

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
AUTO PARTS CENTER, INC.	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 812398
of Sales and Use Taxes under Article 28 and 29	:	
of the Tax Law for the Period March 1, 1989	:	
through February 29, 1992.	:	

Petitioner Auto Parts Center, Inc., 246-06 51st Avenue, Douglaston, New York 11362, filed an exception to the determination of the Administrative Law Judge issued on June 30, 1994. Petitioner appeared by Rose, Michlin, Karpf & Co. (Bruce Danoff, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation submitted a letter on August 18, 1994 stating it would not be filing a brief in opposition and this date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely protested a notice of determination assessing sales and use taxes due.

FINDINGS OF FACT

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

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

The Division of Taxation ("Division") mailed to petitioner, Auto Parts Center, Inc., a notice of determination dated March 1, 1993 assessing sales and use taxes due for the period March 1, 1989 through February 29, 1992 in the amount of \$565,059.50, including penalty and interest. A copy of this notice was also sent to Bernard Singer, petitioner's legal representative at that time.¹

On June 3, 1993, petitioner mailed a request for conciliation conference to the Bureau of Conciliation and Mediation Services.

The conciliation conferee issued an order on July 23, 1993 dismissing petitioner's request as late filed.

On October 21, 1993, petitioner filed a petition with the Division of Tax Appeals for revision of the determination or for refund of sales and use taxes due. The petition sets forth the basis for petitioner's protest on the merits, namely that no meeting was held between the auditor and the taxpayer's representative to discuss the auditor's findings that sales to dealers outside of New York State were unsubstantiated. The petition further asserts that the "request for conciliation conference was filed on time but delayed in the mail."

The Division's answer, dated February 24, 1994, affirmatively states that the request for conciliation conference was untimely filed, and asks that the petition be denied and the notice sustained.

On April 28, 1994, the Division brought a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notice of determination, as required by Tax Law §§ 170(3-a) and 1138(a)(1).

In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of Donna

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The Administrative Law Judge's finding of fact "1" read as follows:

"On March 1, 1993, the Division of Taxation ("Division") issued to petitioner, Auto Parts Center, Inc., a notice of determination assessing sales and use taxes due for the period March 1, 1989 through February 29, 1992 in the amount of \$565,059.50, including penalty and interest. Also on March 1, 1993, a copy of this notice was sent to Bernard Singer, petitioner's legal representative at that time.

We modified this finding to indicate that the record does not establish when the Division issued the notice of determination.

Biondo and Daniel LaFar, employees of the Division; copies of the notice of determination issued to Auto Parts Center, Inc. and also to its representative, Bernard Singer; a copy of the certified mail record containing a list of the notices allegedly issued by the Division on March 1, 1993; and a copy of the envelope which contained petitioner's request for conciliation conference and the face page of such request.

The affidavit of Donna Biondo, Head Clerk of the Case and Resource Tracking System Unit of the Division, sets forth the Division's general procedure for mailing notices of determination to taxpayers, including the delivery of the notices to the post office and the Division's receipt of the postmarked documents from the post office following mailing.

In addition, the affidavit explains that the computerized preparation of notices of determination includes the simultaneous preparation of a certified mail record, the record listing those taxpayers to whom notices are being issued and the certified control number assigned to each notice. According to Ms. Biondo, the pages of the certified mail record remain fan-folded, or connected to each other, before the notices are accepted by the United States Postal Service and even after the mail record is returned to the Division. She states that it is only upon her request that the pages of the mail record are disconnected from one another.

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

Ms. Biondo attests to the truth and accuracy of the copy of the certified mail record attached to her affidavit which contains a list of the notices allegedly issued by the Division on March 1, 1993, including one addressed to petitioner and one addressed to petitioner's representative. This copy of the certified mail record consists of 21 pages, through which the certified control numbers run consecutively from P 911 206 291 on page 1 to P 911 206 516 on page 21, with 11 entries per page except page 21, which contains 6 entries.

Page 14 contains certified mail control number P 911 206 437, notice of determination number L 007044130, addressed to petitioner, Auto Parts Center, Inc., 1000 Long Island Avenue, Deer Park, N.Y. 11729-3718. Page 13 contains certified mail control number P 911 206 431, notice of determination number L 007044130, addressed to petitioner's legal representative, Bernard Singer, 592 Prescott Place, N. Woodmere, N.Y. 11581. The certification and notice numbers listed match those on the notices issued to petitioner and its representative, respectively.

Each of the 21 pages of the certified mail record submitted bears a postmark made by the United States Postal Service. While the month and year of the postmark are clear, i.e., March 1993, the day of the month is not clear, but appears most closely to be the number 11. The record print time is 12:44:17. Ms. Biondo explains in her affidavit that the print date for certified mail records is approximately ten days prior to the mail date, in order to give sufficient time to review the notices by hand and to process the postage. The affidavit states that the print date here, February 20, 1993, was changed to March 1, 1993 to conform to the actual date of delivery of the notices to the United States Postal Service.

It is noted that while the certified mail record submitted contains, on the last page, a total for the number of pieces listed, it does not contain a total for the number of pieces received at the post office.²

The affidavit of Daniel LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. Mr. LaFar states that the certified mail record is the Division's record of receipt by the General Mail Facility of the United States Postal Service for pieces of certified mail. Mr. LaFar also asserts that the staff's regular procedures were followed in mailing the notice of determination in question to petitioner and its representative on March 1, 1993.

The notices of determination sent to petitioner and its representative each stated, on two of the three pages submitted, that any request for conciliation conference or petition for a hearing must be filed by May 30, 1993.

The envelope in which petitioner's request for conciliation conference was mailed bears an office metered (Pitney Bowes) postmark of May 28, 1993 as well as a U.S. Postal Service cancellation postmark of June 3, 1993. This envelope as well as the face page of the request bear a Bureau of Conciliation and Mediation Services received stamp dated June 7, 1993.

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We modified the third paragraph of finding of fact "9" to indicate that the while the month and year of the postmark are clear, the day of the month is not legible.

OPINION

The Administrative Law Judge determined that the Division met its burden to establish that the notice of determination was mailed to petitioner on March 1, 1993. Specifically, the Administrative Law Judge found that the evidence submitted, the Biondo and LaFar affidavits and the certified mail record, was sufficient to establish the Division's standard procedure for the issuance of notices of determination and that the standard procedure was followed in this matter. The Administrative Law Judge also found that while the final page of the certified mailing record does not indicate the total pieces received at the post office, the affidavits and certified mailing record provide direct documentary evidence that the notice was mailed on March 1, 1993. Therefore, the Administrative Law Judge dismissed petitioner's petition because petitioner's request for a conciliation conference was not made within the statutory 90-day period.

On exception, petitioner argues that, while his former representative was negligent in sending the request for a conciliation conference through ordinary mail without getting a receipt from the United States Postal Service, the request was timely mailed and he should not be denied a hearing when the request was only three days late.

We reverse the determination of the Administrative Law Judge. Our review of the record indicates that the Division has not established the date on which the notice of determination was mailed to petitioner. We find that the certified mailing record submitted by the Division is flawed in that the day of the month on the postmark is not clear. In our view, the day in March that the notice was mailed to petitioner appears to be the 11th not the first. In any event, the day in March that the notice was mailed is not legible and, therefore, the 90-day filing period was never triggered. In addition, the certified mailing record is also flawed because it does not contain a total for the number of pieces received by the post office. Therefore, the certified mailing record does not establish that the 226 pieces listed by the sender were received by the post office (see, Matter of Turek (Tax Appeals Tribunal, January 19, 1995)).

In view of the above, we deem petitioner's request for a conciliation conference to be timely with respect to the notice of determination issued to petitioner.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Auto Parts Center, Inc. is granted;
2. The determination of the Administrative Law Judge is reversed; and
3. The request for a conciliation conference filed by Auto Parts Center, Inc. is granted.

DATED: Troy, New York
February 9, 1995

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

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