

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**DHAKA MINIMARKET INC.** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 825867  
Cigarette Tax under Article 20 of the Tax Law :  
for the Period February 14, 2013. :

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Petitioner, Dhaka Minimarket Inc., filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period February 14, 2013.

On January 31, 2014, the Division of Taxation, by Amanda Hiller, Esq. (Michelle W. Milavec, Esq., of counsel), filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(a)(1)(i) and 3000.9(b). Accompanying the motion was the affirmation of Michelle W. Milavec, Esq., dated January 30, 2014 and annexed exhibits. Petitioner did not respond to the motion. Accordingly, the 90-day period for the issuance of this determination commenced on March 3, 2014, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the documents submitted, Arthur S. Bray, 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 subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Determination dated March 21, 2013 and bearing assessment identification number L-039159714-1. The notice is addressed to petitioner, Dhaka Minimarket Inc., at "4736 39TH ST APT 1F, SUNNYSIDE, NY 11104-4404." The notice stated, in part:

During an inspection of your premises, on 02/14/13, you were found to be in violation for failure to possess a valid New York State certificate of registration for retail sales of cigarette and/or tobacco products.

The notice explained that a penalty of \$5,000.00 was due.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Determination. The request was dated July 15, 2013 and stamped as received by BCMS on July 17, 2013. The Request was sent by U.S. Postal Service (USPS) certified mail on July 15, 2013.

3. On July 26, 2013, BCMS issued a Conciliation Order Dismissing Request. 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 March 21, 2013 but the request was not received until July 15, 2013 [sic] or in excess of 90 days, the request is late filed.

4. Petitioner also filed a petition with the Division of Tax Appeals dated September 4, 2013 that was stamped as received on September 9, 2013. According to the petition, petitioner did not receive any correspondence from the Division before July 8, 2013.

5. The Division offered the affidavits of Bruce Peltier, Daniel A. Maney and Heidi Corina, employees of the Division. The first two affidavits concerned the mailing procedures followed

by the Division in mailing notices of determination. These affidavits describe the Division's standard mailing procedure including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets as well as the certified mail record (CMR) and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. The last affidavit pertained to correspondence between Ms. Corina and the Postal Service. The Division also offered a copy of the Certified Record for Presort Mail - Assessments Receivable containing a list of the conciliation orders allegedly issued by the Division on March 21, 2013, including the order allegedly issued to petitioner.

6. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A or she asks the Division's mail room staff to make to make such a request on behalf of the Office of Counsel. Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

7. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A, which requested information regarding the delivery of an article to petitioner. Specifically, this form requests information regarding a piece of mail that was mailed on March 21, 2013 bearing certified mail item number 7104 1002 9730 1521 5532 and addressed to petitioner at 4736 39<sup>th</sup> St., Apt. 1F, Sunnyside, N.Y. 11104-4404. This is the same number as the certified number on the CMR corresponding with the mailing of the Notice of Deficiency to petitioner on March 21, 2013. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request. The letter, on USPS letterhead dated October 31, 2013 refers to the certified mail number item and states in part: "The delivery record shows that this item was delivered on

03/23/2013 at 12:10 pm in SUNNYSIDE, NY 11104.” The letter also contains a scanned image of the signature of the recipient, the printed name of Borne and the address of the recipient is listed as “47-36 39th.”

8. The last filing with the Division by petitioner before the issuance of the Notice of Deficiency was a form DTF-17, Application to Register for a Sales Tax Certificate of Authority. The application listed petitioner’s mailing address as 47-36 39<sup>th</sup> Street, Apt. 1F Sunnyside, New York 11104. This is the same address as appears on the Notice of Determination and CMR.

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

A. Tax Law § 480-a(3) provides that retail dealers of cigarettes and tobacco products are subject to a civil penalty of between \$5,000.00 and \$25,000.00 for the failure to comply with the registration requirements. This determination is final unless the person against whom it is assessed files a petition for a hearing with the Division of Tax Appeals within 90 days after notice has been given (Tax Law § 478). In lieu of filing a petition for a hearing, a taxpayer may file a request for a conciliation conference, within the same 90-day period, in the Bureau of Conciliation and Mediation Services (BCMS) (Tax Law § 170[3-a][b]). In this instance, the Division appears to be relying upon both the date of issuance of the statutory notice and the date of receipt of the notice by the taxpayer to establish that the request for a conciliation conference was untimely. When the receipt of the notice by the taxpayer is established, the 90-day period for filing a petition or a request for a conciliation conference commences with the date of actual notice (*see Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

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. In order to obtain summary judgment, the moving party must offer sufficient evidence to eliminate any material issue of fact and make a prima facie showing of entitlement to judgment as a matter of law (*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]). Here, petitioner presented no evidence to contest the facts alleged in the Corina affidavit; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671).

C. The Corina affidavit with proof of receipt, is determinative of the outcome of this matter. The documentation provided to the Division by the USPS shows that the article of mail bearing the certified control number that was assigned to the notice on the CMR was delivered to petitioner’s address on March 23, 2013. Petitioner thus received actual notice of the subject notice of deficiency on that date.

D. Petitioner's request for a conciliation conference was filed on July 15, 2013, which is beyond 90 days from the date of actual notice. The request was therefore untimely filed (Tax Law § 480-a(3); § 170[3-a][b]; *Matter of Riehm v. Tax Appeals Tribunal*). Consequently, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011).

E. The Division's motion for summary determination is granted and the Notice of Determination, dated March 21, 2013, is sustained. The Division's motion to dismiss is denied.

DATED: Albany, New York  
May 22, 2014

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE