

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER MADOFF	:	
for Revision of a Determination or for Refund of	:	DETERMINATION
Sales and Use Taxes under Articles 28 and 29 of	:	ON REMAND
the Tax Law for the Period March 1, 2006	:	DTA NO. 823411
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.

The Division of Taxation filed a motion seeking dismissal of the petition or, in the alternative, summary determination. Upon receipt of an opposing affidavit with supporting documentation, Arthur S. Bray, Administrative Law Judge, issued a determination, dated August 25, 2011, which granted the Division of Taxation's motion for summary determination and dismissed the petition.

Petitioner timely filed an exception to the determination and in a decision dated April 19, 2012, the Tax Appeals Tribunal remanded this matter to the administrative law judge with the following direction:

We find that further proceedings are warranted in order to clarify the ambiguities with regard to the affidavits submitted and the mailing of the subject Notice. Petitioner's challenge of the merits of the asserted liability is premature until jurisdiction is established.

ACCORDINGLY, it is ORDERED, ADJUDGED and DECREED that: the matter is remanded to the Division of Tax Appeals for further proceedings on the issue of timeliness of the petition and, if appropriate, a determination on the merits.

Petitioner, appearing by James F. Mahon, Jr., CPA, and the Division of Taxation, by its representative, Amanda Hiller, Esq., (David Gannon, Esq., of counsel), agreed to waive a hearing and proceed based on documents and briefs to be submitted by September 28, 2012, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, renders the following determination.

ISSUE

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

FINDINGS OF FACT

The Findings of Fact of the Tax Appeals Tribunal in its decision of April 19, 2012, as modified by the additional evidence presented during the submission following the remand, are set forth below:

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 would prove that the notice of May 4, 2009 was not received or properly served. Petitioner further submitted that the computation of tax and interest were incorrect.

3. To show proof of proper mailing of the notice dated May 4, 2009, the Division provided the following: (i) an affidavit, dated June 14, 2012 of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (ii) an affidavit, dated June 13, 2012 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 2009.¹

4. The affidavit of Patricia Finn Sears sets forth certain aspects of the Division's general practice and procedure for processing statutory notices. Ms. Sears's affidavit indicates that her department supervises the processing of statutory notices prior to shipment of the statutory notices to the Division's Mail Processing Center for mailing.

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 as they relate to statutory notices of determination. In part, Mr. VanDerZee asserts that the relevant Notice of Determination was properly processed and mailed to petitioner. In his

¹ This finding of fact was modified to reflect the additional evidence presented during the submission following the remand.

affidavit, Mr. VanDerZee notes that he was placed in charge of the Division's Mail Processing Center in February of 2010.²

6. 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.

7. The affidavit of Michele R. Statile states that she has been employed by the United States Postal Service as a supervisor in customer service since 2005. 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.

8. 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.

² This finding of fact was modified to reflect the additional evidence presented during the submission following the remand.

This determination makes the following additional findings of fact based on the documents submitted by the Division in the course of the remanded proceedings:

9. Patricia Finn Sears has been employed by the Division since 1976. From April 2011 to the present, she has been a Tax Service Specialist 2 in the Taxpayer's Contact Center. From March 2007 to April 2011, she was a Tax Processing Specialist 2 and Supervisor of Refunds, Deposits, Overpayments and Control Units, which includes the CARTS Control Unit. As part of her duties, during the period March 2007 through April 2011, she supervised the processing of certain statutory notices including notices of determination prior to their shipment to the mail processing center for mailing. Her knowledge of the facts set forth in her affidavit for the period March 2007 through April 2011 are based upon her personal work experience with the Division, her examination of the Division's records, files and procedures and her conversations with employees of the Division who engage in the mailing of statutory notices. In addition, on the basis of her direct participation in the processing of statutory notices, which is a portion of the procedure for the mailing of statutory notices, she is familiar with the activities of the mail processing center and the results that the activities of the U.S. Postal Service have upon the mailing records. CARTS provides Ms. Sears with 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.³ This change is made in order to ensure that the date on the

³ 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.

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.

10. Prior to his current position, Mr. VanDerZee was employed from September 2004 to February 2010 as the principal mail and supply supervisor in the registry unit of the Division. In this position, he was fully familiar with the operation and procedures of the Mail Processing Center. In his current position of Head Mail and Supply Supervisor, Mr. VanDerZee continues to be fully familiar with the operations and procedures of the Mail Processing Center.

11. During his tenure as principal mail and supply supervisor, his regular duties included the supervision of the Mail Processing Center staff including the staff that delivers outgoing mail to branches of the United States Postal Service. In his current position, his regular duties continue to include the same tasks.

12. 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.

13. 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.

14. With regard to the correction of the postmark, 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 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.

15. Based upon his review of the affidavit of Ms. Sears, the exhibits attached thereto, and the CMR, Mr. VanDerZee states that on May 4, 2009, an employee of the Mail Processing Center delivered an item of certified mail addressed to petitioner at his Old Westbury, New York, address to a branch of the USPS in Albany, New York, in a sealed envelope for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on May 4, 2009 for the records of the CARTS Control Unit. Mr. VanDerZee asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner on May 4, 2009.

SUMMARY OF THE PARTIES' POSITIONS

16. Neither an additional argument nor a brief was submitted on petitioner's behalf.

17. The Division continues to maintain that since the request for the conciliation conference was filed more than 90 days from the date the notice was issued, it was untimely filed and the Division of Tax Appeals lacks jurisdiction to review the notice. The Division also submits that the notice was issued to the proper address and that the new affidavits clarify any ambiguities identified by the Tax Appeals Tribunal pertaining to the mailing of the notice to petitioner.

CONCLUSIONS OF LAW

A. Where the timeliness of a Request for a Conciliation Conference is in issue, the first matter examined is whether the Division has carried its burden of establishing 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 present evidence showing that there was a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures and evidence that the procedure was followed in this particular instance (*see Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*).

B. In this case, the Division offered proof that establishes the mailing of the statutory notice on May 4, 2009 to petitioner's last known address. The revised affidavits of Ms. Sears and Mr. VanDerZee establish the basis for their knowledge regarding the mailing procedures of statutory notices at the time the notice in issue was mailed. Specifically, the affidavit of Ms. Sears shows that at the time the Notice of Determination was mailed, she supervised the processing of notices of determination before their shipment to the mail processing center for mailing. Her knowledge of the facts set forth in her affidavit for the period March 2007 through April 2011 are based upon her personal work experience with the Division, her examination of the Division's records, files and procedures and her conversations with employees of the Division who engage in the mailing of statutory notices. In addition, on the basis of her direct participation in the processing of statutory notices, which is a portion of the procedure for the mailing of statutory notices, she is familiar with the activities of the mail processing center and the results that the activities of the U.S. Postal Service have upon the mailing records. Similarly, at the time the Notice of Determination was processed and mailed, Mr. VanDerZee was familiar with the operations and procedures of the Mail Processing Center through his position as the principal mail and supply supervisor in the registry unit of the Division. These duties included supervision of the staff that delivered outgoing mail to branches of the United States Postal Service.

C. The Division has introduced sufficient proof to show the proper mailing of the Notice of Determination to petitioner's last known address on the date claimed. The affidavits and the CMR adequately describe the Division's general mailing procedure as well as the relevant mailing record and, in the process, establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). In addition, the address on the Mailing Cover Sheet and the CMR conforms with the address listed on the returns filed by petitioner both before and after the notice was issued as well as on other documents. Accordingly, it is concluded that the notice was properly mailed and the statutory 90-day time limit to file a request for a Conciliation Conference with the Bureau of Conciliation Services commenced on May 4, 2009 (Tax Law § 170[3-a][b]; § 1138[a][1]).

D. Petitioner's Request for a Conciliation Conference was mailed on September 3, 2009. This date is beyond the 90-day period of limitations for the filing of such a request. Therefore, petitioner's request was untimely filed and the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

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

DATED: Albany, New York
January 31, 2013

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE