

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ROBERTO LIBANI :
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, 1992 :
through February 28, 1993. :

DECISION
DTA NO. 814817

In the Matter of the Petition :
of :
ROBERTO LIBANI :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and the Administrative Code of :
the City of New York for the Periods Ended :
June 30, 1990 and June 30, 1992. :

Petitioner Roberto Libani, 245 East 54th Street, New York, New York 10022-4707, filed an exception to the determination of the Administrative Law Judge issued on October 3, 1996. Petitioner appeared by Gianfranco Iavarone, C.P.A. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter stating that it would not be filing a brief in opposition. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly dismissed, as untimely filed, petitioner's requests for a conciliation conference filed with respect to certain notices of determination and deficiency.

FINDINGS OF FACT

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

The issue raised by the motion brought by the Division of Taxation ("Division") is whether petitioner timely protested four notices of deficiency/determination numbered as follows: L010205550, L010205551, L010205575, and L010205576. Petitioner filed requests for a conciliation conference in respect of these four notices of determination/deficiency on November 3, 1995.

Pursuant to conciliation orders dated February 23, 1996, the Bureau of Conciliation and Mediation Services ("BCMS") denied the above-referenced requests as untimely filed.

Also of relevance to this matter is a Notice of Determination dated April 3, 1995 and addressed to petitioner at the address listed above. Said notice bore a certified number of P 911 206 910 and a notice number of L010205552 and assessed sales tax due for the period ended August 31, 1992. Petitioner filed a request for a conciliation conference in respect of this notice on June 22, 1995. The Division concedes that said request was timely filed. Consequently, petitioner's protest of notice number L010205552 is not the subject of the Division's motion herein.

By Conciliation Order dated January 12, 1996, notice number L010205552 was sustained.

Petitioner subsequently filed a petition with the Division of Tax Appeals in respect of all five of the statutory notices referred to herein. In its answer filed in response to the petition, the Division asserted that BCMS properly dismissed as untimely petitioner's requests for a conciliation conference in respect of the notices referred to above.

The Division did not submit copies of the statutory notices numbered L010205550, L010205551, L010205575, and L010205576 into the record herein. The Division did submit microfiche copies of such notices. It is the Division's regular business practice to retain

microfiche copies of statutory notices for the purposes of reducing paper usage and the amount of personnel resources devoted to the filing of hard copies of statutory notices.

Both microfiche and hard copies of statutory notices are created from assessment data which is entered into the Division's CARTS (Case and Resource Tracking System) computer system by Division employees. Such data is organized by the computer's "Create Assessment" program which, among other things, assigns assessment numbers to the data and sets up a CARTS case in the computer system for each such assessment number.

The CARTS System also has a pre-sort procedure program the purpose of which is to prepare statutory notices for mailing. As part of this program, bar codes are placed on the statutory notices and a certified mail control number is assigned to each notice. This number will correspond with the certified control number appearing on the certified mailing record (see, below) and with the certified mail documentation affixed to the envelope at the time of mailing.

Since both are created from the same data, the content of the microfiche copy of a statutory notice is, with minor exceptions, identical to that of the hard copy. The major difference between the microfiche and the hard copy is the format in which the data is arranged.

The facts set forth above were established through affidavits of Carl Moeske, who is employed as an Associate Computer Programmer Analyst in the Division's Information Systems Management Bureau. As part of his regular duties, Mr. Moeske oversees the daily computer operations of the Division's computer system, which stores information and generates printed documents, including statutory notices, which are sent to taxpayers.

Each of the microfiche copies of statutory notices numbered L010205550, L010205551, L010205575, and L010205576, which were submitted by the Division herein, lists an anticipated mailing date of April 3, 1995 and petitioner's name and address as 245 East 54th Street, New York, New York 10022-4707. The microfiche copies also indicate the Division's position that petitioner was an officer/responsible person of Gian Marco Venturi Madison Ave., Inc. and was therefore personally liable for the sales tax assessed pursuant to sections 1131(1)

and 1133(a) of the Tax Law, or for withholding tax penalty pursuant to section 685(g) of the Tax Law.

The microfiche copies of the statutory notices also contain the following information:

<u>Assessment Number</u>	<u>Certified Control Number</u>	<u>Period Ended</u>	<u>Type of Tax</u>
L010205550	P 911 206 908	2/28/93	
L010205551	P 911 206 909	11/30/92	Sales
L010205575	P 911 206 911	6/30/92	Sales
L010205576	P 911 206 912	6/30/90	Withholding
			Withholding

The Division's CARTS Control Unit's computer preparation of notices of determination/deficiency, such as those at issue herein, also includes the preparation of a certified mailing record ("CMR"). The CMR lists those taxpayers to whom notices of determination/deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the certified mailing record to the CARTS Control Unit.

Each computer-generated notice of determination/deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page 1 of the CMR lists an initial date of March 25, 1995, which has been manually changed to April 3, 1995.

After a notice of determination is placed in the Division's Mail and Supply Room ("mailroom") "Outgoing Certified Mail" basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then counts the envelopes and

verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to the Colonie Center Branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature to the CMR.

In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

The CMR relevant to this case is an 22-page, fan-folded (connected) computer-generated document entitled "Certified Record for Non-Presort Mail". This CMR lists consecutive certified control numbers P 911 206 843 through P 911 207 082, inclusive. Each such certified control number is assigned to an item of mail listed on the 22 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR herein lists 240 items of mail corresponding to the 240 certified control numbers listed thereon and there are no deletions from the list.

Information regarding the notices of determination/deficiency at issue is contained on pages six and seven of the CMR. Specifically, corresponding to certified control numbers P 911 206 908 through P 911 206 912 are notice numbers L010205550, L010205551, L010205552, L010205575 and L010205576, respectively, along with information listing petitioner's name and address, which is identical to that listed on the notices of determination/deficiency described herein. The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated April 3, 1995.

In addition to bearing a Postal Service postmark dated April 3, 1995, the last page of the CMR, page 22, indicates "total pieces" listed thereon of 240. This figure has been manually circled and beneath it is the signature or initials of a Postal Service employee.

Appearing immediately beneath the "total pieces" listing is the confirmatory listing "Total Pieces Received at Post Office". No information appears after this listing.

The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the "total pieces listed figure indicate that all 240 pieces listed on the CMR were received at the post office.

The Division generally does not request, demand, or retain return receipts from certified or registered mail.

The facts set forth above were established through the affidavits of Geraldine Mahon and Daniel G. LaFar. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination/deficiency such as those at issue herein. Mr. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received (see, above) was established through the affidavit of Mr. LaFar. Mr. LaFar's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center specifically requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

The Division also submitted affidavits made by one Monica Amell, who is employed as a Senior Mail and Supply Clerk in the Division's Registry Unit. As part of her duties, Ms. Amell prepares US Postal Service Form 3811-A for mailing. According to Ms. Amell's affidavits and the relevant portion of the Domestic Mail Manual, Issue 48, dated 1/1/95 (a copy of which was attached thereto), the Postal Form 3811-A is a form used by the mailer to request return receipts

after mailing. A Form 3811-A is sent to the post office where the piece of mail in question was delivered. The delivery post office then completes the form by providing the mailer with the delivery date and the name of the individual or organization that postal delivery records show received the mail. Form 3811-A does not provide the mailer with the recipient's signature.

Attached to Ms. Amell's affidavits are the Form 3811-A's which were requested for petitioner herein. Ms. Amell prepared the forms in question and mailed such forms on May 14, 1996. Part of the Form 3811-A is completed by the mailer, i.e., the Division. In this case, box 3, 4, and 5 on each Form 3811-A list the address listed on the article as indicated by the Division's records, the certified mailing number, and the mailing date. This information is consistent with the information contained in the certified mailing record. Boxes 9 and 10 of each of the Form 3811-A's have been completed by the delivery post office as follows: Box 9 states a delivery date of April 8, 1995 and handwritten under the heading "Address" in box 10 is "245 E 54".¹ Additionally, box 8 of the Form 3811-A corresponding to certified number P 911 206 908 indicates that the article in question was delivered to the addressee, i.e, petitioner. The box 8 entries for the other four 3811-A's are blank.

Along with each Form 3811-A completed as described, the delivery post office also returned to the Division a copy of a Postal Service Form 3883-A ("Firm Delivery Receipt"). Handwritten in a box on this form under the heading "Mail For" is petitioner's name and address. Listed on the form under the heading "Article Number" are the five certified numbers referred to previously herein. Below this listing the form states: "A total of 0005XXX articles described above were received." Beneath this statement the number 5 has been handwritten. The form also contains a handwritten entry indicating a date of delivery of "4-08-95" and a signature under the heading "Delivered By (Carrier)". Additionally, the form contains a

¹Box 9 of the 3811-A forms corresponding to certified numbers P 911 206 909 and P 911 206 912 state a delivery date of "4-8-96" (emphasis supplied). It is concluded that this "96" entry was erroneous and that "95" was intended.

signature under the heading "Addressee" and the postmark of the delivery post office dated April 8, 1995.

OPINION

In his determination below, the Administrative Law Judge concluded that the Division had proved that it mailed the subject notices of determination and deficiency to petitioner by introducing evidence of its standard mailing procedure, corroborated by documentary evidence of mailing. The Administrative Law Judge found that the Division submitted adequate proof of its standard mailing procedures through the affidavits of Mr. Moeske, Ms. Mahon and Mr. LaFar. Furthermore, the Administrative Law Judge held that the CMR established that the notices of determination and deficiency at issue were mailed to petitioner on April 3, 1995.

In determining whether petitioner timely filed a request for a conciliation conference concerning the notices, the Administrative Law Judge, in citing to Tax Law §§ 1138(a)(1), 681(b) and 170(3-a)(a), concluded that petitioner's request for a conciliation conference was not timely since the notices were issued to petitioner on April 3, 1995 and his request for a conciliation conference was not made within the 90-day statutory period for filing a request. The Administrative Law Judge concluded that there was no support for petitioner's argument that a protest of a specific tax assessed for a specific period constituted a valid protest of an assessment of a different tax or for a different period.

Petitioner also attempted to address the merits of his case before the Administrative Law Judge. However, the Administrative Law Judge refused to entertain petitioner's arguments and noted that he lacked jurisdiction to do so. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination in this matter.

In his exception, petitioner raises the same arguments as made before the Administrative Law Judge. After reviewing the entire record in this matter, we find that the Administrative Law Judge completely and adequately dealt with the issue presented to him. Thus, we affirm the determination of the Administrative Law Judge for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Roberto Libani is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Roberto Libani is dismissed with respect to notices numbered L 010205550, L 010205551, L 010205575 and L 010205576.

DATED: Troy, New York
May 8, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner