

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>EMMANUEL SMITH</b>	:	DETERMINATION
	:	DTA NO. 821097
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
the Period November 19, 2004.	:	

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Petitioner, Emmanuel Smith, 17 Kislingbury Street, Rochester, New York 14613, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period November 19, 2004.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated October 16, 2006 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner 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 November 15, 2006, the due date for petitioner's 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 petitioner 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 petitioner’s protest of a Notice of Determination dated August 29, 2005 and addressed to petitioner, Emmanuel Smith, at 43 Northview Terrace, Rochester, New York 14621-3125.

2. The subject Notice of Determination asserts penalty of \$6,750.00 due pursuant to Article 20 of the Tax Law. In explanation, the notice states that “on 11/19/04, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products.” The notice bears assessment identification number L-026016623-3 and the corresponding “Mailing Cover Sheet” bears petitioner’s name and address as listed above and certified mail control number 7104 1002 9730 0826 8088.

3. On January 13, 2006, petitioner 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.

4. On February 3, 2006, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner’s 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 mailing date of the statutory notice. Since the notice was issued on August 29, 2005, but the request was not mailed until January 13, 2006, 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 certified number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each notice of determination. The CMR lists a "run" date (the date and time of its printing) in its upper left corner which is generally about 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 run (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 a run date of "20052301700" (meaning "August 18, 2005 5:00 PM"), which has been manually changed to August 29, 2005.

7. After notices of determination, along with accompanying mail cover sheets and appropriate enclosures, are placed in window envelopes by Division personnel, the envelopes are then 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 checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices 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 the employee's 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 an 11-page, computer-generated document entitled “Certified Record for Presort Mail - Assessments Receivable.” This CMR originally listed 119 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 (under the heading “Reference No.”), the name and address of the addressee, and postage and fee amounts. There are two deletions from the list, indicating that two pieces of mail were pulled from this group of statutory notices. A line placed through the entries on the CMR for these two pulled items indicates that they were deleted from this group.

10. Information regarding the subject Notice of Determination is contained on page 10 of the CMR. Specifically, corresponding to the certified control number 7104 1002 9730 0826 8088 is reference (notice) number L026016623 (*see*, Finding of Fact “2”), along with petitioner’s name and an address, which is identical to that listed on the subject Notice of Determination and on the related Mail Cover Sheet.

11. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service dated August 29, 2005 and the initials of a Postal Service employee.

12. At the bottom of page 11 of the CMR there is a pre-printed entry of “119” corresponding to the heading “Total Pieces and Amounts.” A line has been drawn through this figure. Directly below the total pieces entry, and corresponding to the heading “Total Pieces Received at Post Office,” the number “117” has been manually written. The initials of a postal service employee appear next to the handwritten “117.”

13. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the handwritten "117" as the "total pieces received" figure indicate that all 117 pieces of mail remaining listed on the CMR were received at the post office.

14. The facts set forth above in Findings of Fact "5" through "13" were established through affidavits of Patricia Finn Sears and Bruce Peltier. Ms. Sears is employed as the Supervisor of the Division's CARTS Control Unit. Ms. Sears's duties include supervising the processing of notices of determination. Mr. Peltier is employed as a Mail and Supply Supervisor in the Division's Registry Unit. Mr. Peltier's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

15. The fact that the Postal Service employee wrote the total number of pieces received on the CMR to indicate that this was the number of pieces received at the post office was established through the affidavit of Mr. Peltier. Mr. Peltier'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.

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

17. As indicated by a Tax Enforcement Referral Report included with the Division's motion papers, petitioner's address as of November 19, 2004 was 43 Northview Terrace, Rochester, New York. Petitioner did not file any tax returns after this date and before the issuance of the subject Notice of Determination.

18. In his request for conciliation conference, petitioner asserted that he did not receive the August 29, 2005 Notice of Determination because he moved from the 43 Northview Terrace address.

### **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. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

“To defeat a motion for summary judgment the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he

rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan by Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, petitioner did not respond to the Division’s motion; he is 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 Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Sears and Peltier 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, supra*).

D. 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][b]*). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. 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 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” (*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).

F. 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).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact “14”).

H. The CMR provides sufficient documentary proof to establish that the Notice of Determination dated August 29, 2005 was mailed as addressed on August 29, 2005. Each page of this 11-page document bears a U.S. Postal Service postmark dated August 29, 2005 and the initials of a Postal Service employee. A postal employee wrote the number “117” next to the “total pieces received” heading, thereby indicating that all 117 pieces listed on the CMR (after two deletions) were received at the post office. The notice addressed to petitioner was among the 117 pieces so listed. Accordingly, the Division has established that it mailed the subject Notice of Determination as claimed on August 29, 2005.

I. Tax Law § 480-a(2)(d) provides that the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax



shall apply to Article 20 of the Tax Law in the same manner and with the same force and effect as if those provisions of Article 28 had been fully incorporated into Article 20. Tax Law § 1147(a)(1), contained within Article 28, 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 the provisions of [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.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*)

J. Here, a Tax Enforcement Referral Report indicated that petitioner’s address as of November 19, 2004 was 43 Northview Terrace, Rochester, New York. Further, petitioner did not file any tax returns after this date and before the issuance of the subject Notice of Determination. Accordingly, the Division has shown that the subject Notice of Determination was properly mailed to petitioner at his last known address on August 29, 2005.

K. The Division has thus established that it properly mailed the subject Notice of Determination to petitioner on August 29, 2005 as claimed.

L. It is noted that petitioner’s claim, contained in his request for conciliation conference, that he did not receive the subject notice because he moved from the 43 Northview Terrace address, is insufficient to rebut the statutory presumption of receipt.

M. As noted herein, petitioner’s request for a conciliation conference was filed on January 13, 2006. This date falls well beyond the 90-day period of limitations for the filing of such a request. Petitioner’s request was therefore untimely filed (*see*, Tax Law §§ 478, 170[3-a][b]).

N. The Division of Taxation's motion for summary determination is granted, and the petition of Emmanuel Smith is dismissed with prejudice.

DATED: Troy, New York  
January 25, 2007

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE