

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

GOLDEN EAGLE TRADING CORP. :

DECISION
DTA NO. 816841

for Revision of a Determination or for Refund of Tax on :
Alcoholic Beverages under Article 18 of the Tax Law for :
the Period April 1, 1995 through May 31, 1997. :

Petitioner Golden Eagle Trading Corp., Attn: Thomas Shiu, Vice-President, 17 Pike Street, P.O. Box 303, New York, New York 10002, filed an exception to the determination of the Administrative Law Judge issued on June 24, 1999. Petitioner appeared by its vice-president, Thomas Shiu. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely protest challenging two notices of determination issued by the Division of Taxation.

FINDINGS OF FACT

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

We make the following additional finding of fact:

On March 23, 1999, the Division of Taxation ("Division"), by its representative Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to timely file either a request for a conciliation conference or a petition contesting the statutory notices at issue. Petitioner, appearing by its vice-president, Thomas Shiu, responded in opposition to the Division's motion by submitting letters dated April 14, 1999 and April 29, 1999.

At issue on this motion were two notices of determination, dated May 8, 1998 and addressed to petitioner, Golden Eagle Trading Corp., at 17 Pike Street, P.O. Box 303, New York, New York 10002. These notices bear assessment numbers L 014953598 and L 014953694, and certified mail control numbers P 911 206 840 and P 911 206 841, respectively. These notices assess tax on alcoholic beverages in the aggregate amount of \$19,286.46 for the period April 1, 1995 through May 31, 1997, plus penalty and interest.

Petitioner filed a Request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") for each of the notices of determination. Each request form was dated as signed on August 8, 1998. The envelope in which the request forms were mailed, by first class mail, bears an August 17, 1998 United States Postal Service ("USPS") postmark, and also bears an August 19, 1998 BCMS indate stamp. An accompanying letter

setting forth the substantive basis for petitioner's challenge against the notices is dated as signed by petitioner's president on August 8, 1998 and bears an August 19, 1998 BCMS indate stamp.

By a Conciliation Order (CMS No. 170076) dated September 18, 1998, petitioner's requests for a conciliation conference were denied on the basis that such requests had been filed in excess of 90 days after the May 8, 1998 date set forth on the face of each of the notices.

Notices of determination, such as those at issue herein, are computer generated by the Division's computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a computer printout entitled "Assessments Receivable, Certified Record For Non-Presort Manual Mail" (hereinafter "Certified Mail Record" or "CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also lists a separate certified control number assigned to each notice of determination.

The certified control number is recorded on the CMR under the heading "Certified No.," The CMR lists an initial date (the date of its computer printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, the CMR consists of one page, and it bears an initial printed date of 4/28/98 in its upper left hand corner which has been manually crossed out and replaced by the handwritten date 5/8/98 located immediately above the printed date.

All notices targeted for manual review are printed in one run. Each unit (within the Division) which has selected notices for manual review receives a separate and complete CMR for its notices. In this case, the notices selected for manual review by Audit Div-C.O.-FACCTS-Commodities were printed on page one of the CMR. Page one consists of four entries, including two entries for petitioner.¹ The notation on the CMR which states “Mail Room: Return Listing to CARTS Control Unit” indicates that the notices listed on such CMR were to be sent to Audit Div-C.O.-FACCTS-Commodities, the unit listed on the face of the CMR, for manual review before being returned to the CARTS Control Unit and mailed.

The unit performing the manual review of the notices receives the notices from the CARTS Control Unit, together with the accompanying CMR. The notices listed on the CMR are reviewed for accuracy, and are thereafter inserted into individual windowed envelopes. The CMR is wrapped around the envelopes and the bundled notices, envelopes and CMR are returned to the CARTS Control Unit. The returned documents are then sent to the “Outgoing Certified Mail” area in the Division’s Mail Processing Center (“mailroom”) for mailing.

After a notice of determination is placed in the Division’s mailroom “Outgoing Certified Mail” basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped

¹The portions of the CMR which pertain to taxpayers other than petitioner have been redacted to preserve the confidentiality of those other taxpayers.

envelopes and the associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature or initials to the CMR. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the CMR. In the ordinary course of business, a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office within the Division. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The Division generally does not request, demand, or retain individual return receipts with regard to certified or registered mail.

The CMR in this case is a one-page computer-generated document entitled "Assessments Receivable-Certified Record For Non-Presort Manual Mail." This CMR, attested to as a true and accurate copy of the Division's CMR for May 8, 1998, lists consecutive certified control numbers P 911 206 839 through P 911 206 842, inclusive. Each such certified control number is assigned to an item of mail listed on the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR herein lists four items of mail next to the category "Total Pieces and Amounts Listed," corresponding to the four certified control numbers listed on the CMR. Information regarding the notices of determination pertaining to petitioner is set forth as the second and third listed notices on the CMR, with notice number L 014953598 corresponding to

certified control number P 911 206 840 and notice number L 014953694 corresponding to certified control number P 911 206 841. Petitioner's name and address are listed next to each notice. As noted previously, the certified control numbers on the CMR run consecutively, and there are no marks, indications or other evidence that any of the listed items have been deleted or "pulled" from the listing.

In addition to the foregoing, the CMR bears the postmark of the Colonie Center Branch of the USPS, dated May 8, 1998, and also includes the handwritten number "4" followed by the initials "SD" immediately below the listing "Total Pieces Received At Post Office."

The facts set forth above were established through two affidavits dated January 22, 1999 made by Geraldine Mahon and James Baisley, respectively, through an affidavit dated March 18, 1999 made by Heinz Ruppert, and upon review of the CMR and the notices of determination at issue herein. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit, whose duties include supervising the processing of notices of determination such as the ones at issue herein. Mr. Baisley is employed as a Principal Mail and Supply Clerk in the Division's mailroom, whose duties include supervising mailroom staff in delivering outgoing mail to branch offices of the USPS. Mr. Ruppert is employed as a Tax Technician I in Miscellaneous Tax, the Division unit referred to as "Audit Div-C.O.-FACCTS-Commodities," whose duties include receiving and manually reviewing notices of determination and accompanying CMRs.

Petitioner challenged the denial of its requests for a conciliation conference by filing a petition, postmarked November 30, 1998, challenging the merits of the assessments underlying the notices of determination. A preceding letter from petitioner, postmarked September 25, 1998

and requesting petition forms and the rules of practice and procedure, stated in part, that the late filing (of the conference requests) was due to illness of petitioner's president and because the "letter" (again, presumably, the conference requests) was misplaced. Petitioner submitted two letters, dated April 14, 1999 and April 29, 1999, respectively, in response to the Division's motion for summary determination. These letters again request a conference and each includes the same one-page invoice reflecting goods sold to petitioner by Nan Yang Trading Company Incorporated.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge observed that a Notice of Determination issued pursuant to Tax Law § 430 finally and irrevocably fixes the tax asserted due therein unless the person who has been assessed files a petition with the Division of Tax Appeals within 90 days of the mailing of the notice. Alternatively, a taxpayer may request a conciliation conference with BCMS within that same 90-day time period. The timely filing of a petition or a request for a conciliation conference is a jurisdictional prerequisite for a consideration of the merits of a case by either the Division of Tax Appeals or BCMS.

The Administrative Law Judge noted that where the Division claims a taxpayer's protest against a Notice of Determination was not timely filed, the Division bears the burden of proving both the fact and date of mailing. Relying on applicable caselaw, the Administrative Law Judge held that in order to establish proper mailing, the Division was required to prove its standard procedure for the issuance of notices by one with knowledge of the relevant procedures and to prove that the standard procedure was followed in this particular instance.

The Administrative Law Judge concluded that through the affidavits of its employees, the Division had met its burden of proof and established that the particular notices at issue were mailed to petitioner on May 8, 1998. The Administrative Law Judge concluded that in order for a protest of these notices to have been timely, it must have been filed either with the Division of Tax Appeals or BCMS by August 6, 1998. In this case, the Administrative Law Judge found that the requests for a BCMS conference were dated August 8, 1998, postmarked August 18, 1998 and indated stamped as received by BCMS on August 19, 1998. Since all of these dates fell after August 6, 1998, the Administrative Law Judge concluded that no timely request for a conference or petition for a hearing had been filed by petitioner.

The Administrative Law Judge observed that petitioner presented no arguments that it had filed a timely protest for the notices at issue. As a result, the Administrative Law Judge concluded that no material issues of fact existed concerning the date of mailing of the notices and the date of filing of the request for a BCMS conference. Thus, the tax asserted due by the notices became fixed and final as a matter of law on August 6, 1998 and the Division was entitled to summary determination with respect to the notices.

ARGUMENTS ON EXCEPTION

On exception, petitioner conceded that the procedures of the Division were correct. Petitioner argues that its failure to timely request a conference or to petition for a hearing was due to the illness of the wife of petitioner's vice-president during the time that the forms for a tax appeal were received.

The Division argues that the determination of the Administrative Law Judge was correct.

OPINION

We affirm the determination of the Administrative Law Judge. Petitioner has raised the same issues and presented the same arguments herein as were considered by the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the Tax Law and relevant caselaw to the facts of this case. We see no reason to modify his determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Golden Eagle Trading Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Golden Eagle Trading Corp. is dismissed; and
4. The two notices of determination, dated May 8, 1998, are sustained.

DATED: Troy, New York
February 10, 2000

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner