

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ADAM REST CORP. : DETERMINATION
for Revision of Determinations or for Refund of : DTA NO. 825933
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Periods December 1, 2007 :
through November 30, 2009 and March 1, 2012 :
through August 31, 2012. :

Petitioner, Adam Rest Corp., 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 periods December 1, 2007 through November 30, 2009 and March 1, 2012 through August 31, 2012.

On March 27, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Osborne K. Jack, 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 Osborne K. Jack, and annexed exhibits. Petitioner, appearing by David H. Lasky, C.P.A., 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 petitioner filed a timely request for conciliation conference or a petition following the issuance of a notice of determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of notices of determination L-039181354, L-039181355, L-039181356, and L-039181357, all dated March 28, 2013. The aforementioned notices were issued to petitioner for sales and use taxes due as a bulk sale purchaser of a restaurant from Santa Fe Tequila Restaurant Bar, Inc. They reflected outstanding tax liabilities of the seller. The four notices were collectively issued in one document entitled "Notice of Determination" under "Audit Case ID" X-357988186-7.¹

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the statutory notice. The request was dated June 27, 2013, postmarked June 28, 2013, and stamped as received by BCMS on July 1, 2013.

3. On July 12, 2013, BCMS issued a Conciliation Order Dismissing Request to petitioner at "392 Woodbury Road, Hicksville, NY 11801-3037." 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(s) was issued on March 28, 2013, but the request was not mailed until June 28, 2013 or in excess of 90 days, the request is late filed.

4. Petitioner filed its petition in this matter on October 8, 2013. In it, petitioner stated that

¹ As all four of the subject notices were combined in one Notice of Determination (X-357988186-7), for ease of reference, this determination will hereinafter refer to the notice at issue in the singular.

it was represented by David H. Lasky, C.P.A.² Additionally, petitioner asserted the following facts:

The “Notification of Sale, Transfer, or Assignment in Bulk”, Form AU-196.10, was properly filed with the New York State Department of Finance [sic] in November, 2012. **Closing of the transaction took place on January 16, 2013.** (Emphasis in original).

5. The Division filed the instant motion to dismiss the petition or for summary determination on March 27, 2014. To show proof of proper mailing of the March 28, 2013 Notice of Determination, the Division provided the following with its motion papers: (i) an undated affirmation of Osborne K. Jack; (ii) an affidavit, dated March 26, 2014, 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 one-page “Certified Record for Non-Presort Manual Mail - Assessments Receivable” (CMR), which is legibly postmarked March 28, 2013; (iv) an affidavit, dated March 26, 2014, of Bruce Peltier, a mail and supply supervisor in the Division’s Mail Processing Center; (v) a copy of petitioner’s request for conciliation conference; (vi) a copy of the March 28, 2013 Notice of Determination with the associated mailing cover sheet; and (vii) a copy of the Notification of Sale, Transfer, or Assignment in Bulk (Form AU-196.10) filed by petitioner (Notification of Sale), which lists the same address for petitioner as that listed on the subject notice. The Notification of Sale was the last document filed by petitioner with the Division before the notice at issue was issued.

6. The affirmation of Osborne K. Jack asserts that when the subject notice was issued, petitioner’s last known address was 392 Woodbury Road, Hicksville, New York 11801, the same

² The power of attorney attached to the petition appointed Mr. Lasky effective July 1, 2013, after the issuance of the subject notice.

address appearing on the Notification of Sale.

7. Petitioner's request for conciliation conference, dated June 27, 2013, bears the same Hicksville, New York, address.

8. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney's affidavit describes the computer preparation of notices of deficiency, notices of estimated determination, and notices of determination to include the simultaneous preparation of a mailing cover sheet with mailing and return addresses and a bar code for each notice, as well as the preparation of a CMR. The CMR is a computer-generated document, entitled "CERTIFIED RECORD FOR NON-PRESORT MANUAL MAIL - ASSESSMENTS RECEIVABLE" consisting, in this case, of one page. The CMR lists those taxpayers to whom statutory notices are being mailed and also includes for each such notice, a separate certified control number.

9. Each computer-generated notice is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "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." Mr. Maney's affidavit describes the CMR as carrying an initial date (the date of its printing) in its upper left corner that is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing the notices, including affixation of postage, and mailing. The initial date on the certified mailing record is manually changed at the time of mailing by Division personnel to conform to the actual date of

mailing of the notices. All notices selected for manual review are printed in one printing run, and each unit that has notices selected for manual review receives a separate and complete CMR for their notices.

10. The notice at issue here was selected for manual review by the Audit Division - Sales Tax - Desk Audit - AG2 and, therefore, the CMR indicates “manual mail” so that the certified mail could be pulled for manual review prior to mailing.

11. Attached as an exhibit to Mr. Maney’s affidavit is the one-page CMR, which, he states, is the entire document. Printed in the upper right corner of the CMR, however, is the listing “PAGE: 2”. The CMR lists three certified control numbers, which were assigned to the items of mail listed on the CMR. Specifically, corresponding to each of the listed certified control numbers is a reference number and the name and address of the addressee. The CMR is manually dated March 28, 2013.

12. According to Mr. Maney’s affidavit, the USPS representative affixed a postmark to the CMR, wrote the number three and initialed or signed it. He adds that the total number of statutory notices mailed pursuant to the CMR was three. Finally, Mr. Maney states that the procedures followed by the Division were the normal and regular procedures of the CARTS Control Unit.

13. The CMR shows that a notice with certified control number 7104 1002 9730 1524 9582 and reference number X-357988186 was mailed to “Adam Rest Corp.” at the Hicksville, New York, address listed on the subject notice. The corresponding mailing cover sheet bears this certified control number, the name “Adam Rest Corp.” and the same Hicksville, New York, address.

14. 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 envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the sealed 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. The one page CMR in exhibit "A" of Mr. Maney's affidavit contains a USPS postmark of March 28, 2013 and corresponding to "Total Pieces and Amounts," is the preprinted number 3. Below that is the handwritten entry 3 and a set of initials or a signature indicating "Total Pieces Received At Post Office."

15. According to Mr. Maney's affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that three articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on March 28, 2013.

16. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on March 28, 2013.

CONCLUSIONS OF LAW

A. A motion to dismiss made pursuant to 20 NYCRR section 3000.9(a)(1) may be treated

as a motion for summary determination (20 NYCRR § 3000.9[a][2][i]). 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 or a petition, with the Division of Tax Appeals seeking revision of the determination 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 Notice of Determination at issue was mailed as addressed to petitioner on March 28, 2013. The CMR listed: (1) the correct name and address of petitioner, (2) a corresponding certified control number, (3) a USPS postmark dated March 28, 2013, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. The unexplained "page 2" reference at the top of the CMR does not obviate the fact that the CMR listed three items (including the Notice of Determination at issue), all of which were received at the post office. Consequently, the CMR was properly completed, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

F. The Notification of Sale, included by the Division as proof of petitioner's last known address, is undated, save for an unidentified stamped date of "July 2, 2013" at the top of the document.³ In its petition, however, petitioner makes a point of asserting as fact that the Notification of Sale was filed with the Division prior to the closing of the relevant transaction on January 16, 2013. Thus, by its own admission, petitioner's Notification of Sale predated the subject Notice of Determination and, as a result, serves as the last document filed before the subject notice was issued. Further, Mr. Jack's uncontroverted affirmation corroborates that fact. Consequently, petitioner's address on the subject notice, corresponding mail cover sheet, and CMR all conform with the address on the Notification of Sale and the "last known address"

³ There is no indication in the record as to who applied this stamp or of its purpose.

requirement in Tax Law § 1138(a)(1) is satisfied.

G. Moreover, as noted above, petitioner failed to file a response to the instant motion; therefore it is 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]). Petitioner has presented no evidence to contest the facts alleged in the Maney, Peltier, and Jack affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544; *Whelan v. GTE Sylvania*, 182 AD2d 446 [1992]). Therefore, it is concluded that the Division properly mailed the subject notice on March 28, 2013.

H. Petitioner had 90 days from the issuance of the subject Notice of Determination to either file for a conciliation conference with BCMS or file a petition with the Division of Tax Appeals. The request for conciliation conference of petitioner, however, was dated June 27, 2013, or more than 90 days from the March 28, 2013 issuance of the statutory notice. Thus, based on the evidence in this record, petitioner's request is 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 Division of Taxation's motion for summary determination is granted, and the petition of Adam Rest Corp. is dismissed.

DATED: Albany, New York
July 10, 2014

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