

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

| | | |
|---|---|----------------|
| In the Matter of the Petition | : | |
| of | : | |
| 3410 PONS FOOD CORP. | : | DECISION |
| for Revision of a Determination or for Refund | : | DTA No. 813011 |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period September 1, 1990 | : | |
| through February 29, 1992. | : | |

Petitioner 3410 Pons Food Corp., 3410 Broadway, New York, New York 10031, filed an exception to the determination of the Administrative Law Judge issued on January 5, 1995. Petitioner appeared by Denise Vidal, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Any reply brief would have been due on April 26, 1995, the date which 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's request for a conciliation conference was properly denied by the Division of Taxation because petitioner failed to timely file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services of the Division of Taxation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

The Division of Taxation ("Division") issued a Notice of Determination dated September 13, 1993 to petitioner, 3410 Pons Food Corp., for the period September 1, 1990 through February 29, 1992. This notice of determination (Notice No. L-007929945-6, hereinafter "the subject notice") set forth additional sales and use taxes due in the sum of \$312,459.00, plus penalty and interest, for a total amount due of \$530,671.86.

We find the following additional finding of fact.

The Division of Taxation made a motion for summary determination in this matter "on the grounds that the 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 Conciliation Order" (Affidavit in Support of Motion). The Division stated that because "Petitioner did not file a Request for Conciliation Conference or a Petition with the Division of Tax Appeals within the time period prescribed by Tax Law sections 170(3-a) and 1138(a)(1), the late Request for Conciliation Conference was properly denied and the Petition before the Division of Tax Appeals should be dismissed, with prejudice, for lack of jurisdiction" (Affidavit in Support of Motion).

The Division's attorney deposes that the notice of determination (Finding of Fact "1") was duly issued to petitioner on September 13, 1993 by certified mail, using certified control number P 911 172 981.

The motion record includes the affidavit of Geraldine Mahon ("the Mahon affidavit"), principal clerk of the Division's Case and Resource Tracking System ("CARTS"). The CARTS system is the Division's computer system for generating, inter alia, notices of determination to taxpayers under Articles 28 and 29 of the Tax Law.

Geraldine Mahon deposes that it is part of her regular duties to supervise the processing of notices of determination prior to shipment to the Division's Mechanical Section (hereinafter "the mail room") for mailing. Ms. Mahon receives the computer printout, entitled "Assessments Receivable, Certified Record of Non-Presort Mail" (hereinafter "certified mail record" or "CMR"), and the corresponding notices of determination generated by the CARTS system. The computer-generated notices are predated with the anticipated date of mailing, and each notice is assigned a "certified control number." The certified control numbers are recorded on the CMR under the heading "Certified No."

The CMR for the block of notices issued on September 13, 1993, including the subject notice, consists of 20 connected, fan-folded

pages. All pages are connected when the document is delivered to the U.S. Postal Service and remain connected unless otherwise requested by Ms. Mahon.

Upon examination of the CMR in this matter, which is attached to her affidavit, Ms. Mahon deposes that it is a true copy of the CMR issued by the Division on September 13, 1993, and includes the subject notice issued to petitioner. Ms. Mahon states that the certified control numbers on the CMR run consecutively, and there are no deletions. Each of the pages of the CMR consist of 11 entries with the exception of page 20 which contains 4 entries. Each entry includes the certified control number, name, address, postage amount and certified mail fee for each taxpayer (addressee), including petitioner. Portions of the CMR have been redacted to preserve the confidentiality of information relating to taxpayers who are not a party to this proceeding.

Ms. Mahon states that in the upper left hand corner of the CMR, page 1, the date 9/3/93 was changed manually to 9/13/93. The original date, 9/3/93, was the date that the CMR was printed. The certified mail record is printed approximately 10 days prior to the anticipated date of mailing of the notices referred to thereon, so that there is sufficient lead time for the notices to be manually reviewed and then processed for postage, etc. by the Division's mail room. Ms. Mahon states that the handwritten change of date, supra, was made by personnel in the Division's mail room who changed the date so that it conformed to the actual date that the notices and the CMR were delivered into the possession of the U.S. Postal Service.

Ms. Mahon states that the notation in the upper right hand corner of the CMR which states "Page: 18", for example, indicates that this was the eighteenth page of the entire CMR for September 13, 1993.

Ms. Mahon states that each statutory notice is placed in an envelope by Division personnel prior to being delivered into the possession of a U.S. Postal Service representative. The postal service representative then affixes his or her initials, signature or postmark to a page or pages of the CMR. The CMR in this matter contains a U.S. Postal Service postmark on each page and page 20 thereof is signed by a postal service employee.

The CMR in this case, at page 18, indicates that the subject notice was sent to 3410 Pons Food Corp., 3410 Broadway, New York, N.Y. 10031-7419 by certified mail using control number P 911 172 981. The CMR shows petitioner's name, address, the amount of postage paid and the certified mail fee charged by the postal office for this item of mail. The U.S. Postal Service postmark on each page of the CMR reflects that the subject notice was mailed on September 13, 1993. The last page of the CMR shows a total of 213 pieces of mail listed on the CMR. This page reflects that a total of 213 pieces of certified mail were in fact delivered to the U.S. Postal Service. The signature of an employee of the U.S. Postal Service appears on the last page of the CMR.

The Mahon affidavit states that the Division does not request or retain receipts from certified and registered mailings in the regular course of business and as a routine office practice.

Ms. Mahon states that the procedures described supra and in her affidavit are the routine procedures of the CARTS Control Unit, are the general procedures followed in the regular course of business of the CARTS Control Unit, and, in particular, were the procedures followed by that unit on September 13, 1993 in mailing the subject notice.

The motion record also includes the affidavit of Daniel LaFar ("the LaFar affidavit"), principal mail and supply clerk in the Division's mail room.

Mr. LaFar states that his duties include supervision of the mail room staff in delivering outgoing mail to branch offices of the United States Postal Service. In describing the procedures of the Division's mail room in handling certified mail, Mr. LaFar states that after a notice is placed in the "Outgoing Certified Mail" basket in the mail room, a member of his staff weighs and seals each envelope, places "postage" and "fee" amounts on the letters and records the postage and fee amounts on the CMR.

A mail room clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the mail room staff then delivers the stamped envelopes and CMR to the Roessleville Branch of the United States Postal

Service in Albany, New York. The postal employee affixes a U.S. Postal Service postmark and/or his or her signature to the CMR indicating receipt by the U.S. Postal Service.

In the ordinary course of business and pursuant to the routine practices and procedures of the mail room, the signed and/or postmarked CMR is picked up at the post office the following day and delivered to the originating office by a member of LaFar's staff.

The signed and postmarked CMR becomes, and is maintained as, the Division's record of certified mail delivered to and received by the U.S. Postal Service for ultimate delivery to the taxpayer-addressees.

LaFar, upon review of the Mahon affidavit and attachments, including the signed and postmarked CMR for September 13, 1993, deposes that on that day an employee of his mail room delivered a piece of certified mail addressed to petitioner, as recited supra, to the Roessleville Branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes for delivery by certified mail.

LaFar deposes that the mail room's routine office procedures described above for the receipt and processing of certified mail constitute the procedures followed by the mail room in the regular course of its business and that those same procedures were followed in mailing the pieces of certified mail to petitioner and its representative on September 13, 1993.

Petitioner filed a request for conciliation conference in an envelope bearing a U.S. Postal Service postmark of May 7, 1994, with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A copy of the envelope in which this request was mailed bears a U.S. Postal Service postmark of May 7, 1994, which was 236 days after the subject notice was issued to petitioner.

A Conciliation Order (CMS No.138522) dated July 15, 1994 was issued to petitioner advising it that "[s]ince the notice was issued on September 13, 1993, but the request was not received until May 9, 1994, or in excess of 90 days, the request is late filed." The Conciliation Order denied petitioner's request as untimely filed.

We find the following additional finding of fact:

The Division of Taxation did not introduce any proof with respect to the mailing of the Conciliation Order.

Thereafter, petitioner filed the instant petition dated July 19, 1994 with the Division of Tax Appeals. The petition is indated stamped as received by the Division of Tax Appeals on July 20, 1994.

We find the following additional finding of fact.

Petitioner did not respond to the Division's motion for summary determination.

OPINION

The Administrative Law Judge treated the Division's motion as a motion to dismiss for lack of subject matter jurisdiction pursuant to 20 NYCRR 3000.5(b)(ii).

The Administrative Law Judge determined that the Division introduced sufficient evidence to substantiate its claim that the Notice of Determination was mailed to petitioner on September 13, 1993. Specifically, the Administrative Law Judge relied on the affidavits attesting to the Division's customary procedure for the mailing of such notices and the postmarks indicating that such procedure was followed in this case.

The Administrative Law Judge determined that the envelope containing petitioner's request for a conciliation conference bore a United States Postal Service postmark of May 7, 1994, or 236 days after the subject notice was issued.

From these facts the Administrative Law Judge concluded that:

"[t]he instant petition was not mailed until July 19, 1994. Neither the petition nor the request for conciliation conference were filed within 90 days of issuance of the subject Notice of Determination. Accordingly, it is concluded that petitioner failed to timely file a request for conciliation conference or to file a petition with the Division of Tax Appeals in response to the subject notice (see also, Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). The Division of Tax Appeals is without jurisdiction to hear petitioner's challenge to the subject notice, and the assessment is fixed and final (Tax Law § 1138[a][1])" (Determination, conclusion of law "E").

On exception, petitioner argues that the Division has offered no proof that petitioner, in fact, received the Notice of Determination and since the assessment is for over half a million dollars, the burden on petitioner outweighs any benefit the Division may receive by not

permitting petitioner to file for a conference and hearing. Petitioner also respectfully requests an opportunity to be heard.

The Division, in reply, argues that the Administrative Law Judge correctly determined that the Division's evidence of mailing was sufficient to create the presumption of delivery of the statutory notice, pointing out that this evidence was uncontroverted by petitioner, thus the presumption of receipt was established and unrebutted.

The Division further argues that: 1) petitioner failed to file a timely request for conciliation conference or petition; 2) petitioner's request for conference was filed 236 days after issuance of the statutory notice with the petition being filed subsequent to that; 3) petitioner failed to rebut these facts although having a full opportunity to do so; 4) there was no evidence presented to contest the assertions made by the Division in the affidavits, therefore they are deemed admitted; and 5) there is no basis in the record for disturbing the determination of the Administrative Law Judge.

We agree with the Administrative Law Judge that the Division of Taxation submitted sufficient evidence of the mailing of the Notice of Determination to raise the presumption, under section 1147(a)(1) of the Tax Law, that the Notice of Determination was received. Under these circumstances, the Division need not prove actual receipt by the taxpayer and petitioner's mere denial of receipt is not sufficient to rebut the presumption (Matter of T.J. Gulf v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97).¹

We also agree with the Administrative Law Judge that the request for a conciliation conference was not timely because it was not mailed until 236 days after the notice was mailed and that petitioner is not entitled to a conciliation conference. We affirm these portions of the Administrative Law Judge's determination for the reasons stated in the determination.

Although we agree with the Administrative Law Judge's resolution of the issue that was raised in this matter, i.e., whether petitioner filed a timely request for a conciliation conference,

¹Contrary to the Administrative Law Judge's statement in conclusion of law "C," petitioner did, in its petition, deny receipt of the Notice of Determination.

we believe that the Administrative Law Judge made certain procedural errors in his resolution of this matter which we wish to correct.

The Administrative Law Judge concluded that the Division of Tax Appeals was without subject matter jurisdiction in this matter and dismissed the petition because neither the petition nor the request for a conciliation conference was filed within 90 days of the issuance of the Notice of Determination.

The Division did not introduce any evidence with respect to the date of the issuance of the conciliation order. The order bears a date of July 15, 1994. The petition indicates that the petition was received by the Division of Tax Appeals on July 20, 1994. In these circumstances, we find that the petition was filed within 90 days after the issuance of the conciliation order (see, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). Accordingly, the Division of Tax Appeals has subject matter jurisdiction over this case to determine if the request for the conciliation conference was timely (Tax Law §§ 170(3-a)(e), 2006(4); see also, 20 NYCRR 3000.1[k], 3000.3[b][8], 4000.5[c][4]). Thus, the Administrative Law Judge erred in treating the Division's motion as a motion to dismiss the petition and in granting this motion.

The Division entitled its motion a motion for summary determination pursuant to 20 NYCRR 3000.5(c). This regulation provides that 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 3000.5[c][1]). Petitioner did not respond to the Division's motion for summary determination and, as a result, has not controverted the facts as alleged by the Division. Therefore, the Division's motion for summary determination must be granted (see, Matter of Friesch-Groningsche Hypotheek Bank Realty Credit Corp., Tax Appeals Tribunal, December 28, 1990, affd Matter of Friesch-Groningsche Hypotheekbank Realty Credit Corp. v.

Tax Appeals Tribunal, 185 AD2d 466, 585 NYS2d 867, lv denied 80 NY2d 761, 592 NYS2d 670) and the petition denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 3410 Pons Food Corp. is denied;
2. The determination of the Administrative Law Judge is modified to the extent that the Division of Taxation's motion is treated as a motion for summary determination and such motion is granted, but the determination is otherwise affirmed;
3. The petition of 3410 Pons Food Corp. is denied; and
4. The Notice of Determination dated September 13, 1993 is sustained.

DATED: Troy, New York
September 7, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner