

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD ACCARDO	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 809079
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods Ended	:	
November 30, 1985, May 31, 1986 and August 31,	:	
1986.	:	

Petitioner Richard Accardo, 165 Barnes Road, Washingtonville, New York 10992, filed an exception to the determination of the Administrative Law Judge issued on August 6, 1992. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner did not file a brief. The Division of Taxation filed a letter brief in opposition to the exception. Oral argument was not requested. The six-month period to issue this decision began on April 16, 1993, the date by which petitioner could submit a reply brief.

Commissioner Jones delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

ISSUE

Whether petitioner filed a timely request for a conciliation conference.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued to petitioner, Richard Accardo, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Assessment No. S870915709L), dated September 15, 1987, in the amount of \$52,804.85, plus penalty of

\$10,562.32 and interest of \$6,039.13, for a total amount due of \$69,406.30. The notice of determination contained the following explanation:

"[y]ou are liable individually and as officer of Rudolph's Suburban Center, Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Law."

On September 27, 1988, a warrant was filed by the Tax Compliance Division of the Division of Taxation in the office of the clerk of Orange County (relative to Assessment No. S870915709L) for additional tax due of \$52,804.85, plus penalty and interest, for a total amount due of \$80,342.71. The warrant listed petitioner's correct address (165 Barnes Road, Washingtonville, New York), but contained the zip code "10914" when, in fact, the correct zip code was "10992" (the correct zip code was set forth on the notice of determination).

Apparently, in October or November 1988, a collection agent visited petitioner's home to advise him of the existence of the warrant and to seek payment of the amounts due and owing.

On November 6, 1990, petitioner filed a Request for Conciliation Conference. The envelope containing the request was postmarked November 7, 1990, and was stamped received by the Bureau of Conciliation and Mediation Services on November 13, 1990. The Bureau of Conciliation and Mediation Services thereafter issued a Conciliation Order, dated December 21, 1990, which dismissed petitioner's request for a conciliation conference for the following reason:

"[t]he Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on September 15, 1987, but the request was not mailed until November 7, 1990, or in excess of 90 days, the request is late filed.

"The request filed for a Conciliation Conference is denied."

On January 7, 1991, petitioner filed a petition with the Division of Tax Appeals seeking administrative review of the Bureau of Conciliation and Mediation Services' denial of his request for a conciliation conference.

To establish proof of mailing of the aforesaid notice of determination, the Division of Taxation submitted the following:

(a) An affidavit dated July 9, 1991, of Michael O'Reilly, a supervisor of clerks in the Tax Compliance Division ("TCD"), the content of which included:

(1) A statement of his supervisory duties and familiarity with TCD procedures for the mailing of notices of determination;

(2) A copy of the notice of determination issued to petitioner which was prepared by a clerk under his supervision and which was then transferred to the Division's outgoing mail record of notices mailed;

(3) An outline of the TCD's procedures (paragraphs "6" through "11" of the affidavit) including his assertion that the Division does not request the United States Postal Service to obtain a certified mailing receipt from the recipients of the notices;

(4) A statement that the certified mailing of the notice of determination to petitioner was in compliance with TCD procedures and, in addition, that he was unaware of any problems that arose with respect to the issuance of this notice of determination.

(b) A one-page United States Postal Service form (PS Form 3877) containing the following information:

(1) The name and address of the sender was "Tax Compliance, State Campus, 9-17-87". There is writing below which is illegible;

(2) On line 9 is the number 539965 (presumably the certified mailing number) along with petitioner's name and correct mailing address;

(3) The type of mail (there are five types listed) appears to be blank although there are marks near the box labeled "certified";

(4) The remaining lines for addressees are blank (Mr. O'Reilly's affidavit indicated that this was done for confidentiality);

(5) The column for postages/fees, on the line pertaining to petitioner, contains illegible writing;

(6) On the bottom of the form there are two boxes, one labeled "Listed by Sender" and the other "Received at Post Office". Both boxes contain the number "15";

(7) Also at the bottom of the form is a signature, presumably that of a Postal Service employee;

(8) The form also contains a United States postmark (Albany, N.Y. - Roessleville) of September 17, 1987.

OPINION

The Administrative Law Judge determined that the Division had adequately established that it mailed the Notice of Determination to petitioner on September 17, 1987. The Administrative Law Judge further determined that petitioner had failed to timely protest the Notice by filing a request for a conciliation conference or a petition for hearing within 90 days from the mailing of the Notice. The Administrative Law Judge also found that while petitioner had admitted knowing of the existence of the assessment in October or November of 1988, he had not filed a petition or requested a conciliation conference until approximately two years later.

On exception, petitioner contends that he never received the Notice of Determination and that the Division failed to establish that the Notice of Determination was mailed to him. Petitioner asserts that the United States Postal Service Form 3877 submitted by the Division to prove the mailing of the Notice of Determination is illegible and additionally, is incomplete because it does not indicate the amount of postage and fees paid. As a result, petitioner argues, it is possible that the envelope addressed to petitioner was returned for insufficient postage.

In response to the exception, the Division asserts that the testimony of petitioner and his wife that they did not receive the Notice of Determination was insufficient to overcome the presumption contained in Tax Law § 1147(a)(1) that a properly mailed Notice of Determination

has been received. The Division argues that the presumption of receipt arises because the Division proved (by the affidavit of its employee describing the general mailing procedures of the Division to which was attached a copy of a United States Postal Service Form 3877 containing the name and address of petitioner, the signature of a postal employee, and a United States postal service stamp with the date of September 17, 1987) that the Notice of Determination was properly mailed on September 17, 1987.

We uphold the determination of the Administrative Law Judge.

Tax Law § 1138 addresses the authority of the commissioner of taxation and finance to make assessments for sales tax due and the taxpayer's right to challenge such assessments:

"[n]otice of . . . [a] determination [of tax due] shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (Tax Law § 1138[a][1]).

Prior to petitioning the Division of Tax Appeals for a hearing, a taxpayer may request an informal conciliation conference at the Division's Bureau of Conciliation and Mediation (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 20 NYCRR 4000.5[c]). The time for filing a request for a conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment which, in this case, was 90 days (Tax Law §§ 170[3-a][a], 1138[a][1]; see, 20 NYCRR 4000.3[c]).

If properly mailed, notice of the assessment is presumed to be received, and the 90-day period is deemed to begin on the date the notice is mailed:

"[a] notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice" (Tax Law § 1147[a][1]).

Unless a request for a conciliation conference or a petition for hearing is timely filed, the Division of Tax Appeals does not have jurisdiction to review the assessment.

As petitioner clearly did not file a request for a conciliation conference or a petition for a hearing within 90 days of the date the Division asserts it mailed the Notice of Determination to petitioner, the only issue is whether the Division has established that the Notice was properly mailed on September 17, 1987. As we stated in Matter of Bryant Tool and Supply (Tax Appeals Tribunal, July 30, 1992):

"[w]hen addressing a proof of mailing issue, the Division may prove the date of mailing by demonstrating the use of a standard mailing procedure, in general, and by introducing evidence that this procedure was used when conducting the particular mailings at issue (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; see also, Cataldo v. Commissioner, 60 TC 522). The latter requires the Division to introduce direct evidence that the notice was mailed on the date claimed (Matter of Novar TV & Air Conditioner Sales & Serv., *supra*)."

In this case, the Division's proof of mailing consists of the affidavit of a Division employee familiar with the Division's mailing procedures describing that procedure. Attached to the affidavit are photocopies of the Notice of Determination and a document which petitioner does not dispute is a United States Postal Service Form 3877. The form 3877 contains petitioner's name and address and a postmark/date of receipt stamp of September 17, 1987. While the affidavit is not a model of clarity and the copy of the United States Postal Service Form 3877 is extremely poor, we agree with the Administrative Law Judge that, taken together, the Division has shown sufficient direct evidence of mailing to establish that the Division mailed the Notice on the date claimed. Unlike the mailing records in Matter of Greene Valley Ligs. (Tax Appeals Tribunal, November 25, 1992), Matter of Clark (Tax Appeals Tribunal, June 18, 1992) and Matter of Katz (*supra*), the Division's proof that the Notice was sent by certified mail on September 17, 1987 is the United States Postal Service's Form 3877. As we discussed in Greene Valley Ligs., Katz and Clark, a properly completed form 3877 is highly probative evidence that the Notice was sent to the address specified because it contains on one page the name and address of the taxpayer, the dated postmark and the signature of a Postal Service employee acknowledging receipt.

Petitioner contests only one specific aspect of the form, i.e., that the form does not clearly enumerate the amount of postage and fees.¹

We do not agree with petitioner that the form's ambiguity as to the amount of postage or fees is enough to invalidate the form 3877 as evidence of mailing. The form 3877, in conjunction with the affidavit of the Division's employee describing the mailing procedures, sufficiently establishes the mailing of the Notice of Determination on September 17, 1987. Thus, since petitioner has failed to file a timely protest, the Division of Tax Appeals has no jurisdiction to review the assessment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard Accardo is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Richard Accardo is denied.

DATED: Troy, New York
August 12, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner

¹Petitioner's exception claims that the form is "illegible." However, other than to argue that the amount of the postage and fees cannot be determined, petitioner has not explained what specific aspects of the form are illegible or why it would be significant.