

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SECOND ON SECOND CAFÉ, INC. : ORDER
DTA NO. 824627
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, 2007 through May 31, 2010. :

Petitioner, Second on Second Café, 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, 2007 through May 31, 2010.

On October 25, 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 the basis that the petition did not appear to have been filed in a timely manner. Petitioner, by Louis Miu, CPA, submitted a letter dated October 28, 2011. On November 17, 2011, the Division of Taxation filed a letter requesting an extension of time within which to file its response. The Division of Tax Appeals granted an extension until December 27, 2011 for the Division of Taxation to respond to the notice of intent to dismiss petition. The Division of Taxation, by Mark Volk, Esq. (John E. Matthews, Esq., of counsel) submitted affidavits and other documents in support of dismissal on December 22, 2011, which date commenced the 90-day period for issuance of this order.

After due consideration of the documents and arguments submitted by the parties, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. On May 26, 2011, the Division of Taxation (Division) issued to petitioner, Second on Second Café, Inc., a Notice of Determination of sales and use taxes due (assessment number L-035974391-8) for the period June 1, 2007 through May 31, 2010 assessing tax due of \$64,322.66, plus penalty and interest.
2. On September 26, 2011, petitioner filed its petition to Notice of Determination L-035974391-8 with the Division of Tax Appeals.
3. On October 25, 2011, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition with respect to the aforementioned petition, on the basis that the petition had not been timely filed.
4. The Division submitted the following: (i) an affidavit, dated December 20, 2011, of Daniel A. Maney, a Tax Processing Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking System (CARTS); (ii) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 26, 2011; (iii) an affidavit, dated December 21, 2011, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iv) a copy of petitioner's New York State and Local Sales and Use Tax Return (Form ST-809) for the month of March 2010, the last paper return petitioner filed; and (v) a copy of petitioner's New York State and Local Sales and Use Tax Return (Form ST-809) for the month of April 2011, the last return petitioner electronically filed with the Division before the issuance of the subject Notice of Determination.

5. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney 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 "5/26/11." 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 U.S. Postal Service (USPS) and remain so when returned to his office. The pages of the CMR stay banded together unless ordered otherwise by Mr. Maney. The page numbers of the CMR run consecutively, starting with page one, and are noted in the upper right corner of each page.

6. 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 P.O. Address."

7. According to the Maney affidavit, the CMR in the present matter consists of 67 pages and lists 11 certified control numbers on each page, with the exception of page 67 which has no entries. All certified control numbers are accompanied by corresponding assessment numbers, names and addresses. Mr. Maney notes that portions of the CMR that are attached to his affidavit have been redacted to preserve the confidentiality of information relating to taxpayers

who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR and initialed or signed each page as well.

8. Page 4 of the CMR indicates that a notice of determination, assigned certified control number 7104 1002 9730 0612 3907, and assessment ID number L-035974391, was mailed to petitioner at the New York, New York, address listed thereon. The corresponding mailing cover sheet bears this certified control number and petitioner's name and address as noted. Page 5 of the CMR indicates that a notice of determination, assigned certified control numbers 7104 1002 9730 0612 3983, and assessment ID number L-035974391, was mailed to petitioner's previous representative at the representative's New York, New York, address. The corresponding mailing cover sheet bears this certified control number and the previous representative's name and address.

9. 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. 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 pages of the CMR submitted contain 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 the CMR. Here, the USPS circled the total number of pieces received.

10. According to the Maney affidavit, the affixation of the postmarks and the postal service employee's initials indicate that all 726 articles of mail listed on the CMR, including the articles addressed to petitioner and petitioner's representative, were received by the USPS on May 26, 2011.

11. According to the Maney and Peltier affidavits, copies of the subject notices were mailed to petitioner and petitioner's representative on May 26, 2011, as claimed.

12. Petitioner's sales and use tax return for the month of March 2010, dated April 19, 2010, which was the last the last paper return petitioner filed before the Notice of Determination was issued, stated that petitioner's address was 27 2nd Avenue, New York, New York, the same address appearing on the Notice of Determination in issue, the CMR and the petition.

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]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). A notice of determination is thus binding upon a taxpayer unless he or she files a timely petition with the Division of Tax Appeals. In the present matter, the subject petition appeared, upon receipt by the Division of Tax Appeals, to have been filed beyond the 90-day period. Accordingly, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition pursuant to Tax Law § 2006(5) and section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal.

B. Section 3000.9(a)(4) of the Rules of Practice and Procedure allows the supervising administrative law judge on his or her own motion, and on notice to the parties, to issue a determination dismissing a petition for lack of jurisdiction. Similarly, section 3000.9(a)(1) of the Rules of Practice and Procedure allows a party to bring a motion to dismiss a petition for lack of jurisdiction (20 NYCRR 3000.9[a][1][ii], [vii]). Under the Rules, such a motion brought by a party may be treated as a motion for summary determination (20 NYCRR 3000.9[a][2][i]). Inasmuch as a determination issued following a Notice of Intent to Dismiss Petition under section 3000.9(a)(4) would have the same impact as a determination issued following a motion to dismiss brought under section 3000.9(a)(1)(ii), (vii), i.e., the preclusion of a hearing on the merits, it is appropriate to apply the same standard of review to a Notice of Intent to Dismiss. Accordingly, the instant matter shall be treated as a motion for summary determination.

C. 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]).

D. Section 3000.9(c) of the Rules of Practice and Procedure provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the

material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441, 293 NYS2d 93, 94 [1968]; *Museums at Stony Brook v. Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879 [1960]). “To defeat a motion for summary judgment, the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim. . .’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 448-449, 582 NYS2d 170, 173 [1992] citing *Zuckerman at 562*).

E. Where the timeliness of a taxpayer’s protest against a statutory notice or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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). That is, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and there must be 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).

F. Here, the Division introduced sufficient proof to establish proper mailing of the statutory notice at issue to petitioner’s last known address on the date claimed. The submitted affidavits and CMR 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 notice, the corresponding mail cover sheet and the CMR conform with the address petitioner reported on its sales and use tax return for the month of March 2010, dated April 19, 2010, which was the last paper return filed before the Notice of Determination was issued, thereby satisfying the "last known address" requirement in Tax Law § 1138(a)(1). Thus, it is concluded that the Division properly mailed the notice on May 26, 2011, and the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals commenced on that date (Tax Law § 170[3-a][a]; § 1138[a][1]).

G. Petitioner's petition was filed on September 26, 2011. This date falls after the 90-day period of limitations for the filing of such a petition. Petitioner's petition was therefore untimely filed (*see* Tax Law § 1138[a][1]). Thus, 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).

H. The petition of Second on Second Café, Inc., is hereby dismissed.

DATED: Albany, New York
March 8, 2012

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE