

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>AMERICAN HOSPITALITY GROUP, LLC</b>	:	ORDER
for Revision of a Determination or for Refund	:	DTA NO. 823202
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 2004	:	
through May 31, 2007.	:	

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Petitioner, American Hospitality Group, LLC, 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 September 1, 2004 through May 31, 2007.

On December 11, 2009, 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)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, Esq., dated December 10, 2009, and annexed exhibits supporting the motion. Petitioner, appearing by Milton Pitterman and Associates (Judith A. Talmon, EA), did not submit documents or argument in opposition to the motion within 30 days after its filing, i.e., by January 10, 2010, which date commenced the 90-day period for issuance of this determination. After due consideration of the affidavit and documents submitted, and all pleadings filed in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following order.

***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, American Hospitality Group, LLC, at its Grand Island, New York, address, a Notice of Determination, dated January 16, 2009, which assessed sales and use taxes due in the amount of \$200,181.85 for the period September 1, 2004 through May 31, 2007, plus penalty and interest. By its request for a conciliation conference, dated April 22, 2009, petitioner protested the notice, numbered L-031475040-4.

2. On May 15, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued to petitioner a Conciliation Order Dismissing Request (CMS No. 232061). The order determined that petitioner's protest of the subject notice 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 was issued on January 16, 2009, but the request was not mailed until April 23, 2009, or in excess of 90 days, the request is late filed.

3. Petitioner timely challenged this order by filing a petition with the Division of Tax Appeals, by certified mail, on August 13, 2009.

4. To show proof of proper mailing of the notice of determination dated January 16, 2009, the Division provided the following: (i) an affidavit, dated December 1, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated December 1, 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 January 16, 2009; and

(iv) a copy of petitioner's part-quarterly sales and use tax return for the month of December 2008.

5. 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 six-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "1/16/09," 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." Page five of the CMR contains information on the subject notice and establishes that on January 16, 2009 a notice with the control number 7104 1002 9730 1123 3073 was sent to petitioner at its Grand Island, New York, address.

6. 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 final page, corresponding to "Total Pieces and Amounts," is the preprinted number 64. This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date January 16, 2009, confirming that the notices were mailed on that date.

7. Petitioner's Grand Island, New York, address on the CMR and Mailing Cover Sheet matches the address listed on its sales and use tax return for December 2008, and also is the same address listed on petitioner's request for conciliation conference and petition.

8. As noted, the request for conciliation conference was dated April 22, 2009. The request was mailed, via Federal Express US Airbill, on April 23, 2009, and the in-date stamp on the mailing receipt and the request confirms that the request was received by BCMS on April 24, 2009.

9. The file in this matter, and specifically petitioner's request, reveals that petitioner was represented during the course of the audit through the present time by Milton Pitterman and Judith A. Talmon of Milton Pitterman & Associates. The file also includes a letter, dated January 20, 2009 and addressed to Milton Pitterman, in which the auditor advises petitioner's representative as follows:

Enclosed you will find your copy of the notice of determination for American Hospitality Group LLC. There was a mix up in our system with your power of attorney. Please respond as directed in the Notice.

10. There is nothing in the file to establish the date or fact of actual mailing of this letter, or of the notice of determination, either by inclusion with the letter or separately, to petitioner's representative. The affidavit of the Division's representative, John E. Mathews, makes no mention of the mailing of a copy of the notice of determination to petitioner's representative at any time, nor do the CMR or the supporting affidavits indicate or establish any such mailing.

### ***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. There is a 90-day statutory time limit within which a taxpayer may challenge a statutory notice by filing either a request for a conciliation conference with BCMS or a petition for a hearing with the Division of Tax Appeals (Tax Law § 170[3-a][e]; § 1138[a][1]). Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper issuance of the notice by mailing the same, by certified or registered mail, to petitioner's last known address (Tax

Law § 1138[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). A notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

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*).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., January 16, 2009, to petitioner at its 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 conforms with the address listed on petitioner's sales and use tax return for December 2008 which satisfies the "last known address" requirement in Tax Law § 1138(a)(1).

D. The Division has established, as above, that the notice was properly mailed to petitioner. At the same time, the information in the file reflects that petitioner was represented at all times in this matter, yet there is no evidence of the date or even of the actual mailing of a copy of the notice to petitioner's representative. The mailing log does not show any such mailing, and the affidavits make no mention of the issuance of the notice to petitioner's representative.

Further, there is evidence that there was an initial mailing problem in providing a copy of the notice to petitioner's representative (*see* Findings of Fact 9 and 10). While the Tax Law does not specifically mandate the service of the notice on a taxpayer's representative, case law has clearly established that the 90-day period for filing a petition or a request for conference is tolled if the taxpayer's representative is not served with a copy of the statutory notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008). Since there is no evidence establishing that a copy of the notice was provided to petitioner's representative, as required, the 90-day statutory period within which a request or a petition had to have been filed was tolled. (*Id.*)

E. Here, petitioner's representative did actually receive a copy of the notice within sufficient time to file a petition for redetermination or a request for conference, as evidenced by the filing of petitioner's request for a conference on April 23, 2009 (*see* Finding of Fact 1; *see also Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [1992]). Although the April 23, 2009 filing date falls beyond the 90-day protest period, such period was tolled in this case as set forth above. Thus, the request may not be dismissed as untimely and the Division's motion for such relief may not be granted.

F. The Division's motion for summary determination is hereby denied, and the petition of American Hospitality Group, LLC. shall proceed to hearing in due course.

DATED: Troy, New York  
March 18, 2010

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE