

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS KOHLER, AS OFFICER OF CHAMPALE BEER DISTRIBUTORS, INC.	:	DETERMINATION DTA NO. 812582
◆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, 1990 through August 31, 1992.	:	

Petitioner, Thomas Kohler, as officer of Champale Beer Distributors, Inc., 1585 Partridge Street, Toms River, New Jersey 08753, 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, 1990 through August 31, 1992.

The Division of Taxation, by its representative, William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated June 9, 1994 for an order directing the entry of summary determination in favor of the Division of Taxation on the ground that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notice of determination. Petitioner appeared in opposition to the motion by his representative, James T. Murphy, Esq.

Upon review of all the papers filed in connection with this motion, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a request for conciliation conference in response to a Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

FINDINGS OF FACT

In support of its motion for summary determination, the Division of Taxation ("Division") submitted an affidavit of its representative along with attached exhibits. The

Division's representative asserts in her affidavit that, since petitioner did not file a request for conciliation conference or a petition with the Division of Tax Appeals within 90 days of the issuance of a Notice of Determination as prescribed by Tax Law § 1138(a)(1), the Division properly denied petitioner's request for a conference and the petition before the Division of Tax Appeals should be dismissed, with prejudice, for lack of jurisdiction.

Attached to the Division's affidavit are the following exhibits: (1) a copy of petitioner's petition, received by the Division of Tax Appeals on January 24, 1994, which addresses petitioner's arguments on the merits, stating, "Taxes due these periods were paid under Company called Beverage King of Staten Island"; (2) a copy of seven notices of determination and demands for payment of sales and use taxes due, each dated July 6, 1993; (3) a copy of Conciliation Order, CMS No. 133760, dated January 7, 1994, which states that petitioner's request for a conciliation conference is denied because the request was not filed until October 5, 1993 which is 91 days from the date of the statutory notices; (4) copies of the first page of four requests for a conciliation conference signed by petitioner and stamped "received" by the Bureau of Conciliation and Mediation Services ("BCMS") on October 7, 1993; (5) copies of the fronts of four envelopes in which the requests were mailed, each envelope bearing a United States Postal Service cancellation stamp; the date of the stamp is legible on only two of the envelopes, and that date is October 5, 1993. Each envelope also bears a BCMS date stamp indicating receipt on October 7, 1993.

There is an assessment identification number on each of the seven notices of determination and demands for payment of sales and use taxes issued to petitioner. The seven numbers are L-007552217-3, L-007552218-2, L-007552219-1, L-007552220-1, L-007552214-6, L-007552215-5, L-007552216-4. In addition, a certified mail control number appears on the upper right hand side of each notice. The four requests for a conciliation conference offered in evidence by the Division bear assessment identification numbers L-007552217-3, L-007552218-2, L-007552219-1, L-007552220-1. There is no evidence that petitioner filed a request for a conciliation conference for the three remaining assessments. The Conciliation

Order issued to petitioner lists all seven assessment numbers as does the petition filed with the Division of Tax Appeals.

To establish proof of mailing of the notices of determination and demands for payment of sales and use taxes due, the Division also submitted the affidavits of Donna Biondo and Daniel LaFar, employees of the Division.

The affidavit of Donna Biondo, Head Clerk of the Case and Resource Tracking System Control Unit of the Division, sets forth the Division's general procedure for mailing notices of determination to taxpayers, including the delivery of the notices to the post office and the Division's receipt of the postmarked documents following the mailing. In addition, the affidavit explains that the computerized preparation of notices of determination includes the preparation of a corresponding certified mail record, the record listing those taxpayers to whom notices are being issued and the certified control number assigned to each notice. According to Ms. Biondo, the pages of the certified mail record are fan-folded, or connected to each other, and remain that way when the notices are accepted by the United States Postal Service and even after the mail record is returned to the Division. She states that it is only upon her request that the pages of the mail record are disconnected from one another.

Ms. Biondo attests to the truth and accuracy of the copy of the 18-page certified mail record attached to her affidavit. It contains a list of the notices allegedly issued by the Division on July 6, 1993, including seven notices addressed to petitioner. The certified control numbers listed on the certified mail record run consecutively. The first number on page 1 is P 911 206 125, and the last number on page 18 is P 911 206 317.

On pages two and three of the certified mail record there are seven certified mail control numbers (P 911 206 144 through P 911 206 150) and seven notice numbers (L 007552214 through L 007552220), addressed to petitioner at 11 Tralee Rd, Hazlett, New Jersey 07730-1123. The certified mail control numbers correspond to the numbers appearing at the top of each notice of determination. A United States Postal Service postmark of July 6, 1993 appears on page two and page three of the certified mail record.

Ms. Biondo attests to the fact that each statutory notice to be mailed is placed in an envelope by a Division employee, and the envelopes are then delivered to a United States Postal Service representative who then affixes his or her initials or a United States Postal Service postmark to a page or pages of the certified mail record. Each of the 18 pages of the certified mail record submitted in evidence is date stamped July 6, 1993 by the United States Postal Service in Albany, New York, Roessleville Branch Office. In the upper left hand corner of page one of the certified mail record, the pre-printed date 06/25/93 was changed by hand to 7-6-93. According to Ms. Biondo, the original date was the date the certified mail record was printed. She states that the certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular notices so that there will be sufficient lead time for the notice to be reviewed and processed. Ms. Biondo asserts that the handwritten change of date was made by personnel in the Division's mailroom who changed the date so that it would conform to the actual date that the notices and certified mail record were delivered to the United States Postal Service.

Ms. Biondo notes in her affidavit that in the regular course of business and as a common office practice the Division does not request, demand or retain return receipts from certified or registered mail.

The affidavit of Daniel B. LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, attests to the regular procedures followed by the mail and supply room staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the United States Postal Service. According to Mr. LaFar, a member of the mailroom staff weighs and seals each envelope to be mailed, affixes the correct postage and certified mail fee and records those amounts on the mail record. Another member of the staff then delivers the stamped envelopes and the certified mail record to a representative of the United States Postal Service. A member of the mailroom staff picks up the certified mail record the day after its delivery to the United States Postal Service and returns it to the originating office. Mr. LaFar states that the certified mail record is the Division's record of receipt by the United States Postal

Service for pieces of certified mail. Finally, Mr. LaFar asserts that the staff's regular procedures were followed in mailing the notices of determination to petitioner on July 6, 1993.

To prove receipt of the seven notices of determination by petitioner, the Division submitted the affidavit of Monica Amell, a mail and supply clerk in the Division's registry unit, along with seven copies of a United States Postal Service form (PS-3811-A). PS-3811-A is a form which may be used by a mailer to request proof that a piece of certified mail has been delivered to the addressee. The form is submitted to a branch office of the United States Postal Service, and it is completed by the branch office which delivered the mail to the addressee. Ms. Amell states that she completed seven forms PS-3811-A for petitioner, one for each notice of determination mailed, requesting information regarding delivery and mailed the seven forms on April 19, 1994. All seven forms were returned to Ms. Amell after their completion by the United States Postal Service.

Attached to Ms. Amell's affidavit are copies of the forms PS-3811-A prepared by Ms. Amell. Each form shows a certified mail control number corresponding to one of the numbers listed on the certified mail record and on one of the notices of determination. As completed by the United States Postal Service, each form shows delivery of the mail in question to petitioner on July 8, 1993.

Petitioner submitted his own affidavit opposing the Division's motion for summary determination. In his affidavit, he states that he "executed the Notice for Review of the Deficiency on October 1, 1993 and, to the best of my knowledge, mailed same out the same day." Petitioner's representative also submitted an affidavit where he asserts that the postmarks on pages 2 and 3 of the certified mail record "appear to be July 8, 1993." He also states that none of the copies of the envelopes containing the requests for conciliation conference bear a legible postmark.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

"Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact."

"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 University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, on remand 111 AD2d 138, 489 NYS2d 970, citing Zuckerman v. City of New York, 49 NY2d 557, 562, 427 NYS2d 595). 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, Inc. v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably 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, 881).

B. 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 this proceeding, the Division asserts that the Division of Tax Appeals lacks subject matter jurisdiction because petitioner failed to file a petition or request for a conciliation conference within 90 days of the date of mailing of the notices of determination and demands for payment of sales and use taxes due.

C. Where, as here, the Division asserts that a request for conference or petition was not filed within 90 days of the mailing of a statutory notice, it must prove both the fact and date of

mailing of that notice (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 the mailing of statutory notices 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 seven notices of determination were mailed to petitioner on July 6, 1993. The affidavits of Ms. Biondo and Mr. LaFar establish that the Division has a standard procedure for the mailing of notices of determination. Their affidavits and the copies of the notices of determination and the certified mail record show that those procedures were followed here. I can give no credence to petitioner's contention that the postmarks appearing on pages 2 and 3 of the certified mail record show a date of July 8, 1993. The date shown is clearly July 6.

D. Tax Law § 170(3-a)(a) provides, in part, that BCMS shall provide a conference at the request of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund . . . or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed." (Emphasis added.)

Inasmuch as the Division proved that the notices of determination were mailed to petitioner on July 6, 1993, the burden is on petitioner to establish that he mailed requests for a conciliation conference or a petition within 90 days of July 6, 1993, or no later than October 4, 1993.

There is no evidence that petitioner filed requests for a conciliation conference with respect to three notices (assessment numbers L-007552214-6, L-007552215-5, L-007552216-4), and the petition to the Division of Tax Appeals was not received until January 24, 1994, well after the 90-day period to petition for a hearing elapsed. Consequently, the Division of Tax Appeals has no jurisdiction over those notices.

Section 4000.7(a)(2) of the Rules and Regulations of the Commissioner of Taxation and Finance provide as follows:

"Mailing requirements. Any document which is not received by the Bureau of Conciliation and Mediation Services within the prescribed period or on or before the prescribed date will not be considered to be timely served or timely filed unless it is mailed in accordance with all of the following requirements:

"(i) The document must be contained in an envelope or other appropriate wrapper properly addressed to the Bureau of Conciliation and Mediation Services at the address designated by the Department of Taxation and Finance.

"(ii) The envelope or wrapper containing the document must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid. For this purpose, such document is considered to be deposited in the mail of the United States when it is deposited with the domestic mail service of the United States Postal Service

"(iii)(a) If the postmark on the envelope or wrapper containing the document is made by the United States Postal Service, such postmark must bear a date stamped by the United States Postal Service which is within the prescribed period or on or before the prescribed date for service or filing Furthermore, if the postmark made by the United States Postal Service on the envelope or wrapper containing the document is not legible, the provisions of clause (c) of this subparagraph shall apply, unless the person who or which is required to serve or file the document can prove when the postmark was impressed by the United States Postal Service." (Emphasis added.)

As pertinent here, clause (c) states that, if an envelope bears sufficient postage but is missing any postmark (or bears an illegible postmark in accordance with section 4000.7[a][1][iii][a]), "the document must be received by the Bureau of Conciliation and Mediation Services not later than the time when an envelope or wrapper which has sufficient postage prepaid and is properly addressed, mailed and sent by the same class of mail would ordinarily be received". In Matter of Harron's Electric Service (Tax Appeals Tribunal, February 19, 1988), the Tax Appeals Tribunal found that five days was not later than the date a document would ordinarily be received when mailed by United States Postal Service mail.

Copies of two of the envelopes containing requests for conciliation conferences bear postmarks of October 5, 1993 which is 91 days from the date of mailing of the notices of determination. The requests for conference contained in these envelopes were definitely untimely. The postmarks on the two remaining envelopes are illegible. All of the envelopes were date stamped received by BCMS on October 7, 1993, three days from the expiration date for filing a request. Under the rule set forth in 20 NYCRR 4000.7(c), the requests contained in the envelopes bearing an illegible postmark might have been deemed timely, if they could be

identified with certainty. They cannot. Since the evidence does not establish that any particular request can be deemed timely under section 4000.7(c), all of the requests must be deemed untimely.

The only evidence offered by petitioner is his sworn statement that he mailed out the requests on the same day that they were executed, October 1, 1993. His statement alone is not persuasive proof of the exact date of mailing of the requests, especially since that statement conflicts with the United States Postal Service postmark of October 5, 1993 appearing on two of the envelopes. In sum, petitioner has not provided convincing evidence that any of the envelopes containing the requests for a conciliation conference bore a postmark of October 4, 1993 or earlier. As a consequence, the Division of Tax Appeals is without jurisdiction over the notices protested in the petition.

E. The Division of Tax Appeals has no authority to waive the 90-day statutory time limit; therefore, there is no basis to consider the reasons for late filing set forth in the petition or to consider petitioner's arguments for waiving the 90-day time limit (see, Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1994).

F. The motion for summary determination made by the Division of Taxation is granted, and the petition of Thomas Kohler, as officer of Champale Beer Distributors, Inc., is dismissed.

DATED: Troy, New York
August 11, 1994

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE