

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NEW GOLDEN GARDEN : **DETERMINATION**
OF COLUMBUS AVE LLC, : **DTA NO. 825708**
ZHENG MIN WEI, AND :
LIN XIU ZHU :
for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period March 1, 2009 :
through August 31, 2011. :

Petitioners, New Golden Garden of Columbus Ave LLC, Zheng Min Wei, and Lin Xiu Zhu, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2009 through August 31, 2011.

On February 27, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Robert Tompkins, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affidavit of Robert Tompkins, dated February 27, 2014, and annexed exhibits. Petitioners, appearing by Peter F. Chiu, Esq., did not respond to the motion. After due consideration of the documents submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely request for conciliation conference or petition following the issuance of notices of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protest of the following notices of determination dated December 7, 2012:

a. notice number L-038859774, addressed to petitioner, Zheng Min Wei (Zheng), at "14748 Roosevelt Ave, Apt 1G, Flushing NY 11354-4710"; and

b. notice number L-038859775, addressed to petitioner, Lin Xiu Zhu (Lin), at "3250 71st St., East Elmhurst, NY 11370-1722."

The aforementioned notices were issued to petitioners Zheng and Lin for sales and use tax due as responsible persons of petitioner, New Golden Garden of Columbus Ave LLC (New Golden Garden). The petition did not contain, nor is there any evidence of, a notice of determination issued to petitioner New Golden Garden despite the inclusion of its name in the caption.

2. Petitioners New Golden Garden and Zheng filed a joint Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of Notice of Determination number L-038859774. The request was dated April 15, 2013 and stamped as received by BCMS on April 17, 2013.

3. Similarly, petitioners New Golden Garden and Lin filed a joint Request for Conciliation Conference with BCMS in protest of Notice of Determination number L-038859775. The request was also dated April 15, 2013, but does not bear a stamp indicating a date received by BCMS.

4. On May 3, 2013, BCMS issued a Conciliation Order Dismissing Request to "Min Wei Zheng" at "14748 Roosevelt Ave, Apt 1G, Flushing NY 11354-4710." The order, which did not list petitioner Lin in the caption, determined that petitioner Zheng's protest of notices of

determination L-038859774 and L-038859775 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 notices were issued on December 7, 2012, but the request was not mailed until April 15, 2013 or in excess of 90 days, the request is late filed.

5. The record does not contain a copy of a conciliation order issued to petitioners New Golden Garden or Lin.¹

6. Petitioners filed a joint petition with the Division of Tax Appeals dated June 3, 2013 and stamped as received on June 7, 2013. The petition included all three petitioners in the caption, but identified only Zheng and Lin as petitioners on the line on the form calling for such information. Moreover, the petition solely listed notices of determination L-038859774 and L-038859775, which were issued to petitioners Zheng and Lin, respectively, as those at issue. The petition also attached a power of attorney dated January 9, 2013 running from petitioners New Golden Garden and Zheng to Peter F. Chiu, Esq. However, the petition was signed only by petitioner Zheng as “vice-president.” It was not signed by Mr. Chiu or petitioner Lin. There is no power of attorney running from petitioner Lin to petitioner Zheng attached to the petition, nor is there evidence that the latter was qualified to represent the former at the time the petition was filed.²

7. The Division filed an answer dated October 9, 2013. In its answer, the Division states that the petition is untimely as it was filed more than 90 days from the date the notices of

¹ The affidavit of Robert Tompkins, included in support of the Division’s motion, attached only one conciliation order dismissing request. That order is the one referenced in Finding of Fact 4.

² A power of attorney running from petitioner Lin to Mr. Chiu, dated February 5, 2014, was included with the Division’s motion. This was obviously executed after the petition was signed and filed.

determination were issued. Additionally, the Division states that the petition is invalid as to petitioner Lin as the signatory of the petition (petitioner Zheng) was an unauthorized representative.

8. The Division filed the instant motion to dismiss the petition or for summary determination on February 27, 2014. To show proof of proper mailing of the December 7, 2012 notices of determination, the Division provided the following with its motion papers: (i) an affidavit, dated February 27, 2014, of Robert Tompkins, Esq.; (ii) an affidavit, dated December 13, 2013, of Daniel A. Maney, a manager of the Division's Refunds, Deposits, Overpayments and Control Units, which include its Case and Resource Tracking System (CARTS); (iii) a 25-page "Certified Record for Presort Mail - Assessments Receivable" (CMR), each page of which is legibly postmarked December 7, 2012; (iv) an affidavit, dated December 13, 2013, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (v) a copy of petitioners Zheng's and Lin's requests for conciliation conference; (vi) a copy of each of the December 7, 2012 notices of determination with the associated mailing cover sheet; (vii) a copy of petitioner Zheng's 2011 New York State Resident Income Tax Return (Form IT-201), electronically filed on February 24, 2012, which lists the same address for Zheng as that listed on the subject notice; and, (viii) a copy of petitioner Lin's 2011 New York State Resident Income Tax Return (Form IT-201), electronically filed on April 6, 2012, which lists the same address for Lin as that listed on the subject notice. These returns were the last documents filed by petitioners Zheng and Lin with the Division before the statutory notices were issued.

9. 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 "12/7/12."³ In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by Mr. Maney. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

10. 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."

11. According to Mr. Maney's affidavit, the CMR in the present matter consists of 25 pages. Mr. Maney notes that the entire CMR is attached to his affidavit, and that portions 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

³ In his affidavit, Mr. Maney states that the date the notices were mailed was handwritten by personnel in the Mail Processing Center in the upper left-hand corner of the first page of the CMR. In fact, the handwritten date was placed in the upper *right* hand corner.

page of the CMR, circled the number “263,” and initialed or signed page 25. He adds that the total number of statutory notices mailed pursuant to the CMR was 263.

12. Attached to Mr. Maney’s affidavit, as exhibit “A,” is a copy of all 25 pages of the CMR.

13. Page 14 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1427 4776 and assessment ID number L-038859774 was mailed to petitioner Zheng at the Flushing, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to Mr. Maney’s affidavit as exhibit “B,” bears this certified control number and petitioner Zheng’s name and address as noted.

14. Page 16 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 1427 4936 and assessment ID number L-038859775 was mailed to petitioner Lin at the East Elmhurst, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, also attached to Mr. Maney’s affidavit as exhibit “B,” bears this certified control number and petitioner Lin’s name and address as noted.

15. The affidavit of Bruce Peltier describes the Division’s Mail Processing Center’s (Center) 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 names and certified control numbers of up to 30 pieces are 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. 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 CMR. Each page of the CMR in exhibit "A" of Mr. Maney's affidavit contains a USPS postmark of December 7, 2012. On page 25, corresponding to "Total Pieces and Amounts," is the preprinted number 264, which has been lined out, and replaced by the handwritten entry 263, which is surrounded by a circle that extends into the space next to the line reading "Total Pieces Received At Post Office." There is a set of initials or a signature in this area on page 25.

16. According to Mr. Maney's affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that 263 articles of mail listed on the CMR, including the articles addressed to petitioners, were received by the USPS on December 7, 2012.

17. According to both the Maney and Peltier affidavits, a copy of each of the subject notices was mailed to respective petitioners Zheng and Lin on December 7, 2012, as claimed.

18. The Division did not offer any evidence of mailing a statutory notice to petitioner New Golden Garden.

CONCLUSIONS OF LAW

A. A motion for summary determination shall 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. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where "a return required by [Article 28 of the Tax Law] is not filed,

or if a return when filed is incorrect or insufficient. . . .” This section further provides that such a notice “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 in or out of this state.”

C. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination, or a petition with the Division of Tax Appeals within 90 days of the mailing of a notice of determination (*see* Tax Law § 170[3-a][b]; § 1138[a][1]; § 2006[4]). If a taxpayer fails to do either, 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).

D. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the Division must carry 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). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show 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).

E. In the instant case, the Maney and Peltier affidavits establish the Division’s standard mailing procedure. Additionally, the production of the CMR by the Division, along with the aforementioned affidavits, constitutes sufficient documentary evidence to establish the notices of determination were mailed as addressed to petitioners Zheng and Lin on December 7, 2012. For each petitioner, the CMR listed: (1) the correct name and address, (2) a corresponding certified

control number, (3) USPS postmarks dated December 7, 2012, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. Consequently, the CMR was properly completed, therefore constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. Petitioners Zheng's and Lin's addresses on their respective notices, corresponding mail cover sheets, and CMR all conform with the addresses reported on each petitioner's New York State Resident Income Tax Return, both of which were filed prior to December 7, 2012 and were the last documents filed before their notices were issued. This satisfies the "last known address" requirement in Tax Law § 1138(a)(1).

G. Moreover, as noted above, petitioners failed to file a response to the instant motion; therefore they are deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioners have presented no evidence to contest the facts alleged in the Maney, Peltier, and Tompkins affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]). Thus, it is concluded that the Division properly mailed the subject notices on December 7, 2012.

H. Petitioners each had 90 days from the issuance of the subject notices of determination to either file for a conciliation conference with BCMS or file a petition with the Division of Tax Appeals. The requests for conciliation conference of petitioners Zheng and Lin were each dated April 15, 2013, or more than 90 days from the December 28, 2012 issuance of the statutory notice. Thus, based on the evidence in this record, both petitioner Zheng and Lin's requests are

untimely and the Division of Tax Appeals is without jurisdiction to hear the merits (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

I. The petition with regard to New Golden Garden suffers from a different fatal flaw. A proceeding in the Division of Tax Appeals is commenced by filing a petition challenging a statutory notice pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law §§ 2000, 2006 [4]; 20 NYCRR 3000.1 [k]). The Rules of Practice and Procedure of the Tax Appeals Tribunal require that where a statutory notice has been issued, it must be attached to a petition for purposes of determining whether the petition is timely filed (20 NYCRR 3000.3 [b] [8]). Petitioner New Golden Garden has failed to include a reference to, much less a copy of, a statutory notice that had been issued to it and that it intends to challenge. Therefore, the Division of Tax Appeals is likewise without jurisdiction to consider its petition (*see Matter of PC Touch Services Inc.*, Tax Appeals Tribunal, August 23, 2012).

J. Finally, the petition in this matter, purportedly filed by all three petitioners, was signed only by petitioner Zheng. One of the requirements to commence a proceeding before the Division of Tax Appeals is the filing of a petition signed by either the petitioner or the petitioner's duly authorized representative (20 NYCRR 3000.3[b][7]). Qualified representatives include (1) an attorney-at-law licensed to practice in New York State, (2) a certified public accountant licensed to practice in New York State, (3) an enrolled agent licensed to practice before the Internal Revenue Service, or (4) a properly enrolled public accountant (20 NYCRR 3000.2[a][2]), and a valid power of attorney must be filed with a petition. Petitioner Lin did not sign the petition in the instant case, nor is there a valid power of attorney given to petitioner

Zheng.⁴ As a result, the petition filed by petitioner Lin is invalid, giving further reason why the Division of Tax Appeals is without jurisdiction to consider it.

K. The Division of Taxation's motion for summary determination is granted, and the petition of New Golden Garden of Columbus Avenue LLC, Zheng Min Wei, and Lin Xiu Zhu is dismissed.

DATED: Albany, New York
June 12, 2014

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

⁴ Zheng also did not receive special permission from the Tax Appeals Tribunal to represent petitioner Lin (*see* 20 NYCRR 3000.2[a][4]).