

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BEST RAY PIZZA, INC.	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 813768
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1989	:	
through May 31, 1992.	:	

Petitioner Best Ray Pizza, Inc., 56 East 41st Street, New York, New York 10017, filed an exception to the determination of the Administrative Law Judge issued on October 12, 1995. Petitioner appeared by Jack M. Portney, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation declined to file a brief in opposition by letter received on November 27, 1995, which began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation has proven that it mailed a Notice of Determination of sales and use tax due to petitioner on July 1, 1993 in order to commence the running of the 90-day period for petitioner to protest such notice.

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, Best Ray Pizza, Inc., a Statement of Proposed Audit Adjustment, dated March 12, 1993, for sales and use taxes due for the period September 1, 1989 through May 31, 1992.

By letter dated April 7, 1993, petitioner's representative, Jack M. Portney, C.P.A., informed the Division that petitioner "protest[s] the attached proposed audit adjustment of \$180,530.23 and request[s] a conference." In the letter, Mr. Portney requested the Division to contact him "to work out a conference date at your earliest convenience." Petitioner submitted a return receipt indicating that this protest letter was sent by certified mail on April 7, 1993 to the NYS Dept. of Taxation and Finance, Queens District Office, 97-77 Queens Blvd., Third Floor, Rego Park, New York 11374.

The Division issued to petitioner a Notice of Determination (Assessment No. L-007541141-3), dated July 1, 1993, for sales and use taxes due in the amount of \$109,280.83, plus penalty and interest, for the total amount of \$186,853.58. In support of its allegation that a copy of this notice was sent to both petitioner and its representative on July 1, 1993, the Division submitted an affidavit of Daniel LaFar, an affidavit of Geraldine Mahon, and a certified mail record dated July 1, 1993.

In the affidavit of Geraldine Mahon, the principal clerk of the Case and Resource Tracking System ("CARTS") Control Unit, she explained how notices of determination were generated and processed for mailing. As noted by Ms. Mahon, each notice is sent by certified mail and recorded on a certified mail record next to a certified control number. The certified control numbers are listed in numerically consecutive order.

Attached to Ms. Mahon's affidavit were two certified mail records, dated July 1, 1993. One record consists of three pages. On page 1, listed next to the first certified number, P 911 205 732, is notice number L 007541141 and the name and address of Jack M. Portney, 2050 Center Avenue, Fort Lee, New Jersey 07024. Page 1 contains a U.S. Postal Service postmark of July 1, 1993 and page 3 contains a U.S. postmark of July 1, 1993 and the total

pieces of mail and amount of postage that corresponds to the total amounts listed on the three-page certified mail record. The third page also contains initials next to the total pieces of mail received at the post office.

The second mail record consists of 28 pages, the last page of which contains initials next to the total pieces of mail received at the post office, as well as the U.S. Postal Service postmark of July 1, 1993. On page 4 of that record, petitioner's name and address at 341 Lexington Ave., New York, New York 10016-0935, are listed next to notice number L-007541141 and certified number P 911 004 089. Page 4 also contains a postmark of July 1, 1993. In the affidavit of Daniel Lafar, the principal mail and supply clerk in the Division's mail and supply room, he described the operations and procedures of the mailroom used to ensure the proper mailing of each notice. He noted that on page 23 of the second certified mail record, a piece of mail assigned the certified control number of P 911 004 290 was pulled from the record and that this deletion is reflected in the total mail count of pieces received by the post office. Taking into account this deletion, the total number initialed on the last page of the second certified mail record corresponds with the total number of certified control numbers listed in the 28-page document.

The Division sent to petitioner a Correspondence Acknowledgement Notice, dated November 8, 1993, referring to assessment number L-007541141-3, protest number K-331273972-3 and sales tax for the tax period ending May 31, 1992.

By letter dated November 15, 1994, Mr. Portney informed the Division that it had erroneously issued a warrant, dated September 26, 1994, with respect to petitioner's sales and use taxes. In that letter, he stated as follows:

"The Warrant is in error because I am awaiting a conference with your agency requested by me on April 7, 1993, and acknowledged by New York State on November 8, 1993. Until that conference is held, there can be no collections."

By letter dated January 5, 1995, the Division informed Mr. Portney that the Bureau of Conciliation and Mediation Services had received his correspondence indicating that a request for a conciliation conference had been previously filed for Best Ray Pizza, Inc. The Division

stated that a review of its records did not indicate receipt of a timely request and that if he had proof of such a protest, he should mail substantiating documentation within 20 days of the date of the Division's letter.

Mr. Portney responded by letter dated January 24, 1995, and attached a copy of the April 7, 1993 letter requesting a conference, a copy of the proposed audit adjustment, a copy of the Correspondence Acknowledgement Notice, and a copy of the receipt for certified mail stamped April 7, 1993. This letter and attached documents were stamped received by the Bureau of Conciliation and Mediation Services on January 30, 1995.

A conciliation conferee thereafter issued a Conciliation Order, dated March 3, 1995, denying a request for a conciliation conference on the ground that the request was filed late. The conferee stated that the notice was issued on July 1, 1993 and that the request was not received until January 30, 1995.

Mr. Portney filed a petition, dated April 10, 1995, on behalf of Best Ray Pizza, Inc. alleging, inter alia, that petitioner did not receive a Notice of Determination; that prior to issuance of the alleged Notice of Determination, no response was received or conference granted in response to petitioner's April 7, 1993 letter protesting the proposed audit adjustment and requesting a conference; and that petitioner received an acknowledgement on November 8, 1993 of its April 7, 1993 request for a conference.

The Division filed an answer, dated June 2, 1995, alleging, inter alia, that it lacked knowledge or information sufficient to form a belief as to petitioner's allegation that it received an acknowledgement from the Division of its April 7, 1993 request for a conference. The Division affirmatively stated that petitioner's request for a conference was untimely made and that petitioner had the burden of proving that the protest was timely.

OPINION

Tax Law § 1138(a)(1) provides that a Notice of Determination shall finally and irrevocably fix sales tax owing unless the person against whom it is assessed applies within 90 days to the Division of Tax Appeals for a hearing. Tax Law § 1147(a)(1) provides that the 90-

day period is measured from the date of mailing of such notice by registered or certified mail. That section also provides that the mailing of such notice shall be presumptive evidence of receipt of such mailing by the person to whom it was addressed. Absent a timely protest to the assessment of a tax liability, the Division of Tax Appeals has no jurisdiction to hear the merits of the case (Tax Law § 2006[4]).

In its exception, petitioner argues that:

"[p]roof that a notice was properly mailed to the taxpayer by certified or registered mail is partially shown by 'evidence as to the general mailing procedure of such notice and that the procedure was followed when mailing the notice in question.' There is the additional requirement that to complete the proof, it must also be shown that those procedures followed were sufficient to ensure that the notice was actually mailed and to ensure that 'the integrity of the certified mailing record is maintained from the time that the document (Notice of Determination) is generated, delivered to the U.S. Postal Service and returned to the custody of the division,' Matter of 25 Tudor Associates, Tax [Appeals] Tribunal June 18, 1992.

"That chain of integrity was broken when the certified mailings were dropped at the post office, without evidence of post office receipt at the time of delivery to the post office and without witness to post office procedure This fault in their procedure means that no responsible employee from the Department of Taxation and Finance was actually present when the postal employee purportedly affixed a postmark to each envelope, checked each envelope, checked each envelope for proper addressing, checked each envelope to the computer generated certified mail report, recorded each of them in post office records, witnessed the completed mailing of the certified letters, or the physical placing of any certified letter into the mail bins for processing within the post office" (Petitioner's Exception, Attachment "A," pp. 1-2).

We disagree with the premise of petitioner's argument. The Administrative Law Judge correctly stated that when the timeliness of a petition or request for a conciliation conference is at issue:

"the Division has the burden of demonstrating proper mailing (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). To show that a notice was properly mailed to the taxpayer by certified or registered mail, the Division must provide evidence as to the general mailing procedure of such notice and that this procedure was followed when mailing the notice in question (Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Matter of Katz, supra; Matter of Novar TV & Air

Conditioner Sales & Serv., supra)" (Determination, conclusion of law "A").

There is no statutory requirement that the Division witness the U.S. Postal Service performing its duties nor do either State or Federal case law impose such a requirement. To the contrary, in Epstein v. Commissioner (T.C. Memo 1989-498, 58 TCM 128, 134), the Tax Court stated:

"[e]ven if Postal Service regulations are not complied with, an otherwise valid notice of deficiency is not rendered ineffective. This Court only requires respondent to introduce evidence showing that the notice of deficiency was properly delivered to the Postal Service for mailing. We do not require respondent to establish that the Postal Service personnel performed their official duties."

Unlike the factual situation in Matter of 25 Tudor Associates (supra) relied on by petitioner, the Division has maintained the integrity of the certified mail record by entering into evidence the entire multi-page certified mail record which was presented to the U.S. Postal Service.

As for petitioner's remaining arguments, while a return receipt for certified mail provides evidence of delivery (see, Matter of Kropf, Tax Appeals Tribunal, March 21, 1991), the Division is not required to request certified mail receipts for each piece of certified mail it sends. Nor is the failure to use U.S. Postal Service Form 3877 in conjunction with certified mailing a flaw in the Division's procedure. We have found that a properly completed certified mail record is substantively the same as the U.S. Postal Service Form 3877 (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994, citing Munz v. Commissioner, T.C. Memo 1991-171, 61 TCM 2412, affd 972 F2d 1341 [three-part computer generated form treated in same fashion as Form 3877]). The illegibility of the postal employee's signature on the certified mail record is not a fatal flaw in that record (Matter of Montesanto, supra). Petitioner has presented no authority for its argument that there must be a U.S. Postal Service postmark affixed next to every entry on the certified mail record to indicate that every piece of mail was received by the post office.

Therefore, we agree with the conclusion of the Administrative Law Judge:

"[i]n this case, the Division has demonstrated that it properly sent the Notice of Determination by certified mail on July 1, 1993. The affidavits of Geraldine Mahon and Daniel LaFar constituted sufficient evidence as to the general mailing procedures and the certified mail record is evidence that these procedures were followed. Specifically, the names and addresses of petitioner and Jack M. Portney were listed next to the notice number contained on the Notice of Determination and next to a certified number arranged in numerically consecutive order on the certified mail records. Also, the U.S. Postal Service postmark was stamped on the individual pages on which the names and addresses appeared, as well as on the last page of the certified mail records, along with initials and the total number of pieces of mail received by the post office [citations omitted]. Therefore, the Division has provided presumptive evidence of receipt of such mailing by the person to whom it was addressed" (Determination, conclusion of law "A").

Petitioner also argues that it protested the Notice of Proposed Audit Adjustment (on April 7, 1993) and, according to the Division's procedures, petitioner was entitled to a conference with Division personnel. The Administrative Law Judge considered this same argument and found that "a protest filed prior to the issuance of the Notice of Determination cannot function as the equivalent of a protest of the notice itself for the purpose of the 90-day limitation period [citations omitted]. Thus, petitioner has not demonstrated that there is a triable issue of fact warranting denial of this motion" (Determination, conclusion of law "C"). We agree.

We find that the Administrative Law Judge correctly applied the law to the facts in this case in determining that the Division presented adequate proof that it mailed the Notice of Determination at issue to petitioner and to petitioner's representative on July 1, 1993. As a result, petitioner's request for a conciliation conference filed on January 30, 1995 was late filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Best Ray Pizza, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Best Ray Pizza, Inc. is dismissed.

DATED: Troy, New York
May 16, 1996

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Donald C. DeWitt

Donald C. DeWitt
Commissioner