STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROTONDI INDUSTRIES CORP.	:	DECISION DTA NO. 820414
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 June 1, 2001 through November 30, 2003.	:	

Petitioner Rotondi Industries Corp., 187 East Merrick Road, Valley Stream, New York 11580-5900, filed an exception to the determination of the Administrative Law Judge issued on October 13, 2005. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). 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. 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 Division is entitled to summary determination dismissing the petition herein for lack of subject matter jurisdiction.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 14, 2004 against petitioner, Rotondi Industries Corp. (Assessment ID# L-023822279), asserting a total amount due of $301,940.23 for the period June 1, 2001 through November 30, 2003, consisting of tax due of $193,938.01 plus interest of $41,437.23 and penalty of $66,564.99. The Division, with its motion papers, provided proof of mailing on May 14, 2004 of this Notice of Determination consisting of (i) an affidavit dated August 2, 2005 of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center, and (ii) an affidavit dated July 26, 2005 of Geraldine Mahon, the principal clerk of the Division's Case and Resource Tracking System ("CARTS").

The affidavit of Geraldine Mahon sets forth the Division's general practice and procedure for processing statutory notices. According to Ms. Mahon, she receives from CARTS (i) a "certified mail record" consisting of a computer printout entitled "Certified Record for Presort Mail, Assessments Receivable" and (ii) corresponding notices. The notices are predated with the anticipated date of mailing. Each notice is assigned a "certified control number" which is recorded on a separate one-page "Mailing Cover Sheet" which also bears a bar code, the taxpayer's mailing address and a Departmental return address on the front and taxpayer assistance information on the back. The "certified control number" is also listed on the certified mail record under the first heading entitled "Certified No." The assessment numbers are listed

under the second heading entitled "Reference No." The names and addresses of the taxpayers are listed under the third heading, entitled "Name of Addressee, Street and PO Address." Ms. Mahon's affidavit further states that she examined the certified mail record issued by the Department of Taxation and Finance on May 14, 2004 which establishes that a Notice of Determination with "Notice Number L-023822279" was sent to "Rotondi Industries Corp., 187 E Merrick Rd., Valley Stream, NY 11580-5900" by certified mail using control number "7104 1002 9730 0067 5013." The United States Postal Service ("USPS") postmark on each page of the certified mail record, including page five of the certified mail record on which the Notice of Determination at issue appears, confirms that such notice was sent on May 14, 2004. It is also observed that this control number "7104 1002 9730 0067 5013" appears on the mailing cover sheet for Notice Number L-023822279 issued against petitioner.

The affidavit of Bruce Peltier, the mail and supply supervisor in the Division's mail processing center, describes the operations and procedures followed by the mail processing center. Mr. Peltier states that the notices are received by the mail processing center in an area designated for "Outgoing Certified Mail." Each notice is preceded by a Mailing Cover Sheet. A member of his staff retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope so that the address and certified number from the Mailing Cover Sheet shows through the window. The staff member then weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to one of the various branch offices of the USPS located in the Albany, New York area. A postal employee affixes a

postmark and also may place his or her signature on the certified mail record indicating receipt by the post office. 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 mail record. A review of the certified mail record listing the pieces of certified mail delivered to the USPS by the mail processing center staff on May 14, 2004 confirms that a USPS employee initialed pages 1 through 7 of the certified mail record, affixed a postmark to each page of the certified mail record, and wrote 66 as the total number of pieces of certified mail received.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> An examination of the envelope in which petitioner mailed its request for conciliation conference shows that it was mailed at Valley Stream, New York 11580 on October 18, 2004 as indicated by the postal markings on the envelope. Ninety days from the date of mailing of the notice of determination at issue is August 12, 2004. The request for conciliation conference mailed on October 18, 2004 was therefore mailed 67 days late.[1]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed that a notice of determination of additional sales tax due becomes an assessment of the liability determined after 90 days from the mailing of the notice, except where the taxpayer has within such 90-day period applied to the Division of Tax Appeals for a hearing (***see,*** Tax Law § 1138[a][1]), or in lieu thereof, files a request for a conciliation conference, within such 90-day period, in the Bureau of Conciliation and Mediation Services ("BCMS") (***see***, Tax Law § 170[3-a][b]). A request for a conciliation conference

[1]We modified finding of fact "4" to more accurately reflect the record.

suspends the running of the period of limitations for the filing of a petition with the Division of Tax Appeals. Consequently, the Administrative Law Judge observed, a notice of determination of additional sales tax due does not become an assessment of the liability determined if the taxpayer within 90 days from the mailing of the notice files a request for a conciliation conference. However, the Administrative Law Judge pointed out that if a taxpayer fails to file a timely challenge by requesting a conciliation conference or a hearing within 90 days of the mailing of the notice of determination, the Division of Tax Appeals is without jurisdiction to hear and determine the matter (***see, Matter of American Woodcraft***, Tax Appeals Tribunal, May 15, 2003).

The Administrative Law Judge found that the Division offered sufficient proof to establish the mailing of the statutory notice on the same date that it was dated, i.e., May 14, 2004. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case. Given the postmark on petitioner's request for a conciliation conference (October 18, 2004), the Administrative Law Judge determined that it was mailed 57 days late. Consequently, the Administrative Law Judge found that the Division of Tax Appeals has no jurisdiction over this matter. Even *one* day late precludes a taxpayer from having a petition heard since deadlines for filing petitions are strictly enforced (***see, Matter of Maro Luncheonette***, Tax Appeals Tribunal, February 1, 1996).

The Administrative Law Judge next expounded on the rules governing a motion for summary determination in the Division of Tax Appeals. Such a motion may be granted,

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material

> and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Petitioner argued that it is entitled to a hearing at which it can have the opportunity to establish, through the testimony of Mr. Arthur L. Rotondi, petitioner's president, that he personally prepared, signed and dated a Request for Conciliation Conference on August 8, 2004 and the Request, along with four (4) other pages comprising a portion of the Notice of Determination were stamped and set aside for postal pickup on the following day. Petitioner further argued that it should be permitted to solicit the testimony of the postal carrier and/or postal authority representatives to address the issue of the alleged lack of the timely delivery of the request for a conciliation conference.

The Administrative Law Judge granted the Division's motion for summary determination, on the basis that the Division of Tax Appeals has no jurisdiction over this matter, because petitioner failed to file a timely request for conciliation conference. The Administrative Law Judge pointed out that in New York, testimony is "insufficient, as a matter of law, to prove timely filing" (***Matter of Dattilo,*** Tax Appeals Tribunal, May 11, 1995, ***confirmed Matter of Dattilo v. Urbach***, 222 AD2d 28, 645 NYS2d 352). The Administrative Law Judge noted that the only evidence that would meet petitioner's burden to prove that it timely contested the notice of determination is a postal receipt for certified or registered mail (***see, Matter of Seguin***, Tax Appeals Tribunal, October 22, 1992). This is especially so given the postmark of October 18, 2004 on the envelope in which the request for a conference was mailed. Consequently, the Administrative Law Judge rejected petitioner's contention that the Division's motion for summary determination should be denied, so as to provide it with the opportunity to present at

hearing the testimony of its principal and a representative of the USPS. The Administrative Law Judge pointed out that such testimony, without more, would not, as a matter of law, establish the timely filing of its request for a conciliation conference.

Finally, the Administrative Law Judge observed that with the 1996 amendment to Tax Law § 1138(a)(1), effective on or after January 1, 1997, the notice of determination at issue here is no longer treated as "finally and irrevocably fixing the tax" so that petitioner is not without some remedy.[2] It may pay the tax, and file a claim for refund. If the refund claim is disallowed, it may then seek to petition the Division of Tax Appeals or request a conciliation conference in order to contest such disallowance.

Thereupon, the Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition of Rotondi Industries Corp. for lack of jurisdiction.

ARGUMENTS ON EXCEPTION

Petitioner, on exception, argues that a genuine issue of fact exists as to whether it timely filed a request for a conciliation conference. Petitioner argues that it must be permitted to present testimony and evidence at a hearing and that the Administrative Law Judge erred in granting the Division's motion for summary determination.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. The Division filed a motion for summary determination seeking dismissal of this matter for lack of jurisdiction. The Division's motion was supported by the detailed affidavits, with attached exhibits of its employees, Bruce Peltier and Geraldine Mahon, showing proper mailing of the Notice of Determination issued to petitioner on May 14, 2004 to petitioner's last known

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[2] ***see***, L 1996, ch 267

address. To prevail on this motion, petitioner was required to come forward with facts and documentation to defeat the Division's motion (***see***, ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595). The affidavit of Arthur Rotondi and that of petitioner's attorney about what transpired at a conciliation conference[3] are not sufficient to defeat the Division's motion.

We find that the Administrative Law Judge has fully and correctly addressed each of the issues raised in this matter. We can find no basis to disturb his determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rotondi Industries Corp. is denied;

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

3. The petition of Rotondi Industries Corp. is dismissed.

DATED: Troy, New York
July 6, 2006

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/Robert J. McDermott
Robert J. McDermott
Commissioner

[3]Bernard Mark, petitioner's attorney, states in his affidavit that Mr. Rotondi personally testified at the BCMS conference about how he signed and mailed the BCMS request for conciliation conference on August 8, 2004. However, the Division's documentary evidence shows that while Mr. Rotondi signed a request for conciliation conference dated August 8, 2004, the request was not mailed until October 18, 2004 as evidenced by the postal marking on the envelope. It is unclear what conciliation conference Mr. Rotondi is alleged to have testified at, since the conciliation conference relating to the instant notice of determination was denied by BCMS as untimely filed.