

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
CHRISTOPHER TUREK	:	DECISION
for Revision of Determinations or for Refund	:	DTA No. 810796
of Sales and Use Taxes under Articles 28 and 29	:	AND 810797
of the Tax Law for the Period January 1, 1982	:	
through May 31, 1988.	:	

Petitioner Christopher Turek, Horns Park Road, Hyde Park, New York 12538, filed an exception to the determination of the Administrative Law Judge issued on March 10, 1994. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. The six-month period to issue this decision began on July 28, 1994, the date by which petitioner could have submitted a reply brief. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation has established proper mailing to petitioner of a notice of determination asserting omnibus penalty ("the penalty notice") thereby creating a presumption of receipt.

II. Whether the Division of Taxation has established proper mailing of Conciliation Order No. 092094 ("the order") to petitioner thereby creating a presumption of receipt.

III. In the event proper mailing of the penalty notice and the order are established, whether petitioner has proven by clear and convincing evidence that he did not receive either, or both, thereby rebutting the presumption of receipt and entitling him to a hearing.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "8," "9" and "13" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify the Administrative Law Judge's finding of fact "1" to read as follows:

Petitioner, Christopher Turek, operated Turek Landscaping. The Division of Taxation ("Division") issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S880902003A), dated August 31, 1988, for the period January 1, 1982 through May 31, 1985 in the amount of \$14,058.07, plus penalty and interest. On the same date, the Division issued to petitioner a second notice of determination (Notice No. S880902004A) asserting sales and use taxes for the period June 1, 1985 through May 31, 1988 in the amount of \$4,915.28, plus penalty and interest.¹

On or about November 18, 1988, petitioner mailed a Request for Conciliation Conference, dated November 16, 1988, regarding the above assessments to the Division's offices at 30 Russell Road, Albany, New York. On the same day, petitioner and his then representative, Geraldine R. Hurley, also mailed to the same address two petitions by certified mail ("the 1988 petitions") purporting to challenge the same two notices of determination before the Division of Tax Appeals. Petitioner signed both of these petitions and also signed the Request for Conciliation Conference.²

Instructions in the first paragraph of petitioner's Request for Conciliation Conference (Form TA-9.1) state, in relevant part, that:

"If you disagree with an action taken by the Department of Taxation and Finance . . . you may protest by filing a Request for Conciliation Conference or by filing a Petition for a Tax Appeals Hearing." (Emphasis added.)

At the bottom of this request, just below the location where petitioner signed his name, the proper address to which a Request for Conciliation Conference is to be mailed is set forth in

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We modified this fact by adding the notice numbers to more clearly reflect the record.

²In the record there is also a copy of a request for conference dated November 16, 1988 attached to a copy of an envelope addressed to "Bureau of Conciliation and Mediation Services, Bldg. 9, W.A. Harriman Campus, Albany, NY 12227." The envelope is postmarked November 18, 1988. No explanation has been offered for this mailing.

bold print, i.e., "Bureau of Conciliation and Mediation Services, Building 9, W.A. Harriman Campus, Albany, NY 12227."

The Administrative Law Judge takes official notice that petition forms (Form TA-10 [9/87]) used to file the 1988 petitions included the correct address for the Division of Tax Appeals printed thereon, i.e., Supervising Administrative Law Judge, Division of Tax Appeals, W.A. Harriman Campus, Albany, New York 12227.³

Both petitioner's Request for Conciliation Conference and his two 1988 petitions were mailed to the incorrect addresses. Petitioner offered no explanation for why he and his then representative mailed these documents to 30 Russell Road, Albany, New York.

The Division's offices at 30 Russell Road forwarded the Request for Conciliation Conference to the Bureau of Conciliation and Mediation Services ("BCMS"). There is no indication in the record as to what happened to the two petitions that had been erroneously sent to the Russell Road address.

On June 7, 1989, a conference was held before John M. Jones, Conciliation Conferee, with regard to the above notices of determination. An unsigned copy of the Conciliation Order (CMS No. 092094) is in evidence, and is dated December 22, 1989. Petitioner claims he never received this order.

We modify the Administrative Law Judge's finding of fact "8" to read as follows:

An affidavit of Joseph Chyrywat, Supervisor of Tax Conferences in BCMS, sets forth the Bureau's procedures for preparation and mailing of conciliation orders. This affidavit establishes that a clerk in the Bureau, as part of her regular duties, verifies the names and addresses of persons who are to receive conciliation orders and affixes sequential certified mail control numbers to each envelope. The clerk writes the "certified control number" for each addressee's envelope on a Certified Mail Record ("CMR"). The clerk then takes the conciliation orders and the CMR to the Division's mail room and deposits them in the "Outgoing Certified Mail" basket. The certified mail envelopes and the CMR are taken by a mail room employee to a United States Post Office for mailing. Upon delivery to the United States Postal Service, a postmark stamp is affixed to the CMR showing the date of mailing. The CMR is then returned to BCMS and maintained as a permanent record. Attached to the Chyrywat affidavit is page three of a five-page CMR. This one-

³In 1988, the Division of Tax Appeals had not yet moved to its present location in Troy, New York.

page CMR reflects 14 conciliation orders, including Conciliation Order No.

092094, as the number of pieces listed by the sender. The CMR reflects a notation which appears to be "1P" as the number of pieces received at the post office. The CMR shows postage and fees and that the envelope containing said order was addressed to petitioner at Horns Park Road, Hyde Park, New York 12538 and bore certified control number P-150017415. There is also a signature at the bottom of the CMR. There is nothing above or below the signature to indicate that the signature was that of a Postal Service employee. There is also a postal stamp affixed to the CMR of December 22, 1989 made by the Capitol Annex Branch, United States Post Office, Albany, New York.

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The Administrative Law Judge's finding of fact "8" read as follows:

An affidavit of Joseph Chyrywaty, Supervisor of Tax Conferences in BCMS, sets forth the Bureau's procedures for preparation and mailing of conciliation orders. This affidavit establishes that a clerk in the Bureau, as part of her regular duties, verifies the names and addresses of persons who are to receive conciliation orders and affixes sequential certified mail control numbers to each envelope. The clerk writes the "certified control number" for each addressee's envelope on a Certified Mail Record ("CMR"). The clerk then takes the conciliation orders and the CMR to the Division's mail room and deposits them in the "Outgoing Certified Mail" basket. The certified mail envelopes and the CMR are taken by a mail room employee to a United States Post Office for mailing. Upon delivery to the United States Postal Service, a postmark stamp is affixed to the CMR showing the date of mailing. The CMR is then returned to BCMS and maintained as a permanent record.* Attached to the Chyrywaty affidavit is page three of a five-page CMR. This one-page CMR reflects 14 conciliation orders, including Conciliation Order No. 092094, were delivered to, and accepted by, the United States Postal Service. The CMR shows the postage and fees paid for mailing of Conciliation Order No. 092094 and that the envelope containing said order was addressed to petitioner at Horns Park Road, Hyde Park, New York 12538 and bore certified control number P-150017415. The signature of the United States postal employee accepting the subject certified mail is present on the CMR. The postal stamp affixed to the CMR evidences that a Conciliation Order (CMS No. 092094) was delivered to, and accepted by, the Capitol Annex Branch, United States Post Office, Albany, New York, on December 22, 1989.

*It is noted that the Certified Mail Record and the Post Office's Certified Mail Log (Postal Service Form 3877) both contain the taxpayer's name, address, postage fees, certified mail control number (article number), the number of pieces of mail, the signature of a postal employee, and postal date stamp of the branch office of the United States Postal Service to which the mail was delivered. Since this identical information is contained on both forms, and both forms are maintained in the regular course of business of the Division, they are both referred to infra as a "CMR."

Finding of fact "8" has been modified to indicate that the record does not show that 14 conciliation orders were accepted by the United States Postal Service. In addition, the footnote to finding of fact "8" was deleted because it erroneously stated that the CMR contained a signature of a postal employee.

We modify the Administrative Law Judge's finding of fact "9" to read as follows:

The Division issued to petitioner a third notice of determination (Notice No. S890113001A), dated January 10, 1989, asserting omnibus penalty for the period June 1, 1985 through May 31, 1988 in the amount of \$10,000.00 based on petitioner's operation of a landscaping business without obtaining a Certificate of Authority under Articles 28 and 29 of the Tax Law. Petitioner did not request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of this assessment being issued. Petitioner claims that he never received this penalty notice.⁵

An affidavit of Lisa Middleton, an employee of the Division's Albany District Office, sets forth that office's general procedures for preparation and mailing of assessments, and, in particular, the procedures followed in preparation and mailing of the instant penalty notice. Ms. Middleton deposes that she prepared the penalty notice and typed petitioner's address at Horn Park Road, Hyde Park, New York 12538 on the envelope, inserted the penalty notice in the envelope to be mailed by certified mail, return receipt requested.

A Return Receipt Card (Postal Service Form 3811) (hereinafter "green card") was attached to the envelope. Petitioner's name and address, certified mail control number (No. 41138) and notice of determination number were typed onto the CMR (Postal Service Form 3877). The certified mail control number (also known as the "article number") was also written on the envelope and the green card. The envelope was then stamped "Certified Mail, Return Receipt Requested."

The envelope and CMR were then taken to the Division's mail room where proper postage was applied, and the Division's postal clerk delivered the envelope and CMR to an employee of the United States Postal Service. The postal employee stamped a copy of the CMR (Postal Service Form 3877) with a postal service cancellation date stamp. The CMR was then returned to the Division and maintained as part of its permanent records.

The one-page CMR attached to the Middleton affidavit reflects that a single certified mail envelope bearing Certified Control No. 41138 was delivered to the Roessleville Branch of

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We modified this fact by adding the notice number to more clearly reflect the record.

the United States Postal Service on January 10, 1989. This CMR was date stamped "January 10, 1989" by the Roessleville Branch of the United States Postal Service, Albany, New York. Also attached to the Middleton affidavit is a copy of the return receipt, or green card, bearing Certified Control No. 41138. This return receipt is post/date stamped "January 20, 1989" by the United States Postal Service at Hyde Park, New York, and signed by Christopher Turek.

On May 7, 1992, petitioner, through his present representative, Stewart Buxbaum, filed the two petitions initiating the instant proceeding by mailing same, by certified mail, to the Division of Tax Appeals at its offices in Troy, New York.

The first petition challenges the two assessments issued in 1988. The second petition filed May 7, 1992, challenges the penalty assessment.

Petitioner has neither alleged nor offered proof to show that the Conciliation Order was not signed.

We modify the Administrative Law Judge's finding of fact "13" to read as follows:

Petitioner has alleged non-receipt of the conciliation order and the penalty notice.⁶

Petitioner alleged, but did not offer evidence to prove, that he never received the Conciliation Order or the penalty notice.

OPINION

The Administrative Law Judge determined that, with respect to the penalty notice, the Division not only met its burden to show that the notice was properly mailed but also proved petitioner received the notice. Specifically, the Administrative Law Judge found that the

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The Administrative Law Judge's finding of fact "13" read as follows:

"Petitioner did not allege, and offered no evidence to show, that the mailing of the Conciliation Order or the penalty notice was not in accord with the requirements of the Tax Law and regulations. He has merely alleged non-receipt of these notices."

We modified this fact by deleting the first sentence because it was irrelevant and misleading. Our cases hold that where the petition is denied as untimely the Division is required to establish the date that it mailed the statutory notice (Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

Division's evidence, the Middleton affidavit and CMR, were sufficient to prove mailing of the notice and, further, that petitioner's signature on the Return Receipt (PS Form 3811) proved receipt of the notice. Therefore, the Administrative Law Judge dismissed petitioner's petition as it was not filed within 90 days of the issuance of the penalty notice (S890113001A).

The Administrative Law Judge then determined that the Division also met its burden of proof with respect to mailing of the conciliation order. Specifically, the Administrative Law Judge found that the Chyrywaty affidavit and CMR were sufficient to prove mailing of the order on December 22, 1989. The Administrative Law Judge further found that page three of the five-page CMR was a properly completed CMR as it contained the name and address of the taxpayer, the dated postmark and the signature of a Postal Service employee acknowledging receipt and that page three was the only page relevant to this matter. The Administrative Law Judge thus dismissed petitioner's petition as it was not filed within 90 days of the issuance of the conciliation order (No. 092094).

The Administrative Law Judge then found that petitioner did not prove that he never received the penalty notice and conciliation order. The Administrative Law Judge stated that alleging non-receipt is not enough to overcome the presumption of receipt (Nassau Insur. Co. v. Murray, 46 NY2d 828, 414 NYS2d 117; Matter of T. J. Gulf, Inc., State Tax Commn., May 29, 1985, affd Matter of T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97).

Next, the Administrative Law Judge gave no credence to petitioner's assertion that he was not informed of his right to have a hearing before the Division of Tax Appeals in lieu of a conciliation conference. The Administrative Law Judge stated that the request for a conciliation conference, which petitioner signed, informed him in the first paragraph that he could either file a request for a conciliation conference or petition for a hearing before the Division of Tax Appeals.

With respect to whether petitioner received a signed conciliation order, the Administrative Law Judge found "no authority (and none has been cited by petitioner) in the

statute, regulations or case law which require, as a condition of its validity, that a Conciliation Order be signed" (Determination, conclusion of law "N"). The Administrative Law Judge found that the conciliation order sufficiently identified the name of the taxpayer, the name of the conferee, the assessments numbers, the relevant time periods and the result of the conference, and that petitioner was able from this information to calculate the time within which a petition for hearing had to be filed (Determination, conclusion of law "N").

Finally, the Administrative Law Judge rejected petitioner's assertion that his right to seek a hearing was thwarted because his incorrectly addressed petitions were not forwarded to the Division of Tax Appeals by the Division. The Administrative Law Judge determined that the Division could not be held responsible for petitioner's failure to send the petitions to the correct address. The Administrative Law Judge stated that the petition forms themselves and the Tax Appeals Tribunal's regulations both set forth the address for filing petitions with the Division of Tax Appeals. In addition, the Administrative Law Judge found that "[p]etitioner could have discontinued his request for a conciliation conference at any time prior to the issuance of the Conciliation Order, and would have had an additional 90 days from such discontinuance to file a petition with the Division of Tax Appeals (20 NYCRR 4000.6[a],[b])" (Determination, conclusion of law "P").

On exception, petitioner argues that the Chyrywaty affidavit "is not an affidavit from the Tax Department mail clerk to establish that this specific document was mailed by the required regulations, or that this Order or any of the other total number of items listed on all pages of the mailing record were actually received by the Post Office" (Attachment to exception, p. 1). Petitioner also argues that page 3 of the CMR is incomplete. Specifically, petitioner argues that: there is no reference to Conciliation Order No. 092094 on page 3; the other four pages of the mailing record should have been submitted; the number of items received by the United States Postal Service is unclear, i.e., "1P" could mean one piece of mail; and, while there is reference to an alleged certification number 50017415, no evidence was submitted to

correspond to that number. Petitioner argues that the burden of proof is on the Division to establish proper mailing of the conciliation order and the Division has not met this burden.

Petitioner also takes exception to the conciliation order arguing that it was unsigned and, therefore, never issued. Petitioner also argues that there should be a copy of a signed conciliation order in the file.

In response, the Division argues that proper mailing of the conciliation order has been established by the Chyrywaty affidavit and the attached CMR. In this regard, the Division argues that the CMR bears a signature of a Postal Service employee, bears a United States postmark and that with respect to the number of pieces received by the post office, "[a]lthough the handwriting is not the most legible, it is clear that the number is '14'" (Division's letter brief, p. 2). The Division goes on to argue that in Matter of Montesanto (*supra*) and Matter of Accardo (Tax Appeals Tribunal, August 12, 1993) the Tribunal held that "where there is a mailing record which has the postal service date stamp, signature of a postal employee, the number of pieces received by the post office and indicates the amount of postage, the document in conjunction with an affidavit of mailing is sufficient evidence" to show when the notice was issued (Division's letter brief, p. 2).

In response to petitioner's argument that a copy of the signed conciliation order was not admitted into evidence, the Division states that State Administrative Procedure Law § 306(2) provides that the Division "may introduce as exhibits copies of documents" (Division's letter brief, p. 2).

With respect to the Notice of Determination issued on January 10, 1989, we agree with the Administrative Law Judge that the Division established mailing of that notice by the Middleton affidavit and Postal Service Form 3877 and, in addition, that petitioner received the notice as evidenced by the signed return receipt. Therefore, we affirm that part of the determination of the Administrative Law Judge dismissing petitioner's petition with respect to Notice No. S890113001A for the reasons stated in the determination.

However, we find that the Division has not established that it mailed the conciliation order to petitioner on December 22, 1989. We find troubling the fact that the CMR, while clearly showing the number "14" as the number of pieces listed by the sender, is illegible with respect to the number of pieces received at the post office. With respect to the number of pieces received at the post office, the Division, in its letter brief, stated that "although the handwriting is not the most legible, it is clear that the number is '14'." By no stretch of the imagination does the notation appearing on the CMR for the number of pieces received at the post office resemble the number "14." The notation appears to be "1P" which could mean "1 piece" or something entirely different. In any event, the CMR does not establish that the 14 items listed by the sender were received by the post office on December 22, 1989.

In support of its position that the CMR was properly completed, the Division relies on Matter of Montesanto (*supra*) and Matter of Accardo (*supra*). We find the facts in those cases to be distinguishable from the matter before us. In Montesanto, the number of pieces received by the post office was not in question and, therefore, was not an issue before us. In Accardo, the PS Form 3877 clearly showed that 15 pieces were listed by the sender and 15 pieces were received at the post office.

In view of the above, we find that the Division has not established when the conciliation order was mailed to petitioner. Therefore, we deem petitioner's petition timely with respect to Notice No. S880902003A and Notice No. S880902004A.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Christopher Turek is granted;
2. The determination of the Administrative Law Judge is affirmed with respect to the dismissal of the petition dated May 7, 1992 regarding Notice of Determination No. S890113001A and is reversed with respect to the dismissal of the petition dated May 7, 1992 regarding Notice of Determination No. S880902003A and Notice of Determination No. S880902004A;
3. Notice of Determination No. S890113001A is sustained; and

4. The matter is remanded for a hearing with respect to Notice of Determination No. S880902003A and Notice of Determination No. S880902004A.

DATED: Troy, New York
January 19, 1995

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

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