

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN GAMEIRO	:	DETERMINATION
	:	DTA NO. 824239
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 June 1, 2007 through August 31, 2009.	:	

Petitioner, John Gameiro, 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 June 1, 2007 through August 31, 2009.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion on July 18, 2011 seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of John E. Matthews, dated July 15, 2011, and annexed exhibits. Petitioner, appearing pro se, 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 August 17, 2011, 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, Herbert M. Friedman, Jr., 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 July 26, 2010 and bearing assessment identification number L-034416226. The notice is addressed to petitioner, John Gameiro, at "239 Summit Ave, Mt Vernon, NY 10552-3309."

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the July 26, 2010 Notice of Determination. The request was mailed December 10, 2010.

3. On December 24, 2010, 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(s) was issued on July 26, 2010, but the request was not mailed until December 10, 2010, or in excess of 90 days, the request is late filed.

4. To show proof of proper mailing of the July 26, 2010 Notice of Determination, the Division provided the following with its motion papers: (i) an affidavit, dated June 23, 2011, of Daniel A. Maney, a supervisor of the Division's Case and Resource Tracking System (CARTS); (ii) pages numbered 1, 719, and 2,748 from the "Certified Record for Presort Mail - Assessments Receivable" (CMR), the latter two of which are legibly postmarked July 26, 2010; (iii) an affidavit, dated July 7, 2011, of Bruce Peltier, a mail and supply supervisor in the

Division's Mail Processing Center; (iv) an affidavit, dated July 7, 2011, of Heidi Corina, a legal assistant in the Division's Office of Counsel involved in making requests to the United States Postal Service (USPS) for delivery information; (v) a Postal Service form 3811-A (Request for Delivery Information/Return Receipt After Mailing) and the USPS response to such request dated April 26, 2011; (vi) a copy of the July 26, 2010 Notice of Determination with the associated mailing cover sheet; and (vii) a copy of petitioner's Application for Automatic Six-Month Extension of Time to File for Individuals (Form IT-370) for the year 2009, dated April 14, 2010, which lists the same address for petitioner as that listed on the subject notice.¹ This document was the last one filed by petitioner with the Division before the statutory notice was issued.

5. The affidavit of Daniel A. Maney sets forth the Division's general practice and procedure for processing statutory notices. Mr. Maney receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that 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 of the CMR in the present case to the actual mailing date of "7/26/10."² In addition, according to Mr. Maney, generally all pages of the CMR are banded together when the documents are delivered into possession of the USPS and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by

¹ The same address for petitioner is also listed on his aforementioned Request for Conciliation Conference.

² In his affidavit, Mr. Maney states that "[i]n the upper left hand corner of Page 1 of the certified mail record, the date the notices were mailed was handwritten by personnel in the Department=s [sic] Mail Processing Center." In fact, the handwritten date of mailing appears in the upper *right* corner on the pages attached to the Maney affidavit.

Mr. Maney. The page numbers of the CMR run consecutively, starting with “PAGE: 1,” and are noted in the upper right corner of each page.

6. All notices are 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 is also listed on the CMR under the heading entitled “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street and P.O. Address.”

7. According to the Maney affidavit, the CMR in the present matter consists of 2,748 pages. Mr. Maney notes that the portion of the CMR that is attached to his affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. He states that the USPS representative affixed a postmark to each page of the CMR, and initialed or signed page 2,748. He adds that the total number of statutory notices mailed pursuant to the CMR was 30,215.

8. Attached to the Maney affidavit, as exhibit “A,” are copies of pages 1, 719 and 2,748 of the CMR. Pages 1 and 2,748 have a handwritten entry of “7/26/10” in the top right corner; however, page 719 does not have a similar entry.

9. Page 719 of the CMR indicates that a Notice of Determination with certified control number 7104 1002 9730 0097 2686 and assessment ID number L-034416226 was mailed to petitioner at the Mt. Vernon, New York, address listed on the subject Notice of Determination. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit “B,” bears this certified control number and petitioner’s name and address as noted.

10. The affidavit of Bruce Peltier describes the Division's Mail Processing Center's (Center) general operations and procedures. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Peltier confirms that a mailing cover sheet precedes each notice. A staff member retrieves the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member 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 signature on the CMR, indicating receipt by the post office. The Center further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Pages 719 and 2,748 of the CMR in exhibit "A" of the Maney affidavit each contain a USPS postmark of July 26, 2010. The date in the postmark on page 1 of the CMR, however, is illegible. On page 2,748, corresponding to "Total Pieces and Amounts," is the preprinted number 30,217 with a line through it, and next to "Total Pieces Received At Post Office" is the handwritten entry "30,215." There is a set of initials or a signature in the postmark on page 2,748.³

11. According to the Maney affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that 30,215 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on July 26, 2010.

³ In his affidavit, Mr. Peltier states that a review of the CMR confirms that a USPS employee initialed or signed "[p]age 1,214 of the certified mail record. . ." rather than page 2,748. However, page 1,214 is not attached to either the Peltier or Maney affidavit, and is not otherwise a part of this record. Based on the attachment of page 2,748, which actually bears the initials or signature, to the Maney affidavit, it seems that Mr. Peltier's reference to page 1,214 is a typographical error.

12. According to both the Maney and Peltier affidavits, a copy of the subject notice was mailed to petitioner on July 26, 2010, as claimed.

13. The affidavit of Heidi Corina describes the Division's requests to the USPS for delivery information on the subject Notice of Determination. Specifically, using PS Form 3811-A, the Division requested delivery information with respect to the article of mail bearing certified control number 7104 1002 9730 0097 2686. The USPS response to this request indicates that the article bearing certified control number 7104 1002 9730 0097 2686 and addressed to petitioner was delivered as addressed on July 29, 2010. Attached to the Corina affidavit as exhibit "A" is the Division's "Request For Delivery Information" for article number 7104 1002 9730 0097 2686. Exhibit "B" to the Corina affidavit is the USPS response to the Division's request indicating delivery of the same article on July 29, 2010 to "239 Summit Av [*sic*]" in "Mount Vernon, NY 10552."

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. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer where "a return required by [Article 28 of the Tax Law] is not filed, or if a return when filed is incorrect or insufficient. . . ." This section further provides that such a notice "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. A taxpayer may file a Request for Conciliation Conference with the BCMS seeking revision of the determination within 90 days of the mailing of a Notice of Determination (*see* Tax Law § 170(3-a)(b); § 1138[a][1]). If a taxpayer fails to file a timely petition protesting a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a Request for Conciliation Conference or petition is at issue, the Division must carry its burden of demonstrating the fact and date of the mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. Here, the Maney and Peltier affidavits establish the Division's standard mailing procedure. These affidavits and their exhibits, however, do not demonstrate that such procedures were followed in this case. Most importantly, a properly completed CMR is missing from the record. Exhibit "A" of the Maney affidavit contains three pages of an admittedly longer multi-page computer-generated CMR. Moreover, unlike in the procedure described in the Maney affidavit, the three pages in exhibit "A" are not physically connected; the certified mail numbers run consecutively on each page but not from page to page; and the pages are not consecutively numbered. Additionally, the date on the top of pages 1 and 2,748 of the CMR has been changed to July 26, 2010, but remains unchanged on page 719. Pages 1 and 2,748, therefore, bear a

different date than page 719. Also, the postmark on page 1 is illegible. For these many reasons, the partial CMR submitted as exhibit “A” of the Maney affidavit does not establish that the articulated procedure was followed in this case (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000). This inadequacy is compounded by the incorrect CMR page referenced in the Peltier affidavit (*see* Finding of Fact 10, footnote 3).

F. Such a flaw may be overcome, however, by other evidence of mailing in the record (*see Matter of Rywin*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence of receipt in this matter. Specifically, the Corina affidavit, and the USPS delivery information accompanying it shows that a copy of the notice at issue, addressed to petitioner and also listed on the CMR, was delivered as addressed on July 29, 2010. Furthermore, petitioner does not contest receipt of the notice. This additional evidence establishes the fact of receipt of the subject notice, as claimed, on July 29, 2010 (*see Matter of Winner’s Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010).

G. Where the Division fails to establish the exact date of mailing of a statutory notice, the 90-day period for filing a petition or request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]). Here, the period within which to challenge the notice commenced to run on the date of such actual receipt of the notice by petitioner, i.e., July 29, 2010, and petitioner was required to file either a Request for Conciliation Conference with BCMS, or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *rev’d* 118 AD2d 894, 499 NYS2d 457 [1986];

Matter of Rosen, Tax Appeals Tribunal, July 19, 1990). Thus, petitioner had until October 27, 2010 to file a timely protest. Petitioner's request for conciliation conference was not filed until December 10, 2010, however, a date which falls beyond the required statutory period. As a matter of law, there is no jurisdiction to address the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006; ***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

H. Petitioner's address on the notice, corresponding mail cover sheet, CMR, and USPS delivery information all conform with the address reported on petitioner's Application for Automatic Six-Month Extension of Time to File for Individuals (Form IT-370) for the year 2009, dated April 14, 2010, which was the last document filed before the notice was issued. This satisfies the "last known address" requirement in Tax Law § 1138(a)(1). Additionally, petitioner's request for conciliation conference lists the same address (*see* Finding of Fact 4, footnote 1).

I. Finally, as noted above, petitioner failed to file a response to the instant motion; therefore he is 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 [1975]; *John William Costello Assocs. v. Standard Metals Corp.*, 99 AD2d 227, 472 NYS2d 325 [1984], *lv dismissed* 62 NY2d 942 [1984]). Petitioner has presented no evidence to contest the facts alleged in the Maney, Peltier, Matthews and Corina affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170 [1992]).

J. The Division of Taxation's motion for summary determination is granted, and the petition of John Gameiro is dismissed.

DATED: Troy, New York
September 29, 2011

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE