

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARBLE TECHNIQUES, INC. : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 823581
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 2001 through February 28, 2007. :

Petitioner, Marble Techniques, Inc., 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 March 1, 2001 through February 28, 2007.

On September 13, 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)(1)(i) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated September 13, 2010, and annexed exhibits supporting the motion. Petitioner, appearing by Buxbaum Sales Tax Consulting, LLC (Stewart Buxbaum, CPA), submitted a letter in response by September 29, 2010, which date commenced the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, 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 Division of Taxation (Division) issued to petitioner, Marble Techniques, Inc., at its Astoria, New York, address, a Notice of Determination number L-032025904-1, dated June 8, 2009, asserting sales and use taxes due in the amount of \$209,497.48, plus interest, for the period March 1, 2001 through February 28, 2007.

2. Petitioner filed a Request for Conciliation Conference, dated January 14, 2010, with the Bureau of Conciliation and Mediation Services (BCMS) in protest of the Notice of Determination. The request was received by BCMS on January 19, 2010. Petitioner's current representative, Stewart Buxbaum, CPA, signed this request, which alleged, among other things, that neither petitioner nor its representative during the audit, Daniel A. Castellano, CPA, received the Notice of Determination. The request lists petitioner's address as 15-30 131st Street, College Point, New York 11356-2423.

3. On February 5, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. 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(s) was issued on June 8, 2009, but the request was not received until January 19, 2010, or in excess of 90 days, the request is late filed.

4. In response to the dismissal order, petitioner filed a petition with the Division of Tax Appeals. The petition lists petitioner's address as the College Point, New York, address. The

Division subsequently brought this motion, dated September 13, 2009, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner's protest of the statutory notice was filed more than 90 days from the date of the issuance of the statutory notice.

5. In support of its motion for summary determination, the Division submitted: copies of the petition and the envelope in which it was sent via UPS Next Day Air; a copy of the Request for Conciliation Conference dated January 14, 2010; a copy of the Conciliation Order Dismissing Request; a copy of petitioner's New York State and Local Quarterly Sales and Use Tax Return (ST-100) for the period December 1, 2008 through February 28, 2009 filed on March 20, 2009, which was the last sales and use tax return filed by petitioner prior to the issuance of the Notice of Determination; a copy of the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked June 8, 2009; copies of the Notice of Determination and the accompanying mailing cover sheets; the affidavit of John E. Matthews, Esq., the Division's representative; and the affidavits of James Steven VanDerZee and Patricia Finn Sears, employees of the Division.

6. Patricia Finn Sears is employed as a supervisor in the Division's Case and Resource Tracking System (CARTS) Control Unit. Her duties include supervising the processing of notices of determination such as the one at issue herein. Ms. Sears's affidavit 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 16-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 "6/8/09," 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 numbers, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. The third page of the CMR contains information on the subject notice and establishes that on June 8, 2009 a notice with the control number 7104 1002 9730 1349 4847 was sent to petitioner at its Astoria, New York, address. The tenth page of the CMR also contains information on the subject notice and establishes that on June 8, 2009, a notice with the control number 7104 1002 9730 1349 5530 was sent to petitioner's former representative, Daniel A. Castellano, at 313 W. Old Country Road, Hicksville, New York 11801.

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 Mail Processing 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 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 information contained on the CMR. A member of the Mail Processing 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 initials on each page of the CMR and a dated postmark on every

page of the CMR, except for page 13. On the final page, corresponding to “Total Pieces and Amounts,” is the preprinted number 174 and to “Total Pieces Received at Post Office” is the circled handwritten number 174, and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date June 8, 2009, confirming that the notices were mailed on that date.

8. Petitioner’s Astoria, New York, address on the CMR and the Mailing Cover Sheet matches the address listed on its sales and use tax return for the quarter ending February 28, 2009.

9. The record includes a copy of the Power of Attorney form (POA form) appointing Daniel A. Castellano, CPA, as petitioner’s representative in May 2007. This POA form lists Mr. Castellano’s address as Castellano, Korenberg & Co., CPA’s, 313 W. Old Country Road, Hicksville, New York 11801.

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. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Articles 28 and 29. A taxpayer may file a petition with the Division of Tax Appeals seeking a revision of such determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the Notice of Determination (*see* Tax Law § 1138[a][1]; § 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time

limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance 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" (*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 providing 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).

D. The mailing evidence required is two-fold: 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 (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on June 8, 2009. With the exception of page 13, each page of this 16-page document bears a U.S. Postal Service

postmark dated June 8, 2009. A postal service employee handwrote and circled the number “174” corresponding to the “Total Pieces Received at Post Office” heading and initialed the last page next to the circled number, thereby indicating that all 174 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 174 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

E. Tax Law § 1138(a)(1) provides that a 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. . . .” Tax Law § 1147(a)(1) further provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to the provisions of [Article 28] 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. . . . The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*).

F. Here, petitioner’s quarterly sales and use tax return for the period December 1, 2008 through February 28, 2009, filed on March 20, 2009, listed petitioner’s address as Astoria, New York. Petitioner did not file any tax return after this date and before the issuance of the subject Notice of Determination. Accordingly, the Division has shown that the Notice of Determination was properly mailed to petitioner at its last known address on June 8, 2009.

G. Although the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer’s representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer’s

representative is not served with the statutory notice (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29 [1977]). Here the evidence demonstrated that the Notice of Determination was mailed by certified mail to Mr. Castellano, petitioner's duly appointed representative, at his last known address on June 8, 2009, thus fulfilling the case law requirement for doing so.

H. Petitioner's Request for Conciliation Conference was filed on January 19, 2010. This date falls well after the 90-day period of limitations for the filing of such request. Petitioner's request was therefore untimely filed (*see* Tax Law § 1138[a][1]; § 170[3-a][b]). As a result, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

I. 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 claim for refund is disallowed, petitioner 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).

J. The Division of Taxation's motion for summary determination is granted, and the petition of Marble Techniques, Inc., is dismissed.

DATED: Troy, New York
December 2, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE