

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

GIULIO C. MONACO :

ORDER
DTA NO. 818759

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Period October 1, 1989 through November 30,
1989, and for Revision of Determinations or for Refund
of Sales and Use Taxes under Articles 28 and 29 for the
Period June 1, 1993 through May 31, 1996. :

Petitioner, Giulio C. Monaco, 8 DeForest Court, P.O. Box 163, West Nyack, New York 10994, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period October 1, 1989 through November 30, 1989 and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1993 through May 31, 1996.

The Division of Taxation (“Division”) appearing by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the notices of determination or the notice of deficiency. The Division submitted a Notice of Motion and the affidavit of Jennifer A. Murphy, Esq., with attachments, including the affidavit of Geraldine Mahon, two affidavits of James Baisley and the affidavit of Carl DeCesare, in support of its motion.

Petitioner responded to the Division's motion by filing the reply affirmation of James H. Tully, Jr., Esq., on April 1, 2002, which date began the 90-day period for the issuance of this order.

Upon review of the pleadings and the affidavit of Jennifer A. Murphy, Esq., with attachments in support of the Division's motion, and the reply affirmation of James H. Tully, Jr., Esq., in opposition thereto, Gary R. Palmer, Administrative Law Judge, renders the following order.

ISSUE

Whether the Division is entitled to summary determination on the ground that petitioner's request for a conciliation conference or his petition for a hearing were untimely filed.

FINDINGS OF FACT

1. The subject matter of this proceeding consists of three statutory notices identified in the petition by notice numbers L012598850, L012731720 and L006333447. The record includes a copy of notice number L012731720. There are no copies of the notices numbered L012598850 or L006333447 in the record. Notice number L012731720 is addressed to petitioner at 162-35 85th St., Howard Beach, NY 11414-3324. This notice imposed tax in the sum of \$28,407.06 plus interest of \$1,966.08 and penalty in the sum of \$7,385.82, for a total of \$37,758.96.

2. The attorney for the Division has conceded that petitioner is entitled to a hearing on notice number L006333447.

3. Petitioner's attorney filed the petition with the Division of Tax Appeals on September 28, 2001. The petition listed all three notice numbers and stated, *inter alia*, that "[p]etitioner has no record or memory of receiving any assessment on said taxes" Attached to the petition is a consolidated statement of tax liabilities dated July 10, 2000, listing the three notice numbers set forth in Finding of Fact "1" and the amounts claimed to be due thereon by tax amount, interest

amount, penalty and the then-current balance due on each notice and the total balance claimed to be due on all three notices. The petition has a box checked indicating that a conciliation conference was not requested.

4. On December 6, 2001, the Division filed its answer to the petition averring that petitioner was liable for sales tax due on notices numbered L012731720, dated October 7, 1996, and L012598850, dated September 5, 1996, as an officer or responsible person of G.C. Monaco Electric & Daughter, Inc. According to the answer petitioner's liability for notice number L006333447, dated March 1, 1993, was premised on his being liable as an officer or responsible person of the same corporation for unpaid withholding tax for the period from October 1, 1989 through November 30, 1989.

5. The conciliation order dismissing request submitted by the Division with its motion papers is dated February 28, 1997 and sets forth on its face notice numbers L012598850 and L012731720. This conciliation order reads as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on September 5, 1996, but the request was not mailed until January 29, 1997, or in excess of 90 days, the request is late filed. The request filed for a Conciliation Conference is denied.

Also included in the Division's motion papers is a copy of a request for a conciliation conference bearing notice number L012598850, which request has a printed date near the top reading "09/05/96," and a hand-written date beneath petitioner's signature reading "10/10/96." Included with the copy of the request for a conciliation conference is a copy of an envelope addressed to "Bureau of Conciliation, Bldg. 9, WA Harriman Campus, Albany, NY 12227-0300." The envelope bears a U.S. Postal Service ("USPS") postmark dated January 29, 1997 and has no return address. Both the envelope and the request for a conciliation conference bear a date stamp

dated January 31, 1997, which stamp includes the language “Rec’d. Bw. of Conciliation & Mediation.”

6. The Division submitted the affidavit of Geraldine Mahon, an employee of the Division familiar with the processing of notices of determination by the Division’s CARTS Control Unit. Ms. Mahon, in her affidavit, describes the routine office procedures used by the Division to prepare such notices for mailing. The Division also submitted the affidavit of James Baisley, sworn to January 24, 2002. Mr. Baisley is the Chief Mail Processing Clerk of the Division’s Mail Processing Center since 1994, who was fully familiar with the operations and procedures of the Mail Processing Center, and whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These two affidavits describe the general procedures for the preparation and mailing of statutory notices, including notice number L012731720 to petitioner at 162-35 85 St., Howard Beach, NY 11414-3324 on October 7, 1996. The general process for issuing and mailing statutory notices in 1996 began with the computer generation of the notices and a listing of the taxpayers to whom such notices were to be sent by certified mail on a particular day, hereinafter referred to as the Certified Mail Record (“CMR”). A certified control number was assigned to each notice listed on the CMR. In this case, certified control number P 911 006 076 was associated with notice number L012731720 mailed to petitioner, which certified control number appears on page 27 of the CMR as well as on the face of notice number L012731720.

The statutory notices were picked up by an employee of the Division’s Mail Processing Center and delivered to a branch of the USPS in the Albany, New York area. The CMR for the notices mailed on October 7, 1996 consists of 43 pages, and the notice of determination mailed to petitioner at 162-35 85th Street, Howard Beach, New York is listed on page 27. The certified

mailing to petitioner was one of 470 pieces of certified mail delivered to the USPS on October 7, 1996 by the Division's Mail Processing Center employee. Identifying information relating to other taxpayers in the remaining 469 certified mailings listed on the CMR were redacted to preserve the confidentiality of those other taxpayers.

7. A postal employee affixed a USPS postmark identifying the Colonie Center branch of the USPS to each page of the CMR. The date on the postmark was October 7, 1996. The USPS employee circled the printed number 470 on page 43 of the CMR, and then wrote and circled the number 470 below the printed 470 and above his or her signature. A Mail Processing Center employee specifically requested that USPS employees either circle the total number of pieces of mail received or indicate the total number of pieces received at the post office by writing that number on the last page of the CMR. In this case the USPS employee circled both the number 470 that he wrote on the page, as well as the printed 470, to acknowledge the receipt of 470 pieces of mail. A USPS employee returned the CMR to a Mail Processing Center employee who, in turn, delivered the CMR to the CARTS Control Unit to be maintained as a permanent record in the regular course of its business.

8. No comparable certified mailing records were produced by the Division relating to the issuance of the notices numbered L012598850 or L006333447.

9. The Division included in the documents presented in support of its motion a copy of petitioner's 1995 form IT-201, Resident Income Tax Return, showing as petitioner's address 162-35 85th Street, Howard Beach, NY 11414. Petitioner's signature on this return was dated April 14, 1996.

10. The Division's motion papers include documents that relate to the mailing of the conciliation order dismissing request described in Finding of Fact "5". These documents include

a separate affidavit of James Baisley sworn to on January 23, 2002, the affidavit of Carl DeCesare, the Assistant Supervisor of Tax Conferences of the Bureau of Conciliation and Mediation Services (“BCMS”) and a five-page CMR. Mr. DeCesare is familiar with the operations and procedures of BCMS. All conciliation orders mailed within the United States are sent by certified mail. The Word Processing Unit of BCMS is responsible for the preparation of conciliation orders dismissing requests and the associated CMRs. As with the CMRs listing statutory notices, these CMRs list taxpayers to whom conciliation orders were sent by certified mail on a particular day. The conciliation order CMRs are processed by a clerk who manually enters the certified control numbers on the CMR next to the printed taxpayer’s name and address. Each page of the CMR is a separate and individual CMR for the conciliation orders dismissing request listed on that page. Each page of the conciliation order CMR has a space for the USPS employee to record the total number of pieces of mail listed by the sender on that page and a separate space for the total number of pieces of mail received at the post office. There is also a space on each page of the CMR for the receiving postal employee to enter his or her signature or initials. The conciliation order dismissing request CMR attached to Mr. DeCesare’s affidavit consists of five pages. Petitioner’s name and address appear on page four of the five pages next to certified control number P 482 629 057. Mr. Baisley’s affidavit describes his role as the Chief Mail Processing Clerk of the Mail Processing Center where his duties include supervising the staff that delivers outgoing mail to USPS branch offices as well as the staff who weigh and seal each envelope containing a conciliation order and who affix the postage and fee amounts to each envelope and then count and verify the names, addresses and certified mail control numbers on the envelopes against the information on the CMR. Next a member of Mr. Baisley’s staff delivers the sealed and stamped envelopes to the post office where a USPS

employee affixes a dated postmark to each page of the CMR and writes in the total number of pieces of mail received at the post office that are listed on each page of the CMR. On page 4 of the CMR there is a postmark dated February 28, 1997, below which the number 14 has been entered in the space next to the words "Total Number of Pieces Listed by Sender," and the number 14 and the name "Howley" is written in the space next to the words "Name of receiving employee." The space next to the words "Total Number of Pieces Received at Post Office" is empty. Mr. Baisley, in his affidavit, advises that he has read the DeCesare affidavit and the exhibits thereto, which permit him to conclude that on February 28, 1997, a Mail Processing Center employee delivered a piece of certified mail addressed to petitioner at 162-35 85th Street, Howard Beach, NY 11414-3324 to the Colonie Center branch of the USPS in Albany for delivery by certified mail, and that a member of his staff thereafter obtained the CMR with the postmark dated February 28, 1997 for the records of BCMS.

SUMMARY OF THE PARTIES' POSITIONS

11. The Division contends that the Division of Tax Appeals lacks jurisdiction over notice numbers L012598850 and L012731720 because petitioner did not file a petition or request a conciliation conference within 90 days of the issuance of the statutory notices as required by Tax Law §1138(a)(1) and § 170(3-a[a]), and did not file a petition for a hearing within 90 days of the issuance of the conciliation order dismissing request.

12. Petitioner avers that the Division's proof of the date of mailing of notice number L012731720 is deficient with the result that the statutory 90-day period in which to protest was not triggered, thereby preserving petitioner's right to a hearing on the merits as to that notice. Petitioner next argues that the Division's proof of mailing of the conciliation order dismissing request is defective, in that it lacks proof of the number of pieces of certified mail delivered to

the post office on February 28, 1997. Petitioner's final claim is that the Division's proof of mailing of notice number L012598850 is totally lacking with the result that the notice must be canceled.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

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 (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6]).

In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

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 material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn 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. The Division claims that it is entitled to summary determination in its favor with regard to notices of determination numbered L012598850 and L012731720 because petitioner failed to file a timely request for a conciliation conference or a timely petition for a Division of Tax Appeals hearing. Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to this paragraph, as in effect during the periods at issue, such determination “shall finally and irrevocably fix the tax” unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may file a request for a conciliation conference with the BCMS. The time period for filing such a request is also 90 days (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[b][3]). The filing of a petition or a request for a conciliation conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax appeals Tribunal, February 22, 1996).

C. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person 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.” This section further provides that the mailing of such a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of proving proper mailing rests with the Division (*Matter of Novar TV & Air Conditioning Sales & Service, Inc.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered into

the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

D. Where the Division has denied a taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice of determination (*Matter of Novar TV & Air Conditioning Sales & Service, Inc., supra*). The required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of Perk*, Tax Appeals Tribunal, December 13, 2001). As to notice number L012731720, the affidavit of Geraldine Mahon and the associated affidavit of James Baisley, sworn to on January 24, 2002, contain sufficient proof to establish the Division's standard procedure for issuing such notices. The affidavits demonstrate that, as each notice is generated, a unique certified control number is assigned to each notice. In the process, a CMR is generated which contains the names and addresses of the taxpayers to whom notices are to be issued on a particular date, the assessment numbers of those notices and the corresponding certified control numbers of each listed notice. Next, the Division established that its standard procedure was followed on October 7, 1996 in the generation and mailing of notice number L012731720 to petitioner. Specifically, the Mahon and Baisley affidavits together with the CMR show the total number of pieces of mail received by the USPS to be 470, while the postmark on each page of the CMR establishes the October 7, 1996 date of mailing. The number 470 is circled on page 43 of the CMR next to the signature of the USPS employee. The significance of the circled number 470 and the signature is explained by Mr. Baisley in terms of the Mail Processing Center, that he supervises, having requested that the receiving postal

employee indicate the total number of pieces of mail received by the USPS by either circling the number of pieces or writing that number on the last page of the CMR next to the employee's signature or initials. This serves as the acknowledgment of receipt by the USPS of the number of pieces of mail circled or written on the last page of the CMR. Accordingly, and consistent with the Tax Appeals Tribunal's reasoning in *Matter of Roland (supra)*, the Division has established that notice of determination number L012731720 was properly mailed to petitioner on October 7, 1996 at his last known address. It follows that petitioner was required to file his request for a conciliation conference or petition the Division of Tax Appeals for a hearing within 90 days of October 7, 1996, or Monday, January 6, 1997. The Division has placed in the record a copy of a request for a conciliation conference bearing only notice number L012598850, which request is associated with a copy of an envelope that bears a USPS postmark that is dated January 29, 1997. There is no proof in the record that a request for a conciliation conference for notice number L012731720 was filed by January 6, 1997. The conciliation order dismissing request serves to acknowledge receipt of a request for a conciliation conference for notice number L012731720 on January 29, 1997. Because the request is untimely, the Division of Tax Appeals lacks jurisdiction to provide a hearing on the merits as to notice of determination number L012731720.

E. With respect to notice of determination number L012598850, there is no CMR in the record, no copy of the notice, no affidavits attesting to the Division's adherence to its standard procedures for the issuance of statutory notices in the matter at hand, and no return receipt or other evidence in support of the issuance of a valid notice. Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, in order to prevail, the Division must prove both the date and the fact of mailing of the notice at issue (*Matter of Perk, supra*).

Where the Division is able to present a CMR and affidavits of habit in support of its standard mailing procedure, but fails to prove the date of mailing due to technical defects in its documents, the Tax Appeals Tribunal has consistently held the proper remedy to be a finding that the request or petition was timely filed and to remand the matter for a hearing on the merits (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). However, where the Division has failed to present any evidence in support of the date or the fact of the mailing of notice number L012598850, it has failed to prove that a valid notice was ever issued. In circumstances where, as here, the Division is unable to prove even the fact of mailing, then its case fails on jurisdictional grounds and the notice must be canceled (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

F. A further jurisdictional impediment that prevents the Division of Tax Appeals from considering the merits of notice number L012598850 is the absence of a copy of said notice from the record. In *Matter of Scharff* (Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Dept. of Taxation and Fin. v Tax Appeals Tribunal*, 151 Misc 2d 36, 573 NYS2d 140), the Tribunal held that without a valid notice of deficiency in the record, it was constrained to conclude that such a notice did not exist, and since the Division's failure to issue a valid notice is a jurisdictional defect that cannot be waived, the Tribunal lacked jurisdiction to reach the merits of the case. That the notice absent from the record here is a notice of determination rather than a notice of deficiency is no less a jurisdictional defect and the same result must follow. The Division of Tax Appeals lacks jurisdiction to consider notice number L012598850 on its merits.

G. With respect to notice of deficiency number L006333447, based on the concession of the Division that petitioner is entitled to a hearing on the merits, the Division of Tax Appeals has

jurisdiction. There is jurisdiction notwithstanding the absence of a copy of this notice from the record because the record is not yet closed as to notice number L006333447.

H. Inasmuch as there are no material and triable issues of fact as to notice of determination number L012731720, the Division's motion for summary determination is granted. There are issues of fact extant as to notice of deficiency L006333447. Accordingly, the Division's motion for summary determination is denied as to this notice and a formal hearing will be scheduled by the Division of Tax Appeals.

I. 20 NYCRR 3000.9(b)(1) permits the granting of summary determination to a party other than the moving party without the necessity of a cross-motion. In accordance with this provision and with respect to notice of determination number L012598850, summary determination is granted to petitioner for the reasons stated in Conclusions of Law "E" and "F" above, and the notice is canceled.

J. The petition of Giulio C. Monaco is dismissed as to notice number L012731720, granted as to notice number L012598850, and as to notice number L006333447, the petition is granted to the extent that a hearing on the merits will be held on June 18, 2002.

DATED: Troy, New York
June 3, 2002

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE