

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
EL PATIO RESTAURANT, INC.	:	ORDER
	:	DTA NO. 823853
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, 2005	:	
through February 28, 2009.	:	

Petitioner, El Patio Restaurant, 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 December 1, 2005 through February 28, 2009.

On March 23, 2011, the Division of Taxation, by its representative, Mark F. Volk, 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 (b). Accompanying the motion was the affidavit of John E. Matthews, Esq., dated March 23, 2011, and annexed exhibits supporting the motion. On April 21, 2011, petitioner, appearing by David Walton, CPA, submitted the affidavit of David Walton, CPA, and additional documents in opposition to the motion, which date commenced the 90-day period for issuance of this order. After due consideration of the affidavits and documents submitted, and all pleadings filed in this matter, Herbert M. Friedman, Jr., 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, El Patio Restaurant, Inc., at 918 Southern Boulevard, Bronx, New York, 10459, a Notice of Determination, numbered L-033410313-4 and dated March 11, 2010, which assessed sales and use taxes due in the amount of \$111,689.03 for the period December 1, 2005 through February 28, 2009, plus penalty and interest. By its request for a conciliation conference, dated June 17, 2010, petitioner protested the notice.

2. On July 2, 2010, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued to petitioner a Conciliation Order Dismissing Request. 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 March 11, 2010, but the request was not mailed until June 17, 2010, or in excess of 90 days, the request is late filed.

3. Petitioner timely challenged the conciliation order by filing a petition with the Division of Tax Appeals on September 13, 2010.

4. To show proof of proper mailing of the subject Notice of Determination, the Division provided the following in addition to the Matthews affidavit: (i) an affidavit, dated March 22, 2011, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated March 18, 2011, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the 60-

page “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked March 11, 2010; (iv) a copy of the March 11, 2010 Notice of Determination with the associated mailing cover sheet addressed to petitioner; and (v) petitioner’s quarterly sales tax return for the period ended February 28, 2009, which lists the same address for petitioner as that listed on the subject notice. According to the Matthews affidavit, this sales tax return was the last return filed with the Division by petitioner before the notice was issued.

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 60-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 “3/11/10,” 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 Department’s 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 18 of the CMR contains information on the subject notice and states that on March 11, 2010, a notice with the control number 7104 1002 9730 1786 9825 was sent to petitioner at its Bronx, New York, address.

6. The affidavit of Bruce Peltier, the mail and supply supervisor of the staff of the

Division's Mail Processing Center, describes the Center's general operations and procedures. 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 652. Below the preprinted number, this number is handwritten and 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 March 11, 2010, confirming that the notices were mailed on that date.

7. Petitioner's Bronx, New York, address on the CMR and Mailing Cover Sheet matches the address listed on its sales and use tax return for the quarter ended February 28, 2009, and also is the same address listed on petitioner's request for conciliation conference and petition.

8. The file in this matter reveals that petitioner was represented during the course of the audit through the present time by David Walton, CPA, of Havre De Grace, Maryland.¹ In particular, as part of documents submitted with its motion, the Division included a power of attorney running from petitioner to Mr. Walton, dated December 23, 2009, and covering the tax and periods at issue. Additionally, both parties submitted a copy of a letter from Mr. Walton to the Division's auditor, dated February 12, 2010, in which the auditor is clearly advised of Mr. Walton's representation of petitioner. Mr. Walton has since been listed as petitioner's representative on the request for conciliation conference and petition.

9. The Matthews affidavit makes no mention of mailing of a copy of the Notice of Determination to petitioner's representative at any time. Similarly, neither the CMR nor the Peltier affidavit indicate or establish any such mailing to Mr. Walton.

10. The Sears affidavit states:

[a]ttached hereto as Exhibit "B" is a true and accurate copy of the Notice of Determination mailed to the petitioner and the petitioner's representative, on March 11, 2010, along with the associated Mailing Cover Sheet.

Despite this assertion, nowhere in Exhibit B is there a reference to Mr. Walton or his address.

11. Attached to petitioner's opposition to the instant motion is the affidavit of David Walton, CPA. In his affidavit, Mr. Walton asserts that neither he nor petitioner received a copy of the subject notice and that his power of attorney was on file with the Division. Petitioner also denies receipt of the notice in its petition.

¹According to the power of attorney, Mr. Walton is a certified public accountant duly qualified to practice in New York State.

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][a]; § 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 March 11, 2010 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 February 2009, which satisfies the "last known address" requirement in Tax Law § 1138(a)(1).

D. The Division has established, as noted above, that the notice was properly mailed to petitioner. At the same time, the information provided by both parties reflects that petitioner was represented at all relevant times in this matter by Mr. Walton, 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 CMR does not show any such mailing, and two of the Division's affidavits (those of Mr. Matthews and Mr. Peltier) make no mention of the provision of the notice to petitioner's representative. The Division's third affidavit (that of Ms. Sears) mentions mailing of the notice to petitioner's representative, but its attached exhibit does not support that claim. There is no second mailing cover sheet addressed to petitioner's representative nor does the notice bear his address. 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 for conference or a petition had to have been filed was tolled. (*Id.*) Thus, the request may not be dismissed as untimely and the Division's motion for such relief may not be granted.

E. The Division's motion for summary determination is hereby denied, and the petition of El Patio Restaurant, Inc. shall proceed to hearing in due course.

DATED: Troy, New York
May 26, 2011

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE