

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JONATHAN ERLER	:	DETERMINATION
	:	DTA NO. 822995
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
the Period August 14, 2008.	:	

Petitioner, Jonathan Erler, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period August 14, 2008.

On August 21, 2009, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated August 21, 2009, and annexed exhibits supporting the motion. Petitioner, appearing by Simonetti & Associates (Louis F. Simonetti, Jr., Esq., of counsel), filed his response on October 19, 2009, which date commenced the 90-day period for issuance of this determination.

After due consideration of the motion and the affirmation in opposition of Louis F. Simonetti, Jr., Esq., and all pleadings and proceedings had herein, Winifred M. Maloney, 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 November 17, 2008 and addressed to petitioner, Jonathan Erler, at West Hempstead, New York.

2. The Notice of Determination asserts penalty of \$6,990.00 due pursuant to Article 20 of the Tax Law. In explanation, the notice states that "on 8/14/08, 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-031002497-3, and the corresponding Mailing Cover Sheet bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 0937 7710. By his Request for Conciliation Conference, dated February 13, 2009, petitioner protested the subject Notice of Determination.

3. On March 13, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice 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(s) was issued on November 17, 2008, but the request was not received until February 23, 2009, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the notice dated November 17, 2008, the Division provided the following: (i) an affidavit, dated August 14, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (ii) an affidavit,

dated August 13, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked November 17, 2008; and (iv) a Tax Enforcement Referral Report dated September 2, 2008.

5. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the 22-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "11-17-08," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page Mailing Cover Sheet, which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. The eleventh page of the CMR contains information on the subject notice and establishes that on November 17, 2008 a notice with the control number 7104 1002 9730 0937 7710 was sent to petitioner at his West Hempstead, New York, address.

6. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Mail Processing Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals

and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against information contained on the CMR. A member of the Mail Processing Center then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Mail Processing Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 234. This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date November 17, 2008, confirming that the notices were mailed on that date.

7. As indicated by a Tax Enforcement Referral Report included with the Division's motion papers, petitioner's address as of September 2, 2008 was West Hempstead, New York. Petitioner did not file any tax returns after this date and before the issuance of the subject Notice of Determination.

8. Petitioner's Request for Conciliation Conference was signed and dated by petitioner's representative, Louis F. Simonetti, on February 13, 2009. The envelope used to mail the request was sent via United States First Class mail and bore petitioner's representative's return address in Jericho, New York. The postage stamp on the envelope was cancelled by the Postal Service on

February 20, 2009. A stamp shows that the request was received by BCMS on February 23, 2009.

9. In opposition to the Division's motion, petitioner submitted the affidavit of mailing, dated February 13, 2009, of Deborah Fiorello.

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 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]).

B. 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. (20 NYCRR 3000.9[b][1]).

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][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). The filing of a petition or a request for conciliation

conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

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 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).

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 the statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see Matter of Katz; 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. Sears and Mr. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

G. The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notice of determination was mailed as addressed to petitioner on November 17, 2008. Each page of this 22-page document bears a U.S. Postal Service postmark dated November 17, 2008. A postal service employee circled the preprinted entry of "234"

corresponding to the “Total Pieces and Amounts Listed” heading and initialed the last page directly above the U.S. Postal Service postmark, thereby indicating that all 234 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 234 pieces so listed. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. 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.*)

I. Here, a Tax Enforcement Referral Report indicated that petitioner’s address as of September 2, 2008 was West Hempstead, 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 November 17, 2008.

J. The Division has thus established that it properly mailed the subject Notice of Determination to petitioner on November 17, 2008 as claimed. Accordingly, in order to timely

protest the notice, petitioner was required to file the request for a conciliation conference within 90 days of November 17, 2008, i.e., on or before February 15, 2009 (*see* Tax Law § 478, § 170[3-a][b]). Since in 2009, February 15th fell on a Sunday and Monday, February 16, 2009 was the Washington's Birthday (Presidents' Day) holiday, petitioner had until the next business day, or Tuesday, February 17, 2009 to file his request (*see* General Construction Law § 20; § 25-a). The envelope containing petitioner's Request for Conciliation Conference bears a USPS postmark dated February 20, 2009. This date falls 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]).

K. Ms. Fiorello's affidavit of mailing is of no value in proving the date of mailing where there is a conflicting USPS postmark. The envelope containing the request for conciliation conference must bear a date stamped by the USPS that is on or before the prescribed date for filing. If the USPS postmark date is not on or before the prescribed date for filing, the request for conciliation conference will not be considered to be timely filed regardless of when the envelope was deposited in the mail. The sender assumes the risk that the envelope will bear a postmark date that is beyond the prescribed date for filing unless he or she uses USPS registered or certified mail (*see* 20 NYCRR 4000.7[a][2][iii]).

L. The Division of Taxation's motion for summary determination is granted, and the petition of Stephen Erler is dismissed.

DATED: Troy, New York
December 23, 2009

/s/ Winifred M. Maloney _____
ADMINISTRATIVE LAW JUDGE