

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HERNANDEZ URENA, INC.	:	ORDER
		DTA NO. 824124
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, 2006 through February 28, 2009.	:	

Petitioner, Hernandez Urena, 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, 2006 through February 28, 2009.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (Lori P. Antolick, Esq., of counsel), brought a motion on May 17, 2012 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on June 18, 2012, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy Alston, 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 a Notice of Determination.

FINDINGS OF FACT

1. On November 23, 2010, petitioner, Hernandez Urena, Inc., filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services (BCMS) of the Division of Taxation (Division). The request indicates that it was filed in protest of notice number E-032380657-4 and indicates the date of the notice as “08/11/2010.” Attached to the request is a document captioned “Field Memorandum Immediate Response Required,” apparently issued to petitioner by the Division’s Metropolitan District Office. This Field Memorandum references “Collection ID: E-032380657-4” and also indicates a “Date of Visit: August 11, 2010.”

2. On December 17, 2010, BCMS issued a Conciliation Order Dismissing Request to petitioner. Referencing notice number L032380657, the order determined that petitioner’s protest 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 August 3, 2009, but the request was not mailed until November 23, 2010, or in excess of 90 days, the request is late filed.

3. In its motion papers, the Division offered proof of mailing of a Notice of Determination dated August 3, 2009, and bearing “Audit Case ID X-970476511-8.” Specifically, the Division submitted a certified mailing record and affidavits of Division employees involved in the processing and mailing of notices of determination, all indicating the mailing of a document bearing this identification number.

4. The above-referenced August 3, 2009, Notice of Determination is addressed to petitioner and asserts petitioner’s liability for sales and use taxes as a bulk sale purchaser. The

computation summary section of the notice references “Purchaser’s Assessment ID: L-032380657-6.”

5. The affidavit of Lori P. Antolick, dated May 17, 2012, also submitted by the Division in support of its motion, asserts that “[p]etitioner was issued Notice of Determination L-032380657 (X-970476511-8) because it was liable as a bulk sale purchaser”

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. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of a determination within 90 days of the mailing of a Notice of Determination (*see* Tax Law § 170(3-a)(a); § 1138[a][1]). If a taxpayer fails to timely protest such a notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. 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 mailing of the subject statutory notice 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).

D. Here, the motion for summary determination must be denied because the Division has not established that it mailed the *subject* statutory notice to petitioner. Specifically, while petitioner’s Request for Conciliation Conference protested notice number E-032380657-4 and

the Division's own BCMS issued its Order Dismissing Request with respect to notice number L032380657, the mailing evidence submitted in support of the motion references identification number X-970476511-8. Neither the reference to the purchaser's assessment ID in the computation summary section of the August 3, 2009 notice nor the apparent implication in Ms. Antolick's affidavit that the two identification numbers are interchangeable explains this discrepancy.

E. The Division of Taxation's motion for summary determination is denied and this matter shall proceed to hearing in due course.

DATED: Troy, New York
July 12, 2012

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE