

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HENRY WELLS AND RICHARD WELLS	:	DETERMINATION
for Revision of a Determination or for Refund of	:	DTA NO. 819061
Cigarette Tax under Article 20 of the Tax Law for	:	
the Period Ended April 6, 2001.	:	

Petitioners, Henry Wells and Richard Wells, 3606 John Glenn Boulevard, Syracuse, New York 13209, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended April 6, 2001.

The Division of Taxation, by its representative, Barbara G. Billet, Esq. (Michelle M. Helm, Esq., of counsel), brought a motion dated September 30, 2002 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on October 30, 2002, the due date for petitioners' response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (“Division”) is the timeliness of petitioners’ protest of a Notice of Determination dated July 16, 2001 and addressed to petitioners, Henry Wells and Richard Wells, at 3606 John Glenn Boulevard, Syracuse, NY 13209-1838.

2. The subject Notice of Determination asserts \$400.00 in penalty for the period ended April 6, 2001. The notice bears certified mail control number 7104 1002 9739 0032 5032 and assessment identification number L-019851605.

3. Petitioners filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the subject Notice of Determination on November 14, 2001.

4. On January 18, 2002, BCMS issued a Conciliation Order Dismissing Request to petitioners. The order determined that petitioners’ protest of the subject Notice of Determination was untimely and stated, in part:

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 July 16, 2001, but the request was not mailed until November 14, 2001, or in excess of 90 days, the request is late filed.

5. Notices of determination, such as the one at issue, are computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such 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 such notice, a separate certified control number.

6. Each computer-generated notice of determination is pre-dated with its anticipated mailing date and each is assigned a certified mail control number. This number is recorded on

the CMR under the heading “Certified No.” The CMR lists an initial date (the date of its printing) in its upper left-hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case the CMR lists an initial date of July 7, 2001, which has been manually changed to July 16, 2001.

7. After a notice of determination 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 thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his initials (or signature) or both to the CMR.

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

9. The CMR relevant to this case is a seven-page, computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” This CMR lists 70 certified control numbers, each of which is assigned to an item of mail listed thereon. That is,

corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

10. Information regarding the subject Notice of Determination is contained on page six of the CMR. Specifically, corresponding to the certified control number listed in Finding of Fact “2” is notice number L-019851605, along with petitioners’ names and an address, which is identical to that listed on the subject Notice of Determination.

11. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service dated July 16, 2001 and the initials of a Postal Service employee.

12. At the bottom of the CMR there is a pre-printed entry of 70 corresponding to the heading “Total Pieces and Amounts Listed.” This figure has been manually circled.

13. Appearing immediately below the “total pieces” listing is the heading “Total Pieces Received at Post Office.” No information appears after this heading.

14. The affixation of the Postal Service postmark, the initials of the Postal Service employee, and the circling of the “total pieces listed” figure indicate that all 70 pieces of mail listed on the CMR were received at the post office.

15. The facts set forth above in Findings of Fact “5” through “14” were established through affidavits of Geraldine Mahon and Daniel LaFar. 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 determination. Mr. LaFar is employed as a Principal Mail and Supply Clerk in the Division’s Mail Processing Center. Mr. LaFar’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

16. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. LaFar. Mr. LaFar's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

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

18. The address on the subject Notice of Determination is the same as the address given on petitioners' filed Renewal Application for Registration of Retail Dealers and Vending Machines for Sales of Cigarettes or Tobacco Products dated August 15, 2000 and on petitioners' filed Sales and Use Tax Return for the period ended February 28, 2001 dated March 16, 2001. The address on the subject notice is also the same as the address listed on the petition filed in this matter.

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]).

B. Here, petitioners did not respond to the Division's motion; they are therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioners presented no evidence to contest the facts alleged in the Mahon and LaFar affidavits; consequently, those facts may be deemed admitted (*see, Kuehne &*

Nagel v. Baiden, supra, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

C. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Article 20. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination* (*see*, Tax Law §§ 478, 170[3-a][a]).

D. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. LaFar, Division employees involved in

and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact “15”).

G. The CMR provides sufficient documentary proof to establish that the Notice of Determination dated July 16, 2001 was mailed as addressed on July 16, 2001. This seven-page document lists 70 certified control numbers with corresponding names and addresses. There are no deletions from this list. The CMR bears a U.S. Postal Service postmark dated July 16, 2001 and the initials of a Postal Service employee on each page. Additionally, a postal employee circled the entry “70” next to the “total pieces listed” heading. The CMR thus indicates on its face that the post office received all of the pieces of mail listed thereon. The Division has thus established that it mailed the subject Notice of Determination as claimed on July 16, 2001.

H. As noted herein, petitioners’ request for a conciliation conference was filed on November 14, 2001. This date falls beyond the 90-day period of limitations for the filing of such a request. Petitioners’ request was therefore untimely filed (*see*, Tax Law §§ 478, 170[3-a][a]).

I. The Division of Taxation’s motion for summary determination is granted, and the petition of Henry Wells and Richard Wells is dismissed with prejudice.

DATED: Troy, New York
December 12, 2002

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE