STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOE SUGRANES	:	DECISION DTA NO. 818773
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, 1997 through February 29, 2000.	:	

Petitioner Joe Sugranes, 80-04 151st Avenue, Howard Beach, New York 11414, filed an exception to the determination of the Administrative Law Judge issued on March 21, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition. 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 petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "2" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The subject of the motion of the Division of Taxation ("Division") is the timeliness of petitioner's protest of a Notice of Determination dated May 18, 2001 and addressed to petitioner, Joe Sugranes, as follows:

> 80 04 151st Ave.
> Howard Beach, NY 11414-1104

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> The subject Notice of Determination asserts $10,741.92 in additional tax due for the period June 1, 1997 through February 29, 2000, plus penalty of $4,179.53 and interest of $3,660.19, for a total amount due of $18,581.64. The notice bears certified mail control number 7104 1002 9739 0019 0692 and assessment identification number L-019435375. Page one of the Notice contained the following statement: "You may challenge this Notice through a hearing process by filing a Request for Conciliation Conference or a Petition for a Division of Tax Appeals hearing by 08/16/01 (90 days from the date of this Notice)." Page two of the Notice contained the following statement: "IF WE DO NOT RECEIVE a response to the Notice by 08/16/01, this Notice will become an assessment subject to collection action." Page three of the Notice contained the following statement: "NOTE: You must file the request for a Conciliation Conference or a Petition for a Division of Tax Appeals hearing by 08/16/01."[1]

Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") in protest of the subject Notice of

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[1]We modified finding of fact "2" of the Administrative Law Judge's determination to more clearly reflect the record.

Determination. The request was mailed via the United States Postal Service ("USPS") and was addressed to "Tax Compliance Division, NYS Campus, Building 8 Rm 438, Albany, NY 12227." As part of its motion papers, the Division submitted a photocopy of the envelope in which the request was mailed. The envelope has both a USPS postmark and a metered mail postmark. The date of the USPS postmark is partially obscured by the metered mail postmark, but appears to be August 24, 2001. The year ("2001"), month ("Aug") and the numeral "2" in the postmark date are clearly visible; the second numeral in the date (the "4") is partially obscured. The metered mail postmark is undated. The request is dated August 14, 2001 and was received by BCMS on September 13, 2001.

On September 28, 2001, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject Notice of Determination was untimely and stated, 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 May 18, 2001, but the request was not mailed until August 20, 2001, or in excess of 90 days, the request is late filed.

Notices of determination, such as the one at issue, are computer-generated by the Division's Computerized 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.

Each computer-generated notice of determination is pre-dated with its anticipated mailing date and each is assigned a certified mail 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 the CMR lists an initial date of May 8, 2001, which has been manually changed to May 18, 2001.

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 counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the USPS in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

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 case is a one-page, computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." This CMR lists ten certified control numbers, each of which is assigned to an item of mail listed thereon. That is,

corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

Information regarding the subject Notice of Determination is contained on the CMR. Specifically, corresponding to the certified control number listed in Finding of Fact "2" is notice number L-019435375, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Determination.

The CMR bears the postmark of the Colonie Center Branch of the USPS, dated May 18, 2001.

At the bottom of the CMR there is a pre-printed entry of the number 10, corresponding to the heading "Total Pieces and Amounts Listed." This figure has been manually circled and below it is the signature or initials of a Postal Service employee.

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

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 10 pieces of mail listed on the CMR were received at the post office.

The facts set forth above were established through 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 a 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.

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 was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center 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 generally does not request, demand or retain return receipts from certified or registered mail.

The address on the subject Notice of Determination is the same as the address given on petitioner's filed 2000 Resident Income Tax Return (Form IT-201), which was signed by petitioner and dated August 13, 2001. The address on the subject notice is also the same as the return address on the envelope containing the request for conciliation conference.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination may be granted if no material and triable issue of fact was presented and, as a matter of law, a determination can be issued in favor of any party. However, the Administrative Law Judge observed, the motion must be denied if any material facts are in dispute, if the existence of a triable issue of fact is *arguable*, or if contrary inferences may be reasonably drawn from undisputed facts.

The Administrative Law Judge pointed out that pursuant to Tax Law § 1138(a)(1), the Division is authorized to issue a notice of determination to a taxpayer where a return is not filed or a filed return is incorrect or insufficient. To seek revision of a notice of determination, a

taxpayer may file a petition with the Division of Tax Appeals, or alternatively, request a conciliation conference with BCMS, within 90 days of the mailing of the notice of determination.

The Administrative Law Judge cited applicable case law which provides that if the Division claims a taxpayer's protest against a notice of determination was not timely filed, the initial inquiry must focus on the mailing of the notice. Where a notice is found to have been properly mailed, a presumption arises that the notice was delivered to the taxpayer. However, the presumption of delivery does not arise unless the Division introduces evidence of its standard procedure for the issuance of statutory notices by one with knowledge of the relevant procedures as well as proof that the standard procedure was followed in this particular instance.

The Administrative Law Judge found that the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley and, through the CMR, sufficient documentary proof to establish that the Notice of Determination dated May 18, 2001 was mailed as addressed on May 18, 2001.

The Administrative Law Judge remarked that where an envelope containing a conciliation conference request bears a USPS postmark, the date of the USPS postmark is deemed the date of filing (***see***, 20 NYCRR 4000.7[a][2]). The Administrative Law Judge found that the photocopy of the envelope containing petitioner's conference request appeared to indicate a USPS postmark date of August 24, 2001. The Administrative Law Judge found that while the numeral "4" in the date was partially obscured, the "2" in the date was not. Accordingly, viewing the facts in a light most favorable to petitioner, the Administrative Law Judge concluded that the earliest possible postmark date would be August 20, 2001. As a request for conciliation conference with BCMS

would have had to have been filed within 90 days of the mailing of the notice of determination (or not later than August 16, 2001), the Administrative Law Judge concluded that petitioner's request for a conciliation conference was untimely and the Division of Tax Appeals had no jurisdiction to consider the merits of the case.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that his BCMS conference request was not mailed in a timely manner because he did not understand the requirement that the request had to be mailed within 90 days of the issuance of the Notice of Determination. He argues that he did not receive the Notice and that it is unfair to deprive him of a hearing, especially as he is disabled and does not owe the tax assessed.

In opposition to the exception, the Division argues that the Administrative Law Judge correctly determined that the Division presented sufficient proof that it mailed the Notice of Determination at issue to petitioner on May 18, 2001 and that petitioner's request for a BCMS conference was not filed within 90 days of that date. As a result, the Division asserts that the Administrative Law Judge properly granted the Division's motion for summary determination dismissing the petition in this matter for lack of jurisdiction.

OPINION

Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that a motion for summary determination may be granted:

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

That section further provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v. New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595). Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]). Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***see***, ***Alvord & Swift v. Muller Constr. Co.,*** 46 NY2d 276, 413 NYS2d 309).

Tax Law § 1138(a)(1) authorizes the Division to issue a notice of determination to a person liable for the collection or payment of the tax if a return required under Article 28 was not filed or if a return, when filed, was incorrect or insufficient. The timely filing of a request for a BCMS conference or a petition for a hearing before the Division of Tax Appeals concerning such a notice of determination is a jurisdictional prerequisite for review of that notice (***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989). A notice of determination is mailed when it is delivered into the custody of the United States Postal Service for mailing (***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). However, the presumption of delivery does not arise

unless or until sufficient evidence of mailing has been proffered (***see, Matter of MacLean v. Procaccino***, 53 AD2d 965, 386 NYS2d 111).

Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to produce evidence of its standard procedures for the issuance of notices of determination by one with knowledge of such procedures, corroborated by direct testimony or documentary evidence that this procedure was followed in the particular case at hand (***see, Matter of Novar TV & Air Conditioner Sales & Serv., supra***). We find that the Administrative Law Judge correctly concluded that the Division met its burden to demonstrate its procedure for mailing notices of determination and that, on May 18, 2001, it mailed the notice at issue to petitioner.

As the Administrative Law Judge concluded, despite his inability to determine the actual date of mailing of the conference request, the earliest possible postmark date of that request would have been August 20, 2001. As a request for conciliation conference with BCMS had to be filed within 90 days of the mailing of the notice of determination (***see***, Tax Law §§ 1138[a][1]; 170[3-a][a]), petitioner's request for conciliation conference was untimely.

In his response to the motion of the Division for summary determination, petitioner claims to have never received the notice. While the taxpayer has the right to rebut the presumption of delivery, the rebuttal must consist of more than a mere denial of receipt (***Matter of American Cars 'R' Us v. Chu.***, 147 AD2d 797, 537 NYS2d 672). Here, petitioner provided no evidence to establish that he did not receive the notice mailed to him on May 18, 2001.

Petitioner has alleged that due to his financial situation and his disabled condition, it is unfair to deprive him of a conference in this matter as he does not owe any tax. Further, he

claims that he was confused by the requirement that his conference request had to be mailed to the Division within 90 days of the date the notice was mailed to him. Although we are sympathetic to petitioner's circumstances in this case, petitioner has not articulated any legal basis to support his position nor has he provided any evidence sufficient to raise an issue of fact requesting a trial. Any relief for the seemingly harsh result produced by application of the statute of limitations set forth in Tax Law § 1138(a) would require legislative action.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

It is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joe Sugranes is denied;

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

3. The petition of Joe Sugranes is dismissed.

DATED: Troy, New York
October 3, 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