

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
MING QIANG WANG : ORDER
 : DTA NOS. 821046
 : AND 821047
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, 2002 through February 28, 2005. :

Petitioner, Ming Qiang Wang, 2412 Settlers Ridge, New Windsor, New York 12553, filed petitions 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, 2002 through February 28, 2005.

On April 10, 2006, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) for each of the petitions filed. Petitioner responded by letter from his representative, Peter F. Chiu, Esq., dated April 28, 2006. By a letter dated May 3, 2006, the date by which the Division of Taxation could file a response to the Notice of Intent to Dismiss Petition was extended to June 12, 2006, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). On May 19, 2006, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), submitted affidavits and other documents in support of dismissal. After due consideration of the documents and arguments submitted by the parties, Brian L. Friedman, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the merits of the issues raised by petitioner in the petitions filed herein.

FINDINGS OF FACT

1. A Notice of Determination dated April 22, 2005 was issued to Ming Qiang Wang, Chan's Peking Kitchen II, by the Division of Taxation ("Division") which assessed additional sales and use taxes in the amount of \$66,642.16, plus penalty and interest, for a total amount due of \$103,310.31 for the period March 1, 2002 through February 28, 2005. The Notice of Determination was issued to petitioner at the address of "190 200 Wolcott Ave., Beacon, NY 12508."

2. A Notice of Determination dated June 6, 2005 was issued to Ming Qiang Wang by the Division which assessed additional sales and use taxes in the amount of \$66,642.16 (the identical amount of tax assessed in the notice dated April 22, 2005), plus penalty and interest, for a total amount due of \$105,140.45 for the period March 1, 2002 through February 28, 2005 (the same period as assessed in the notice dated April 22, 2005). The Notice of Determination was issued to petitioner at the address of 2412 Settlers Ridge, New Windsor, New York 12553.

3. Separate petitions were filed in response to each of the notices of determination. Each petition was dated March 20, 2006 and was mailed in a separate envelope. Each of the envelopes bore a United States Postal Service ("USPS") postmark of March 23, 2006.

4. On April 10, 2006, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to each of the aforementioned petitions. The notice stated as follows:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to § 2006.4 of the Tax Law, a petition must be filed within ninety days from the date a statutory notice is issued.

The Notice of Determination appears to have been issued on April 22, 2005,¹ and it appears the petition was not filed until March 23, 2006 or three hundred thirty-five days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.

5. In response to the issuance of the notices of intent to dismiss petitions, the Division submitted the following: affidavits of four Division employees, John E. Matthews, Esq., an attorney in the Office of Counsel, Bruce Peltier, the Mail and Supply Supervisor of the Division's Registry Unit, Geraldine Mahon, the Principal Clerk of the Division's Case and Resource Tracking System ("CARTS") Control Unit and Heidi Corina, Legal Assistant 2 in the Office of Counsel; copies of the notices of determination issued to petitioner; copies of each of the petitions filed as well as copies of the envelopes in which the petitions were mailed; copies of the Division's certified mail records for April 22, 2005 and June 6, 2005; a copy of the final sales and use tax return filed by Ming Qiang Wang, Chan's Peking Kitchen II; and a copy of the Division's computer record entitled "Business Profile Inquiry - Address Summary" which indicated petitioner's address as of the date of issuance of the notices of determination.

¹ The Notice of Intent to Dismiss Petition issued by the Division of Tax Appeals with respect to the second Notice of Determination (*see*, Finding of Fact "2") differed only as to the date on which the Notice of Determination appeared to have been issued, i.e., May 6, 2005, and as to the number of days that the petition was allegedly filed after issuance of the Notice of Determination, i.e., 321 days later. It must be noted that the Notice of Determination was dated June 6, 2005, not May 6, 2005 as set forth in the Notice of Intent to Dismiss Petition.

6. In response to the issuance of the notices of intent to dismiss petitions, petitioner's representative, Peter F. Chiu, Esq., sent a letter which stated, in relevant part, as follows:

Taxpayer Ming Qiang Wang sold the business on January 12th, 2005. A Bulk Sale Notice was filed. Subsequent to the sale of the business, on March 2, 2005, records show that the NYS Department of Taxation and Finance sent a notice to conduct a filed [sic] audit of Taxpayer's business. Taxpayer was no longer at the business premises and all communications were directed to Taxpayer's accountant, G&G Consolidated Corporation, as he was out of state during this period. Taxpayer's claim is that he only had knowledge of the Notice of Determination on March 20th, 2006 upon which we filed a request for an appeal hearing.

7. The affidavits of Geraldine Mahon, Principal Clerk of the Division's CARTS Control Unit, described the general procedure for issuing and mailing statutory notices. Notices of determination, such as the ones at issue herein, are computer generated and are predated with the anticipated date of mailing and each statutory notice is assigned a certified control number. The certified number for each notice appears on a separate one-page "Mailing Cover Sheet" (form DTF-997) which also bears, among other things, a bar code and the taxpayer's mailing address. Each batch of statutory notices is accompanied by a certified mail record ("CMR") which lists each statutory notice in the order that the notices are generated in the batch. Each CMR and associated batch of statutory notices are forwarded to the Division's Mail Processing Center together.

8. The CMR for the block of statutory notices issued on April 22, 2005, including the Notice of Determination issued to petitioner, consists of two connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service ("USPS") and the pages remain connected when it is returned to the CARTS Control Unit. Page one of the CMR for notices issued on April 22, 2005 consists of eleven entries and page two contains seven entries.

In the upper left corner starting on page one and on each subsequent page of the CMR is the Run which signifies the date and time the CMR was produced by year, Julian day of the year and military time of day. The original date and time of “20051021700” was the date and time that the entire CMR was printed. The CMR is printed approximately ten days in advance of the anticipated date of mailing of the statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed, processed for postage, etc., by the Division’s Mail Processing Center. In the upper left corner of page one of the CMR, the date the notices were mailed was handwritten by personnel in the Mail Processing Center. This change was made in order to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative. The postal service representative then affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this case, a postmark was affixed to each page of the CMR, the postal service employee circled “18” on page two of the CMR and initialed or signed pages one and two of the CMR which indicated that the total number of statutory notices mailed was 18.

Page two of the CMR indicates that a Notice of Determination with notice number L-025240633 was sent to “MING QIANG WANG, 190 200 WOLCOTT AVE., BEACON, NY 12508” by certified mail using the control number “7104 1002 9730 0620 1254.” A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on April 22, 2005.

In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

Ms. Mahon's affidavit asserts that the procedures followed and described in her affidavit were the normal and regular procedures of the CARTS Control Unit on April 22, 2005.

9. The final sales and use tax return, dated March 20, 2005, filed for the period December 1, 2004 through February 28, 2005 by Ming Qiang Wang, Chans Peking Kitchen II, listed the address of the business as "190 Walcott Avenue, #200, Beacon, NY 12508."

10. The affidavits of Bruce Peltier, Mail and Supply Supervisor in the Division's Registry Unit, described the procedures for delivery of outgoing mail to branch offices of the USPS. After a Notice of Determination is placed in an area designated for "Outgoing Certified Mail," a member of the Mail Processing Center staff weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and performs a random review of up to 30 pieces of certified mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area where a postal employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The Mail Processing Center has requested that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff who delivers it to the CARTS Control Unit.

As to the CMR delivered to the USPS on April 22, 2005, Mr. Peltier's review of the CMR confirms that a USPS employee initialed or signed pages one and two of the CMR, affixed a postmark to each page thereof and circled the total number of pieces of certified mail received, i.e., 18 pieces.

11. Attached to the Notice of Determination dated April 22, 2005 is a copy of form DTF-974.1 which informed petitioner's former representative, Katherine Sy of G&G Consolidated Corp., 13-17 Elizabeth Street, Suite 404, New York, NY 10013, that a copy of the notice was being forwarded to her because the Division's records indicated that she had a Power of Attorney to act as petitioner's legal representative. The Division's CMR for statutory notices issued on April 22, 2005 (*see*, Finding of Fact "8") does not indicate that the Notice of Determination was sent to Ms. Sy.

12. The CMR for the block of statutory notices issued on June 6, 2005, including the Notice of Determination issued to petitioner, consists of 42 connected pages. All pages are connected when the document is delivered into the possession of the USPS and remain connected when it is returned to the CARTS Control Unit. Each page of the CMR consists of 11 entries with the exception of page 42 which contains 10 entries.

The original date and time of "20051461700" was the date and time that the entire CMR was printed. In the upper left corner of page one of the CMR, the date the notices were mailed was handwritten by personnel in the Division's Mail Processing Center to conform with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS. The postal employee then affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this case, the postal employee affixed a postmark to each page of the CMR and initialed or signed pages 1 through 42 of the CMR. The total number of statutory notices mailed pursuant to the CMR was 461.

Page 36 of the CMR indicates that a Notice of Determination with notice number L-025515168 was sent to "WANG-MING QIANG, 2412 SETTLERS RIDGE, NEW WINDSOR,

NY 12553” by certified mail using control number “7104 1002 9730 0664 7106.” A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on June 6, 2005.

Ms. Mahon’s affidavit asserts that the procedures followed and described in her affidavit were the normal and regular procedures of the CARTS Control Unit on June 6, 2005.

13. With respect to the CMR delivered to the USPS on June 6, 2005, Mr. Peltier’s review of the CMR confirms that a USPS employee initialed or signed pages 1 through 42 of the CMR and affixed a postmark to each page thereof. However, the USPS employee failed to circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the CMR. Notwithstanding this omission, the Division provided an affidavit of Heidi Corina, a Legal Assistant 2 in the Division’s Office of Counsel.

As part of her duties, Ms. Corina prepares USPS form 3811-A which is a form used by a mailer to request return receipts after mailing and can be used for registered, certified, insured and express mail. In this particular case, the form 3811-A was mailed to Gary Chiboucas, Claims and Inquiry of the U.S. Postal Service-Albany General Mail Facility, 30 Old Karner Rd., Albany, NY 12288. The response which was received indicates that a piece of certified mail bearing number 7104 1002 9730 0664 7106 was delivered on “06/17/05 at 04:46 PM in NEW WINDSOR, NY 12553.” The scanned signature image of the recipient was “Zhao Lin” which was above the handwritten name “Zhao Lin” and the address of the recipient was written in as “2412 Settlers Ridge.”

14. The Division’s computer record entitled “Individual Taxpayer Profile Inquiry - Address Summary” indicates that as of February 14, 2003 (and for periods through March 18,

2006), the address for Ming Qiang Wang was 2412 Settlers Ridge, New Windsor, New York 12553.

15. Unlike the Notice of Determination dated April 22, 2005, the Notice of Determination dated June 6, 2005 does not include form DTF-974.1 to indicate that a copy of the notice was sent to petitioner's representative (*see*, Finding of Fact "11"). In addition, as was the case for the April 22, 2005 notice, the CMR for statutory notices issued on June 6, 2005 does not indicate that a copy of the notice was sent to petitioner's representative.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a person liable for the collection or payment of tax where "a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient." The 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."

B. Tax Law § 1133(a) provides that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed" A taxpayer may file a petition with the Division of Tax Appeals seeking revision of the determination, or alternatively, a request for a conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination* (*see*, Tax Law § 1138[a][1]; 20 NYCRR 3000.3[c]).

C. If a taxpayer fails to file a timely petition (or request for a conciliation conference) timely protesting a statutory 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).

D. Where, as here, the Division claims a taxpayer’s protest against a Notice of Determination was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (see, *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by 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).

E. The mailing evidence required is two-fold: First, 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 second, there must be proof that the standard procedure was followed in this particular instance (see, *Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Since two notices of determination were issued to petitioner and separate petitions were filed by petitioner in response to each of the notices, the evidence produced by the Division with respect to the issuance of each statutory notice will be separately addressed.

F. With respect to the Notice of Determination dated April 22, 2005, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, employees of the Division who are involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination. The

Division also presented sufficient documentary proof to establish that the statutory notice was mailed to petitioner on April 22, 2005.

However, a review of the documentation presented reveals that the address to which the Notice of Determination was sent was incorrect. While the notice was sent to petitioner at 190 200 Wolcott Avenue, Beacon, New York 12508, the final sales tax return of the business, dated March 20, 2005, filed for the period December 1, 2004 through February 28, 2005, lists the business address as 190 Wolcott Avenue, #200, Beacon, New York 12508. Because petitioner denies ever having received the notice, and contends that the business was sold on January 12, 2005 (a date which is prior to the date of issuance of the notice) and was he no longer at the business premises, and the evidence presented clearly shows that the address to which the notice was sent was incorrect, it must be found that the Division has failed to meet its burden of demonstrating proper mailing of this statutory notice.

It must also be noted that despite the fact that a form DTF-974.1 was attached to the Notice of Determination, the Division has offered no proof that petitioner's representative was, in fact, served with a copy of the notice. The Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or a request for a conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice (*see, Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29).

G. As to the Notice of Determination dated June 6, 2005, the Division has again introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon, Mr. Peltier and Ms. Corina. While, as previously noted, the USPS employee failed

to circle, on the CMR, the number of pieces of mail received or indicate the total number of pieces received by writing the number of pieces on the CMR, the affidavit of Ms. Corina, the USPS form 3811-A and the response thereto are sufficient to show that the Notice of Determination was delivered on June 17, 2005 to the last known address of petitioner at 2412 Settlers Ridge, New Windsor, New York 12553, the address set forth on the Division's computer record entitled "Individual Taxpayer Profile Inquiry - Address Summary," which indicated that, as of February 14, 2003 and for periods through March 18, 2006, this was petitioner's correct address. While petitioner did not sign for the piece of certified mail, a person by the name of Zhao Lin signed for and received the document at the New Windsor, New York address.

However, as was the case with the Notice of Determination dated April 22, 2005, the Division has failed to introduce any proof that it served a copy of the notice on petitioner's representative. As noted in Conclusion of Law "F", the 90-day period for filing a petition (or request for conciliation conference) is tolled if the representative is not served with a copy of the statutory notice.

H. Since the granting of a Notice of Intent to Dismiss Petition is essentially the equivalent of the granting of a motion to dismiss or, after issue has been joined, a motion for summary determination dismissing a petition for failure to have timely filed such petition, its impact has serious consequences, i.e., the preclusion of a hearing on the substantive issues of the assessment. As provided in 20 NYCRR 3000.9(b)(1), such a motion "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."

Clearly, that is not the case herein. As to the Notice of Determination dated April 22, 2005, it appears that the notice was mailed to an incorrect address. In addition, no evidence has been introduced which would show that petitioner's representative was served with a copy of this notice.

For the Notice of Determination dated June 6, 2005, the Division has again failed to provide proof that petitioner's representative was served with a copy of the statutory notice. Moreover, petitioner claims through the letter from his representative in response to the Notice of Intent to Dismiss that he never received notification of this assessment until March 20, 2006, at which time he filed a petition with the Division of Tax Appeals. Where the Division has proven that it mailed the notice by certified mail to the taxpayer's last known address, such mailing gives rise to presumptive evidence of receipt of the notice by the person to whom it is addressed (Tax Law § 1147[a][1]). Once the Division has introduced sufficient evidence to enable it to obtain a presumption of receipt of the notice by petitioner, the burden is then on the petitioner to rebut that presumption by introducing evidence of nonreceipt (*Matter of Huggins*, Tax Appeals Tribunal, April 8, 1999).

Petitioner, by means of a letter from his representative in response to the Notice of Intent to Dismiss Petition, denied ever having knowledge of the notices of determination until March 20, 2006 (at which time petitions with the Division of Tax Appeals were filed).

While it is well established that a mere denial of receipt will not suffice to rebut the presumption of receipt (*Matter of T.J. Gulf, Inc. v. State Tax Commission*, 124 AD2d 314, 508 NYS2d 97), petitioner should be afforded the opportunity to present evidence at a hearing to substantiate his contention that he never received the notices.

It appears, therefore, that there are several material and triable issues of fact presented herein and, accordingly, each Notice of Intent to Dismiss Petition must be withdrawn.

I. The two notices of intent to dismiss petition dated April 10, 2006 are hereby withdrawn and the Division of Taxation shall have 75 days from the date of this order to file answers to petitioner's petitions.

DATED: Troy, New York
August 17, 2006

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE