

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SABANDO AUTO PARTS, INC. AND JORGE SABANDO, AS OFFICER	:	DETERMINATION DTA NO. 810896
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 December 1, 1986 through August 31, 1989.	:	

Petitioners, Sabando Auto Parts, Inc. and Jorge Sabando, as officer, 3225 Third Avenue, Bronx, New York 10451, filed a petition 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 December 1, 1986 through August 31, 1989.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 19, 1993 at 1:45 P.M. The Division of Taxation filed a brief on January 6, 1994. Petitioners' reply brief was to have been filed by February 14, 1994 which began the six-month statutory period for issuance of a determination. Petitioners did not file a brief. Petitioners appeared by Lawrence R. Cole, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. Dewitt, Esq., of counsel).

ISSUE

Whether the petition filed with the Division of Tax Appeals was timely.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner Sabando Auto Parts, Inc. two notices of determination and demands for payment of sales and use taxes due each dated March 15, 1990. The first notice assessed tax of \$85,013.94 for the period December 1, 1986 through August 31, 1989, plus penalty and interest. The second notice assessed a penalty (the omnibus

penalty) of \$8,501.40 for the same period. Two identical notices, also dated March 15, 1990, were issued to petitioner Jorge Sabando, as officer of Sabando Auto Parts, Inc.

The Division introduced in evidence a Request for Conciliation Conference (the "Request") signed by Jorge Sabando and received by the Division on June 20, 1990. The Request identifies petitioners' representative as Elliot Quinones and provides the following address for Mr. Quinones: 384 E. 149th St., Suite 330, Bronx, NY 10455. The address of Sabando Auto Parts, Inc. is shown on the Request as 3223 3rd Avenue, Bronx, NY 10451.

The Division received a letter from Mr. Quinones dated December 18, 1990 asking for special permission to appear as petitioners' representative at the conciliation conference. The letter bears a letterhead showing the following address for Mr. Quinones: 337 East 149th Street Suite 3-A, Bronx, New York 10455. The following statement appears at the bottom of the letter: "Please note our new address".

The Division issued to petitioners a Conciliation Order dated July 5, 1991, reducing the tax assessed pursuant to the statutory notices to \$60,779.40, plus penalty and interest, and reducing the omnibus penalty to \$6,077.94.

On June 1, 1992, petitioners filed a petition in the Division of Tax Appeals. By its answer, the Division claimed that the petition should be dismissed because it was not filed within 90 days of the issuance of the Conciliation Order. In their petition, petitioners claimed that neither Mr. Sabando nor Mr. Quinones ever received the Conciliation Order.

To establish proof of mailing of the Conciliation Order to petitioners and Mr. Quinones, the Division introduced in evidence the affidavits of Joseph Chyrywaty and Daniel LaFar, employees of the Division, as well as a copy of a two-page certified mail record.

The affidavit of Mr. Chyrywaty, Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services, sets forth the Division's general practice and procedure for preparing conciliation orders for mailing. According to Mr. Chyrywaty, conciliation orders mailed to addresses within the United States are mailed by certified mail. A clerk in his office prepares the conciliation orders and certified mail records. The name and address of each

person to whom a conciliation order is to be mailed on a particular day is listed on a certified mail record. A second clerk reviews the certified mail records and conciliation orders to verify that the names and addresses shown on the certified mail record reconcile with those on the conciliation orders to be mailed. A certified mail number is assigned to each conciliation order and then affixed to the envelope containing a conciliation order. The clerk then records on the certified mail record, under the heading "Certified No.", the certified mail number assigned to each envelope. When the conciliation orders are ready for mailing, they are picked up by an employee of the Division's mailroom, along with the corresponding certified mail record.

The affidavit of Daniel LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, describes the operations and procedures followed by the Division's mail and supply room staff. Mr. LaFar states that after the conciliation orders are placed in an "Outgoing Certified Mail" basket, they are retrieved by a member of his staff who weighs, seals and places postage on each envelope. The amount of postage affixed to each envelope and the certified mailing fee are entered on the certified mail record. A mailroom clerk counts the envelopes and verifies that the names and addresses on the envelopes correspond with the names and addresses shown on the certified mail record. A member of the mailroom staff then delivers the envelopes and the certified mail record to the Roessleville Branch of the United States Postal Service in Albany, New York. 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 certified record is picked up by a mail and supply room employee the day after its delivery to the post office and returned to the originating office, in this case the Bureau of Conciliation and Mediation Services. The certified mail record is the Division's record of mailing.

Both Mr. Chyrywaty and Mr. LaFar attest that the procedures described by them are the regular procedures followed by their offices when items are to be mailed by certified mail. They each stated that from review of the certified mail record submitted in evidence by the Division they could attest to the fact that the mailing procedures described by them were followed in this case.

The certified mail record offered in evidence by the Division consists of two pages and is dated July 5, 1991. It shows the sender as the Bureau of Conciliation and Mediation Services. On page 1 of the certified mail record, 15 certified numbers are listed. Next to certified mail number P852372554 are listed the names, Sabando Auto Parts, Inc. and Jorge Sabando, as Officer, and the address 3223 3rd Avenue, Bronx, New York 10451. Next to certified mail number P852372555 is listed the name Elliot Quinones and the address 337 East 149th Street, Suite 3-A, Bronx, New York 10455. The number 15 is shown as the total number of pieces of mail listed by the sender. On the face of the certified mail record is a United States Postal Service date stamp, showing the date July 5, 1991. There is no entry in the space provided to show the number of pieces of mail received at the post office. The space where the postal employee's name is to be listed is also blank. On the second page of the certified mail record, 14 certified mail numbers are listed. The total number of pieces listed by the sender is shown as 14. The second page also bears a United States Postal Service date stamp of July 5, 1991. The spaces provided for other information are left blank. The certified mail numbers listed on pages 1 and 2 of the certified mail record are sequential, and there are no gaps in numbering. According to Mr. Chyrywat, the certified mail record offered in evidence is a true and accurate copy of the certified mail record prepared by his office in connection with the mailing of conciliation orders to petitioners and Mr. Quinones. He states that the certified mail record was returned to him by the Division's mail room staff and kept by the Bureau of Conciliation and Mediation Services as a permanent mail record.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1138(a)(1), a notice of determination becomes a fixed and final assessment of tax due unless the taxpayer files a petition requesting a hearing within 90 days from the date of mailing of the notice. As an alternative, the taxpayer may request a conference in the Bureau of Conciliation and Mediation Services, if the time to petition for a hearing has not elapsed (Tax Law § 170[3-a][a]). In most instances, a conciliation order will be binding on the person who requested the conciliation conference unless that person petitions for a hearing

within 90 days after the order is issued (Tax Law § 170[3-a][e]). A conciliation order is issued on the date it is mailed (Matter of Wilson, Tax Appeals Tribunal, July 13, 1989). Pursuant to 20 NYCRR 4000.7(a)(6), service of all conciliation orders must be made by registered or certified mail.

In this proceeding, the Division asserts that the Division of Tax Appeals lacks subject matter jurisdiction because petitioners failed to file a petition for a hearing within 90 days of the time the conciliation orders were mailed. Petitioners allege that neither they, nor Mr. Quinones, ever received the conciliation orders which the Division claims to have mailed to them on July 5, 1991.

B. Where, as here, the Division asserts that the petition was not filed within 90 days of the mailing of the conciliation order, it must prove both the fact and date of mailing of that order (see, T. J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). To prove proper mailing, the Division must show that it has a standard procedure for mailing conciliation orders and that the procedure was followed in this instance (see, Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*).

Through the evidence it has submitted, the Division has established that conciliation orders were, in fact, mailed to petitioners and to Mr. Quinones on July 5, 1991.

The affidavits of Mr. Chyrywaty and Mr. LaFar establish that the Division has a standard procedure for the mailing of conciliation orders. In addition, the Division established, through affidavits and the submission of the certified mail record, that those procedures were followed here. In particular, the certified mail record shows that two pieces of certified mail, one addressed to petitioners and one addressed to Mr. Quinones, were delivered to the post office on July 5, 1991. The certified mail record did not contain the signature of the postal employee or list the number of pieces of mail received by the post office; however, I find these lapses to be insignificant in light of all of the proof presented. Both pages of the two-page certified mail

record were offered in evidence; each page bears a postal service date stamp of July 5, 1991; the certified mail numbers assigned to pieces of mail listed on the certified mail record are sequentially numbered allowing each page of the certified mail record to be related to the other and there is no indication that any of the pieces of mail listed on the certified mail record were later retracted (cf., Matter of Green Valley Liquors, Tax Appeals Tribunal, November 25, 1992 [where the certified mail record consisted of two sheets which could not be related and the sheet bearing the petitioner's name bore no postal stamp, the Tax Appeals Tribunal found that neither the fact nor date of mailing had been proven]; Matter of Katz, supra [where the Tax Appeals Tribunal found the same flaws in the mailing proof]).

C. At hearing, petitioners' representative alleged that neither petitioners nor Mr. Quinones ever received the conciliation orders, and he noted that the Division did not prove receipt by introducing a postal receipt. This is not sufficient to prove that the notices of determination were not properly served. A conciliation order is deemed to have been timely served if it is properly mailed in accordance with the provisions of section 4000.7 of the Commissioner's regulations (20 NYCRR 4000.7[a][1][ii]), [3][ii], [6]). Even if lack of receipt were deemed an adequate defense to a statute of limitations claim, petitioners would still fail here. No witnesses appeared at hearing to testify with regard to the alleged lack of receipt of the notices, and neither the petition nor petitioners' representative offered any details with regard to this claim. All that was offered were bald conclusory statements with no evidence to support them. This is not sufficient to overcome the presumption of delivery created by the Division's proof of mailing (see, Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643, affd 62 NY2d 943, 479 NYS2d 108).

Finally, petitioners' contention that the Conciliation Order addressed to Mr. Quinones was not sent to his last known address is without merit. At hearing, petitioners' representative claimed that the Conciliation Order should have been sent to Mr. Quinones at the address shown on the Request for Conciliation Conference which was received by the Division on June 20, 1990. The Conciliation Order was addressed to Mr. Quinones at the address shown on

the letterhead of a letter he sent to the Division on December 18, 1990. The letter specifically states, "Please note our new address", and the Division did so.

D. The petition of Sabando Auto Parts, Inc. and Jorge Sabando, as officer, is dismissed.

DATED: Troy, New York
July 21, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE