

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ARSHAD MUSHTAQ</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 818822</b>
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 2000 through May 31, 2000.	:	

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Petitioner, Arshad Mushtaq, 874 Old Britton Road, North Bellmore, New York 11710, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 2000 through May 31, 2000.

The Division of Taxation (“Division”) appearing by Barbara G. Billet, Esq. (John E. Matthews, 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 (“BCMS”) or petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the notice of estimated determination. Petitioner appeared by Isaac Sternheim, CPA. The Division submitted a Notice of Motion and the affidavit of John E. Matthews, Esq., with attachments, including the affidavits of Geraldine Mahon and Daniel LaFar, in support of its motion. Petitioner did not respond to the motion as permitted by April 10, 2002, which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings and the affidavit of John E. Matthews, Esq., with attachments, in support of the Division's motion, Gary R. Palmer, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division is entitled to summary determination on the ground that petitioner's request for a conciliation conference was untimely filed.

***FINDINGS OF FACT***

1. The documents attached to the motion papers filed by the Division include a notice of estimated determination dated April 12, 2001 and bearing assessment identification number L019224032. The notice is addressed to petitioner at 3210 Avenue L, North Bellmore, NY 11710.

2. The notice informed petitioner that as an officer or responsible person of AJY Corporation, he is liable for sales and use tax due in the sum of \$8,384.86, plus penalty of \$1,593.04 and interest due of \$856.85 for a total amount due of \$10,834.75 for the quarter ending May 31, 2000. The notice sets forth, in bold type, the following statement:

The tax assessed has been estimated in accordance with provisions of section 1138 of the Tax Law and may be challenged through a hearing process by filing a request for a conciliation conference or a petition for a Tax Appeals hearing by 07/11/01.

3. On August 29, 2001, petitioner's representative filed a request for a conciliation conference with BCMS. In the request the taxpayer stated *inter alia*, "[t]axpayer never received the original notice of determination."

4. The conciliation order dismissing request included in the Division's motion papers is dated September 21, 2001, and reads as follows:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on April 12, 2001, but the request was not mailed until August 30, 2001, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

5. Petitioner's representative on November 19, 2001 filed a petition for a hearing with the Division of Tax Appeals. The petition stated, "[t]axpayer never received the original notice of determination."

6. The Division served its answer to the petition on January 24, 2002, wherein it asserted that the *petition* was untimely filed and that the burden was on petitioner to show that the assessment is erroneous.

7. Also included in the Division's motion papers are the affidavits of Geraldine Mahon and Daniel LaFar, and the 26-page certified mail record that is alluded to in each affidavit. The affidavit of Ms. Mahon identifies her as the Principal Clerk of the CARTS Control Unit of the New York State Department of Taxation and Finance, who is familiar with and who supervises the processing of statutory notices, including notices of estimated determination, and certified mail records.

8. Daniel LaFar is employed in the Department's Mail Processing Center as a Principal Mail and Supply Clerk, a position he has held since 1978. Mr. LaFar is fully familiar with the operations and procedures of the Mail Processing Center. His duties include the supervision of the Mail Processing Center staff responsible for the delivery of outgoing mail to the post office.

9. The Mahon and LaFar affidavits describe the general procedures for the preparation and mailing of statutory notices, including notice of estimated determination number L019224032, mailed to petitioner at 3210 Avenue L, North Bellmore, New York 11710 on April 12, 2001.

The general process for issuing and mailing statutory notices 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 discrete certified control number was assigned to each notice listed on the CMR. In this case, certified control number 7104 1002 9739 0011 5275 was associated with notice number L019224032, which certified control number appears on page 18 of the 26-page CMR.

Each statutory notice was placed in an envelope by a machine which then sealed the envelope, then weighed it and placed postage and fee amounts thereon. This machine was operated by an employee of the Mail Processing Center. Another Mail Processing Center employee then delivered the sealed envelopes and the CMR to a branch of the United States Postal Service (“USPS”) in the Albany, New York area. The CMR for the notices mailed on April 12, 2001 consists of 26 pages with petitioner’s name, address and other pertinent information listed on page 18. The certified mailing to petitioner was one of 286 pieces of certified mail delivered to the USPS on April 12, 2001 by a Mail Processing Center employee. Identifying information relating to other taxpayers in the remaining 285 certified mailings listed on the CMR was redacted to protect the confidentiality of those other taxpayers.

10. A USPS employee affixed a postmark to each page of the CMR identifying the Colonie Center branch of the USPS. The date on this USPS postmark is April 12, 2001. The USPS employee circled the printed number 286 on page 26 of the CMR. The USPS employee had placed his or her initials on each page of the 26-page CMR. A Mail Processing Center employee specifically requested that the receiving USPS employee either circle the total number of pieces of mail received at the post office or indicate that number by writing it on the CMR. In this case the USPS employee circled the number 286 on the last page of the CMR to

acknowledge receipt of 286 pieces of certified mail on April 12, 2001. 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 that Unit's business.

11. The Division included in the documents presented in support of its motion copies of petitioner's joint New York resident income tax returns for the years 1999 and 2000.

Petitioner's address on the 1999 return is 3210 Avenue L, North Bellmore, NY 11710, while his address on the 2000 return is 874 Old Britton Road, North Bellmore, NY 11710. Petitioner's signature on the 1999 return is dated April 12, 2000, and his signature on his 2000 return is dated April 10, 2001. The Division of Taxation postmark date inquiry documents included in the Division's motion papers show the postmark dates for petitioner's 1999 and 2000 income tax returns to be April 15, 2000 and April 15, 2001, respectively, and the dates of delivery of the returns to the Division are, respectively, April 18, 2000 and April 17, 2001.

#### **SUMMARY OF THE PARTIES' POSITIONS**

12. The Division contends that because petitioner filed his request for a conciliation conference more than 90 days after the notice of estimated determination was issued, the Division of Tax Appeals lacks jurisdiction to convene a hearing on the merits and, as a consequence, there are no triable issues of fact and the Division's motion for summary determination should be granted.

13. Petitioner did not file a response to the Division's motion, but in his request for a conciliation conference, and again in his petition, he denied receiving the notice of estimated determination.

### **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 the notice of estimated determination at issue because petitioner failed to file a timely request for a conciliation conference or timely petition for a hearing before the Division of Tax

Appeals. Tax Law § 1138(a)(1) authorizes the Division to estimate tax due and 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, after 90 days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in the notice together with the interest and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such 90-day period applied to the Division of Tax Appeals for a hearing. As an alternative to filing a petition for a hearing with the Division of Tax Appeals, a taxpayer may file a request for a conciliation conference with BCMS. The time period for filing such 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). Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it mailed the statutory notice at issue to the taxpayer at his last known address (*Matter of Perk*, Tax Appeals Tribunal, December 13, 2001).

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, supra*).

E. As to notice of estimated determination number L019224032, the affidavits of Geraldine Mahon and Daniel LaFar set forth sufficient proof to establish the Division's standard procedure for issuing such notices. The affidavits demonstrate that, as each notice is generated, a discrete certified control number is assigned to each notice. In the process, a CMR is generated which lists 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 number of each listed notice. Next, the Division established that its standard procedure was followed on April 12, 2001 in the generation and mailing of notice number L019224032 to petitioner. Specifically, the Mahon and LaFar affidavits, together with the CMR, show the total number of pieces of mail received by the USPS to be 286, while the postmark on each page of the CMR establishes the April 12, 2001 date of mailing. The number 286 is circled on page 26 of the CMR. The significance of the circled number 286 is explained by Mr. LaFar in terms of the Mail Processing Center 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 received or by writing that number on the last page of the CMR. After the receiving postal employee has signed or placed his or her initials on the last page of the CMR, then the entire document 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 reasoning in *Matter of Roland* (*supra*), the Division has established that notice of estimated determination number L019224032 was mailed to petitioner on April 12, 2001 at 3210 Avenue L, North Bellmore, New York 11710.

F. Demonstrating that a notice was addressed and mailed to petitioner at petitioner's last known address is an important element in the Division's proof of mailing (*Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). Toward this end, the Division included in its motion papers copies of petitioner's 1999 and 2000 resident income tax returns, forms IT-201, as well as a copies of two CARTS postmark date inquiry screens showing the postmark date and date of receipt by the Division of each return. Petitioner's 1999 return set forth petitioner's mailing address as 3210 Avenue L, North Bellmore, NY 11710. This return was postmarked on April 15, 2000 and received by the Division on April 18, 2000. Petitioner's 2000 IT-201 bore as a mailing address 874 Old Britton Road, North Bellmore, NY 11710. The date of petitioner's signature on the 2000 return is April 10, 2001. It was postmarked on April 15, 2001 and received by the Division on April 17, 2001.

The Division is entitled to rely upon the address on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). On April 12, 2001, the date the Division mailed the notice of estimated determination to petitioner, the last return filed by

petitioner was his 1999 personal income tax return which was postmarked on April 15, 2000 and received by the Division on April 18, 2000. The next return filed by petitioner was the 2000 personal income tax return which was postmarked on April 15, 2001 and received by the Division on April 17, 2001. The notice of estimated determination mailed by the Division on April 12, 2001 was mailed to petitioner's then last known address.

G. Petitioner, in his request for a conciliation conference and again in his petition, expressly denied having received the notice of estimated determination. Where the Division has proven it mailed the notice by certified mail to the taxpayer's last known address, such mailing gives rise to presumptive evidence of receipt of the notice by the person to whom it is addressed (Tax Law § 1147[a][1]). Once the Division has introduced sufficient evidence to enable it to obtain a presumption of receipt of the notice by petitioner, the burden is then on petitioner to rebut that presumption by introducing evidence of nonreceipt (*Matter of Huggins*, Tax Appeals Tribunal, April 8, 1999). Mere denial of receipt will not suffice to rebut the presumption of receipt (*T.J. Gulf, Inc. v State Tax Commission*, 124 AD2d 314, 508 NYS2d 97). The Division is under no obligation to prove actual receipt by the petitioner of the notice (*Matter of 3410 Pons Food Corp.*, Tax Appeals Tribunal, September 7, 1995). Petitioner has not met his burden to present evidence sufficient to prove nonreceipt of the notice.

H. Because the request for a conciliation conference was not filed within 90 days of the issuance by the Division of the notice of estimated determination, the Division of Tax Appeals lacks jurisdiction to consider the petition on its merits.

I. The petition of Arshad Mushtaq is dismissed.

DATED: Troy, New York  
June 27, 2002

/s/ Gary R. Palmer  
ADMINISTRATIVE LAW JUDGE