

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SABANDO AUTO PARTS, INC. : **DECISION**
AND JORGE SABANDO, AS OFFICER : **DTA No. 810896**
: :
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 December 1, 1986 through August 31, 1989. :

Petitioners Sabando Auto Parts, Inc. and Jorge Sabando, as officer, 3225 Third Avenue, Bronx, New York 10451, filed an exception to the determination of the Administrative Law Judge issued on July 21, 1994. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioners had until October 6, 1994 to file a reply brief, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the petition filed with the Division of Tax Appeals was timely.

FINDINGS OF FACT

We find the fact as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") issued to petitioner Sabando Auto Parts, Inc. two notices of determination and demands for payment of sales and use taxes due each dated March 15, 1990. The first notice assessed tax of \$85,013.94 for the period December 1, 1986 through August 31, 1989, plus penalty and interest. The second notice assessed a penalty (the omnibus

penalty) of \$8,501.40 for the same period. Two identical notices, also dated March 15, 1990, were issued to petitioner Jorge Sabando, as officer of Sabando Auto Parts, Inc.

The Division introduced in evidence a Request for Conciliation Conference (the "Request") signed by Jorge Sabando and received by the Division on June 20, 1990. The Request identifies petitioners' representative as Elliot Quinones and provides the following address for Mr. Quinones: 384 E. 149th St., Suite 330, Bronx, NY 10455. The address of Sabando Auto Parts, Inc. is shown on the Request as 3223 3rd Avenue, Bronx, NY 10451.

The Division received a letter from Mr. Quinones dated December 18, 1990 asking for special permission to appear as petitioners' representative at the conciliation conference. The letter bears a letterhead showing the following address for Mr. Quinones: 337 East 149th Street Suite 3-A, Bronx, New York 10455. The following statement appears at the bottom of the letter: "Please note our new address."

The Division issued to petitioners a Conciliation Order dated July 5, 1991, reducing the tax assessed pursuant to the statutory notices to \$60,779.40, plus penalty and interest, and reducing the omnibus penalty to \$6,077.94.

On June 1, 1992, petitioners filed a petition in the Division of Tax Appeals. By its answer, the Division claimed that the petition should be dismissed because it was not filed within 90 days of the issuance of the Conciliation Order. In their petition, petitioners claimed that neither Mr. Sabando nor Mr. Quinones ever received the Conciliation Order.

To establish proof of mailing of the Conciliation Order to petitioners and Mr. Quinones, the Division introduced in evidence the affidavits of Joseph Chyrywaty and Daniel LaFar, employees of the Division, as well as a copy of a two-page certified mail record.

The affidavit of Mr. Chyrywaty, Supervisor of Tax Conferences in the Bureau of Conciliation and Mediation Services, sets forth the Division's general practice and procedure for preparing conciliation orders for mailing. According to Mr. Chyrywaty, conciliation orders mailed to addresses within the United States are mailed by certified mail. A clerk in his office

prepares the conciliation orders and certified mail records. The name and address of each person to whom a conciliation order is to be mailed on a particular day is listed on a certified mail record. A second clerk reviews the certified mail records and conciliation orders to verify that the names and addresses shown on the certified mail record reconcile with those on the conciliation orders to be mailed. A certified mail number is assigned to each conciliation order and then affixed to the envelope containing a conciliation order. The clerk then records on the certified mail record, under the heading "Certified No.", the certified mail number assigned to each envelope. When the conciliation orders are ready for mailing, they are picked up by an employee of the Division's mailroom, along with the corresponding certified mail record.

The affidavit of Daniel LaFar, a Principal Mail and Supply Clerk in the Division's Mail and Supply Room, describes the operations and procedures followed by the Division's mail and supply room staff. Mr. LaFar states that after the conciliation orders are placed in an "Outgoing Certified Mail" basket, they are retrieved by a member of his staff who weighs, seals and places postage on each envelope. The amount of postage affixed to each envelope and the certified mailing fee are entered on the certified mail record. A mailroom clerk counts the envelopes and verifies that the names and addresses on the envelopes correspond with the names and addresses shown on the certified mail record. A member of the mailroom staff then delivers the envelopes and the certified mail record to the Roessleville Branch of the United States Postal Service in Albany, New York. A postal employee affixes a postmark and also may place his or her signature on the certified mail record indicating receipt by the post office. The certified record is picked up by a mail and supply room employee the day after its delivery to the post office and returned to the originating office, in this case the Bureau of Conciliation and Mediation Services. The certified mail record is the Division's record of mailing.

Both Mr. Chyrywaty and Mr. LaFar attest that the procedures described by them are the regular procedures followed by their offices when items are to be mailed by certified mail. They each stated that from review of the certified mail record submitted in evidence by the Division

they could attest to the fact that the mailing procedures described by them were followed in this case.

The certified mail record offered in evidence by the Division consists of two pages and is dated July 5, 1991. It shows the sender as the Bureau of Conciliation and Mediation Services. On page 1 of the certified mail record, 15 certified numbers are listed. Next to certified mail number P852372554 are listed the names, Sabando Auto Parts, Inc. and Jorge Sabando, as Officer, and the address 3223 3rd Avenue, Bronx, New York 10451. Next to certified mail number P852372555 is listed the name Elliot Quinones and the address 337 East 149th Street, Suite 3-A, Bronx, New York 10455. The number 15 is shown as the total number of pieces of mail listed by the sender. On the face of the certified mail record is a United States Postal Service date stamp, showing the date July 5, 1991. There is no entry in the space provided to show the number of pieces of mail received at the post office. The space where the postal employee's name is to be listed is also blank. On the second page of the certified mail record, 14 certified mail numbers are listed. The total number of pieces listed by the sender is shown as 14. The second page also bears a United States Postal Service date stamp of July 5, 1991. The spaces provided for other information are left blank. The certified mail numbers listed on pages 1 and 2 of the certified mail record are sequential, and there are no gaps in numbering. According to Mr. Chyrywaty, the certified mail record offered in evidence is a true and accurate copy of the certified mail record prepared by his office in connection with the mailing of conciliation orders to petitioners and Mr. Quinones. He states that the certified mail record was returned to him by the Division's mail room staff and kept by the Bureau of Conciliation and Mediation Services as a permanent mail record.

OPINION

The Administrative Law Judge determined that the Division met its burden to show that the Conciliation Order was mailed to petitioners and their representative on July 5, 1991. The Administrative Law Judge further determined that the Chyrywaty and LaFar affidavits establish the Division's standard mailing procedure and, in addition, determined that the affidavits and

CMR establish that the mailing procedure was followed in this matter. The Administrative Law Judge found that the absence of a signature of a postal service employee and the number of items received at the post office on the CMR was insignificant in view of all the proof presented. With respect to petitioners' allegation that neither they nor their representative received the Conciliation Order, the Administrative Law Judge found that petitioners did not submit any evidence to support this allegation. The Administrative Law Judge stated that petitioners' "bald conclusory statements" were "not sufficient to overcome the presumption of delivery created by the Division's proof of mailing (see, Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643, affd 62 NY2d 943, 479 NYS2d 188)" (Determination, conclusion of law "C").

Finally, the Administrative Law Judge found that the Conciliation Order was sent to petitioners' representative's last known address as noted on the December 18, 1990 letter to the Division.

On exception, petitioners argue that the "[a]ssessment was addressed to the business 'Sabando Auto Parts Inc.,' but sent to the home of Mr. Jorge Sabando. The address of the business is 3225 Third Avenue, Bronx, NY. There was no separate assessment for the officer Jorge Sabando" and, therefore, they are entitled to a hearing on the merits (Petitioners' Exception).

In response, the Division argues that it has established, by the uncontroverted proof submitted, that the Conciliation Order was properly issued to petitioners and their representative on July 5, 1991. With respect to petitioners' assertion that neither they nor their representative received the Conciliation Order, the Division argues that petitioners submitted no evidence to overcome the presumption of delivery created by its proof of mailing.

The Division also argues that "[s]eparate assessments in this matter were issued to the corporate petitioner, Sabando Auto Parts, Inc., at 3225 3rd Avenue, Bronx, N.Y. and to Jorge Sabando at 3223 3rd Avenue, Bronx, N.Y." (Division's brief, p. 7); however, the assessments are not at issue here. What is at issue, argues the Division, is the timeliness of petitioners' petition as calculated from the issuance of the Conciliation Order.

We reverse the determination of the Administrative Law Judge. We find that the certified mail record submitted by the Division is flawed in that it does not contain a total for the number of pieces received by the post office. Therefore, the certified mailing record does not establish that the 15 pieces listed by the sender on page 1 and the 14 pieces listed by the sender on page 2 were received by the post office on July 5, 1991 (see, Matter of Auto Parts Ctr., Tax Appeals Tribunal, February 9, 1995; Matter of Turek, Tax Appeals Tribunal, January 19, 1995). We also find that the certified mail record does not contain a signature of the postal service employee indicating receipt of the certified mail.

In view of the above, we find that the Division has not established when the Conciliation Order was mailed to petitioners and their representative. Therefore, we deem petitioners' petition timely and remand this matter for a hearing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sabando Auto Parts, Inc. and Jorge Sabando, as officer is granted;
2. The determination of the Administrative Law Judge is reversed; and
3. The matter is remanded for a hearing.

DATED: Troy, New York
March 9, 1995

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner