STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ASSOCIATION OF ELECTRICAL CONSTRUCTION ENGINEERS	:	ORDER DTA NO. 817121
for Review of a Denial of an Application for Exempt Organization Status under Articles 28 and 29 of the Tax Law.	:	

Petitioner, Association of Electrical Construction Engineers, Attn: Michael A. Miller, c/o Consolidated Edison, 4 Irving Place, Room 1006-S, New York, New York 10003, filed a petition for review of a denial of an application for exempt organization status under Articles 28 and 29 of the Tax Law.

On June 16, 1999, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On July 23, 1999, the Division of Taxation, by Terrence M. Boyle, Esq. (Christina L. Siefert, Esq., of counsel), submitted documents in support of dismissal. On June 23, 1999 and July 30, 1999, respectively, petitioner submitted letters in support of its position, with such July 30, 1999 date commencing the 90-day period for issuance of this order. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition contesting the denial of its application for exempt organization status.

FINDINGS OF FACT

1. Petitioner, Association of Electrical Construction Engineers, filed an application with the Division of Taxation ("Division") seeking exempt organization status, pursuant to Tax Law § 1116(a)(4), with respect to sales and use taxes. The record does not include a copy of petitioner's application, or otherwise indicate the date on which such application was filed or the specific address listed for petitioner thereon.

2. By a letter dated January 27, 1999, the Division denied petitioner's application. The Division's letter indicates that petitioner failed to meet the requisite organizational and operational tests for exempt organization status.

3. Petitioner challenged the denial of its application by filing a petition with the Division of Tax Appeals. The petition is dated as signed on May 25, 1999, and bears a stamp indicating receipt by the Division of Tax Appeals on May 28, 1999. The envelope in which the petition was filed, by first class mail, bears a United States Postal Service postmark date of May 26, 1999. The petition challenges the substantive merits of the Division's denial of petitioner's application.

4. On June 16, 1999, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. This notice advises that a petition challenging denial of exempt organization status must be filed within 90 days from the date of the denial letter (citing 20 NYCRR 590.11). The notice further states that the denial letter in this instance was issued on January 27, 1999, but the petition was not filed thereafter until May 26, 1999, a span of some 119 days. Therefore, the petition was subject to dismissal for lack of timeliness.

5. Petitioner responded to the notice by a letter dated June 21, 1999. This letter, authored by petitioner's treasurer, Michael A. Miller, states that 20 NYCRR 590.11 requires that a protest

be filed within 90 days from the date of *receipt* of the denial letter, as opposed to its issuance date. The letter further claims that the petition should be considered filed on the date it was signed, i.e., May 25, 1999, rather than the May 26, 1999 date on which it was mailed. Finally, the letter alleges that correspondence from the Division was consistently delayed, lengthy and untimely.

6. In response to petitioner's letter, the Division submitted an affidavit made by Daniel Mihalek, together with annexed documents, and an affidavit made by James Baisley. These affidavits, dated July 12, 1999 and July 15, 1999, respectively, describe the process by which the denial letter was generated and issued to petitioner.

7. Mr. Mihalek has been employed as a Tax Technician in the Division's Sales Tax Exempt Organizations Unit since April 14, 1990. His regular duties include the preparation and mailing of letters denying requests for exemption from sales and use taxes. In this case, after reviewing petitioner's application, Mr. Mihalek directed a clerk in his office to type a letter denying petitioner's application. Mr. Mihalek reviewed the completed denial letter, signed it, inserted the letter together with a petition for hearing form (Form TA-10) into a windowed envelope, and sealed the envelope. Mr. Mihalek also prepared a Certified Mail Record ("CMR")[1] for issuance of this denial letter by handwriting petitioner's name and address on the CMR and by recording on the CMR, under the column heading "Article Number," the certified control number assigned to this correspondence. Mr. Mihalek also affixed the certified control number sticker to the envelope bearing the denial letter. In this case, the certified control number P 255 253 178 was assigned and appears on the CMR, as does the following address:

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[1] The CMR is a one-page USPS document bearing form number "PS Form 3877."

Association of Electrical Construction Engineers, 4 Irving Place, Room 1006-S, New York, New York 10003-3598. Mr. Mihalek's affidavit states that he "verified the name and address of the taxpayer listed on the CMR against the information in the taxpayer's file."

8. In addition to the foregoing, Mr. Mihalek also prepared a Domestic Return Receipt (PS Form 3811) and attached it, together with three copies of the CMR, to the envelope containing the denial letter and the Form TA-10. The envelope, together with the CMR and the Form 3811, was picked up from Mr. Mihalek by an employee of the Division's Mail Processing Center.

9. The affidavit of James Baisley, who has been the Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom") since 1994, attests to the regular procedures followed by the mailroom in the ordinary course of its business of delivering outgoing certified mail to branches of the USPS. Mr. Baisley states that after a letter is placed in the outgoing certified mail basket in the mailroom, a member of his staff weighs and seals each envelope and places postage and fee amounts on the envelope. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the mailroom staff delivers them to the Colonie Center branch of the USPS in Albany. In turn, the postal employee affixes either a postmark or his or her initials or signature to the CMR to indicate receipt of the envelopes by the USPS. Mr. Baisley explains that the CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the CMR is picked up at the post office the following day and delivered to the originating office by a mailroom staff member.

10. The CMR and the Form 3811 are returned to and retained by Mr. Mihalek's office (the originating office in this case) in the regular course of its business. Included with Mr. Mihalek's

affidavit were copies of the CMR and the Form 3811. The CMR is hand-dated "1/29/99" in its upper right-hand corner, and also bears, in its center area, the postmark of the Colonie Center branch of the USPS dated January 29, 1999. In its lower left area, the CMR bears the handwritten number "1" under each of the headings "Total Number of Pieces Listed by Sender" and "Total Number of Pieces Received at Post Office." The CMR also bears the initials "AMA" under the heading "Postmaster, Per (Name of Recieving Employee)." Mr. Baisley's affidavit notes the Division specifically requested that the USPS indicate the number of pieces of mail received by either circling the number of pieces, or by writing (as in this case) the number of pieces received, on the CMR. In addition, the PS Form 3811 ("Domestic Return Receipt") indicates, per the February 3, 1999 postmark of the Cooper Station branch of the USPS affixed thereon, that an article of certified mail addressed as specified above and bearing article number P 255 253 178 was delivered to and signed for as received by an agent of the addressee.

11. Based on the foregoing affidavits and documents, the Division takes the position that since the denial letter was mailed on January 29, 1999, but the petition was not filed until May 26, 1999, the petition was not timely filed and must be dismissed. Petitioner notes, in its July 30, 1999 letter, that its treasurer's name, Michael A. Miller, does not appear as part of the address on the denial letter, the CMR or the Form 3811 return receipt. In contrast, petitioner points out that its address, as listed on the Notice of Intent to Dismiss Petition and on the Division's submission of affidavits and documents herein, is "Association of Electrical Construction Engineers, Attn: Michael A. Miller, c/o Consolidated Edison, 4 Irving Place, Room 1006-S, New York, New York 10003-3598." In addition, the return address on the envelopes in which petitioner's letters in opposition to the notice were mailed reads "Michael A. Miller, Room 1006-S, Consolidated Edison Company of New York, Inc., 4 Irving Place, New York, NY

10003." Finally, the petition lists petitioner's address as "c/o Con Edison, 4 Irving Place, Room 1006-S, New York, N.Y. 10003, and lists petitioner's representative as Michael A. Miller, Treasurer. In this regard, petitioner's July 30, 1999 letter states as follows:

> Why is it that the Senior Attorney is able to put my name on her "cc" and the envelope, my exhibits "1" and "2", so that the mail gets to be [sic] without delay.
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> In a large company of 14,000 people it is impossible for mail to be delivered in a timely fashion without the person's name affixed to the address. In the attached "Affidavit" no where does he indicate that the proper envelope with the named party was sent out. One would imagine that this would be an appropriate procedure.
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> This explains the delay in my response and thus I should be given the chance to have a hearing.
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> It would appear to be simpler to allow the hearing then [sic] to force the Association to begin the filing process all over again.

CONCLUSIONS OF LAW

A. Tax Law § 1116(a)(4) provides exemption from sales and use taxes for organizations which are organized and operated exclusively for charitable, educational or other specified purposes, where no part of the net earnings of such organization inures to the benefit of any private shareholder or individual and where such organization does not engage in proscribed legislative or political activities. Petitioner has applied for exempt organization status under section 1116(a)(4) but the Division, upon review of petitioner's application, denied the same by letter dated January 27, 1999.

B. Regulations of the Commissioner of Taxation, at 20 NYCRR 529.11, detail the protest procedures available to an organization whose application for exemption has been denied. Specifically with regard to time periods, 20 NYCRR 529.11(a) provides as follows:

> The denial of an exemption claimed or the revocation of an exempt status previously granted will be final unless the person or organization whose exempt status was denied or revoked, *within 90 days after the mailing by certified mail of the revocation or denial by the [Division],* applies to the Bureau of Conciliation and Mediation Services of the [Division] for a conciliation conference or the Division of Tax Appeals, for a hearing. (Emphasis added.) [2]

The filing of a petition within this time period is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a notice of denial (Tax Law § 2006.4; ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

C. Where the taxpayer files a petition and, as here, the timeliness of the petition is thereafter questioned, the initial inquiry must focus on the issuance (i.e., mailing) of the notice, and the Division has the burden of proving the proper mailing thereof (***see, Matter of Katz,*** Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). In this case, proper mailing requires that the notice must be mailed, by certified mail per 20 NYCRR 529.11, to the person or organization 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" (Tax Law § 1147[a][1]; 20 NYCRR 529.11). Proof of mailing of a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (***Id.***)

D. A notice is mailed when it is delivered to the custody of the USPS (***Matter of Air Flex Custom Furniture***, Tax Appeals Tribunal, November 25, 1992). The Division may meet its

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[2] In this case, petitioner opted not to file a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services, but to file a petition directly with the Division of Tax Appeals.

burden of demonstrating mailing by submitting evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (***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 by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (***see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra***).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Messrs. Mihalek and Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of denial. Furthermore, the Division has offered adequate proof to establish the fact that the denial letter in this case was actually mailed on January 29, 1999. Specifically, the affidavits of Messrs. Mihalek and Baisley, together with the CMR, show that the one piece of mail listed on the CMR was received by the USPS, and the postmark on the CMR, in turn, shows the date of mailing as January 29, 1999 (***see, Matter of Auto Parts Center***, Tax Appeals Tribunal, February 9, 1995). Moreover, the CMR used in this case was a USPS Form 3877 which, when properly completed as here, represents direct documentary evidence of the date and fact of mailing and raises a presumption of official regularity (***Matter of Air Flex Custom Furniture, supra; see also, Coleman v. Commr.,*** 94 TC 82; ***Wheat v. Commr.,*** 63 TCM 2955). Finally, the Division provided PS Form 3811, Domestic Return Receipt, establishing that the correspondence listed on the CMR was delivered *as addressed* on February 3, 1999. Accordingly, the Division has clearly met its burden of proof on the question of actual mailing of the denial letter in this case.

F. In response, petitioner does not question that the notice was mailed as claimed by the Division. In fact, petitioner does not dispute that the notice was received. However, petitioner alleges that there was a delay in receipt by the person to whom the notice should have been directed. Specifically, petitioner complains that the notice was not addressed to the attention of its treasurer, Michael A. Miller, and takes the position that such failure in address delayed Mr. Miller's receipt of the denial letter and resulted in the petition being filed more than 90 days after the date of mailing of the denial letter. [3] In short, petitioner argues that the notice was simply not properly addressed, and thus was not properly mailed.

G. As discussed above, the Division has established actual mailing of the denial letter on January 29, 1999 as claimed. It is also clear that the denial letter was delivered thereafter, *as addressed,* on February 3, 1999. However, it is not clear that the denial letter was *properly* mailed, in that the address to which it was mailed differs from petitioner's address as reflected on the documents in the record. Specifically, the address to which the denial letter was mailed does not include the name of petitioner's treasurer, Michael A. Miller, whereas the balance of the correspondence in the record does include this name. To effect *proper* mailing, the Division is required under Tax Law § 1147(a) to mail a notice to the address "given in the last return filed . . . pursuant to [Article 28] *or in any application made by* [the taxpayer] . . ." (emphasis added). In this case, petitioner filed an application for exempt organization status, presumably listing thereon its address. It may well be that this application carried an address which did *not* include the name of petitioner's treasurer, in which case the denial letter as addressed would have been proper and the petition would clearly be dismissed as untimely. However, the only information

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[3] Petitioner's claim in its June 21, 1999 letter that the time period should be measured from the date of receipt of the notice rather than the date of its mailing is rejected as incorrect (20 NYCRR 529.11[a]).

in the record concerning petitioner's address vis-avis the application and the denial letter is the statement in the Mihalek affidavit that "I then verified the name and address of the taxpayer listed on the CMR against the information in the taxpayer's file."

H. In ***Matter of Combemale*** (Tax Appeals Tribunal, March 13, 1994), the taxpayers listed their address to include not only their own names but also to include the name of their representative Arthur B. Greene, specifically within the address as "c/o Arthur B. Greene." However, the Division's notice of deficiency was simply addressed to petitioners with the additional word "Greene," as opposed to "c/o Arthur B. Greene," included therein. The Tribunal pointed out that eliminating "Arthur B." (Greene) from the address eliminated an additional named addressee to look for in attempting delivery and, furthermore, that eliminating "c/o" (in care of) from the address eliminated the direction to look for such particular additional addressee. The Tribunal held that these errors were consequential rather than harmless, and refused to dismiss the petition as untimely. By comparison, in ***Matter of Service Merchandise Co., Inc.*** (Tax Appeals Tribunal, January 14, 1999), the taxpayer's claim of consequential as opposed to harmless error in the Division's failure to list a specific person's name as part of the address on a notice of determination was rejected because such individual's name was not listed as part of the taxpayer's address given in the last return (or application) filed by the taxpayer.

In this case, since petitioner's application itself is not part of the record, it is not possible to conclude that the application did not include Mr. Miller's name as part of the address. In turn, it is not possible to conclude that the Division properly addressed the notice, to wit, to the address as listed on petitioner's application. As a result, it is not possible to conclude that the denial letter was properly mailed, that the petition filed more than 90 days after such mailing was therefore untimely, and that a hearing on the merits is therefore precluded.

I. This matter has proceeded by way of a Notice of Intent to Dismiss Petition, which is essentially the equivalent of a motion to dismiss a petition for lack of timeliness. The impact of dismissing the petition will be to preclude a hearing on the merits of petitioner's application. It is well established that such a result should not occur unless it has been established sufficiently that no material issue of fact exists and that, as a matter of law, a determination on the challenged issue may be issued in favor of any party (***see*** 20 NYCRR 3000.9[b][1]). The absence of proof concerning the address shown on petitioner's application leaves unanswered a material issue of fact, to wit, whether the notice was properly mailed as required. Notwithstanding that the Division has established actual mailing to and actual receipt of the denial letter as addressed, the Division has not established that the denial letter was properly addressed and thus properly mailed as required. If the address in the application included the name of the person (Michael A. Miller) to whom petitioner specifically desired the denial letter to be directed, while the mailing address used by the Division does not, the claimed resulting delay in filing a petition in response to the denial letter has credence. In short, if petitioner specified a particular addressee in its application, such specificity must be respected by the Division (Tax Law § 1147[a][1]; ***Matter of Combemale, supra***). Absent such specificity the Division is not entitled to a presumption (nor has it established in fact) that the denial letter was delivered to the specific intended addressee. It would be in error to grant the procedural equivalent of a motion to dismiss where there exists such a material issue of fact. [4]

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[4] It seems the timeliness issue in this matter may well be rendered academic even if the Division establishes, by documents submitted with a motion to dismiss or a motion for summary determination, that the address to which the letter of denial was mailed was in fact the exact address indicated on the application filed by petitioner (i.e., such application did *not* include the name of petitioner's treasurer). That is, while such proof would render the instant petition untimely and preclude a hearing on the merits, there is no apparent bar to petitioner's refiling its application for exempt status and, upon such application being denied, filing a timely petition contesting such denial.

J. Accordingly, it is ordered that a hearing or other agreed upon procedure on the Notice of Intent to Dismiss be scheduled to determine the issue of the proper mailing address.

DATED: Troy, New York
October 28, 1999

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE