

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
PETER MADOFF	:	DETERMINATION
	:	DTA NO. 823411
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, 2006	:	
through May 31, 2008.	:	

Petitioner, Peter Madoff, 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, 2006 through May 31, 2008.

On March 29, 2011, the Division of Taxation, by its representative, Mark F. Volk, Esq. (David Gannon, 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)(i) and 3000.9(b). Accompanying the motion was the affidavit of David Gannon, Esq., dated March 28, 2011, and annexed exhibits supporting the motion. Petitioner, appearing by James F. Mahon, Jr., CPA, submitted an opposing affidavit with supporting documentation on May 31, 2011.¹ Accordingly, the 90-day period for the issuance of this determination commenced on May 31, 2011, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavits, annexed exhibits, and all pleadings and proceedings had herein, Arthur S. Bray, Administrative Law Judge, renders the

¹ Petitioner was granted an extension of time to respond until May 31, 2011.

following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Peter Madoff, at his 34 Pheasant Run, Old Westbury, New York, address a Notice of Determination, dated May 4, 2009, which assessed sales and use taxes for the period March 1, 2006 through May 31, 2008 (Notice, L-031903356-5). The notice assessed tax in the amount of \$904,288.24, plus interest for a balance due of \$1,063,361.44.

2. On December 21, 2009, petitioner mailed a petition by Federal Express to the Division of Tax Appeals. It was received on December 22, 2009. The petition noted that petitioner filed a request for a conciliation conference on September 3, 2009, but that the request was dismissed in a letter dated September 25, 2009. It also asserted, among other things, that petitioner will prove that the notice of May 4, 2009 was not received or properly served. Petitioner further submits that the computation of tax and interest are incorrect.

3. To show proof of proper mailing of the notice dated May 4, 2009, the Division provided the following: (i) an affidavit, dated August 30, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated August 25, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) an affidavit, dated March 16, 2011, of Michele R. Statile, a supervisor of customer service for the United States Postal Service; (iv) a

copy of the “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked May 4, 2009; (v) a copy of the Sales Tax Examination Questionnaire regarding the audit of Bernard L. Madoff Investment Securities, LLC and (vi) copies of petitioner’s New York State resident income tax returns for the years 2008 and 2009.

4. 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 18-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, in the upper right corner of page one of the CMR, the date the notices were mailed was handwritten by personnel in the Division’s mail processing center.² This change is made in order to ensure that the date on the CMR conforms with the date the notices and CMR are delivered to the Postal Service. Each notice is assigned a certified control number. The certified control 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 listed on the CMR. The eighth page of the CMR contains information on the subject notice and establishes that on May 4, 2009 a notice with control number 7104 1002 9730 1320 4651 and assessment number L-031903356 was sent to petitioner at his Old Westbury, New York, address.

² The affidavit of Ms. Sears states that the date appears in the upper left corner of page one. The difference is obviously a mistake and will be disregarded.

5. 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. The 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 the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (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 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. In the ordinary course of business, a mail processing employee picks up the CMR from the post office on the following day and returns it to the originating office, the CARTS control unit, within the Division.

6. A review of page 18 of the CMR confirms that a USPS employee wrote her initials and wrote and circled the number 191. Page 18 of the CMR originally listed 192 pieces of mail; however, the number of pieces received at the post office shows 191 in order to indicate the fact that one piece of certified mail had been "pulled" from the mailing record. A piece of mail may be pulled for a variety of reasons, including, but not limited to a discrepancy in a name or

address. In this instance, a piece of mail listed on the first page of the CMR was pulled, as evidenced by a line drawn through the entry in the CMR for the pulled entity.

7. Postmarks of May 4, 2009 and May 5, 2009 appear on each page of the CMR. The postmark of May 5, 2009 has been crossed off, while the correct postmark of May 4, 2009 is undisturbed. When an error in the date occurs, a Postal Service employee or a member of the Center's staff may catch the mistake and request that the CMR be corrected to properly reflect the date of mailing. Each page of the CMR also bears the initials of a Postal Service employee. The undisturbed postmarks, together with the postal employee's initials and handwritten number "191," confirm that 191 notices were mailed on May 4, 2009.

8. The affidavit of Michele R. Statile states that since 2005 she has been employed by the United States Postal Service as a supervisor in customer service. Following a review of the CMR, Ms. Statile determined that postmarks reflecting May 5, 2009 were erroneously applied to each page of the CMR for May 4, 2009. When such an error occurs, an employee of the post office or a member of the Division's staff may catch the error and request that the CMR be corrected by a post office employee to accurately reflect the date of mailing. According to Ms. Statile, it is the proper Postal Service procedure to cross out the incorrect date stamp, initial the CMR and restamp it with the correct mailing date. Based upon her review of the mailing log and her investigation of the circumstances concerning the correction of the date stamp error, the incorrect postmarks were properly crossed off and the correct postmarks were left intact.

9. The address appearing on the Notice of Determination is 34 Pheasant Run, Old Westbury, New York 11568. The same address was entered on a Sales Tax Examination Questionnaire, dated August 26, 2008, regarding the underlying audit of Bernard L. Madoff

Investment Securities, LLC, and on the 2008 and 2009 resident income tax returns filed by petitioner. The return for 2008 was dated February 13, 2009 and the return for 2009 was dated October 15, 2010. This address was also utilized on the Request for Conciliation Conference.

SUMMARY OF PETITIONER'S POSITION

10. In response to the motion to dismiss, petitioner's accountant submitted an affidavit, which alleged that the Division's proof of mailing is insufficient to support a motion to dismiss or summary determination and that material questions of fact mandate that petitioner be granted a conciliation conference or a hearing. With respect to the proof of mailing, petitioner's representative argues:

a. The Division is attempting to deny petitioner due process on the basis of an alleged technicality and thereby avoid addressing the merits of petitioner's challenge to a grossly overstated tax assessment.

b. Petitioner did not receive the notice dated May 4, 2009 and the first notice he received was a Notice and Demand dated August 27, 2009. Petitioner's representative submits that he filed his Request for a Conciliation Conference on or about September 3, 2009, which was within days of first learning of the assessment.

c. The Division's evidence to establish mailing on May 4, 2009 is insufficient to warrant dismissal of the petition or summary determination without granting petitioner a full hearing.

d. The Division's evidence of mailing does not include an individualized record of certified mailing expressly pertaining to the notice issued to petitioner.

e. The CMR is unreliable concerning whether the notice was properly mailed to petitioner because it contains two different date stamps, the May 5, 2009 date is crossed out, and

initials are written next to the stamp. Further, no explanation appears on the CMR as to why two date stamps appear or when the writing was placed on the CMR, undercutting the reliability of the CMR.

f. The CMR is unreliable because, on page 18 of the CMR, the number 192 is crossed out and the number 191 is handwritten. Again, no explanation was written on the CMR as to why the number 192 was crossed out and the number 191 was written. Petitioner also notes that an entry on page 1 is crossed out but there is no indication that this entry corresponds to a notice that was not mailed. Petitioner surmises that someone interrupted the routine process and all 192 notices were not mailed. Petitioner posits that this undercuts the reliability of the CMR that the Division mailed a notice to petitioner on May 4, 2009.

g. The affidavits are insufficient because they were not made by the person or persons who made any of the alterations to the CMR. Petitioner also notes that the affidavits were sworn to more than a year after the purported mailing date.

11. On the basis of the forgoing, petitioner argues that there are substantial questions of fact warranting denial of the Division's motion. Petitioner contends that by the Division's own calculation, the delay is only a month which is not a case of severe neglect. Petitioner also requests that this matter be considered in light of the harsh result sought by the Division. That is, the sales tax at issue is allegedly owed by a now-defunct business of which petitioner is one of several responsible persons. According to petitioner, since the Division is seeking to hold him liable for the sales tax of a defunct business, it is appropriate that the Division's less than conclusive evidence of mailing of the notice not be considered sufficient to warrant dismissal or summary determination.

12. Petitioner's response also includes a series of allegations regarding errors in the audit methodology including: incorrectly utilizing the same invoice twice, incorrectly including nontaxable items in determining the error rate, incorrectly including certain items in the calculation of the error rate for which tax was already paid and the inclusion of nontaxable services in the error rate. In his papers, petitioner offered to present evidence of these errors as well as evidence of other errors at a conciliation conference or hearing before the Division of Tax Appeals.

CONCLUSIONS OF LAW

A. A motion for summary determination 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]).

B. Where the timeliness of a petition or Request for Conciliation Conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

Additionally, Tax Law § 1138(a)(1) requires that the Notice of Determination “shall be mailed by certified or registered mail to the person or persons liable for the collection or payment of the tax at his last known address in or out of this state.”

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., May 4, 2009, to petitioner’s last known address. The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conform with the address listed on the returns filed by petitioner prior to and after the issuance of the notice as well as on other documents. It is concluded that the notice was properly mailed, and thus, the statutory 90-day time limit to file either a Request for Conciliation Conference with the Bureau of Conciliation or Mediation Services (BCMS) or a petition with the Division of Tax Appeals commenced on May 4, 2009 (Tax Law § 170[3-a][b]; § 1138[a][1]).

D. The documents show that the notice was mailed to petitioner on May 4, 2009, but the request for a conciliation conference was not mailed until September 3, 2009, which is beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division. (*See Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

E. The arguments raised by petitioner do not warrant a finding in his favor. As set forth above, the 90-day period is jurisdictional and not a mere technicality. Moreover, the Division has submitted sufficient evidence of the mailing of the Notice of Determination to raise the

presumption, under section 1147(a)(1) of the Tax Law, that the Notice of Determination was received. The question presented here is whether the notice was properly mailed and a mere denial of receipt will not rebut the presumption and warrant the granting of a hearing (*Matter of T. J. Gulf v. New York State Tax Commn.*, 124 AD2d 314 [1986]; *Matter of Titanium Constuction Corp.*, Tax Appeals Tribunal, May 5, 2011).

There is no requirement that the Division produce an individualized record of certified mailing pertaining to the notice issued to petitioner. Rather, the affidavits of its general mailing procedure and the properly completed CMR evidences the Division's compliance with its procedures and creates a presumption of official regularity in favor of the Division (*see Matter of Titanium Constuction Corp.*; *Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

Petitioner argues that certain defects in the CMR prevent it from being regarded as reliable. Namely, petitioner submits that the CMR is unreliable because a notice was pulled and an explanation was not written on the CMR. Similarly, petitioner contends that the CMR is unreliable because a date was erroneously stamped on the CMR and no statement appears on the CMR to account for this anomaly. These arguments are clearly without merit. The Division presented clear explanations regarding the procedure for pulling a notice from a mailing and for why the CMR had two date stamps. It is readily evident from the affidavits that the standard mailing procedures were followed with respect to the mailing of the notices on May 4, 2009 and that the purported defects had no bearing upon the notice mailed to petitioner (*see e.g. Matter of Kostiuk*, Tax Appeals Tribunal, March 18, 2010 [where the Tribunal found that the CMR established the fact and date of mailing despite the fact that a notice was pulled from the CMR]).

Contrary to the arguments raised by petitioner's representative, there is no legal requirement that the explanation for the deletion of a notice or the correction of a date stamp appear on the face of the CMR. Nor is there any legal requirement that the affidavits be prepared by the individual with personal knowledge of the mailing (*Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003).

F. Petitioner's arguments regarding the accuracy of the audit may not be addressed because of his failure to establish that he timely filed a request for a conciliation conference or a petition for a hearing that would confer jurisdiction on the Division of Tax Appeals to address such issues (*see Matter of Kostiuk*, Tax Appeals Tribunal, March 18, 2010).

G. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the tax assessment and file a claim for refund (Tax Law § 1139[c]). If the refund claim is disallowed, he may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 1139).

H. The Division of Taxation's motion for summary determination is granted, and the petition of Peter Madoff is dismissed.

DATED: Troy, New York
August 25, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE