

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PAMELA B. SIMPSON : ORDER
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Periods September 1, 2004 through November 30, 2005, :
March 1, 2006 through November 30, 2006 and March 1, :
2007 through May 31, 2007. :
DTA NO. 823407

Petitioner, Pamela B. Simpson, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 2004 through November 30, 2005, March 1, 2006 through November 30, 2006 and March 1, 2007 through May 31, 2007.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated October 26, 2010 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, sworn to October 26, 2010, and annexed exhibits supporting the motion. Petitioner, appearing pro se, filed a letter, dated November 7, 2010, with two exhibits in response to the Division of Taxation's motion. The 90-day period for the issuance of this order began on November 7, 2010, the filing date of petitioner's response to the motion. On February 1, 2011, the due date for issuance of this order was extended to May 10, 2011 pursuant to 20 NYCRR 3000.5(d) of the Tax Appeals Tribunal's regulations. After due consideration of

the affidavits and documents submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of certain notices 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 nine notices of determination.
2. One of the notices is dated April 11, 2005 and was addressed to petitioner, Pamela B. Simpson, at 3708 Paulding Avenue, Apt PH, Bronx, NY 10469-1212. The notice asserted additional sales and use tax for the period September 1, 2004 through November 30, 2004 and bore the assessment number L-025181742-6. The corresponding mailing cover sheet, more fully described below, bore petitioner's name and the above-noted address and a certified mail control number assigned to the notice.
3. Two of the notices are dated November 14, 2005 and were addressed to petitioner, Pamela B. Simpson, at 3708 Paulding Avenue, Bronx, NY 10469-1212. The notices asserted additional sales and use tax for the period December 1, 2004 through May 31, 2005 and bore assessment numbers L-026321311-7 and L-026321312-6. The corresponding mailing cover sheets bore petitioner's name and the above-noted address and a certified mail control number assigned to each notice.
4. Four of the notices are dated March 26, 2007 and were addressed to petitioner, Pamela B. Simpson, at 3708 Paulding Avenue, Bronx, NY 10469-1212. The notices asserted additional sales and use tax for the periods June 1, 2005 through November 30, 2005 and March 1, 2006

through August 31, 2006 and bore assessment numbers L-028336065-5, L-028336067-3, L-028336068-2 and L-028336069-1. The corresponding mailing cover sheets bore petitioner's name and the above-noted address and a certified mail control number assigned to each notice.

5. One of the notices is dated July 27, 2007 and was addressed to petitioner, Pamela B. Simpson, at 3708 Paulding Avenue, Bronx, NY 10469-1212. The notice asserted additional sales and use tax for the period September 1, 2006 through November 30, 2006 and bore assessment number L-028968683-5. The corresponding mailing cover sheet bore petitioner's name and the above-noted address and a certified mail control number assigned to the notice.

6. One of the notices is dated December 14, 2007 and was addressed to petitioner, Pamela B. Simpson, at 3708 Paulding Avenue, Bronx, NY 10469-1212. The notice asserted additional sales and use tax for the period March 1, 2007 through May 31, 2007 and bore assessment number L-029521574-2. The corresponding mailing cover sheet bore petitioner's name and the above-noted address and a certified mail control number assigned to the notice.

7. By letter, dated October 15, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the nine notices of determination described above.

8. On November 6, 2009, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the nine subject notices 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 [sic] issued on December 14, 2007, but the request was not mailed until October 20, 2009, or in excess of 90 days, the request is late filed.

9. To show proof of proper mailing of the notice dated April 11, 2005, the Division provided the following: (i) an affidavit, dated October 21, 2010, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated October 19, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); and (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 11, 2005.

10. To show proof of proper mailing of the two notices dated two November 14, 2005, the Division provided the following: (i) an affidavit, dated October 21, 2010, of Bruce Peltier; (ii) an affidavit, dated October 19, 2010, of Patricia Finn Sears; and (iii) the CMR postmarked November 14, 2005.

11. To show proof of proper mailing of the four notices dated March 26, 2007, the Division provided the following: (i) an affidavit, dated October 21, 2010, of Bruce Peltier; (ii) an affidavit, dated October 19, 2010, of Patricia Finn Sears; and (iii) the CMR postmarked March 26, 2007.

12. To show proof of proper mailing of the notice dated July 27, 2007, the Division provided the following: (i) an affidavit, dated October 21, 2010, of Bruce Peltier; (ii) an affidavit, dated October 19, 2010, of Patricia Finn Sears; and (iii) the CMR postmarked July 27, 2007.

13. To show proof of proper mailing of the notice dated December 14, 2007, the Division provided the following: (i) an affidavit, dated October 21, 2010, of Bruce Peltier; (ii) an affidavit, dated October 19, 2010, of Patricia Finn Sears; and (iii) the CMR postmarked December 14, 2007.

14. The affidavits of Patricia Finn Sears each set forth the Division's general practice and procedure for processing statutory notices.

15. The notices are predicated with the anticipated date of mailing. With respect to the notice dated April 11, 2005, each page of the 16-page CMR lists an initial date that 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 "4-11-05," to reflect the actual mailing date.

With respect to the two November 14, 2005 notices each page of the 33-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. The date on the first page of this CMR was also manually changed in accordance with the Division's general procedure to "11-14-05," to reflect the actual mailing date.

With respect to the four March 26, 2007 notices each page of the 16-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. The date on the first page of this CMR was also manually changed in accordance with the Division's general procedure to "3/26/07," to reflect the actual mailing date.

With respect to the notice dated July 27, 2007, each page of the 11-page CMR lists an initial date that 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 "7/27/07," to reflect the actual mailing date.

With respect to the notice dated December 14, 2007, each page of the 12-page CMR lists an initial date that 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 "12/14/07," to reflect the actual mailing date.

16. All notices are assigned a certified control number. The certified control 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."

17. Page 4 of the April 11, 2005 CMR contains information on the notice bearing that date (L-025181742-6). The control number, assessment identification number and petitioner's address as listed on the CMR all correspond to the information on the mailing cover sheet and the April 11, 2005 Notice of Determination.

18. Page 5 of the November 14, 2005 CMR contains information on the two notices (L-026321311-7 and L-026321312-6) bearing that date. The control numbers, assessment identification numbers and petitioner's address as listed on the CMR all correspond to the information on the mailing cover sheets and the November 14, 2005 Notices of Determination.

19. Page 4 of the March 26, 2007 CMR contains information on the three of the four notices bearing that date (L-028336065-5, L-028336067-3, and L-028336068-2).¹ The control numbers, assessment identification numbers and petitioner's address as listed on the CMR for the three notices all correspond to the information on the mailing cover sheets and the March 26, 2007 Notices of Determination.

20. Page 5 of the July 27, 2007 CMR contains information on the notice bearing that date (L-028968683-5). The control number, assessment identification number and petitioner's

¹The CMR lists an assessment numbered L-028336066, which was not petitioned and is not in issue. In addition, the CMR did not list L-028336069, which was petitioned. Therefore mailing has not been established for the latter notice and a hearing must be granted.

address as listed on the CMR all correspond to the information on the mailing cover sheet and the July 27, 2007 Notice of Determination.

21. Page 4 of the December 14, 2007 CMR contains information on the notice bearing that date (L-029521574-2). The control number, assessment identification number and petitioner's address as listed on the CMR all correspond to the information on the mailing cover sheet and the December 14, 2007 Notice of Determination.

22. The Peltier affidavits describe the general operations and procedures of the Division's Mail Processing Center. 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 and mailing cover sheet 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.

23. A review of the CMR submitted by the Division in respect of the April 11, 2005 notice confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 169. In addition, the postal service employee initialed the page and wrote 169 and circled both. The USPS

postmarks are from the Colonie Center branch and each bears the date April 11, 2005. The affixation of the postmarks, the postal service employee's initials, and the circling of the number 169 indicating that all such pieces were received, confirm that the Notice of Determination dated April 11, 2005 was received by the USPS on that date.

24. A review of the CMR submitted by the Division in respect of the November 14, 2005 notices confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 361. In addition, the postal service employee initialed the page and wrote 361 thereon. The USPS postmarks are from the Colonie Center branch and each bears the date November 14, 2005. The affixation of the postmarks, the postal service employee's initials, and the writing of the number 361 indicating that all such pieces were received, confirm that the notices of determination dated November 14, 2005 were received by the USPS on that date.

25. A review of the CMR submitted by the Division in respect of the March 26, 2007 notices confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 168. In addition, the postal service employee initialed the page and wrote 168 and circled it. The USPS postmarks are from the Colonie Center branch and each bears the date March 26, 2007. The affixation of the postmarks, the postal service employee's initials, and the circling of the number 168 indicating that all such pieces were received, confirm that the notices of determination dated April 11, 2005 were received by the USPS on that date.

26. A review of the CMR submitted by the Division in respect of the July 27, 2007 notice confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 111. In addition,

the postal service employee initialed the page and circled the preprinted number 111. The USPS postmarks are from the Colonie Center branch and each bears the date July 27, 2007. The affixation of the postmarks, the postal service employee's initials, and the circling of the number 111 indicating that all such pieces were received, confirm that the Notice of Determination dated July 27, 2007 was received by the USPS on that date.

27. A review of the CMR submitted by the Division in respect of the December 14, 2007 notice confirms that a USPS employee affixed a dated postmark and initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 125. In addition, the postal service employee initialed the page and circled the preprinted number 125. The USPS postmarks are from the Colonie Center branch and each bears the date December 14, 2007. The affixation of the postmarks, the postal service employee's initials, and the circling of the number 125 indicating that all such pieces were received, confirm that the Notice of Determination dated December 14, 2007 was received by the USPS on that date.

28. Petitioner's 2003 New York resident income tax return, dated April 15, 2004, her 2004 New York resident income tax return, dated April 18, 2005, her 2005 New York resident income tax return, dated April 19, 2006 and her 2006 New York resident income tax return, all reported petitioner's address as 3708 Paulding Avenue, Bronx, NY 10469. These were the last returns filed by petitioner prior to the issuance of the subject notices.

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's response to the Division's motion was unresponsive to the allegations with respect to the issue of whether she filed timely requests for a conciliation conference for any of the notices of determination in issue. Petitioner has thus presented no evidence to contest the facts alleged in the Sears and Peltier affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]). Although petitioner did address and submit documentation germane to her substantive objections to the notices, she completely ignored the subject of the Division's motion.

C. Where the timeliness of a Request for Conciliation Conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of 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 eight of the nine statutory notices at issue to petitioner's last known address on the dates claimed. The submitted affidavits and CMRs 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, petitioner's address on the notices, the corresponding mail cover sheets and the CMRs conforms with the address she reported on her New York personal income tax returns filed prior to the issuance of the subject statutory notices, thereby satisfying the "last known

address" requirement in Tax Law § 1138(a)(1). Thus, it is concluded that the Division properly mailed the April 11, 2005, November 14, 2005, July 27, 2007 and December 14, 2007 notices 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 those respective dates (Tax Law § 170[3-a][a]; § 1138[a][1]). Likewise, three of the four notices dated March 26, 2007 were properly mailed and the 90-day time limit to file a Request for Conciliation Conference was commenced on that date. However, with respect to notice number L-028336069-1, the Division failed to produce a CMR that attested to its mailing and therefore it did not prove that it followed its standard procedure for issuance of this notice.

E. Petitioner's Request for Conciliation Conference for all of the notices was filed on October 20, 2009. This date falls after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed for all the notices except L-028336069-1 (*see* Tax Law § 1138[a][1], § 170[3-a][b]). Thus, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest for all of the notices except L-028336069-1 (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

F. The Division of Taxation's motion for summary determination is granted with respect to all of the notices except L-028336069-1 for which a hearing will be scheduled in due course, but in all other respects the petition of Pamela B. Simpson is dismissed with prejudice.

DATED: Troy, New York
March 17, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE