

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RUPERT MOORE	:	DECISION
		DTA NO. 817863
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, 1990 through February 28, 1995.	:	

Petitioner Rupert Moore, 205 Atkins Avenue, Brooklyn, New York 11208, filed an exception to the determination of the Administrative Law Judge issued on December 14, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition to the exception. Petitioner filed a reply brief. 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 summary determination was properly granted to the Division of Taxation on the basis that petitioner did not timely file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals.

FINDINGS OF FACT

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

The Division of Taxation (“Division”) issued to Rupert Moore, a Notice of Determination dated November 9, 1995 which was addressed to petitioner at “205 ATKINS AVE, BROOKLYN, NY 11208-2427.” The notice bears assessment identification number L-011275315-9 and at the top of the notice is certified control number P 911 206 257. The notice assessed a total amount of \$71,913.64, which consisted of tax due in the amount of \$41,099.17, plus interest of \$18,889.73 and penalty of \$11,924.74 for the period December 1, 1990 through February 28, 1995. The notice was issued to petitioner as a responsible person of “Rupert Moore Gen Ptr.”

By letter dated December 22, 1997, petitioner requested a courtesy conference with the Division’s New York City audit group concerning a Notice of Determination bearing assessment identification number L011275315-9, as well as an additional assessment bearing the identification number L011271654-5.¹

As a result of the courtesy conference and an audit of petitioner’s records, on April 30, 1998, the Division issued a Statement of Proposed Audit Adjustment reducing the assessment for the period December 1, 1990 through February 28, 1995 to a total tax due in the amount of \$21,936.73, plus interest in the amount of \$13,782.07.

¹ The record is silent as to the date of issuance of this notice. However, this assessment identification number references a Notice of Determination asserting sales and use taxes for the the period ending February 28, 1995.

Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") in protest of Notice of Determination L 011275315-9. However, that notice's date of issuance is listed as April 30, 1998 on the request form. The request form signed by petitioner is dated January 28, 2000. The envelope in which the request form was mailed, by certified mail, bears a January 28, 2000 United States Postal Service ("USPS") postmark, and also bears a stamp indicating receipt by BCMS on February 1, 2000. On the request form, petitioner's address is listed as 205 Atkins Ave., Brooklyn, New York 11208-2427.

The following was set forth in the request as the basis for the disagreement with the Notice of Determination:

The Assesment [sic] ID above is based on my having been assesed [sic] as a responsible partner of a partnership, which did not exist. And I have proof that I never had a partnership. I only did business as a propreitor [sic]. The employer identification number assigned to this partnership was never applied for by me or anyone else. When I had my Courtesy Conference before the NYC metro audit section I was told that if I could prove that I was not a partnership, the assessment, would be cancelled. I have proof now, and I had proof then, no partnership ever existed under my name.

On March 31, 2000, BCMS issued a Conciliation Order Dismissing Request (CMS No. 179488) to petitioner. The order states, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on November 9, 1995, but the request was not mailed until January 28, 2000, or in excess of 90 days, the request is late filed.

On May 26, 2000, petitioner filed a petition with the Division of Tax Appeals seeking a revision of the determination issued in this matter and a refund of a \$2,000.00 payment which

has been applied to this assessment. The assertion in the petition addresses the merits of the case.

Notices of determination, such as the one at issue herein, are computer-generated by the Division's Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination 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 USPS through return of the CMR to the CARTS Control Unit.

Each computer-generated notice of determination 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 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 a printing date of "10/31/95," which has been manually changed to "11-9-95."

After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the

CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate the total number of pieces received.

In the ordinary course of business, a Mail Processing Center 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 matter is a 17-page, fan-folded (connected) computer-generated document entitled “ASSESSMENTS RECEIVABLE CERTIFIED RECORD FOR NON-PRESORT MAIL.” This CMR lists consecutive certified control numbers P 911 206 182 through P 911 206 367. Each page contains 11 entries, with the exception of the last page (page 17) which contains 10 entries. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 17 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.²

² 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.

The information concerning the Notice of Determination issued to petitioner is contained on page 7 of the CMR. Review of page 7 of the CMR indicates that a Notice of Determination, with notice number L 011275315, was sent to “MOORE-RUPERT, 205 ATKINS AVE, BROOKLYN, NY 11208-2427,” by certified mail using control number P 911 206 257.

Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated November 9, 1995.

The last page of the CMR, page 17, contains a pre-printed entry of 186 corresponding to the heading “TOTAL PIECES AND AMOUNTS LISTED.” This pre-printed entry has been manually circled and beneath it in the bottom right hand corner is the signature of a Postal Service representative. The Postal Service representative’s signature also appears in the bottom right hand corner on page 2 of the CMR.

The affixation of the Postal Service postmarks, the signature of the Postal Service representative appearing on two pages of the CMR and the circling of the “186” indicate that all 186 pieces listed on the CMR were received at the post office.

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

The facts set forth above were established through the affidavits of Geraldine Mahon and James Baisley. 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. Mr. Baisley is employed as the Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

Attached to the Division's motion papers is a copy of a Notification of Sale, Transfer or Assignment in Bulk dated August 3, 1995, prepared and signed by Lyndon Rudder, the purchaser of the assets of petitioner's liquor store. Review of the notice indicates that petitioner's home address was 205 Atkins Avenue, Brooklyn, New York 11208. This notice was received by the Division's Sales Tax Audit Section on August 7, 1995.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9) a motion for summary determination shall be granted if the Administrative Law Judge finds that no material and triable issue of fact is presented. Such motion is subject to the same provisions as motions filed pursuant to CPLR § 3212.

The Administrative Law Judge also observed that pursuant to Tax Law § 1138(a)(1) (as in effect during the period at issue), a notice of determination finally and irrevocably fixes the tax asserted therein unless the person against whom it is assessed applies to the Division of Tax Appeals for a hearing within 90 days of the issuance of such notice. Alternatively, a taxpayer may request a conciliation conference with the Division's BCMS within the same 90 day period (Tax Law § 170[3-a][a]).

The Administrative Law Judge recited that pursuant to Tax Law § 1147(a)(1), a Notice of Determination must be mailed by certified or registered mail to the person for whom it is intended at the address given in the last tax return filed by him, application made by him or, if no return has been filed or application made, then to such address as may be obtainable. Further, the mailing of such notice is presumptive evidence of the receipt of the same by the person to whom

addressed. The Administrative Law Judge found that the address listed on the subject Notice of Determination was petitioner's last known address.

The Administrative Law Judge stated that based on relevant case law, when the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of demonstrating the standard procedure used by it for the issuance of the statutory notices by someone with knowledge of the relevant procedures. The Division must also present proof that the standard procedure was followed in the particular instance in question.

Based on the affidavits of two Division employees, the Administrative Law Judge concluded that the Division had provided adequate proof of its standard procedures for the mailing of notices of determination by certified mail and that this standard procedure was followed on November 9, 1995 in the generation and mailing of petitioner's Notice of Determination. Accordingly, the Administrative Law Judge concluded that the Division established that the Notice of Determination was mailed to petitioner on November 9, 1995 and a statutory presumption thereby arose of receipt of that notice by petitioner.

The Administrative Law Judge noted that the taxpayer has the right to rebut this presumption of receipt, but the rebuttal must consist of more than a mere denial of receipt. Although petitioner denied receiving the Notice of Determination in issue, petitioner failed to submit any evidence to rebut the presumption of receipt. Thus, the Administrative Law Judge concluded that petitioner failed to carry his burden of proving that he did not receive the Notice of Determination.

As petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of November 9, 1995, and since the

request for a conference was not made until January 28, 2000, the Administrative Law Judge found that petitioner's conference request was time barred. At the expiration of that 90-day period, petitioner's liability for tax became finally and irrevocably established pursuant to Tax Law § 1138. The Administrative Law Judge stated that while the Division, after a courtesy conference, redetermined the amount of tax due from petitioner, that redetermination took place long after the 90-day period of time to apply for a hearing had expired.

The Administrative Law Judge concluded that the only issue of fact raised on the motion for summary determination was the nonreceipt of the Notice of Determination by petitioner. Since the Division had sufficiently refuted such nonreceipt by its proof, and petitioner submitted nothing further, the Administrative Law Judge granted summary determination to the Division.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that through new evidence he can show that he did not receive the Notice of Determination. Petitioner alleges that from November 2, 1995 until January 8, 1996, he was excluded from his residence at 205 Atkins Avenue, Brooklyn, New York pursuant to a court order and petitioner never returned to that residence until July 15, 1996. Petitioner also argues that he is not liable for the amount of additional tax assessed.

In opposition, the Division argues that the Administrative Law Judge correctly decided this matter by awarding the Division summary determination in its favor. The Division asserts that petitioner is not entitled to present new evidence on exception and petitioner has not shown any basis for reopening this matter to allow the introduction of such evidence into the record.

OPINION

On January 13, 2001, petitioner submitted several documents to the Tribunal allegedly in support of his exception. By letter dated January 26, 2001, the Tribunal returned these documents to petitioner, advising petitioner that it would not consider them. Petitioner again submitted documents to the Tribunal with his reply brief on March 12, 2001. These documents were returned to petitioner by letter dated March 15, 2001.

We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not helpful towards that end and does not provide an opportunity for the adversary to question the evidence on the record (*Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also*, *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). As summary judgment is the procedural equivalent of a trial (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93), we find this principle equally applicable to attempts to submit additional evidence for consideration subsequent to the granting of a motion for summary determination. As a result, we reject petitioner's attempt to introduce additional evidence into the record after the time for him to oppose the Division's motion before the Administrative Law Judge had expired.

We affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and correctly applied the Tax Law and relevant case law to the facts of this case. Petitioner has not provided us with any basis to modify the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Rupert Moore is denied;

2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Rupert Moore is dismissed.

DATED: Troy, New York
June 28, 2001

/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