the mailing of the statutory notice on the same date that it was dated, i.e., February 2, 2009, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of Deweese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conform with the address listed on the request for a conciliation conference and the petition. It is concluded that the notice was properly mailed, 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 February 2, 2009 (Tax Law § 170[3-a][a]; § 1138[a][1]).

D. The documents show that the notice was mailed on February 2, 2009, but the petition was not mailed until June 19, 2009, which is beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division. (*See Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

E. It is recognized that the petition in this matter alleges that petitioner filed a timely request for a conciliation conference but did not receive any response from BCMS. This allegation is rejected because the record is devoid of any evidence, such as a receipt for certified mail, to show that there was a timely mailing of a request to BCMS.

F. In an affirmation by petitioner's representative, petitioner maintains that the Division's motion is deficient because it does not contain a Form 3877, which is used to establish that the Notice of Determination was actually delivered into the custody of the United States Postal Service for mailing. It is submitted that the presumption that the notice was properly mailed is rebutted by the absence of Form 3877.

G. The foregoing argument is also without merit. A properly completed CMR is substantively the same as a Postal Service Form 3877 (*Matter of Service Merchandise Co.*, Tax Appeals Tribunal, January 14, 1999; *Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994). It is noteworthy that the Tribunal has also concluded that "a properly completed Postal Service Form 3877 represents documentary evidence of the date and the fact of mailing, shows the Division's compliance with its own procedures and creates a presumption of official regularity in favor of the Division (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). The same conclusion would apply to a properly completed CMR.

H. As set forth above, the Division was required to mail the notice to the taxpayer's last known address (Tax Law § 1138) and the Division has shown that this requirement was satisfied through the field audit report. Although petitioner may no longer be operating, the address on the petition supports the conclusion that this continues to be an address used by petitioner's principals.

I. Petitioner's reliance on *Matter of Ruggerite, Inc. v. State Tax Commission* (97 AD2d 634 [3d Dept 1983], *aff'd* 64 NY2d 688 [1984]) is misplaced. In *Ruggerite*, the notice was returned unclaimed to the Division. This evidence was accepted as sufficient to establish that the notice had not been received. In this case, petitioner has not offered any evidence to rebut the

presumption of receipt other than to aver that petitioner and its representative never received the notice mailed on February 2, 2009. This argument is rejected because a mere denial of receipt is not sufficient to rebut the presumption of receipt (*Matter of T.J. Gulf v. State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]).

J. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the tax assessment and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, it may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).

K. The Division's motion for summary determination is granted, and the petition of Titanium Construction Corp. is dismissed.

DATED: Troy, New York
July 29, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE