

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WILLIAM E. HALLENBECK, JR. : ORDER
 : DTA NO. 818389
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period March 1, 1994 through July 10, 1997; and for :
Redetermination of Deficiencies of Personal Income Tax :
under Article 22 of the Tax Law for the Period July 1, 1994 :
through December 31, 1994; and for Redetermination of :
Deficiencies of Corporation Franchise Tax under Article :
9-A of the Tax Law for the Years 1993 through 1996. :
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Petitioner, William E. Hallenbeck, Jr., 21 King Phillip Road, Narragansett, Rhode Island 02882-1129, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1994 through July 10, 1997; and for redetermination of deficiencies of personal income tax under Article 22 of the Tax Law for the period July 1, 1994 through December 31, 1994; and for redetermination of deficiencies of corporation franchise tax under Article 9-A of the Tax Law for the years 1993 through 1996.

On August 17, 2001, the Division of Taxation filed a motion for an order dismissing the petition in part and granting it partial summary determination on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing within 90 days of the mailing of certain notices of determination and notices of deficiency issued pursuant to Articles 22, 28 and 29 of the Tax Law. Petitioner filed no response to the motion; therefore, the 90-day period for the issuance of this determination began on September 17, 2001. Petitioner appears by

E. David Duncan, Esq.. The Division of Taxation appears by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel). After due consideration of the documents and arguments submitted, Jean Corigliano, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner timely filed requests for conciliation conferences with the Division of Taxation following the issuance of certain notices of determination and notices of deficiency.

FINDINGS OF FACT

1. On March 9, 2001, petitioner, William E. Hallenbeck, Jr., filed a petition for review of five conciliation orders dismissing requests issued by the Bureau of Conciliation and Mediation Services (“BCMS”) of the Division of Taxation (“Division”). The conciliation orders were issued in response to a letter written on petitioner’s behalf by his attorney, E. David Duncan, requesting a conference in regard to a Statement of Consolidated Tax Liabilities. That statement lists a total of 25 assessments of tax due, 10 of which are the subject of this motion. The letter was received by BCMS on December 15, 2000.¹

2. Conciliation Order number 184565 dismissed a request for conference regarding two notices of deficiency of personal income tax (numbers L-014058385 and L-014058386). Conciliation Order number 184564 dismissed a request for conference regarding eight sales and use tax notices of determination (L-011578518, L-011578520, L-011578521, L-012955126, L-012955127, L-013156352, L-013873057, L-013873058). On August 16, 2001, the Division filed the instant motion seeking dismissal of the petition as it applies to these 10 notices.

¹ The Division submitted a copy of the envelope in which Mr. Duncan's letter was received, but the postmark on the envelope is illegible.

3. The Division concedes the jurisdiction of the Division of Tax Appeals as it applies to the remaining portions of the petition: CMS number 184566 relating to notice numbers L-013417895 and L-013419068; CMS number 184567 relating to notice numbers L-0132003496, L-0132003497, L-0132003498 and L-015580289; and CMS number 184568 relating to notice numbers L-009669005, L-009977797, L-011498806, L-012424684, L-012776312, L-013109345, L-013309515, L-013626705 and L-014211712.

4. Each statutory notice issued to petitioner bears the same name and address: William E. Hallenbeck, Jr., 19 Lawnridge Ave., Albany, NY 12208-3111. Wherever reference is made in this determination to petitioner's name and address, this is the name and address referred to. The Division's computer system stores information derived from various sources including tax returns filed by taxpayers. The computer files show that petitioner filed an Automatic Extension for Time to File for Individuals for the 1995 and 1996 tax years. Each extension request shows petitioner's address as 19 Lawnridge Avenue, Albany, New York 12208-3111.

5. As relevant, BCMS issued to petitioner two conciliation orders dismissing request, each dated February 2, 2001. In both cases, the basis for denying the request for a conference is that the request was not made within the 90-day statutory period of limitation for making such a request. With respect to notices of determination of sales and use taxes due, assessment numbers L-011578518, L-011578520, L-011578521, L-012955126, L-012955127, L-013156352, L-013873057, and L-013873058, the conciliation order alleges that the notices were issued between January 2, 1996 and July 10, 1997, but the request for conference was not filed until December 13, 2000. With respect to notices of deficiency of personal income tax, numbers L-014058385 and L-014058386, the conciliation order states that statutory notices were issued on September 4, 1997 and the request for conference was not filed until December 13, 2000.

6. Statutory notices, such as the ones at issue here, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of statutory notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each notice, a separate certified control number. The CMR is a fan-folded document, and the pages remain connected to each other from the time the CMR is submitted to the United States Postal Service with the notices until the CMR is returned to the CARTS Control Unit.

7. Each computer-generated notice is pre-dated with its anticipated mailing date, and each is assigned a certified control number. The certified control number is recorded on the CMR under the heading "Certified No." The date that the CMR was printed is shown in its upper left hand corner. This date is approximately 10 days earlier than the anticipated mailing date for the notices. This lead period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The print date on the first page of the CMR is manually changed by Division personnel at the time of mailing to conform to the actual date of mailing of the notices.

8. At the bottom of each CMR, the number of pieces of mail listed on that CMR is totaled, and the total number appears next to the legend "TOTAL PIECES AND AMOUNTS LISTED." A space is left beneath that line for the United States Postal Service ("USPS") to enter the actual number of pieces received.

9. After a statutory notice is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts. A Mail Processing Center clerk then counts the envelopes and

verifies, by a random review of 30 or fewer pieces of mail, that the names and certified mail numbers on the notices correspond with the names and addresses on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branches of the USPS located in the Albany, New York area.

10. A postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the Division's Mail Processing Center to either circle the total number of pieces listed as shown on the CMR or write in the total number of pieces received by the USPS to indicate the actual number of pieces of mail received by the USPS. The CMR is normally left overnight at the USPS branch office to provide the USPS employees with sufficient time to process the certified mail and to make the appropriate notations on the certified mail record.

11. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the post office on the day following its delivery to the USPS office and returns it to the originating office (CARTS Control Unit) within the Division.

Notice numbers L-011578518, L-011578520, L-011578521

12. The CMR evidencing the mailing of notices of determination numbered L-011578518, L-011578520 and L-011578521 is a 34-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip+4 Minimum Discount Mail." Each page of the document bears a print date of 12/22/95 in the upper lefthand corner. On page 1, this date has been crossed out and the date 1/2/96 has been handwritten in its place. This CMR lists consecutive certified control numbers P 911 005 011 through P 911 005 375. There are no deletions from the document. Each item of mail listed on the

34 pages of the CMR is assigned a certified control number. A notice number, the name and address of the addressee, and postage and fee amounts are listed with the corresponding certified control number.

13. The three notices of determination issued to petitioner are listed on page 29 of the CMR. Notice number L-011578518 is listed next to certified control number P 911 005 319. Petitioner's name and address, as shown on the notice of determination bearing the same notice number and certified mail control number, is also listed. The same is true for notice number L-011578520 which is listed with certified mail control number P 911 005 321 and notice number L-011578521 which is listed with certified mail control number P 911 005 322.

14. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated January 2, 1996.

15. The last page of the CMR, page 34, contains a pre-printed entry of 365 next to the legend "Total Pieces and Amounts Listed." There is no entry next to the pre-printed statement "Total Pieces Received at Post Office," but the number 365 has been circled to indicate the number of pieces of mail actually received by the USPS. A signature appears at the end of the listings.

16. The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the number "365" indicate that all 365 pieces of mail listed on the CMR were received at the post office.

17. The Division generally does not request, demand or retain return receipts from certified or registered mail.

Notice numbers L-012955126 and L-012955127

18. The CMR evidencing the mailing of notices of estimated determination numbered L-012955126 and L-012955127 is a 38-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip+4 Minimum Discount Mail." Each page of the document bears a print date of 11/21/96 in the upper lefthand corner. On page 1, this date has been crossed out and the date 12/2/96 has been handwritten in its place. This CMR lists consecutive certified control numbers P 911 004 048 through P 911 004 462. There are no deletions from the document. Each item of mail listed on the 38 pages of the CMR is assigned a certified control number. A notice number, the name and address of the addressee, and postage and fee amounts are listed with the corresponding certified control number.

19. The two notices of estimated determination issued to petitioner are listed on page 25 of the CMR. Notice number L-012955126 is listed next to certified control number P 911 004 318. Petitioner's name and address as shown on the Notice of Estimated Determination bearing the same notice number and certified mail control number is also listed. The same is true for notice number L-012955127 which is listed with certified mail control number P 911 004 319.

20. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated December 2, 1996.

21. The last page of the CMR, page 38, contains a pre-printed entry of 415 next to the legend "Total Pieces and Amounts Listed." There is no entry next to the pre-printed statement "Total Pieces Received at Post Office," but the number 415 has been circled to indicate the number of pieces of mail actually received by the USPS. A signature appears at the end of the listings.

22. The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the number “415” indicate that all 415 pieces of mail listed on the CMR were received at the post office.

Notice number L-013156352

23. The CMR evidencing the mailing of Notice of Estimated Determination numbered L-013156352 is a 34-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Zip+4 Minimum Discount Mail.” Each page of the document bears a print date of 1/31/97 in the upper lefthand corner. On page 1, this date has been crossed out and the date 2/10/97 has been handwritten in its place. This CMR lists consecutive certified control numbers P 911 004 212 through P 911 004 581. There are no deletions from the document. Each item of mail listed on the 34 pages of the CMR is assigned a certified control number. A notice number, the name and address of the addressee, and postage and fee amounts are listed with the corresponding certified control number.

24. Notice of Estimated Determination L-01356352, issued to petitioner, is listed on page 23 of the CMR next to certified control number P 911 004 458. Petitioner’s name and address is also listed. The Notice of Estimated Determination bears the identical name and address, notice number and certified mail control number as appear on the CMR.

25. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated February 10, 1997.

26. The last page of the CMR, page 34, contains a pre-printed entry of 370 next to the legend “Total Pieces and Amounts Listed.” There is no entry next to the pre-printed statement “Total Pieces Received at Post Office,” but the number 370 has been circled to indicate the number of pieces of mail actually received by the USPS. A signature appears at the end of the

listings.

27. The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the number “370” indicate that all 370 pieces of mail listed on the CMR were received at the post office.

Notice numbers L-014058385 and L-014058386

28. The CMR evidencing the mailing of notices of deficiency numbered L-014058385 and L-014058386 is a 46-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Zip+4 Minimum Discount Mail.” Each page of the document bears a print date of 8/26/97 in the upper lefthand corner. On page 1, this date has been crossed out and the date 9/4/97 has been handwritten in its place. This CMR lists consecutive certified control numbers P 911 002 002 through P 911 002 504. There are no deletions from the document. Each item of mail listed on the 46 pages of the CMR is assigned a certified control number. A notice number, the name and address of the addressee, and postage and fee amounts are listed with the corresponding certified control number.

29. Notice of Deficiency L-014058385 is listed on page 33 of the CMR next to certified control number P 911 002 356. Petitioner’s name and address is also listed. The Notice of Deficiency bears the identical name and address, notice number and certified control number as appears on the CMR. Notice of Deficiency L-014058386 is listed on page 33 next to certified control number P 911 002 357, and the CMR also shows a name and address for petitioner, certified control number and notice number identical to that on the Notice of Deficiency.

30. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated September 4, 1997.

31. The last page of the CMR, page 46, contains a pre-printed entry of 503 next to the

legend "Total Pieces and Amounts Listed." There is no entry next to the pre-printed statement Total Pieces Received at Post Office, but the number 503 has been circled to indicate the number of pieces of mail actually received by the USPS. A signature appears at the end of the listings.

32. The affixation of the Postal Service postmarks, the signature of the Postal Service employee, and the circling of the number "503" indicate that all 503 pieces of mail listed on the CMR were received at the post office.

Notice numbers L-013873057 and L-013873058

33. The CMR evidencing the mailing of notices of determination numbered L-013873057 and L-013873058 is a 57-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Zip+4 Minimum Discount Mail." Each page of the document bears a print date of 7/1/97 in the upper lefthand corner. On page 1, this date has been crossed out and the date 7/10/97 has been handwritten in its place. This CMR lists consecutive certified control numbers P 911 002 002 through P 911 002 625. There are no deletions from the document. Each item of mail listed on the 57 pages of the CMR is assigned a certified control number. A notice number, the name and address of the addressee, and postage and fee amounts are listed with the corresponding certified control number.

34. Notices of determination L-013873057 and L-013873058, issued to petitioner, are listed on page 25 of the CMR next to certified control numbers P 911 002 268 and P 911 002 269 respectively. Petitioner's name and address is listed next to each notice number. Each of the notices of determination bears the identical name and address as that appearing on the CMR, and each notice bears a notice number and corresponding certified control number consistent with the information on the CMR.

35. Each page of the CMR bears two postmarks of the Colonie Center Branch of the U.S. Postal Service, one dated July 16, 1997 and one dated July 10, 1997. The July 16, 1997 postmark has been crossed out on each page.

36. The last page of the CMR, page 57, contains a preprinted entry of 624 next to the legend "Total Pieces and Amounts Listed." There is no entry next to preprinted statement "Total Pieces Received at Post Office," but the number 624 has been circled to indicate the number of pieces of mail actually received by the USPS. A signature appears at the end of the listings.

37. The facts set forth above in Findings of Fact "6" through "36" were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of deficiency and determination. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division's Mail Processing Center. Mr. Baisley's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

38. Regarding the presence of two postmarks on the CMR bearing the preprinted date July 1, 1997, Mr. Baisley avers as follows:

Postmarks of July 16, 1997 and July 10, 1997 appear on the July 10 mail log. The erroneously applied postmark of July 16, 1997 has been crossed off, while the correct postmark of July 10, 1997 is still intact. When such an error occurs in the normal course of business, a post office employee may catch the mistake or a member of my staff may catch the error and request that the mail log be corrected to properly and accurately reflect the date of mailing.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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]).

The proponent of a summary determination motion must make a prima facie showing of entitlement to a determination in its favor as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*see, Alvarez v. Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 925; *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316). The burden is then placed on the opponent of the motion to present facts sufficient to demonstrate an unresolved material issue which can be determined at a hearing (*Walski v. Forma*, 54 AD2d 767, 387 NYS2d 538). Petitioner did not respond to the Division's motion or in any other manner challenge the facts presented by the Division through affidavits and documents. Accordingly, petitioner is deemed to have conceded the correctness of those facts (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667). Inasmuch as there are no material and triable issues of fact presented, a determination may be issued, as a matter of law, in favor of any party.

Notice numbers L-011578518, L-011578520, L-011578521, L-012955126, L-012955127, L-013156352, L-014058385 and L-01458386

B. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where “a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient.” This section further provides that such a notice “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

Likewise, Tax Law § 681(a) authorizes the Division to mail a notice of deficiency of income tax to a taxpayer by certified or registered mail to his last known address. In this case, the record is

clear that the address listed on the statutory notices was petitioner's last known address (*see*, Finding of Fact "4").

C. A petition contesting either a notice of determination of sales tax due or a notice of deficiency of personal income tax must be filed within 90 days after the date of mailing of the statutory notice (Tax Law § 681[b]; § 1138[a][1]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). If a taxpayer fails to file a timely request for conference or a petition protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. When, as here, the Division brings a motion for summary determination on the ground that the request for a conciliation conference was not made within a statutory time limit, it bears the initial burden of proving when the applicable time limit began by establishing the date of mailing of the statutory notice (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

The Division satisfies its burden by offering evidence of "a standard procedure for the issuance of such notices by one with knowledge of such procedures, and [introducing] evidence to show that this procedure was followed in the particular case at hand" (*Matter of Katz, supra*; *see also, Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal,

May 23, 1991). Once this burden is met, a presumption of proper mailing arises (*Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112).

E. Regarding the eight notices listed above, the Division 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 mailing notices of determination and notices of deficiency.

The Division also presented sufficient documentary evidence to establish that the notices were mailed to petitioner on the dates alleged. This evidence consists of four CMR's each of which provides proof that the Division's mailing procedures were followed in each of the four individual instances of mailing. Each CMR lists sequentially numbered certified control numbers with corresponding names and addresses. All pages of each CMR bear a U.S. Postal Service postmark corresponding to the alleged date of mailing of the notices. In addition, a postal employee signed the last page of each CMR and circled the number of pieces of mail listed on the CMR to indicate receipt by the post office of all of the items of mail listed. A properly completed CMR, reflecting Postal Service receipt of the item or items listed on the form, represents direct documentary evidence of the date and fact of mailing (*see, Matter of Roland, supra*). Thus, the Division's evidence is sufficient to establish the fact and date of mailing of each of the subject notices of determination and notices of deficiency.

F. Petitioner's request for a conciliation conference was not received until December 15, 2000. Since the notices of determination were mailed between January 2, 1996 and September 4, 1997, the request for conference was not filed within the 90-day statutory period of limitations, and the Division of Tax Appeals has no jurisdiction over the matters raised in the petition.

Notice numbers L-013873057 and L-0138730058

G. The CMR's associated with the notices of determination allegedly mailed on July 10, 1997 are not properly completed. Each CMR bears two postmarks: one dated July 10, 1997 and one dated July 16, 1997. Mr. Baisley states that the erroneous postmark is the one crossed out, and the correct one is the July 10, 1997 postmark. But he does not reveal the basis for his assertion that the erroneous postmark is the one that is crossed out. Where an irregularity of this nature appears on the face of the document, the presumption of regularity does not arise, and something more than a reasonable assumption is required to prove the date of mailing of the items listed on the CMR. Mr. Baisley's assertion that mistakes are made and corrected in the normal course of business is not sufficient to establish that in this case the items listed on the CMR were actually mailed on July 10, 1997, although the Division's evidence is sufficient to show that the items listed were delivered into the custody of the USPS. Where the Division fails to affirmatively prove the date of mailing of a notice, but is able to prove that the item was mailed, the statutory time period is not triggered and the petition will be deemed timely filed (*Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

Accordingly, petitioner is entitled to a hearing on the merits for notice numbers L-013873057 and L-0138730058.

H. It is concluded that the Division of Tax Appeals has no jurisdiction over the petition with regard to notice numbers: L-011578518, L-011578520, L-011578521, L-012955126, L-012955127, L-013156352, L-014058385 and L-01458386.

I. The motion of the Division of Taxation for summary determination is granted to the extent indicated in Conclusion of Law "H;" the motion is denied with respect to notice numbers L-013873057 and L-0138730058; a hearing will be scheduled on the merits of petitioner's

claims with respect to the notices listed in Finding of Fact “3” and notices L-013873057 and L-0138730058.

DATED: Troy, New York
November 8, 2001

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE