STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RAFAEL R. COLLADO D/B/A COLLADO GROCERY	:	DECISION DTA NO. 818010
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1995 through May 31, 1998.	:	

Petitioner Rafael R. Collado d/b/a Collado Grocery, 464 Myrtle Avenue, Brooklyn, New York 11205, filed an exception to the determination of the Administrative Law Judge issued on March 8, 2001. Petitioner appeared by Leonard L. Fein, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUE

Whether petitioner's request for a conciliation conference was a request for a refund of sales and use tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "11" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On May 5, 2000, the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS") received from petitioner, Rafael R. Collado, a Request for Conciliation Conference ("Request"). This Request, referencing Notice/Assessment ID L-015610213-9, is filed in the name of Rafael R. Collado d/b/a Collado Grocery and is signed and hand dated May 1, 2000. The envelope in which the Request was mailed, via first class mail, bears the United States Postal Service ("USPS") postmark and cancellation stamp of the Brooklyn, New York post office. On this USPS postmark the month, May, and the year, 2000, are clear and legible. However, the specific day is not clearly legible. The Request, as well as the envelope, bear a BCMS receipt stamp dated May 5, 2000.

In response to the foregoing Request, BCMS issued a Conciliation Order. This Order, titled "Conciliation Order Dismissing Request," bears CMS No. 180815 and is dated June 9, 2000. The caption portion of the Order indicates that it pertains to Notice Number L-015610213, and the text of the Order states the following:

> The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on October 13, 1998, but the request was not mailed until May 3, 2000, or in excess of 90 days, the request is late filed.
>
> The request filed for a Conciliation Conference is denied.

Petitioner challenged the denial of his Request by filing a petition with the Division of Tax Appeals. This petition, signed and hand dated August 31, 2000 and stamped as received by the

Division of Tax Appeals on September 5, 2000, lists petitioner as Rafael R. Collado, 464 Myrtle Avenue, Brooklyn, New York 11230, and references Notice/Assessment number L-015610213. Petitioner claims, in his petition and in his Request, that he does not speak or read English, that he never received any notice of determination in a language he could understand, and that his Request was filed within 90 days after he understood the notice and related filing requirements vis-a-vis protesting the notice.

In response to the petition the Division filed an answer dated November 9, 2000. The Division's answer asserts, *inter alia*, that the Notice of Determination in question was issued on October 13, 1998 and that the Request was not received until May 5, 2000. Accordingly, the Division maintains that the Request was properly dismissed as untimely and that, since neither the Request nor any petition for a hearing was filed within 90 days after the date of issuance of the Notice, such Notice must be sustained. On December 7, 2000, the Division brought the subject motion for summary determination on the same basis set forth in its answer, to wit, that since neither a request for conciliation conference nor a petition for a hearing was filed in a timely manner, there is no jurisdiction to address the matter.

In support of its motion, the Division submitted the affidavits of Geraldine Mahon and James Baisley, employees of the Division, as well as a copy of the certified mail record ("CMR") containing a list of the notices of determination allegedly issued by the Division on October 13, 1998.

The affidavit of Geraldine Mahon, principal clerk of the Division's Case and Resource Tracking System ("CARTS"), sets forth the Division's general procedure for preparing and mailing notices of determination. This procedure culminates in the mailing of the notices by

USPS certified mail and confirmation of the mailing through the receipt and retention of a postmarked copy of the CMR.

The computer-generated notices of determination are accompanied by a CMR entitled "Assessments Receivable, Certified Record For Zip + 4 Minimum Discount Mail." The notices are predated with their anticipated date of mailing, while the CMR is dated in its upper left corner with the actual date of its printing, in this case October 1, 1998. The difference between the anticipated mailing date for the notices and the printing date of the CMR is to ensure that there is sufficient lead time for the notices to be manually reviewed and processed for postage and fees by the Division's mechanical section prior to mailing. In this case, consistent with the Division's procedure, the CMR printing date of October 1, 1998 has been lined through and the date "10/13/98" has been handwritten immediately above to indicate and confirm October 13, 1998 as the date of mailing.

A certified control number is assigned to each notice listed on the CMR, and such number is recorded on the CMR under the heading "Certified No." The CMR for October 13, 1998 is a 40-page fan-folded (connected) document. Each page of the CMR is numbered in sequence from 1 through 40, with such page numbers appearing on the upper right corner of each page of the CMR. The certified numbers on the CMR for October 13, 1998 run consecutively from P 911 006 742 through P 911 007 176. Each page of the CMR lists 11 items of certified mail, with the exception of page 40 which lists 6 items of certified mail, for a total of 435 items of certified mail listed on the CMR. The certified control number P 911 006 869, corresponding to the entry listing petitioner's name, Rafael R. Collado, address, 464 Myrtle Avenue, Brooklyn, New York

11205-2522, and Notice Number, L-015610213, is found on page 12 of the CMR.[1] Each page of the CMR, including specifically page 12, is date stamped October 13, 1998 by the Colonie Center branch of the USPS in Albany, New York. At the bottom of page 40, the number "435" has been circled as the "Total Number of Pieces Listed," beneath which appear the initials of the postal employee to verify the receipt of 435 pieces of certified mail by the USPS.

The affidavit of James Baisley, Chief Mail Processing Clerk in the Division's Mail Processing Center (" mailroom"), attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a piece of correspondence, including a statutory notice, is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the mailroom staff operates a machine which puts each notice in an envelope, weighs and seals each envelope and places postage and fee amounts thereon. A mailroom clerk then checks the first and last pieces of mail listed on the CMR against the information contained on the CMR, and also performs a random review of 30 or fewer pieces of certified mail by checking the information on the envelopes against that appearing on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. Mr. Baisley's knowledge that the postal employee circled the number "435" on page 40 of the CMR and initialed the same page to indicate the receipt of 435 pieces of certified mail is based on the fact that the Division's mailroom specifically requested that the postal employees either

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

circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. The CMR is the Division's record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division's mailroom, as followed in this case, the CMR is picked up at the post office by a member of Mr. Baisley's staff on the following day after its delivery and is then delivered to the originating office within the Division (here CARTS).

Included with the Division's exhibits was a copy of petitioner's Quarterly Sales and Use Tax Return ("Form ST-102") for the period March 1, 1998 through May 31, 1998, the last sales tax quarterly period included under the assessment at issue. This sales tax return lists petitioner's address as Rafael R. Collado, Collado Grocery, 464 Myrtle Avenue, Brooklyn, New York 12205-2502. The Division also submitted a copy of the Notice of Determination in question, dated October 13, 1998, listing the same address for petitioner, specifying assessment number L-015610213-9, and carrying on its upper center section the certified number P 911 006 869.

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> Petitioner's affirmation in opposition makes the same claim as was raised in the Request and in the petition, and also asserts that petitioner never received the notice of determination until he received a copy thereof from the Division's Collection Unit, as well as that petitioner's request for a conciliation conference was, in effect, an application for a refund.[2]

[2]We modified finding of fact "11" to more clearly reflect the record.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 1138(a)(1), the Division is authorized to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed or if such a return, when filed, is incorrect or insufficient. For tax years ending prior to January 1, 1997, such a determination finally and irrevocably fixes the tax due unless the person against whom it is assessed either files a petition with the Division of Tax Appeals or a request for a conciliation conference with BCMS seeking revision of the determination within 90 days of the mailing of the notice. The Administrative Law Judge observed that for tax years beginning January 1, 1997, Tax Law § 1138(a)(1) was amended to provide that the notice becomes an assessment of tax unless a petition or request for a BCMS conference is filed within 90 days. The Administrative Law Judge concluded that while a portion of the period covered by the underlying notice in this case falls after January 1, 1997, there was insufficient information in the record to determine the possible applicability of amended section 1138(a)(1) *vis-a-vis* payment of tax for such post January 1, 1997 period followed by the filing of a claim for refund.

The Administrative Law Judge, relying on applicable case law, recited that when a taxpayer fails to file either a timely conference request or a petition contesting a Notice of Determination, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case. The Administrative Law Judge found that in the present case, there was no claim that a petition was filed at any time within 90 days after issuance of the notice in this case nor any dispute that the request in this matter was filed with the Division when it was mailed in May 2000. The Administrative Law Judge found that the only

issue presented is whether the mailing of petitioner's Request in May 2000 was within 90 days after the issuance (mailing) of the Notice of Determination.

The Administrative Law Judge found that where the timeliness of a Request is at issue, the Division bears the burden of proving proper mailing of the statutory Notice of Determination. When a notice is properly mailed by the Division, a presumption arises that the notice was received by the person to whom it was addressed. The burden of demonstrating proper mailing rests with the Division. The Division must establish the standard procedure used by the Division for the issuance of notices, by someone with knowledge of the relevant procedures, and that the standard procedure was followed in this particular instance. The Administrative Law Judge determined that in this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of its employees and that the particular notice at issue was actually mailed to petitioner on October 13, 1998, the date appearing on the face of the notice. As the Request was not filed until May 1, 2000 at the earliest, the Administrative Law Judge concluded that it was clearly filed in excess of 90 days after issuance of the notice.

The Administrative Law Judge found that while it was petitioner's burden to provide evidence to overcome the presumption of receipt which arose upon the Division's demonstration of proper mailing, petitioner made only the bare assertion that he did not receive the Notice in due course. The Administrative Law Judge noted that a general denial of receipt of a properly mailed notice is insufficient, as a matter of law, to overcome the presumption of receipt. The Administrative Law Judge rejected petitioner's argument that he did not file a protest within 90 days because he does not speak or read English and, therefore, did not understand such time requirement. The Administrative Law Judge observed that the Tax Law does not require that a

statutory notice must be issued in any language other than English nor did petitioner specify which language he does speak and read. Upon all of the proof presented, the Administrative Law Judge concluded that no material and triable issue of fact was presented and, as there was no protest within 90 days as required, there is no jurisdiction to address the merits of the underlying notice of determination. Therefore, the Administrative Law Judge granted the Division summary determination in its favor, denied the petition and sustained the Notice of Determination dated October 13, 1998.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that his request for a conference with the Bureau of Conciliation and Mediation Services was not an untimely request for a revision of a determination of sales tax due. Rather, his request for a conference was actually a claim for refund. By virtue of denying the petitioner's request for a conference, the Division was actually denying petitioner's refund request, thus entitling him to a hearing on such denial.

The Division, in opposition, argues that petitioner failed to file either a request for a BCMS conference or a petition for a hearing within 90 days of the date of the issuance of the notice of determination at issue herein. As a result, the Administrative Law Judge properly granted summary determination to the Division because BCMS and the Division of Tax Appeals have no jurisdiction over the matter and are statutorily precluded from hearing the merits of the case. Further, the Division argues that petitioner's claim that his BCMS request was actually a claim for refund is inaccurate. Petitioner never filed a written claim for a refund with the Division nor has the Division ever denied a request for refund by petitioner.

OPINION

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to a person liable for the collection or payment of the tax if a return required under Article 28 was not filed or if a return, when filed, was incorrect or insufficient. The timely filing of a request for a BCMS conference or a petition for a hearing before the Division of Tax Appeals concerning such a notice of determination is a jurisdictional prerequisite for review of that notice (***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

A notice of determination is mailed when it is delivered into the custody of the postal service for mailing (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (***see***, ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division must produce evidence of its standard procedures for the issuance of notices of determination by one with knowledge of such procedures, corroborated by direct testimony or documentary evidence that this procedure was followed in the particular case at hand (***see, Matter of Novar TV & Air Conditioner Sales & Serv., supra***).

The Administrative Law Judge correctly concluded that the Division met its burden to demonstrate its procedure for mailing notices of determination and that, on October 13, 1998, it mailed the notice at issue to petitioner. Petitioner does not dispute this conclusion on exception. Rather, petitioner claims that his BCMS request was, in effect, a claim for credit or refund of sales tax and it was, therefore, timely filed.

First, we note that in order to claim a refund of sales or use tax erroneously, illegally or unconstitutionally collected or paid, a taxpayer must first file an application with the Division as provided by Tax Law § 1139. The content of such an application is set forth in 20 NYCRR 534.2(a)(2). Petitioner does not allege that any such application was filed. Rather, petitioner argues that his request for a conference filed with BCMS constituted a claim for refund. Petitioner is mistaken in this belief. While it is the function of BCMS to provide a conciliation conference to a taxpayer concerning "a denial of a refund or credit application" by the Division, (Tax Law § 170[3-a][a]), it is not the function of BCMS to review an application for refund in the first instance.

Further, we reject petitioner's assertion that the denial of petitioner's request for a conference was the equivalent of a determination by the Division granting or denying such refund application in whole or in part (as the Division is authorized to do by Tax Law former § 1139[b]). It is only such a determination by the Division that is subject to review by BCMS or the Division of Tax Appeals (Tax Law § 1139[b]). Since there is no such determination by the Division to be reviewed, there is no claim properly before us in relation to the denial of an application for refund by petitioner.

As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rafael R. Collado d/b/a Collado Grocery is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Rafael R. Collado d/b/a Collado Grocery is dismissed for lack of jurisdiction; and

4. The Notice of Determination dated October 13, 1998 is sustained.

DATED: Troy, New York
October 25, 2001

/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