

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>MOHAMMED BASSAM-AHMED ALAWI</b>	:	DECISION
	:	DTA NO. 819280
for Revision of a Determination or for Refund of Tax on	:	
Cigarettes and Tobacco Products under Article 20 of the	:	
Tax Law for the Period November 1, 1996.	:	

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Petitioner Mohammed Bassam-Ahmed Alawi, 35 E. Bihrwood Drive, West Seneca, New York 14224, filed an exception to the determination of the Administrative Law Judge issued on July 31, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal 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 summary determination was properly granted to the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of a notice of determination to petitioner.

***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 a Notice of Determination, dated July 14, 1997, to Mohammed Bassam-Ahmed Alawi (“petitioner”) which was addressed as follows: “MOHAMMED BASSAM-AHMED ALAWI, 8330 LOWER EAST HILL RD., COLDEN, NY 14033-9761.” The notice bore assessment identification number L-013877728-3 and assessed a penalty in the amount of \$155,500.00 for the period November 1, 1996.

On December 27, 2002, the Division of Tax Appeals received a petition for an administrative hearing which was dated December 20, 2002. The envelope containing the petition bore a United States Postal Service (“USPS”) postmark of December 24, 2002. Attached to the petition were various letters between petitioner’s former representatives and the Division which were written between February and May 2001 as well as a form DTF-991 (Correspondence Acknowledgment Notice) dated October 7, 2002 and a form DTF-982.52 (Release of Income Execution) dated October 23, 2002. On March 6, 2003, the Division served an Answer to the petition.

In support of its motion for summary determination, the Division submitted: an affidavit of its representative, Michelle M. Helm, Esq.; the Division’s answer to the petition; affidavits of Geraldine Mahon and Daniel LaFar, employees of the Division; a copy of the notice of determination; a copy of the Division’s certified mail record (“CMR”) for July 14, 1997; and a copy of petitioner’s petition (with attachments) as well as a copy of the envelope in which the petition was sent to the Division of Tax Appeals.

Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

Ms. Mahon receives a CMR and the corresponding statutory notices generated by CARTS each of which are predated with the anticipated date of mailing. Each notice is assigned a certified control number which is recorded on the CMR under the heading "CERTIFIED NO."

The CMR for the block of statutory notices issued on July 14, 1997, including the notice of determination issued to petitioner, consisted of 24 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the USPS. The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed via certified mail on July 14, 1997, including the notice issued to petitioner, bears certified control numbers which run consecutively. Each page contains eleven entries, with the exception of the last page (page 24) which contains two entries.

In the upper left hand corner of page 1 of the CMR, the date "07/03/97" was manually changed to "7/14/97." The original date of 07/03/97 was the date that the entire CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from 07/03/97 to 7/14/97 was made by

personnel in the Division's Mail Processing Center. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative affixed a postmark to each page of the CMR, circled "255" on page 24 of the CMR and initialed or signed page 24 of the CMR. Pursuant to the CMR, the total number of statutory notices mailed on July 14, 1997 was 255.

Page 20 of the CMR indicates that a Notice of Determination with notice number L 013877728 was sent to "MOHAMMED BASSAM-AHMED ALAWI, 8330 LOWER EAST HILL RD., COLDEN, NY 14033-9761" by certified mail using control number "P 911 204 915." A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on July 14, 1997.

In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on July 14, 1997.

Daniel LaFar is a Principal Mail and Supply Clerk in the Division's Mail Processing Center. He is fully familiar with the operations and procedures of the Mail Processing Center and supervises Mail Processing Center staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on the envelope. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information listed on the CMR.

A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and the CMR itself. The USPS has further 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 CMR. As a matter of standard procedure and to insure accountability, the CMR may be left overnight at the post office to enable the postal employee to process the certified mail and to make the appropriate notations on the CMR. The CMR is then picked up at the post office on the following day by a member of Mr. Baisley's staff whereupon it is then delivered to the CARTS unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

A USPS employee affixed a postmark to each page of the CMR, initialed or signed page 24 of the CMR and circled the total number of pieces of certified mail received. The last page of the CMR, page 24, indicates that 255 pieces were delivered to the USPS.

Based upon his review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit and his personal knowledge of the procedures of the Mail Processing Center, Mr.

LaFar attested to the fact that on July 14, 1997, an employee of the Mail Processing Center delivered a piece of certified mail addressed to MOHAMMED BASSAM-AHMED ALAWI, 8330 LOWER EAST HILL RD., COLDEN, NY 14033-9761, to the USPS in Albany, New York in a sealed postpaid windowed envelope for delivery by certified mail. Mr. LaFar further attested to the fact that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on July 14, 1997 to be kept as part of the records of the CARTS Control Unit.

The procedures described in Mr. LaFar's affidavit are the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and such procedures were followed on July 14, 1997.

In response to the Division's motion for summary determination, petitioner submitted a letter wherein he denies ever having received the notice which allegedly was sent to him on July 14, 1997. He admits, however, that he lived at 8330 Lower East Hill Road in Colden, New York where he rented a room. He states that he never knew that he had an option to dispute the tax assessment at issue until his wife explained his options to him.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that a motion for summary determination may be granted if no material and triable issue of fact is presented and the Administrative Law Judge can, as a matter of law, issue a determination in favor of any party. Further, the Administrative Law Judge observed that pursuant to Tax Law § 478, the Division of Taxation is authorized to issue a Notice of Determination to a taxpayer which "finally and irrevocably" fixes the tax due unless the person against whom it is assessed files a petition with

the Division of Tax Appeals or a request for a conciliation conference with the Bureau of Conciliation and Mediation Services seeking revision of the determination within 90 days of the mailing of the notice. The Administrative Law Judge pointed out that the filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals.

The Administrative Law Judge also opined that pursuant to Tax Law § 480-a(2)(d), the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax shall apply to Article 20 of the Tax Law. Referencing Article 28, the Administrative Law Judge stated that Tax Law § 1147(a)(1) provided that a Notice of Determination shall be mailed by certified or registered mail to the person for whom it is intended “at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable” and the mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.”

The Administrative Law Judge pointed out that when the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice. The Division must show the standard procedure used by it for the issuance of the statutory notice by one with knowledge of the relevant procedures, and then show that the standard procedure was followed in the particular instance in question.

Relying on the affidavits of two Division employees, the Administrative Law Judge concluded that the Division had shown its standard procedures for the mailing, by certified mail,

of notices of determination. Further, the Administrative Law Judge found that the Division had proven that its procedures were followed with respect to the Notice of Determination issued by the Division on July 14, 1997 to petitioner. As a result, the Administrative Law Judge concluded that the Division had proven that it had mailed the subject Notice of Determination to petitioner on July 14, 1997.

As petitioner's petition to the Division of Tax Appeals was mailed on December 24, 2002, a date which was approximately five and one-half years after the issuance of the Notice of Determination, the Administrative Law Judge concluded that the petition was untimely filed and granted the Division's motion for summary determination in its favor.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that he should be allowed to have a hearing in order to articulate material and triable issues of fact concerning the Notice of Determination, the presumption of receipt of mail sent and the fact that underlying criminal charges were dismissed. Petitioner further argues that summary determination deprives petitioner of his constitutional and non-constitutional defenses and that the 90-day period for seeking a revision of the determination may be subject to equitable tolling.

In opposition, the Division argues that the filing of a timely petition for a hearing or a timely request for a conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals to entertain the merits of the case. The Notice of Determination was issued more than 90 days prior to the date on which petitioner filed a petition for a hearing and, as petitioner failed to submit any evidence to rebut the presumption of receipt of the Notice, the Division



argues that the Administrative Law Judge properly held that there were no material facts in dispute.

### ***OPINION***

To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (*see*, 20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is arguable (*see, Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *see also, Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879). Summary determination is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue (*see, State Bank of Albany v. McAuliffe*, 97 AD2d 607, 467 NYS2d 944, *appeal dismissed* 61 NY2d 758).

In this case, in order to obtain summary determination in its favor, it was necessary for the Division to show that it provided petitioner with notice of its determination of penalty due in the manner prescribed by law and that petitioner either failed to request a conciliation conference or to file a petition for a hearing within the time provided therefor. We find that the Division did not meet its burden in this regard.

The Administrative Law Judge concluded in his determination that pursuant to Tax Law § 480-a(2)(d), the provisions of Article 28 apply to Article 20 of the Tax Law in the same manner as if the provisions of Article 28 had been fully incorporated into Article 20 (*see*, Determination, conclusion of law “C”). The Administrative Law Judge was incorrect. In fact, Tax Law § 480-a(2)(d) provides that Article 28 applies to Article 20 only insofar as it relates to applications for registration of retail dealers of cigarettes and tobacco products and vending machines, the fees for filing such applications and the penalty imposed by § 480-a.

As the Notice of Determination at issue does not concern Tax Law § 480-a, the provisions of Article 28 are not made applicable to it by specific statutory provision<sup>1</sup>.

Tax Law § 481(1)(b)(iii) provides, in applicable part, that “[a]ny penalty provided for in this paragraph shall be determined as provided in section four hundred seventy-eight of this chapter, and may be reviewed only pursuant to such section.”

Tax Law § 478 provides, in applicable part, that:

If any person files any return under this article, but such return is incorrect or insufficient, the commissioner of taxation and finance shall determine the amount of tax due at any time within three years after the return was filed (whether or not such return was filed on or after the due date), *and give written notice of such determination to such person*, except that if such person fails to file a return or files a willfully false or fraudulent return with intent to evade the tax, such determination may be made at any time. . . . *Any determination made pursuant to this section shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing.* After such

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<sup>1</sup> The Notice of Determination forming the basis of this proceeding indicates that it was issued by the Division pursuant to Article 20 of the Tax Law. The Notice contained no information on its face of the basis for the penalty it sought to impose. However, the Division, in its Answer to the petition, stated that the notice asserted a penalty of \$155,500.00 pursuant to Tax Law § 481 due to petitioner’s possession of 3,205 cartons of unstamped cigarettes in November 1996.

hearing, the division of tax appeals shall give notice of the determination of the administrative law judge to the person liable for the tax and to the commissioner of taxation and finance . . . (emphasis added).

Section 478 provides no methodology for the Division to “give written notice” of its determination to a taxpayer. However, the Division has adopted a regulation concerning notices of determination issued pursuant to Article 20 which states that:

A notice of determination is given by mailing it to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the application for a license as a cigarette agent or as a wholesale dealer, at the address reflected in the last return filed by such person or in the event that no application or return has been filed, then at any address of such person as may be obtainable (20 NYCRR 79.1[b]).

Compliance with this regulation requires the Division, at the very least, to disclose how it determined that the address to which the notice was sent was the address of petitioner. No such information was provided by the Division.

Petitioner, in his reply to the Division’s motion for summary determination, denied receipt of the Notice of Determination. While he admitted that he lived in a rented room at the address used by the Division, no time frame for his presence is specified. In short, the Division has failed to show that it gave notice of its determination of penalty to petitioner so as to start the running of the time within which he might file a petition for a hearing. As a result, we reverse the determination of the Administrative Law Judge, deny the Division’s motion for summary determination and remand this matter to the Administrative Law Judge for a hearing on the issue of the timeliness of petitioner’s request for a hearing before the Division of Tax Appeals.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of Mohammed Bassam-Ahmed Alawi is granted;

2. The determination of the Administrative Law Judge granting the Division of Taxation's motion for summary determination is reversed; and

3. The matter is remanded for a hearing consistent with our decision herein.

DATED: Troy, New York  
April 15, 2004

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner