

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GEBRHIWOT ASHEBR : DETERMINATION
for Revision of a Determination or for Refund of Cigarette : DTA NO. 818865
Tax under Article 20 of the Tax Law for the Period Ending :
January 18, 2001. :

Petitioner, Gebrhiwot Ashebr, 234 Crittenden Way, Rochester, New York 14623, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ending January 18, 2001.

A small claims hearing was held before Arthur Johnson, Presiding Officer, at the offices of the Division of Tax Appeals, 340 East Main Street, Rochester, New York, on June 19, 2002 at 2:15 P.M. with additional evidence to be submitted by July 19, 2002. Petitioner appeared by Michael A. Rose, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Paula Tunkel).

ISSUE

Whether petitioner filed a timely request for a conciliation conference.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued a Notice of Determination dated June 8, 2001 to petitioner, Gebrhiwot Ashber, for the period ending January 18, 2001. The notice assessed a penalty of \$3,500.00 and gave the following explanation “During an inspection of

your premises, on 01/18/01, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarette and/or tobacco products.”

2. The above notice was sent by certified mail on June 8, 2001 addressed to petitioner at 711 N. Goodman St., Rochester, New York 14609. The Division submitted its certified mailing records for notices of determination mailed on June 8, 2001, including a “Certified Record for Non-Presort Mail” bearing a postmark of June 8, 2001; an affidavit of Geraldine Mahon, Principal Clerk of the CARTS Control Unit of the Department of Taxation and Finance, to describe the Division’s ordinary procedure for preparing and mailing of notices of determination; and an affidavit of Daniel LaFar, Principal Mail and Supply Clerk, outlining the procedures for delivering outgoing mail to the United States Postal Service.

3. On October 4, 2001, the Bureau of Conciliation and Mediation Services (“BCMS”) received a Request for Conciliation Conference from petitioner regarding the notice in dispute. The request was mailed in an envelope bearing a postmark of October 2, 2001.

BCMS issued a Conciliation Order on October 19, 2001 denying petitioner’s request for a conference because the request was not filed within 90 days from the issuance of the Notice of Determination.

On December 20, 2001, the Division of Tax Appeals received a petition for a hearing in response to the conciliation order.

4. Petitioner did not dispute that the Division mailed the Notice of Determination on June 8, 2001 or the fact that he mailed the Request for Conciliation Conference on October 2, 2001. The only issue is whether petitioner received the Notice of Determination mailed on June 8, 2001.

5. Petitioner owned and operated the Stop and Look Mini Mart located at 711 North Goodman Street, Rochester, New York. On July 19, 2000, petitioner entered into an agreement to sell the store to Mohammad Parvez. Mr. Parvez took possession of the store at that time but the actual closing was not to take place until Mr. Parvez obtained a license to sell beer from the New York State Liquor Authority. The sale never took place because Mr. Parvez was killed by a customer at the store.

The records of the Division showed that petitioner filed sales tax returns through June 28, 2001 under his name with the business address of 711 North Goodman Street, Rochester, New York. The Division's records also show that petitioner renewed his certificate of registration to sell cigarettes on June 8, 2001.

SUMMARY OF THE PARTIES' POSITIONS

6. Petitioner argued that he was not in possession of the store when the Notice of Determination was mailed by the Division and therefore never received the notice. He maintained that he learned of the violation of failing to possess a valid certificate of registration and of the penalty assessed by the Division on a visit to the store. Petitioner did not recall the date of the visit but stated that he immediately contacted his attorney to have him protest the penalty.

7. The Division took the position that the notice was properly mailed to petitioner in accordance with Tax Law § 478 and that the date of mailing, June 8, 2001, commenced the 90-day period for protesting the notice.

CONCLUSIONS OF LAW

A. A petition contesting a Notice of Determination must be filed within 90 days after the giving of notice of such determination (Tax Law § 478). As an alternative to filing a petition in

the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day statutory time period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving proper mailing of the notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991).

B. The mailing of the notice on June 8, 2001 is not at issue. However, petitioner denies receiving the notice because he was not in possession of or involved with the operation of the store at the time. The evidence shows that the store was never actually sold and that sales tax returns were filed through June 2001 by petitioner using the address for the store. Moreover, petitioner had applied for a renewal of his certificate of registration to sell cigarettes and tobacco products prior to June 8, 2001. The Division has adduced substantial evidence to show that it properly mailed the Notice of Determination to petitioner and there is no credible evidence to prove that the notice was not received by petitioner. The rebuttal by the taxpayer must consist of more than mere denial of receipt (*Matter of T.J. Gulf v. New York State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97, 98-99). Since petitioner did not submit sufficient evidence to rebut receipt of the notice, the date of mailing commenced the running of the 90-day period for filing a request for conciliation conference. Consequently, the request for conciliation conference filed on October 2, 2001 was not timely.

C. The petition of Gebrhiwot Ashebr is dismissed.

DATED: Troy, New York
October 3, 2002

/s/ Arthur Johnson
PRESIDING OFFICER