

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
S. J. & Y. ENTERPRISE, INC.	:	DECISION DTA NO. 820032
for Revision of a Determination or for Refund of	:	
Alcoholic Beverage Tax under Article 18 of the	:	
Tax Law for the Period Ended December 31, 2001.	:	

Petitioner S. J. & Y. Enterprise, Inc., 2123 Nostrand Avenue, Brooklyn, New York 11230, filed an exception to the determination of the Administrative Law Judge issued on January 27, 2005. Petitioner appeared by Leonard Fein, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter stating that it was not filing a brief. 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 the Administrative Law Judge properly granted the motion of the Division of Taxation for summary determination on the grounds that petitioner failed to file a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

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, S. J. & Y Enterprise, Inc., a Notice of Determination, dated May 12, 2003, addressed to petitioner and Stephen Falcone¹ at 2123 Nostrand Avenue, Brooklyn, New York 11210-3001. The notice bore assessment identification number L-021995572-9 and asserted tax due of \$926.52 plus interest of \$76.72.

On March 1, 2004, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”), protesting the Notice of Determination, dated May 12, 2003, stating that all its taxes were timely paid and declaring that it had protested the “notice of 2/3/03,” a reference to a Statement of Proposed Audit Changes issued to petitioner on February 3, 2003 and indicating additional Alcoholic Beverage Tax due for the period ended December 31, 2001.

On March 19, 2004, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

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 May 12, 2003, but the request was not mailed until March 1, 2004, or in excess of 90 days, the request is late filed.

Notices of determination, such as the one at issue herein, were computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record (“CMR”). The CMR listed those taxpayers to whom notices of determination were being mailed

¹Stephen Falcone is apparently the President of petitioner, having executed a power of attorney on behalf of petitioner.

and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service (“USPS”) through return of the CMR to the CARTS Control Unit.

Each computer-generated notice of determination was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading “Certified No.” The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was 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 was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR stated an initial date of April 30, 2003 which was manually changed to May 12, 2003.

After a notice of determination was placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer weighed and sealed each envelope and affixed postage and fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the USPS and affixed a dated postmark or his signature or initials, or both, to the CMR.

In the ordinary course of business, a Mail Processing Center employee picked up the CMR from the USPS on the following day and returned it to the CARTS Control Unit.

In the instant case, the CMR was an 18-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR listed 196 control numbers. Each such certified control number was assigned to an item of mail listed on the 18 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

Information regarding the Notice of Determination issued to petitioner was contained on page 3 of the CMR. Corresponding to certified control number 7104 1002 9739 0174 2388 was notice number L-021995572, along with petitioner’s name and address, which was identical to that listed on the subject Notice of Determination.

Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated May 12, 2003, and the initials of the postal employee, verifying receipt of the items.

The last page of the CMR, page 18, contained a preprinted entry of “196” corresponding to the heading “Total Pieces and Amounts Listed.” Below this preprinted entry was a handwritten “196,” manually circled, and beneath it were the aforementioned initials of a Postal Service employee and to the right, a postmark of the Colonie Center Branch of the USPS bearing the date “May 12, 2003.” These same initials appeared on each page of the CMR.

The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the “196” indicated that all 196 pieces listed on the CMR were received at the post office.

In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

The facts set forth above were established through the affidavits of Geraldine Mahon, sworn on December 8, 2004, and Bruce Peltier, sworn on December 9, 2004. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of determination. Mr. Peltier was employed as a Mail and Supply Supervisor in the Division’s Registry Unit. Mr. Peltier’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

The address on the subject Notice of Determination, 2123 Nostrand Avenue, Brooklyn, NY 11210-3001, was the same as the address provided on petitioner’s New York State S Corporation Franchise Tax Return for the year 2002, filed on March 15, 2003, the last return filed before the notices herein were issued. In addition, the same address was used by the Division on the Statement of Proposed Audit Changes, dated February 3, 2003, which petitioner acknowledged receiving.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge observed that a motion for summary determination shall be granted if the Administrative Law Judge finds that no material and triable issue of fact is presented and, as a matter of law, a determination can be issued in favor of any

party. The Administrative Law Judge noted that in response to the Division's motion, petitioner submitted an affidavit of his accountant which denied that petitioner never received the notice in issue. However, the Administrative Law Judge stated that the affidavit presented no evidence to contest the facts of the Division's mailing of the Notice. Consequently, the Administrative Law Judge found that those facts were deemed admitted. The Administrative Law Judge concluded, based on all of the proof presented, that there was no material and triable issue of fact presented and that the Division was entitled to summary determination in its favor.

The Administrative Law Judge pointed out the procedure for contesting a Notice of Determination issued to a taxpayer pursuant to Article 18 of the Tax Law. The Administrative Law Judge noted that the filing of a petition or a request for a conciliation conference within 90 days of the mailing of the notice is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case. Relying on applicable case law, the Administrative Law Judge stated that:

[W]here, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice, and the Division bears the burden of proving both the fact and date of mailing . . . When a notice is found to have been properly mailed by the Division, a presumption arises that the notice was received by the person to whom it was addressed (Tax Law § 434-a[2].) However, the "presumption of receipt" does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of demonstrating proper mailing rests with the Division [citation omitted] (Determination, conclusion of law "E").

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 then prove that the standard procedure was followed in this

particular instance. The Administrative Law Judge concluded that the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Peltier, and also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Determination in issue was mailed to petitioner on May 12, 2003.

As petitioner's request for conciliation conference was filed on March 1, 2004, almost ten months after the date of mailing of the Notice of Determination, the Administrative Law Judge held that the request was untimely. The Administrative Law Judge found that although petitioner had the right to rebut the presumption of receipt of the notice, petitioner did not offer any proof to do so. The Administrative Law Judge held that unsubstantiated allegations or assertions are insufficient to raise an issue of fact and the statement of petitioner's representative did not rebut the presumption of delivery established through proof of a standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing.

As a result, the Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition.

ARGUMENTS ON EXCEPTION

In support of its exception, petitioner argues that the Division provided self-serving evidence of mailing of the Notice of Determination at issue, which was not subject to cross examination and not corroborated by a signed receipt. Petitioner maintains that although it did not receive the Notice, the Notice was protested in a timely fashion as soon as its existence was discovered. Further, petitioner asserts that it did not owe alcoholic beverage tax in any event as it is not required to file returns and it pays this tax directly to liquor distributors on its liquor purchases.

OPINION

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of S. J. & Y. Enterprise, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of S. J. & Y. Enterprise, Inc. is dismissed.

DATED: Troy, New York
May 19, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner