

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition :  
of :  
**JONATHAN ERLER** : DECISION  
for Revision of a Determination or for Refund of : DTA NO. 822995  
Cigarette Tax under Article 20 of the Tax Law for :  
the Period August 14, 2008. :

---

Petitioner, Jonathan Erler, filed an exception to the determination of the Administrative Law Judge issued on December 23, 2009. Petitioner appeared by Louis F. Simonetti, Jr., Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner did not file a brief in support of his 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. Commissioner Tully took no part in the consideration of this decision.

***ISSUE***

Whether the Division of Taxation was 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 findings of fact "1," "7," and "8," which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact “1” of the Administrative Law Judge’s determination to read as follows:

The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner’s protest of a Notice of Determination dated November 17, 2008 and addressed to petitioner, Jonathan Erler, at 443 Herbert Street, West Hempstead, New York 11552.<sup>1</sup>

The Notice of Determination asserts penalty of \$6,990.00 due pursuant to Article 20 of the Tax Law. In explanation, the notice states that “on 8/14/08, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.” The notice bears assessment identification number L-031002497-3, and the corresponding Mailing Cover Sheet bears petitioner’s name and address as listed above and certified mail control number 7104 1002 9730 0937 7710. By his request for conciliation conference, dated February 13, 2009, petitioner protested the subject Notice of Determination.

On March 13, 2009, the Division’s Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner’s protest of the subject notice was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on November 17, 2008, but the request was not received until February 23, 2009, or in excess of 90 days, the request is late filed.

To show proof of proper mailing of the notice dated November 17, 2008, the Division provided the following: (I) an affidavit, dated August 14, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division’s Mail Processing Center; (ii) an affidavit, dated August 13, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division’s

---

<sup>1</sup> We modify this fact to more accurately reflect the record.

Case and Resource Tracking System (CARTS); (iii) the “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked November 17, 2008; and (iv) a Tax Enforcement Referral Report dated September 2, 2008.

The affidavit of Patricia Finn Sears sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the 22-page CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first page to “11-17-08,” to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page Mailing Cover Sheet, which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. The eleventh page of the CMR contains information on the subject notice and establishes that on November 17, 2008 a notice with the control number 7104 1002 9730 0937 7710 was sent to petitioner at his West Hempstead, New York, address.

The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division’s Mail Processing Center, describes the Center’s general operations and procedures. As the mail and supply supervisor, he supervises the Center’s staff. The Mail Processing Center receives the notices and places them in an “Outgoing Certified Mail” area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are

checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against information contained on the CMR. A member of the Mail Processing Center then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Mail Processing Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 234. This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date November 17, 2008, confirming that the notices were mailed on that date.

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

As indicated by a Tax Enforcement Referral Report included with the Division's motion papers, a Tax Enforcement investigator found invoices addressed to petitioner at: 443 Herbert Street, West Hempstead, New York 11552.<sup>2</sup>

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

Petitioner's request for conciliation conference was signed and dated by petitioner's representative, Louis F. Simonetti, on February 13, 2009. The request listed petitioner's address as: 443 Herbert St, West Hempstead, NY 11552-2339.

---

<sup>2</sup> We modify this fact to more accurately reflect the record.

The envelope used to mail the request was sent via United States First Class mail and bore petitioner's representative's return address in Jericho, New York. The postage stamp on the envelope was cancelled by the Postal Service on February 20, 2009. A stamp shows that the request was received by BCMS on February 23, 2009.<sup>3</sup>

In opposition to the Division's motion, petitioner submitted the affidavit of mailing, dated February 13, 2009, of Deborah Fiorello.

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

In her determination, the Administrative Law Judge noted that a motion for summary determination shall be granted if it is established that no material and triable issue of fact is presented and that a determination can be issued, as a matter of law, in favor of any party.

The Administrative Law Judge observed that if the Division issues a notice of determination for additional tax or penalties due under Article 20, a taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference with BCMS, within 90 days of the mailing of the notice of determination. The Administrative Law Judge pointed out that the Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit.

The Administrative Law Judge noted that where the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. 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.

The Administrative Law Judge cited applicable case law providing that in order to establish the presumption of delivery, the Division had the burden to demonstrate proper mailing

---

<sup>3</sup> We modify this fact to more accurately reflect the record.

by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing.

The Administrative Law Judge found that in this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of its employees and the Division also presented sufficient documentary proof to establish that the subject Notice of Determination was mailed as addressed to petitioner on November 17, 2008.

The Administrative Law Judge pointed out that the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax also apply to Article 20 of the Tax Law. Specifically, the Administrative Law Judge observed that Tax Law § 1147(a)(1) of Article 28 provides 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 the provisions of [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.”

The Administrative Law Judge found that the Division had shown that the subject Notice of Determination was properly mailed to petitioner at his last known address on November 17, 2008.

The Administrative Law Judge noted that since the Division established that it properly mailed the subject Notice of Determination to petitioner on November 17, 2008, petitioner was required to file his request for a conciliation conference within 90 days of such date, i.e., on or before February 15, 2009. However, since February 15, 2009 fell on a Sunday and Monday, February 16, 2009 was a holiday, the Administrative Law Judge concluded that petitioner had until the next business day, or Tuesday, February 17, 2009, to file his request.

The Administrative Law Judge found that the envelope containing petitioner's request for conciliation conference bore a USPS postmark dated February 20, 2009, which was beyond the 90-day period of limitation. The Administrative Law Judge concluded that Ms. Fiorello's affidavit of mailing was of no value in proving the date of mailing where there was a conflicting USPS postmark. The Administrative Law Judge concluded that if the USPS postmark did not bear a date on or before the prescribed date for filing, the request for conciliation conference would not be considered to be timely filed regardless of when the envelope was deposited in the mail.

As a result, the Administrative Law Judge held that petitioner's request was untimely filed, granted the Division's motion for summary determination and dismissed the petition.

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

On exception, petitioner argues that he timely filed a request for a conciliation conference with BCMS.

#### ***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 of its employees showing proper mailing of the Notice of Determination issued to petitioner on November 17, 2008 to petitioner at his last known 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 [1980]). The affidavits of petitioner's attorney and Deborah Fiorello concerning the alleged mailing of the request for conciliation conference

on February 13, 2009 are not sufficient to defeat the Division's motion in view of the USPS postmark on petitioner's envelope showing a date of mailing of February 20, 2009.

We find that the Administrative Law Judge has fully and correctly addressed each of the issues raised in this matter and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jonathan Erler is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Jonathan Erler is dismissed.

DATED:Troy, New York  
April 22, 2010

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

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner