

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>RAYMOND AZZATO</b>	:	DECISION
		DTA NO. 823185
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 March 1, 2002 through November 30, 2005.	:	

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Petitioner, Raymond Azzato, filed an exception to the determination of the Administrative Law Judge issued on August 12, 2010. Petitioner appeared by Douglas J. Lerosé, Esq. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

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

***ISSUE***

Whether petitioner filed 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 subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated October 14, 2008 and addressed to

petitioner, Raymond Azzato, at a Great River, New York, address. The Notice of Determination assesses a total amount due of \$196,935.47, which is comprised of interest and penalty for the period March 1, 2002 through November 30, 2005. In explanation, the notice states that it is being issued because petitioner is liable as an officer or responsible person of Island Auto Stop, Inc. The notice bears assessment identification number L-030757584-1 and the corresponding "Mailing Cover Sheet" bears petitioner's name and a Great River, New York, address and certified mail control number 7104 1002 9730 0865 3600.

On April 20, 2009, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Determination.

On May 8, 2009, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination 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 was issued on October 14, 2008, but the request was not received until April 20, 2009, or in excess of 90 days, the request is late filed.

To show proof of proper mailing of the notice dated October 14, 2008, the Division provided the following: (i) an affidavit, dated February 12, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated February 9, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked October 14, 2008; and (iv) a transcript of

petitioner's electronically filed New York personal income tax return for the year 2007, filed April 15, 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 211-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, the upper left corner of the first page of the CMR contains the handwritten date "10/14/08" 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 is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." Page 128 of the CMR contains information on the subject notice and establishes that, on October 14, 2008, a notice with the control number 7104 1002 9730 0865 3600 was sent to petitioner at a Great River, New York, address, which is the same as listed on petitioner's 2007 income tax return, which was electronically filed on April 15, 2008.

The affidavit of James Steven VanDerZee describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The 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 the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (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 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 postmark, dated October 14, 2008, on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 2,315. Below this number, "-8" and "2,307" have been handwritten to reflect the fact that 8 pieces of mail have been "pulled" from the CMR, thus leaving 2,307 pieces mailed. The removal of these pieces is reflected on the CMR by a line drawn through the entries for these eight items. No such line is drawn through the entry for the subject notice. A USPS employee initialed the final page of the CMR and has handwritten "2,307," confirming that 2,307 notices were mailed on that date.

Petitioner's Great River, New York, address on the CMR and Mailing Cover Sheet matches the address reported on his personal income tax return for 2007, which as noted, was electronically filed on April 15, 2008. This is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

Petitioner's response to the Division's motion included an affidavit of petitioner, Raymond Azzato, dated May 21, 2010. In his affidavit, petitioner alleged that the Notice of Determination,

dated October 14, 2008 “was never received by me or anyone authorized to accept such notice on my behalf.” Petitioner further alleged that he had no notice of the subject assessment until more than 90 days from the mailing date of the Notice of Determination.

Petitioner’s affidavit and the affidavit of petitioner’s representative, which was also submitted in opposition to the Division’s motion, make reference to certain exhibits attached thereto, specifically: a Notice of Cancellation dated May 5, 2008 in respect of a corporation franchise tax assessment against Island Auto Stop, Inc.; a Notice of Adjustment dated May 5, 2008 with respect to Island Auto Stop, Inc.’s corporation tax liability, showing a credit of \$57.13; a filing receipt from the New York State Department of State indicating a filing dated May 8, 2008 in connection with the dissolution of Island Auto Stop, Inc.; and a remittance advice in respect of a refund check dated May 2, 2008 issued in connection with a refund from the New York State Department of Motor Vehicles.

Petitioner acknowledged in his affidavit that the Great River address on the statutory notice was his home address.

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

In his determination, the Administrative Law Judge noted that the Rules of Practice and Procedure of the Tax Appeals Tribunal provide that a motion for summary determination may be granted if it has been sufficiently established that no material and triable issue of fact is presented and that the Administrative Law Judge can, as a matter of law, issue a determination in favor of any party. The Administrative Law Judge pointed out that pursuant to the Tribunal’s Rules, a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. The Administrative Law Judge cited relevant case law concerning the level of proof required to obtain summary judgment.

The Administrative Law Judge pointed out that where the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of the notice to petitioner's last known address pursuant to Tax Law § 1138(a)(1). To prove the fact and the date of mailing of the subject notice, the Administrative Law Judge noted that the Division must provide proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures and proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge found that the Division had offered proof sufficient to establish the mailing of the statutory notice on October 14, 2008, to petitioner's last known address. As a result, the Administrative Law Judge found that the statutory 90-day time limit to file either a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on October 14, 2008.

The Administrative Law Judge determined that the request for a conciliation conference was not filed until April 20, 2009, which was well beyond the 90-day period. The Administrative Law Judge concluded that the Division of Tax Appeals had no jurisdiction over this matter, granted summary determination in favor of the Division of Taxation and dismissed the petition.

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

On exception, petitioner argues as he did below that the mailing of the Notice does not prove or insure receipt of the Notice. Petitioner also argues that the Administrative Law Judge did not address an exhibit that was in an affidavit below. Petitioner asserts that the documentary evidence provided raises material questions of fact and are not mere conclusions, expressions of hope or unsubstantiated allegations.

**OPINION**

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to the person liable for the collection or payment of sales and use tax, which will become an assessment unless the person to whom it is assessed either: a) requests a conciliation conference with BCMS or b) files a petition with the Division of Tax Appeals seeking revision of the determination, within 90 days of the mailing of the notice. Pursuant to Tax Law § 1147(a)(1), a notice of determination is to 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.”

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” (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered (*see Matter of MacLean v. Procaccino*, 53 AD2d 965 [1976]). When the timeliness of a petition is at issue, the Division must establish proper mailing of the notice of determination to petitioner (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). Petitioner has the right to rebut this presumption (*see Matter of Ruggerite v. State Tax Commn.*, 64 NY2d 688 [1984]). The Division is entitled to the presumption of receipt unless petitioner can rebut the presumption by showing that he did not receive the notice (*see Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]; *Matter of Esther Parking Corp.*, Tax Appeals Tribunal, December 18, 1997; *Matter of Montesanto*, Tax Appeals Tribunal, March 31,

1994). We find that the mere denial of receipt is insufficient to rebut this presumption (*see Matter of T.J. Gulf v. New York State Tax Commn., supra*).

We find that the Division has met its burden to establish proper mailing of the Notice of Determination to petitioner on October 14, 2008, by submitting affidavits describing its general mailing record, which showed that the procedure was followed in this case (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Further, petitioner did not present any evidence apart from the denial of receipt, which is not sufficient evidence to rebut the presumption.

We next address petitioner's argument that the documentary evidence provided raises material questions of fact. As the Administrative Law Judge noted, section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that a motion for summary determination 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]).

That section further provides that a motion for summary determination is subject to the same provision as a motion for summary judgment pursuant to CPLR § 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]).



Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*see Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276 [1978]).

In this case, the Administrative Law Judge determined that the Division had proven both the fact and date of mailing of the Notice of Determination dated October 14, 2008. Based upon our review of the record herein, we agree with his conclusion. Petitioner's attempt to raise substantive issues is precluded by his failure to establish that he timely filed a petition that would confer jurisdiction upon the Division of Tax Appeals to deal with such issues. Further, petitioner has not presented any arguments that are relevant to the issue of timeliness on exception. Since the Administrative Law Judge adequately and correctly addressed the issue presented to him, we sustain the determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Raymond Azzato is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Raymond Azzato is dismissed with prejudice.

DATED: Troy, New York  
May 19, 2011

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

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

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