

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROSA CARVAJAL	:	DECISION
	:	DTA No. 815317
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 March 1, 1992	:	
through May 31, 1994.	:	

Petitioner Rosa Carvajal, 486 Montauk Avenue, Brooklyn, New York 11208-4825, filed an exception to the determination of the Administrative Law Judge issued on March 27, 1997. Petitioner appeared by Manuel Vidal. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief in this matter. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed a request for a conciliation conference or a petition for a hearing within the statutorily prescribed period.

FINDINGS OF FACT

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

Petitioner, Rosa Carvajal, filed a petition which was received by the Division of Tax Appeals on September 3, 1996. The petition references assessment number L 011571982. Attached to the petition is a warrant filed against petitioner by the Commissioner of Taxation and Finance on August 7, 1996. The warrant references three different assessments including the one assessment listed on the petition. Also attached to the petition is a Conciliation Order

Dismissing Request issued by the Bureau of Conciliation and Mediation Services ("BCMS") of the Division of Taxation ("Division") on August 23, 1996 and referencing assessment number L 011571982 (CMS No. 155946). The order states that a statutory notice was issued to petitioner on January 2, 1996 and that petitioner's request for a conciliation conference was not received until June 13, 1996. Because the request for a conference was not made within 90 days of the issuance of the statutory notice, the Division denied petitioner's request for a conference.

In its motion, the Division asserts that as a consequence of petitioner's failure to request a conciliation conference or petition for a hearing within 90 days of the mailing to her of a Notice of Determination, petitioner is not entitled to a hearing on the merits of her petition.

To establish the fact and date of mailing of the notice of determination, the Division submitted an affidavit from Geraldine Mahon, Principal Clerk of the Division's CARTS Control Unit (CARTS is an acronym for Case and Resource Tracking System and refers to the Division's computer system for generating statutory notices, among other things); an affidavit from James Baisley, the Division's Chief Mail Processing Clerk since 1994; a certified record of mailing and a copy of the notice in question.

Ms. Mahon states that she supervises the processing of notices of deficiency and notices of determination before they are shipped to the Division's Mechanical Section for mailing. Ms. Mahon receives a computer printout, entitled Assessments Receivable, Certified Record for Non-Presort Mail, which the Division refers to as its "certified mail record" ("CMR"). The statutory notices listed on the CMR and generated by CARTS are also forwarded to Ms. Mahon's unit. When it is received by Ms. Mahon, the CMR bears the date on which it was printed at the top left hand corner of each page. Each notice to be mailed is assigned a certified mail control number which is printed on the face of the notice. That same number is listed under a column of the CMR headed "CERTIFIED NO". Each notice to be mailed is identified by an assessment identification number. This number appears on the statutory notice and is listed in the second column of the CMR under the heading "NOTICE NUMBER". The certified

control number and notice number on the CMR are followed by the name of the addressee and the address to which the notice is being mailed.

The Division submitted a photocopy of the CMR on which the Notice of Determination issued to petitioner is listed. The CMR was printed with the date December 21, 1995 in the upper left hand corner of each page. On the first page, that date was crossed out, and the date January 2, 1996 was handwritten in its place. Ms. Mahon states that the CMR is ordinarily printed approximately 10 days in advance of the anticipated date of mailing of the notices. The handwritten change in the date is made by Division personnel to conform to the actual date that the CMR and the notices are delivered to the possession of the United States Postal Service.

According to Ms. Mahon, whose unit maintains possession of the original copy of the CMR, the CMR listing the notices mailed to petitioner consists of 21 fan-folded pages. Ms. Mahon asserts that all pages of a CMR are connected when the document is delivered to the possession of the United States Postal Service. The pages remain connected when the document is returned to Ms. Mahon's office after mailing of the notices, and they stay connected unless she requests that the pages be separated.

A copy of the CMR listing the notice mailed to petitioner was placed in evidence. The certified mail control numbers on this CMR run consecutively from P 911 204 339 to P 911 204 568. The pages are numbered consecutively from 1 to 21. Each page of the 21-page document bears a United States Postal Service date stamp of January 2, 1996.

Page nine of the CMR lists an item of certified mail addressed to Carvajal-Rosa, 486 Montauk Ave, Brooklyn, NY 11208-4825. The certified mail control number assigned to this item is shown as P 911 204 428. The item is identified on the CMR as notice number L 011571982.

The Division placed in evidence a copy of the Notice of Determination issued to petitioner. On the face of the notice, there is a certified mail control number and an assessment identification number, each of which corresponds to the associated number listed on the CMR.

In the regular course of business and as a common office practice, the Division does not request or retain certified mail return receipts.

In a second affidavit, Mr. Baisley describes the Division's ordinary procedure for delivering outgoing mail to the United States Postal Service.

After receipt of the CMR and notices, a member of Mr. Baisley's staff counts the envelopes and verifies the names and certified mail numbers on the notices against the information contained on the CMR. Each envelope is weighed and sealed and the appropriate postage and fee is placed on each one.

Mr. Baisley states that a member of his staff delivers the CMR and the stamped envelopes to the Colonie Center Branch of the United States Postal Service where a postal employee affixes a postmark or his or her signature or both to the CMR indicating receipt by the Postal Service.

On the CMR entered in evidence, a United States Postal Service date stamp of January 2, 1996 appears on the bottom of the last page of the CMR. There are two printed statements at the bottom of the CMR, following the listing of items to be mailed. The first line states: "TOTAL PIECES AND AMOUNTS LISTED 230". The next line states: "TOTAL PIECES RECEIVED AT POST OFFICE". The number 230 was handwritten next to this statement. Initials appear under this number. In reference to these entries, Mr. Baisley states:

"Here, the postal employee affixed a Postmark to every page of the certified mail record, rewrote the total number of pieces, and initialed the certified mail record to indicate that this was the total number of pieces received at the Post Office."

Mr. Baisley states that his knowledge that the postal employee wrote in the total number of pieces to indicate receipt of 230 pieces of mail:

"is based on the fact that the Department's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record."

After its delivery, the CMR is left in the custody of the United States Postal Service. It is normally picked up by a member of the Mail Processing Center staff on the day following

delivery and returned to the originating office. The CMR is the Division's record of receipt by the United States Postal Service of pieces of certified mail.

Petitioner mailed a Request for a Conciliation Conference to the Division by United States Postal Service Express Mail. A copy of the Express Mail Service receipt shows that the request was delivered to the custody of the Postal Service on June 12, 1996 and received by the Division on June 13, 1996.

Petitioner did not reply to the Division's motion for summary determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In this matter, the Division brought a motion for summary determination to which petitioner did not respond. The Administrative Law Judge stated that since petitioner failed to respond to the motion, she is deemed to have conceded that no question of fact requiring a hearing existed and that the facts alleged in the Division's motion papers were true.

The Administrative Law Judge determined that petitioner failed to timely request a conciliation conference and, also, failed to timely file a petition for a hearing with the Division of Tax Appeals. The Administrative Law Judge noted that a petition contesting a notice of determination of sales and use taxes due must be filed within 90 days after the giving of notice of such determination (Tax Law § 1138[a][1]) or a request for a conciliation conference in BCMS must be made within 90 days (Tax Law § 170[3-a][a]). The Administrative Law Judge determined that the Division established both the fact and date of mailing the notice of determination to petitioner on January 2, 1996. Therefore, petitioner had 90 days within which to file a request for a conciliation conference or file a petition with the Division of Tax Appeals contesting the notice. Since petitioner's request for a conciliation conference was not mailed until June 12, 1996, such request was not timely. Therefore, the Administrative Law Judge concluded that the Division of Tax Appeals lacked jurisdiction to address the merits of this case and she granted summary determination in favor of the Division and dismissed petitioner's petition.

ARGUMENT ON EXCEPTION

In her exception, petitioner requests that the default judgment rendered against her be vacated since her absence from the hearing was due to extenuating circumstances which involved a serious medical condition. Therefore, petitioner asks that her default order be opened.

OPINION

Petitioner's request for relief is without merit. Petitioner apparently believes that she was held in default for failing to appear at a hearing. However, there was no formal hearing in this matter. Therefore, petitioner was not held in default. Rather, the Administrative Law Judge decided the motion for summary determination based on the papers submitted.

Since petitioner has failed to raise an objection to any part of the determination or any valid grounds for its vacatur, 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 Rosa Carvajal is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Rosa Carvajal is dismissed.

DATED: Troy, New York
November 26, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner