

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AMERICAN PROJECT & REPAIR, INC. : ORDER
for Revision of a Determination or for Refund of Sales and : DTA NO. 824102
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 2002 through August 31, 2008. :

Petitioner, American Project & Repair, 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 June 1, 2002 through August 31, 2008.

On January 27, 2011, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On February 22, 2011, petitioner, appearing by Brendan P. McCafferty, Esq., submitted a letter in opposition to dismissal. On March 24, 2011, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), having been granted a 30-day extension to do so, submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced March 24, 2011. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. On December 29, 2010, petitioner, American Project & Repair, Inc., filed a petition with the Division of Tax Appeals protesting a Notice of Determination dated February 1, 2010 and bearing assessment identification number L-033285032. The notice is addressed to petitioner at a Wixom, Michigan, address that is the same as that listed on the petition.

2. On January 27, 2011, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner. The Notice of Intent to Dismiss Petition indicates that the petition was late-filed.

3. In response to the Notice of Intent to Dismiss Petition, the Division of Taxation (Division) submitted the following: (i) an affidavit, dated March 18, 2011, of Patricia Finn Sears, a supervisor in the Division's Case and Resource Tracking System (CARTS); (ii) pages numbered 1, 56, and 59 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR) each postmarked February 1, 2010; (iii) an affidavit, dated March 22, 2011, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) an affidavit, dated March 22, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) two Postal Service forms 3811-A (Request for Delivery Information/Return Receipt After Mailing) and United States Postal Service responses to such requests dated February 22, 2011; and (vi) a copy of the front page of the field audit report, which resulted in the issuance of the subject statutory notice and which lists petitioner's name and address as indicated on said notice.

4. 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. Each page of the 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 of the CMR in the present case to the actual mailing date of "2/1/10." It is also the Division's general practice that all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to her office. The pages of the CMR stay banded together unless ordered otherwise by Ms. Sears. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

5. 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 CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address."

6. According to the Sears affidavit, the CMR in the present matter consists of 59 pages and lists 639 certified control numbers along with corresponding assessment numbers, names and addresses. Ms. Sears notes that portions of the partial CMR that are attached to her affidavit have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. She states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed a page or pages thereof.

7. Each of pages 1, 56, and 59 of the CMR has a USPS postmark dated February 1, 2010 and the initials of a USPS employee. Pages 1 and 59 have a handwritten entry of “2/1/10” in the top left corner.

8. Page 56 of the CMR indicates that a Notice of Determination assigned certified control number 7104 1002 9730 1770 1606 and assessment ID number L-033285032 was mailed to petitioner at the Wixom, Michigan, address listed on the subject Notice of Determination. The corresponding mailing cover sheet bears this certified control number and petitioner’s name and address as noted.

9. Page 56 of the CMR also indicates that a copy of the subject notice assigned certified control number 7104 1002 9730 1770 1590 and assessment ID number L-033285032 was mailed to petitioner’s representative, Patrick M. Hanniford, at a Brighton, Michigan, address. The corresponding mailing cover sheet bears this certified control number and Mr. Hanniford’s name and address as noted.

10. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center (Center), describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. Here, as noted,

each of the three pages of the CMR submitted contains such postmarks and initials. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the last page of CMR. Here, the USPS did not comply with this request.

11. According to the Sears affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 639 articles of mail listed on the CMR, including the article addressed to petitioner and its representative, were received by the USPS on February 1, 2010.

12. According to both the Sears and Peltier affidavits, a copy of the subject notice was mailed to petitioner and to its representative on February 1, 2010, as claimed.

13. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 1770 1606 and addressed to petitioner. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 1770 1606 and addressed to petitioner was delivered as addressed in Wixom, Michigan, on February 4, 2010. The Division also requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 1770 1590 and addressed to petitioner's representative, Mr. Hanniford. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 1770 1590 and addressed to petitioner's representative was delivered as addressed in Brighton, Michigan, on February 4, 2010.

14. The city name "Wixom" on the subject Notice of Determination, the CMR and the PS Form 3811-A is misspelled as "Wixam." The city name is correctly spelled as "Wixom" on the USPS response to the 3811-A and on the petition filed herein.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Determination (Tax Law § 1138[a][1]). In most cases, where, as here, the timeliness of a petition is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). In the present matter, however, the Division does not seek to establish the date of issuance of the statutory notice, but rather the date of receipt of the notice by the taxpayer and its representative. Under such circumstances, that is, where the date of mailing is not established, the 90-day period for filing a petition commences with the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3rd Dept 1992], *lv denied* 79 NY2d 759 [1992]).

B. Here, the record shows that petitioner and its former representative received actual notice of the subject Notice of Determination on February 4, 2010. Specifically, the Sears and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheet as well as the CMR, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheets related to the notices mailed to petitioner and its former representative confirms that the control numbers listed thereon are consistent with the control numbers listed on the CMR and the USPS response to the Division's request for delivery information (*see* Finding of Fact 13). The documentation provided to the Division by the USPS shows that articles of mail bearing such certified control numbers were delivered to petitioner and petitioner's former representative on

February 4, 2010 (*id.*). Petitioner and its former representative therefore received actual notice of the subject Notice of Determination on that date. Petitioner's sole argument in opposition to dismissal, that petitioner's former representative was not properly served with a copy of the subject notice, is thus refuted.

C. The petition in this matter was filed on December 29, 2010, well-beyond the 90-day time limitation from the date of actual notice. The petition was therefore untimely filed (*see* Tax Law § 1138[a][1]) and 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, 2005).

D. Given petitioner's undisputed receipt of the statutory notice, the misspelling of the city name on the notice (*see* Finding of Fact 14) is inconsequential.

E. The petition of American Project & Repair, Inc., is hereby dismissed.

DATED:Troy, New York
May 26, 2011

/s/ Timothy Alston

ADMINISTRATIVE LAW JUDGE