STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MITCHELL RACKER	:	DECISION DTA NO. 818399
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 September 1, 1995 through November 30, 1996.	:	

Petitioner Mitchell Racker, 2360 National Drive, Brooklyn, New York 11234, filed an exception to the determination of the Administrative Law Judge issued on October 4, 2001. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner filed a brief in support of his exception, the Division of Taxation filed a brief in opposition and 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 in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of the Notice of Determination to petitioner.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "19" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

As a result of a sales and use tax audit of Parkset Supply Ltd's ("Parkset") records, the Division of Taxation (the "Division") issued a Statement of Proposed Audit Adjustment ("Statement"), dated April 9, 1998, to Parkset asserting sales and use taxes due for the period September 1, 1993 through November 30, 1996 of $16,011.36, plus interest, for a total amount due of $20,747.17.

On April 20, 1998, Parkset, by its authorized representative, Isaac Sternheim, executed a consent, which appears on the Statement, that finally and irrevocably fixed the sales and use tax due in the amount of $16,011.36, plus interest.

The Division issued to Mitchell Racker, a Notice of Determination dated November 2, 1998 which was addressed to petitioner at "2360 NATIONAL DR, BROOKLYN, NY 11234-6835." The notice bears assessment identification number L-015753335-3 and at the top of the notice is certified control number P 911 005 307. The notice assessed a total amount of $7,517.36, which consisted of tax due in the amount of $6,170.67, plus interest of $1,346.69 for the period September 1, 1995 through November 30, 1996. The notice was issued to petitioner as an officer and person responsible to collect and remit sales and use taxes on behalf of Parkset pursuant to Tax Law § 1138(a), § 1131(1) and § 1133(a).

The instructions on the notice stated, among other things, "**If we do not receive a response to this notice by 01/31/99:** This notice will become an assessment subject to collection action."[1] (Emphasis in original.)

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-015753335-3. The request form signed by petitioner's representative, Bernard S. Mark, is dated January 29, 2001. The envelope in which the request form was mailed by certified mail[2] bears a stamp indicating receipt by BCMS on February 2, 2001. On the request form, petitioner's address is listed as 2360 National Dr., Brooklyn, New York 11234-6835.

The following was set forth in the request as the basis for the disagreement with the Notice of Determination: "Parkset properly filed and paid all sales taxes for the periods indicated. In any event, Mitchell Racker was not a responsible person during those periods."

On February 16, 2001, BCMS issued a Conciliation Order Dismissing Request (CMS No. 18434) 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 2, 1998, but the request was not received until February 2, 2001, or in excess of 90 days, the request is late filed.

On March 19, 2001, petitioner filed a petition with the Division of Tax Appeals seeking a revision of the determination issued in this matter. In that petition, petitioner asserts that the tax

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[1] January 31, 1999 is the due date for a request for conciliation conference or petition as listed on the notice of determination. However, since January 31, 1999 was a Sunday, the petition or request for a conciliation conference was required to be filed by Monday, February 1, 1999 (***see***, Tax Law § 1147[a][3]; General Construction Law §§ 20, 25-a; ***Matter of American Express Co.***, Tax Appeals Tribunal, July 3, 1991).

[2] A United States Postal Service ("USPS") postmark is not visible on the photocopy of the envelope included in the record.

was fully paid, even if delinquent. In support of that assertion, exhibits attached to the petition include, among others, copies of seven canceled checks drawn on Parkset's checking account, each of which is payable to "N.Y.S. Sales Tax Central Returns Pro. Ctr." and bears a date in 1998, the sum of which total $20,747.17.

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 "10/24/98," which has been manually changed to "11/2/98."

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 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 25-page, fan-folded (connected) computer-generated document entitled "ASSESSMENTS RECEIVABLE CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." This CMR lists consecutive certified control numbers P 911 005 182 through P 911 005 448. Each page contains 11 entries, with the exception of the last page (page 25) which contains 3 entries. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 25 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.[3]

The information concerning the Notice of Determination issued to petitioner is contained on page 12 of the CMR. Review of page 12 of the CMR indicates that a Notice of Determination, with notice number L 015753335, was sent to "RACKER-MITCHELL, 2360 NATIONAL DR, BROOKLYN, NY 11234-6835," by certified mail using control number P 911 005 307.

Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated November 2, 1998.

The last page of the CMR, page 25, contains a pre-printed entry of 267 corresponding to the heading "TOTAL PIECES AND AMOUNTS LISTED." This pre-printed entry has been manually circled and beneath it is the illegible signature or initials of a Postal Service representative.

The affixation of the Postal Service postmark, the signature or initials of the Postal Service representative appearing on the last page of the CMR and the circling of the "267" indicate that all 267 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.

[3] 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.

Baisley is employed as the Chief Mail Processing Clerk in the 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 was a copy of the first two pages of Mitchell and Phyllis Racker's joint 1997 resident income tax return (form IT-201) which indicates that their address was 2360 National Drive, Brooklyn, NY 11234. This return was signed by petitioner and his spouse on April 30, 1998.

We modify finding of fact "19" of the Administrative Law Judge's determination to read as follows:

> Petitioner's response in opposition to the Division's motion consists of the affidavit of Bernard S. Mark, petitioner's representative, which affidavit references the petition filed in this matter and attachments thereto. In his affidavit, Mr. Mark states that "[p]etitioner advises that he has *no recollection* of actually receiving the Notice of Determination" (Exhibit "1," ¶ 3, emphasis added) at issue in this matter. However, Mr. Mark also states that he was provided with a copy of the Notice of Determination by petitioner's former representative. The remainder of Mr. Mark's affidavit states that petitioner does not owe the tax, because the tax has already been paid by the corporation. Mr. Mark's affidavit does not claim that the Notice of Determination was improperly mailed or improperly addressed, nor does he make an outright denial of receipt of the notice.[4]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge stated that once a notice of determination of sales and use tax due has been issued to the person liable for the collection or payment of the tax, such determination shall finally and irrevocably fix the tax unless the person against whom it is

[4]We modified finding of fact "19" of the Administrative Law Judge's determination to more accurately reflect the record.

assessed, within ninety days after giving of such notice, shall challenge the determination by applying for a hearing with the Division of Tax Appeals or requests a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (Tax Law § 1138[a][1];[5] § 170[3-a][a]).

As the Administrative Law Judge noted, the filing of a timely petition or a timely request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (***see***, ***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996).

Tax Law § 1147(a)(1) requires that a Notice of Determination be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed" (Tax Law § 1147[a][1]). In this case, the Administrative Law Judge found that the address listed on the subject Notice of Determination was petitioner's last known address.

When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice. The Administrative Law Judge noted that there must be proof of a standard mailing procedure used by the Division for the issuance of the statutory notice by one having knowledge of the

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[5]Section 1138(a)(1), as amended by the Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997 as specified in section 3 of the Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect (***see,*** McKinney's Cons Law of NY, Book 1, Statutes § 51[b]). Since the assessment in this case pertains to the time period September 1, 1995 through November 30, 1996, the amendment to Tax Law § 1138(a)(1) does not apply.

relevant procedures and proof that those standard procedures were followed in the instance in question (***see***, ***Matter of Katz,*** Tax Appeals Tribunal, November 14, 1991).

Here, the Administrative Law Judge determined that the affidavits of two Division employees provided proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination. Moreover, the Administrative Law Judge concluded that the Division established that its standard mailing procedure for issuance of a statutory notice was followed on November 2, 1998 in the generation and mailing of petitioner's Notice of Determination.

The Administrative Law Judge noted that a taxpayer has the right to rebut the presumption of receipt, but rebuttal must consist of more than a mere denial of receipt. The Administrative Law Judge stated that petitioner's response to the Division's motion for summary determination consisted of his representative's affidavit. In his affidavit, Mr. Mark states that "petitioner advises that he has *no recollection* of actually receiving the Notice of Determination" at issue in this matter (Exhibit "1," ¶ 3, emphasis added). However, Mr. Mark averred that he was provided with a copy of the Notice of Determination by petitioner's former representative. The Administrative Law Judge determined that petitioner failed to submit any evidence to rebut the presumption of receipt other than a general denial of recollection made on his behalf in Mr. Mark's affidavit submitted in response to the Division's motion. The Administrative Law Judge found that petitioner's representative had no personal knowledge concerning the receipt of the subject Notice of Determination and that his affidavit had no probative value. The Administrative Law Judge concluded that petitioner failed to carry his burden of proving non-receipt of the subject Notice of Determination.

Therefore, the Administrative Law Judge determined that 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 2, 1998, or no later than February 1, 1999. Since the request was not made until February 2, 2001, the Administrative Law Judge concluded it was time barred.

Mr. Mark's affidavit also contained certain allegations relating to the merits of the petition. With respect to such allegations, absent a timely filed petition, the Administrative Law Judge concluded that the Division of Tax Appeals has no jurisdiction to consider the merits of petitioner's claim (***see, Matter of Halperin v. Chu,*** 134 Misc 2d 105, 509 NYS2d 692, ***affd*** 138 AD2d 915, 526 NYS2d 660, ***appeal dismissed in part, denied in part*** 72 NY2d 938, 532 NYS2d 845).

The only issue of fact raised by Mr. Mark's affidavit was petitioner's lack of recollection of receipt of the Notice of Determination. The Administrative Law Judge treated this as a denial of receipt. However, since the Division refuted petitioner's claimed non-receipt by its proof, and petitioner has submitted nothing further, the Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition.

ARGUMENTS ON EXCEPTION

Petitioner's exception again raises the substantive claim that the sales tax in dispute here has been paid by the corporation, and that the Division, therefore, has no basis to issue the Notice of Determination against him.

Additionally, petitioner's brief on exception raises new procedural arguments not raised on exception. Claims not raised on exception are not addressed here.

OPINION

We disagree with the Administrative Law Judge's statement that the only factual issue raised by Mr. Mark's affidavit was petitioner's non-receipt of the Notice of Determination. Petitioner's purported lack of recollection as to whether he received the subject Notice of Determination is insufficient to even rise to the level of a general denial of receipt, and should not have been dignified as such. This is especially the case in view of Mr. Mark's admission that he acquired his copy of the Notice of Determination from petitioner's former representative. Other than for this comment, we affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioner's response to the Division's motion for summary determination failed to raise any issue of fact, and the motion for summary determination was properly granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mitchell Racker is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Mitchell Racker is dismissed.

DATED: Troy, New York
September 19, 2002

/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