

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
	:	
of	:	
	:	
<b>PETER MADOFF</b>	:	DECISION
	:	DTA NO. 823411
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 May 31, 2008.	:	

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Petitioner, Peter Madoff, filed an exception to the determination of the Administrative Law Judge issued on August 25, 2011. Petitioner appeared by James F. Mahon, Jr., CPA. The Division of Taxation appeared by Mark Volk, Esq. (David Gannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter 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 Division of Taxation sufficiently met its burden of proof in support of its motion seeking dismissal of the petition or whether there exists sufficient ambiguity in the record to warrant granting the parties an opportunity to present more evidence on a particular issue.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “4,” “5” and “7,” which have been modified. We have deleted finding of fact “6” since it is

not sufficiently supported by the record as presented. The Administrative Law Judge's remaining findings of fact and the modified findings of fact are set forth below.

The Division of Taxation (Division) issued to petitioner, Peter Madoff, at his 34 Pheasant Run, Old Westbury, New York, address a Notice of Determination, dated May 4, 2009, which assessed sales and use taxes for the period March 1, 2006 through May 31, 2008 (Notice L-031903356-5). The notice assessed tax in the amount of \$904,288.24, plus interest, for a balance due of \$1,063,361.44.

On December 21, 2009, petitioner mailed a petition by Federal Express to the Division of Tax Appeals. It was received on December 22, 2009. The petition noted that petitioner filed a request for a conciliation conference on September 3, 2009, but that the request was dismissed in a letter dated September 25, 2009. It also asserted, among other things, that petitioner would prove that the notice of May 4, 2009 was not received or properly served. Petitioner further submitted that the computation of tax and interest were incorrect.

To show proof of proper mailing of the Notice dated May 4, 2009, the Division provided the following: (i) an affidavit, dated August 30, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (ii) an affidavit, dated August 25, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) an affidavit, dated March 16, 2011, of Michele R. Statile, a supervisor of customer service for the United States Postal Service; (iv) a copy of the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked May 4, 2009; (v) a copy of the Sales Tax Examination Questionnaire regarding the audit of Bernard L. Madoff Investment Securities, LLC; and, (vi) copies of petitioner's New York State resident income tax

returns for the years 2008 and 2009.

We modify finding of fact “4” of the Administrative Law Judge’s determination to read as follows:

The affidavit of Patricia Finn Sears sets forth certain aspects of the Division’s general practice and procedure for processing statutory notices. Ms. Sears’ affidavit indicates that her department supervises the processing of statutory notices prior to shipment of the statutory notices to the Division’s Mail Processing Center for mailing.<sup>1</sup>

We modify finding of fact “5” of the Administrative Law Judge’s determination to read as follows:

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 they relate to statutory notices of determination. In part, Mr. VanDerZee asserts that the relevant Notice of Determination was properly processed and mailed to the petitioner; however, in his affidavit, Mr. VanDerZee notes that he was placed in charge of the Division’s Mail Processing Center in February of 2010. There is no representation of whether Mr. VanDerZee was employed by the Division, or what his title and responsibilities might have been, prior to that date.<sup>2</sup>

We modify finding of fact “7” of the Administrative Law Judge’s determination to read as follows:

Postmarks of May 4, 2009 and May 5, 2009 appear on each page of the CMR. The postmark of May 5, 2009 has been crossed off, while the correct postmark of May 4, 2009 is undisturbed.<sup>3</sup>

The affidavit of Michele R. Statile states that she has been employed by the United States Postal Service as a supervisor in customer service since 2005. Following a review of the CMR, Ms. Statile determined that postmarks reflecting May 5, 2009 were erroneously applied to each

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

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

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

page of the CMR for May 4, 2009. When such an error occurs, an employee of the post office or a member of the Division's staff may catch the error and request that the CMR be corrected by a post office employee to accurately reflect the date of mailing. According to Ms. Statile, it is the proper Postal Service procedure to cross out the incorrect date stamp, initial the CMR and restamp it with the correct mailing date. Based upon her review of the mailing log and her investigation of the circumstances concerning the correction of the date stamp error, the incorrect postmarks were properly crossed off and the correct postmarks were left intact.

The address appearing on the Notice of Determination is 34 Pheasant Run, Old Westbury, New York 11568. The same address was entered on a Sales Tax Examination Questionnaire, dated August 26, 2008, regarding the underlying audit of Bernard L. Madoff Investment Securities, LLC, and on the 2008 and 2009 resident income tax returns filed by petitioner. The return for 2008 was dated February 13, 2009, and the return for 2009 was dated October 15, 2010. This address was also utilized on the Request for Conciliation Conference.

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

The Administrative Law Judge initially noted that, in order to prove the fact and the date of mailing of the subject statutory notice, the Division must first prove the standard procedures used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures. Second, there must be proof that the standard procedures were followed in the particular instance in question.

Based upon the affidavits and documents offered by the Division, the Administrative Law Judge concluded that the Division had offered sufficient proof to establish the mailing of the statutory notice on the same date that it was dated, i.e., May 4, 2009, to petitioner's last known

address. The Administrative Law Judge also concluded that the affidavits submitted by the Division adequately describe the Division's general mailing procedures, as well as the relevant mailing record, and thereby establish that the general mailing procedures were followed in this case.

The Administrative Law Judge found that the Notice was properly mailed, and that the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation or Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on May 4, 2009. The Administrative Law Judge concluded that the documents show that the Notice was mailed to petitioner on May 4, 2009, but the request for a conciliation conference was not mailed until September 3, 2009, which is beyond the 90-day period. Therefore, the Administrative Law Judge held that the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division.

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

In his exception, petitioner first argues that the Division performed an inaccurate audit that has grossly overstated the amount of the underlying asserted tax liability. As was advanced below, petitioner also argues that the Division has submitted insufficient evidence to establish the proper mailing of the statutory Notice to petitioner. In this regard, petitioner now asserts that the affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, does not adequately meet the burden of proof of the mailing procedures of the Division in effect at the time the relevant notice was mailed. In response, the Division argues that the Determination of the Administrative Law Judge should be upheld and that the petition should be dismissed as untimely.

**OPINION**

We reverse the determination of the Administrative Law Judge.

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 (Tax Law § 1138(a); § 170[3-a]). 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]). The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard mailing procedure used by the Division provided by one with knowledge of the relevant procedure; and second, there must be proof that the standard procedure was followed in the particular instance (*see Matter of Katz, supra; Matter of Novar TV & A.C. Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

A motion for summary determination shall 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]).

In this case, the Division has attempted to offer proof to establish the mailing of the statutory notice on the same date that the notice was dated, i.e., May 4, 2009, to petitioner's last known address. The affidavits submitted by the Division describe the Division's general mailing procedures. The affidavit of Patricia Finn Sears, the supervisor of the CARTS unit, sets forth certain aspects of the Division's general practice and procedure for processing statutory notices. Ms. Sears' affidavit indicates that the CARTS unit supervises the processing of statutory notices prior to their shipment to the Department's Mail Processing Center for mailing. Accordingly, Ms. Sears is not competent to assert what procedures take place in the Division's Mail Processing Center or what services the United States Postal Service performs for the Mail Processing Center personnel.

The Division also submitted the affidavit of James Steven VanDerZee, the mail and supply supervisor of the Division's Mail Processing Center. In his affidavit, Mr. VanDerZee described the center's operations and procedures as they pertain to statutory notices. However, in his affidavit, Mr. VanDerZee did not clearly represent whether he was employed with the Division on the date the Notice was alleged to have been mailed, i.e., May 4, 2009, and thus how he knew the Mail Processing Center's operation and procedures on that date. Rather, in his affidavit, Mr. VanDerZee, in relevant part, represented that he has been with the Division, at his current supervisor's title, since February of 2010, which is months after the date that the relevant Notice is claimed to have been mailed.

As we previously noted in *Matter of United Water New York*:

Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is ‘arguable’ (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93). If material facts are in dispute, or if contrary inferences may be reasonably drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879). Upon such a motion, it is not for the court ‘to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist’ (*Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990) (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004).

We reverse the Administrative Law Judge’s determination because petitioner has sufficiently established that a triable and material issue of fact is in dispute.

We find that further proceedings are warranted in order to clarify the ambiguities with regard to the affidavits submitted and the mailing of the subject Notice. Petitioner’s challenge of the merits of the asserted tax liability is premature until jurisdiction is established.



Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Peter Madoff is granted;
2. The determination of the Administrative Law Judge granting summary determination is reversed; and
3. The Division of Taxation's motion for summary determination is denied and the matter is remanded to the Division of Tax Appeals for further proceedings on the issue of timeliness of the petition and, if appropriate, a determination on the merits.

DATED: Albany, New York  
April 19, 2012

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

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