

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>EASTERN CARRIERS, INC.</b>	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 815542
Corporation Tax under Article 9 of the Tax Law for the	:	
Years 1981 through 1994.	:	

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Petitioner, Eastern Carriers, Inc., Attn: William M. McDaniel, Vice-President, P.O. Box 8499, Greenville, South Carolina 29604, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1981 through 1994.

The Division of Taxation by its representative, Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel), brought a motion dated April 22, 1997, requesting the Division of Tax Appeals to dismiss the petition and grant summary determination in favor of the Division of Taxation as a matter of law on the ground that petitioner failed to timely file either a request for conciliation conference or a petition contesting the statutory notices at issue. Pursuant to section 3000.5(d) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, petitioner's response to the motion was due within 30 days, i.e., by May 22, 1997, which date commenced the 90-day period for issuance of this determination. Petitioner, appearing by its vice-president, William McDaniel, submitted a letter dated May 26, 1997 in opposition to the motion.

Based upon the motion papers, the affidavits and exhibits submitted therewith, and all pleadings and documents submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed either a request for a conciliation conference or a petition with the Division of Tax Appeals contesting certain statutory notices.

**FINDINGS OF FACT**

1. At issue on this motion are three notices of deficiency, each dated July 31, 1995 and addressed to petitioner, Eastern Carriers, Inc., at P.O. Box 8499, Greenville, South Carolina 29604-8499. Respectively, these notices bear assessment identification numbers L-010685525, L-010685526 and L-010685527. These notices also, respectively, bear certified mail control numbers P 911 205 019, P 911 205 020 and P 911 205 021. These notices assert corporation tax deficiencies under Tax Law Article 9, sections 183, 184 and 184(a), respectively, in the aggregate amount of \$17,096.26, including penalty and interest to the alleged date of issuance of the notices. Under the heading "Explanation and Instructions", each of the notices contains the statement "[a] field audit of your records has disclosed an additional tax due." In addition, each of the notices states, in bold type on its face, "NOTE: You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 10/29/95."

2. Petitioner challenged the above-notices by its submission of Form DTF-968.4 ("Payment Document") to the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). Form DTF-968.4 is a Division form on which a taxpayer can indicate either agreement or disagreement with the Division's action. In this case, petitioner indicated its disagreement with the above-described notices by inserting an "x" in the "I DISAGREE" section of the form, followed by a listing of the assessment identification numbers and dollar amounts of the three notices in question. Petitioner provided the following statement on the face of the form in explanation of its disagreement:

"No hearing no tax payment. I have not been provided a hearing. I formally wrote my disagreement with letter dated 6/9/95 and with an official protest dated 11/25/95 and with another protest dated 4/22/96. Eastern Carriers, Inc. (ECI) incurred a complete change of ownership in 7/91. NY State consistently failed from 1982 to 1993 to provide to provide [sic] corp tax forms for filing tax returns while making threatening [sic] demands from 1990 to 1992, despite my request for forms. NOTE: A HEARING WILL BE NECESSARY IN ACCORDANCE WITH MY PREVIOUS CORRESPONDENCE. I WILL MEET WITH A NY STATE OFFICIAL IN NEW YORK OR DISCUSS THE MATTER BY CONFERENCE PHONE OR BOTH. IF AFTER THE HEARING A DETERMINATION IS MADE THAT ECI OWES ANY OR ALL OF THIS TAX, I REQUEST A PAYMENT PLAN. ECI OPERATES 25 TRACTORS NOW

(RATHER THAN FIFTY) AND IS NOT ABLE TO PAY ALL AT ONCE. IF THE AMOUNT IF [sic] REDUCED A GREAT DEAL, THEN PERHAPS A SINGLE PAYMENT CAN BE MADE. BUT A HEARING WILL BE REQUIRED."

3. The above Form DTF-968.4 is signed by petitioner's vice-president, William McDaniel, and is dated June 15, 1996. The envelope in which the form was mailed bears a machine metered (Pitney Bowes) postmark date of June 15, 1996, but does not bear a United State Postal Service ("USPS") postmark. The face of the form is indate stamped as received by BCMS on June 27, 1996.

4. By a Conciliation Order (CMS No. 156265) dated September 13, 1996, petitioner's request for a conference per the above-Form DTF-968.4 was denied on the basis that such request had been filed in excess of 90 days after the July 31, 1995 date set forth on the face of each of the foregoing notices. Petitioner continued its challenge by filing a petition. The Division, in turn, filed its answer to the petition alleging, inter alia, that petitioner had failed to timely protest the notices. Thereafter, the Division brought the subject motion for summary determination.

5. To establish proof of mailing of the notices of deficiency on July 31, 1995, the Division submitted (i) a March 11, 1997 affidavit of Geraldine Mahon, the principal clerk of the Division's Case and Resource Tracking System ("CARTS") control unit, and an attached photocopy of a nine page fan-folded (connected) certified mail record, and (ii) a March 11, 1997 affidavit of James Baisley, the chief processing clerk of the Division's mail processing center.

6. The affidavit of Geraldine Mahon sets forth the Division's general practice and procedure for processing notices of deficiency generated by CARTS. According to Ms. Mahon, she receives from CARTS (i) a computer printout entitled "Assessments Receivable-Certified Record for Non-Presort Mail" ("certified mail record") and (ii) the corresponding notices of deficiency generated by CARTS. The notices are predated with the anticipated date of mailing. Each notice is assigned a "certified control number" which is recorded on the certified mail record under the heading "Certified No." The name and address of the person to whom the

notice is to be mailed on a particular day is also recorded on the certified mail record. On the certified mail record included in the record herein, the names of taxpayers other than petitioner have been redacted to preserve confidentiality.

Ms. Mahon's affidavit further states that she examined the certified mail record issued by the Department of Taxation and Finance for July 31, 1995 which, according to Ms. Mahon, establishes that the three notices of deficiency at issue were sent to petitioner at P.O. Box 8499, Greenville, South Carolina 29604-8499 by certified mail using certified control numbers P 911 205 019, P 911 205 020 and P 911 205 021, respectively. Ms. Mahon points out that these same certified control numbers are recorded on the face of each of the corresponding notices. The certified control numbers on the certified mail record run consecutively, with eleven entries on each of the first eight pages and five entries on the ninth and final page, with no deletions therefrom, thus resulting in 93 pieces of certified mail. Ms. Mahon states that the USPS postmark appearing on each page of the certified mail record, including specifically page nine of the certified mail record on which the three notices of deficiency at issue appear, confirms that such notices were sent on July 31, 1995.

7. The affidavit of James Baisley, the chief processing clerk in the Division's mail processing center, describes the operations and procedures followed by the mail processing center. Mr. Baisley states that after the notices 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 envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to the Colonie Center Branch of the USPS 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. A review of the certified mail record at issue shows that the postal employee affixed a postmark to every page of the certified mail record, circled the total number of pieces of mail, and signed the

certified mail record to indicate that 93 was the total number of pieces received at the post office. Mr. Baisley states that his knowledge that the postal employee circled the "Total Number of Pieces" for the purpose of indicating that 93 pieces were received at the post office is based on the fact that the Division's mail processing center specifically requested that postal employees either circle the number of pieces received or write the number of pieces received on the mail record to indicate the total number of pieces received by the USPS. The certified mail 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 CARTS control unit. Mr. Baisley, from his own review of the certified mail record, confirms Ms. Mahon's statement that the general mailing procedures were followed in this case.

8. In response to the motion, petitioner submitted a letter, dated and mailed on May 26, 1997, together with a copy of the petition. Petitioner's letter states that petitioner objects to the motion for summary determination based on the reasons set forth in its petition, noting that "[t]he Department was put on notice of Eastern Carriers, Inc.'s objection to this tax bill long below [sic] the stated date in the Motion for Summary Judgment."

9. Petitioner alleges, in its petition, that the Division failed to respond to or acknowledge letters allegedly sent by petitioner on November 25, 1995 and April 22, 1996 "protesting any pending tax liability and requesting a hearing." Petitioner goes on to allege that the Division was placed on notice of petitioner's disagreement via letters to the Division's auditor dated June 9, 1995 and July 28, 1995. Petitioner states that:

"[t]hese letters were not written on the proper Department forms (non [sic] were available to ECI at that time) and also were not specifically in response to the 7/31/95 Notices of Deficiency. Nevertheless, an equitable argument can be presented by the petitioner that the Department was clearly on notice of ECI's disagreement with the assessment prior to 10/29/95."

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1081(a) provides, in part, as follows:

"If upon examination of a taxpayer's return . . . the [Division of Taxation] determines that there is a deficiency of tax, it may mail a notice of deficiency to the

taxpayer . . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at its last known address in or out of this state."

Pursuant to Tax Law § 1081(b):

"After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment . . . except only for any such tax or other amount as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . . ."

B. As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). If a taxpayer fails to file a petition or a request for a conference in a timely manner (i.e., within the 90-day period), the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (Matter of Roland, Tax Appeals Tribunal, February 22, 1996; Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice, and the Division bears the burden of proving both the fact and date of mailing (Matter of Novar TV & Air Conditioning Sales & Serv., Tax Appeals Tribunal, May 23, 1991; Matter of Katz, Tax Appeals Tribunal, November 14, 1991). The Division, in turn, may meet this burden by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (see, Matter of Accardo, Tax Appeals Tribunal, August 12, 1993). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices of deficiency by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (see, Matter of Katz, *supra*; Matter of Novar TV & Air Conditioning Sales and Serv., *supra*).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees

involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency (see, Findings of Fact "5", "6" and "7"). Furthermore, the Division has offered adequate proof to establish the fact that the particular notices in question were mailed to petitioner on July 31, 1995, the date appearing on the face of the notices. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the certified mail record, in turn, show the date of mailing as July 31, 1995 (see, Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995). It is observed that the certified mail record used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purpose of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient. Finally, it is noted that the figure "93" on the last page of the certified mail record, signifying the total number of pieces of mail involved, has been circled. As in Matter of Roland (supra), the Division's affiant (here Mr. Baisley) states that the circling of this figure indicates that this was the number of pieces of mail received by the USPS. In addition, and unlike the situation in Roland, the affiant here also states the basis of his knowledge for this proposition. That is, the Baisley affidavit states that the Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in Roland. Accordingly, consistent with the reasoning in Roland, the Division has met its burden of proof on the question of mailing in this case.

E. In view of the foregoing conclusion, petitioner was required to request a conciliation conference or file a petition within 90 days after July 31, 1995, that is by October 29, 1995, in order for such request or petition to be considered timely (Tax Law § 1081[b]). Unfortunately,

the evidence does not establish that petitioner filed either a request for a conciliation conference or a petition in a timely manner. The only such document in the record is the Form DTF-968.4, specifying petitioner's disagreement with the notices in question and requesting a hearing. This document, treated by the Division as a request for a conciliation conference, was dated June 15, 1996 and bears a BCMS indate receipt stamp of June 27, 1996. Since these dates fall well after the October 29, 1995 date specified above, the Division properly rejected petitioner's request as untimely.

While the record contains no other documentary evidence of protests, petitioner has alleged that protest letters were sent on June 9, 1995 and on July 28, 1995, and thereafter on November 25, 1995 and on April 22, 1996 (see, Findings of Fact "2" and "9"). Even assuming, arguendo, that such letters in protest were mailed on the dates claimed, they would not serve as timely protests. The first two dates (6/9/95 and 7/28/95) each fall before the July 31, 1995 date of issuance of the notices. Thus, these letters could not have been in protest to such notices, and would have been premature (West Mountain Corp. v. State Dept. of Taxation and Finance, 105 AD2d 989, 482 NYS2d 140, affd 64 NY2d 991, 489 NYS2d 62).<sup>1</sup> In turn, the latter two dates (November 25, 1995 and April 22, 1996) both fall after the October 29, 1995 date by which a protest had to have been filed. In sum, the evidence does not establish that petitioner protested the July 31, 1995 notices of deficiency in a timely manner, and thus the Division of Tax Appeals is without jurisdiction to address the case.

F. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party. Here, there are no material issues of fact with regard to the

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<sup>1</sup>In fact, petitioner acknowledges in its petition that such letters were not specifically in response to the July 31, 1995 notices of deficiency.



notices. That is, they were properly mailed by the Division and there was no timely protest thereafter by petitioner, thus leaving no jurisdiction over such notices in this forum.

Accordingly, the Division of Taxation is entitled to summary determination with respect to such notices.

G. The Division's motion for summary determination is hereby granted and the petition of Eastern Carriers, Inc. is dismissed.<sup>2</sup>

DATED: Troy, New York  
July 17, 1997

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>2</sup>Notwithstanding the dismissal herein, petitioner is not entirely without redress. That is, petitioner can still obtain a hearing on the merits of its case by paying the amount due and filing a claim for refund within two years from the time of such payment (Tax Law § 1087[a]). Thereafter (assuming the claim for refund is denied or is not acted upon within six months of the date of its filing and thus is deemed denied), petitioner may file a petition or a request for conciliation conference challenging the refund denial pursuant to Tax Law § 1089(c).