

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**POLONIO GROCERY CORPORATION** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 825740  
Cigarette Tax under Article 20 of the Tax Law for the :  
Period November 30, 2012. :

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Petitioner, Polonio Grocery Corporation, 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 30, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Osa Iyinbo, Esq., of counsel), brought a motion on June 12, 2014, to dismiss the petition or, in the alternative, seeking summary determination in favor of the Division of Taxation pursuant to sections 3000.5, 3000.9(a)(i) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affidavit of Osa Iyinbo, Esq., dated June 11, 2014, and annexed exhibits. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this order began on July 14, 2014, 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, Catherine M. Bennett, Administrative Law Judge, 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***

1. The Division of Taxation (Division) issued to petitioner, Polonio Grocery Corporation, at its Bronx, New York, address, a Notice of Determination, dated January 9, 2013, which assessed penalties pursuant to Article 20 of the Tax Law, for the period ended November 30, 2012, in the amount of \$35,000.00. By its Request for Conciliation Conference, postmarked May 23, 2013, petitioner protested the notice, numbered L-038984377-2.

2. The Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request dated June 14, 2013 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 January 9, 2013, but the request was not received until May 28, 2013, or in excess of 90 days, the request is late filed.

3. The petition filed herein indicates that it was received by the Division of Tax Appeals on June 24, 2013, within 90 days after the issuance of the conciliation order.

4. To show proof of proper mailing of the notice dated January 9, 2013, the Division provided the following: (i) an affidavit, dated May 5, 2014, of Daniel A. Maney, a taxpayer services specialist and manager of a unit that oversees the Case and Resource Tracking System (CARTS); (ii) an affidavit, dated June 5, 2014, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked January 9, 2013; and (iv) a copy of petitioner's General Business Corporation Franchise Tax Return Short Form, Form CT-4, for the period December 1, 2011 through November 30, 2012, which was the last filing from petitioner prior to the issuance of the notice.

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 and last pages of the CMR in the present case to reflect the actual mailing date of "1/9/13."

In addition, Mr. Maney stated that all pages of the CMR are banded together when the documents are delivered into possession of the U.S. Postal Service (USPS) and remain so when returned to his office. The pages of the CMR stay banded together unless otherwise ordered by him. 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 PO Address."

7. According to the Maney affidavit, the CMR in the present matter consists of 70 pages and lists 767 certified control numbers along with corresponding assessment numbers, names and addresses. 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 his or her initials or signature and a U.S. postmark to each page of the CMR and circled "767" on page 70.

8. Page 16 of the CMR indicates that a notice of determination with certified control number 7104 1002 9730 1443 2770 and assessment ID number L-038984377 was mailed to petitioner at its Bronx, New York, address listed on the subject notice. The corresponding mailing cover sheet, attached to the Maney affidavit as exhibit "B," bears the same certified control number and petitioner's name and address as noted.

9. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's mail processing unit, describes the unit's general operations and procedures. The mail room 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 mail room 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. Page 1 of the CMR bears a postmark of January 9, 2013, and each of the other 69 pages of the CMR in exhibit "A" of the Maney affidavit contains either a postmark, partial postmark showing the same zip code of the USPS location, or a date stamp of January 9, 2013. On page 70, corresponding to "Total Pieces and Amounts," is the preprinted and circled number 767, along with the dated postmark. There are also initials, though not legible, which are presumably the initials of the postal employee handling this mailing.

10. According to the Maney affidavit, the affixation of the postmarks and the Postal Service employee's initials indicate that all 767 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS on January 9, 2013.

11. According to both the Maney and Peltier affidavits, a copy of the subject notices were mailed to petitioner on January 9, 2013, as claimed.

12. Petitioner's Bronx, New York, address on the CMR and Mailing Cover Sheet matches the address listed on its General Business Corporation Franchise Tax Return Short Form (Form CT-4) for the period December 1, 2011 through November 30, 2012. Bearing a date of December 26, 2012, this is the last return that petitioner filed with the Division before the issuance of the subject Notice of Determination.

#### ***CONCLUSIONS OF LAW***

A. The Division of Taxation has made a motion to dismiss, or alternatively, a motion for summary determination, as to the issue of the timeliness of petitioners' request for a conciliation conference. A motion to dismiss the petition may be granted, as pertinent in this matter, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9[a][1][ii]). As the petition in this matter was filed within 90 days of the conciliation order, the Division of Tax Appeals has jurisdiction over the petition and, accordingly, a motion for summary determination under 20 NYCRR 3000.9(b) is the proper vehicle to consider the timeliness of petitioner's request for conciliation conference. This determination shall address the instant motion as such.

B. 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]). 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 Civil Practice Law and Rules § 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, 853 [1985], *citing Zuckerman v City of New York*, 49 NY2d 557 [1980]). 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 [1968]; *Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572 [1989]).

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).

D. In a case where the timeliness of a petitioner’s protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner’s last known address (*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. As to whether such procedures were followed in this instance, a properly completed CMR is highly probative evidence of the mailing of a statutory notice to the address and on the date indicated thereon (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). In the present matter, page 1 of the CMR contains a postmark identifying the Postal Service location of Colonie Center, the zip code of 12205, and the January 9, 2013 mailing date. Although some of the pages of the CMR bear postmarks that are not legible in as much detail, the circular stamp with the same date format and some of the identifying information is present on all pages, including page 16 and 70, sufficient to conclude that these date stamps are also postmarks that contained the same location information as page 1. Accordingly, the Division has presented sufficient documentary proof, i.e., the respective CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on the date claimed.

F. 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.)* Thus, the notice is presumed received by petitioner at its Bronx, New York, address.

G. Pursuant to Tax Law § 478, petitioner had 90 days to file a petition for a hearing or a conference with BCMS (Tax Law § 170 [3-a][a]). The documents show that the notice was mailed on January 9, 2013, but petitioner's request for conciliation conference was not mailed until May 23, 2013, which is over a month beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction to consider the merits of petitioner's protest (*see Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late]), and the Division's motion for summary determination as to the issue of timeliness is granted.

H. The Division's motion for summary determination is granted and the petition is denied.

DATED: Albany, New York  
October 9, 2014

/s/ Catherine M. Bennett  
Administrative Law Judge