

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
	:	
of	:	
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<b>KHURRAM KHAN</b>	:	DECISION
	:	DTA NO. 823409
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, 2006 through	:	
February 28, 2009.	:	

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Petitioner, Khurram Khan, filed an exception to the determination of the Administrative Law Judge issued on August 19, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a letter brief in lieu of a formal 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 the Administrative Law Judge properly granted the Division of Taxation's motion for summary determination on the ground that petitioner failed to file a timely request for a conciliation conference following the issuance of a notice of deficiency.

***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, Khurram Khan, Notice of Determination L-031854178, dated April 27, 2009.

In protest of the notice of determination, petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was dated September 5, 2009 and delivered to BCMS on September 3, 2009.

Following this request, BCMS issued a Conciliation Order Dismissing Request (CMS No. 234955) on September 25, 2009 denying petitioner's request for a conciliation conference because, having filed a request for conciliation conference on September 3, 2009, petitioner had allowed 130 days to elapse between the issuance of the notice of determination and subsequent request.

On December 19, 2009, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the notice of determination at issue.

The Division provided a copy of petitioner's last personal income tax return for 2007, which confirmed petitioner's last known address as 90-15 211<sup>th</sup> Street, Queens Village, NY 11428, for purposes of issuing the notice of determination at issue on April 27, 2009.

The Division provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the New York State Department of Taxation and Finance (Department). CARTS refers to the Department's computer system for generating documents that include notices of determination issued to taxpayers. This affidavit attested to the Division's mailing procedures, as follows. The computer generated statutory notices are predated with the anticipated date of mailing and each are assigned a certified control

number.

Each batch of statutory notices is accompanied by a computer printout entitled “Certified Record for Presort Mail-Assessments Receivable.” It lists each notice in the order the notice was generated and each notice’s certified control number appears under the first heading, “Certified No.” The assessment numbers are listed under the second heading, “Reference No.” and the names and addresses of the taxpayers are listed under the third heading, “Name of Addressee, Street and PO Address,” while the remaining heading lists postage and fees.

The CMR for the notice issued to petitioner on April 27, 2009 consisted of 18 pages, with the words, “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas” on page 18.

The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the United States Postal Service (USPS), as follows. After a notice of determination is placed in the “Outgoing Certified Mail” area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A certified mail record (CMR) is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and performs a random review of up to 30 pieces of the certified mail listed.

Once the review is completed, a member of the MPC staff 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 certified mail record indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS will also 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 CMR confirms that a USPS employee initialed page 18 of the CMR, affixed a postmark to each page of the CMR and wrote the total number of pieces of certified mail received. Page 18 of the CMR originally listed 189 pieces of mail; however, the number of pieces received at the post office shows 184, reflecting the fact that 5 pieces of certified mail had been “pulled” from the mailing record. The 5 pieces that were pulled from the CMR did not concern the listing for petitioner.

On April 27, 2009, an employee of the MPC delivered one piece of certified mail addressed to petitioner at 90-15 211<sup>th</sup> Street, Queens Valley, NY 11428, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail.

The Division also submitted the affidavit of Heidi Corina, a legal assistant in the Division’s Office of Counsel involved in preparing United States Postal Form 3811-A to request return receipts after mailing certified mail. Ms. Corina attested to the request she made to the Postal Service for delivery information on the certified mail sent to petitioner. Specifically, the Form 3811-A detailed that certified mail number 7104 1002 9730 1317 9355 was delivered on April 29, 2009 at 1:13 P.M. at petitioner’s Queens Village address. It also shows the scanned signature image of the recipient, which appears as Naseem Akhtas with 90-15 211 St. written, as well.

Petitioner responded to Division’s motion to dismiss on June 16, 2010, asserting that he

did not receive the notice of determination until the 90-day period in which he had to reply had nearly expired. Mr. Khurram's explanation for this occurrence was that he was in Pakistan from January 11, 2009 until July 21, 2009.

Mr. Khurram provided photocopies of his passport, showing a stamp from the Lahore Airport in Pakistan, dated January 11, 2009, on page 10 of his passport and a stamp from customs in New York, dated July 21, 2009, on page 20 of his passport.

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

In his determination, the Administrative Law Judge noted that where the Division claims that a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on whether the Division can demonstrate proper mailing of the notice by certified or registered mail to petitioner's last known address.

The Administrative Law Judge cited applicable case law holding that in order to prove the fact and date of mailing of a statutory notice, the Division has the burden to provide evidence of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedure, as well as proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge found that in this case, the Division introduced adequate proof of its general mailing procedures and established that the general mailing procedure was followed. The Administrative Law Judge concluded that the Division had proven that the statutory notice was mailed on April 27, 2009, to petitioner at his last known address.

The Administrative Law Judge determined that as the notice was properly mailed, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a

petition with the Division of Tax Appeals commenced on April 27, 2009. As petitioner's request for a conciliation conference was not mailed until September 3, 2009, which was beyond the 90-day period, the Administrative Law Judge held that the Division of Tax Appeals had no jurisdiction over this matter and granted summary determination in favor of the Division. As a result, the Administrative Law Judge dismissed the petition.

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

On exception, petitioner argues that he was not in the United States from January 11, 2009 through July 21, 2009, which is why he did not file a timely request for a conciliation conference. Petitioner also argues that when he returned to the United States on July 21, 2009, he changed his address to a different location than the one to which the notice had been mailed.

### ***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 April 27, 2009 to petitioner's last known address. To prevail on this motion, petitioner was required to come forward with facts and documentation sufficient to defeat the Division's motion (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Petitioner submitted no evidence regarding either the issuance of the statutory notice or the mailing of his request for a conciliation conference. Petitioner's only argument was that he was out of the country at the time the notice was mailed, and that when he returned to the United States on July 21, 2009, he moved to an address different from the one to which the notice had previously been mailed. Petitioner's

argument is without merit. He has presented no evidence to show that he notified the Division of a change of address prior to the date on which the notice was mailed, specifically, April 27, 2009. The Division has presented sufficient evidence to show that the notice was mailed to petitioner's last known address. Indeed, petitioner admits that he did not change his address until after he returned to the United States on July 21, 2009, which was after the notice had been issued. Moreover, petitioner's assertion that he was out of the country when the notice was issued does not relieve him of the ninety day statute of limitations. As a result, petitioner has failed to defeat the Division's motion.

We find that the Administrative Law Judge has fully and correctly addressed the issue 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, to demonstrate 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 Khurram Khan is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Khurram Khan is dismissed.

DATED:Troy, New York  
April 21, 2011

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

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

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