

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FATHI HAMOOD	:	DECISION DTA NO. 823375
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, 2005	:	
through May 31, 2008.	:	

Petitioner, Fathi Hamood, filed an exception to the determination of the Administrative Law Judge issued on September 2, 2010. Petitioner appeared by E. David Duncan, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation did not file a brief in opposition. 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 a conciliation conference following the issuance of a notice of determination.

FINDINGS OF FACT

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

Petitioner, Fathi Hamood, was issued Notice of Determination L-031886401-1 dated May

4, 2009 by the Division of Taxation (Division).

In protest of the Notice of Determination, petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was dated August 17, 2009 and mailed on August 18, 2009 to BCMS.

Following this request, BCMS issued a Conciliation Order Dismissing Request, CMS No. 234617, on September 4, 2009, denying petitioner's request for a conciliation conference because, having filed for conciliation conference on August 18, 2009, petitioner had allowed 107 days to elapse between the issuance of the Notice of Determination and his request.

Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination at issue. The petition was date stamped received on November 27, 2009.

Petitioner's last known address was 401 James St., Utica, NY 13501, for purposes of issuing the Notice of Determination at issue on May 4, 2009. The Division provided a copy of petitioner's most recent DTF-719 and sales tax return, which confirmed the address.

The Division provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the Division. CARTS refers to the Division's computer system for generating documents, including notices of determination issued to taxpayers. The computer-generated statutory notices are predated with the anticipated date of mailing and each is assigned a certified control number.

Each batch of statutory notices is accompanied by a computer printout entitled "Certified Record for Presort Mail-Assessments Receivable." It lists each notice in the order the notice was

generated, and each notice's certified control number appears under the first heading, "Certified No." The assessment numbers are listed under the second heading, "Reference No." and the names and addresses of the taxpayers are listed under the third heading, "Name of Addressee, Street and PO Address," while the remaining heading lists postage and fees.

On page 23 of the Certified Mail Receipt (CMR), Notice of Determination L-031886401 is indicated as being sent to Fathi Hamood, 401 James St., Utica, NY 13501, by certified mail using control number 7104 1002 9730 1320 1346.

The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of determination is placed in the "Outgoing Certified Mail" area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A CMR is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random check of up to 30 pieces of the certified mail listed.

Following this review, a member of the MPC staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS will also either circle the number of pieces received or indicate the total number of pieces received by

writing the number of pieces on the mail record.

The CMR for the notice issued on May 4, 2009 to petitioner consisted of 28 pages. A Division employee stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas” on page 28.

A review of the CMR confirms that a USPS employee initialed or signed all 28 pages of the CMR, affixed a postmark to each page of the CMR and wrote and circled the total number of pieces of certified mail received. Page 28 of the CMR listed 298 pieces of mail.

Mr. Peltier attested that, on May 4, 2009, an employee of the MPC delivered one piece of certified mail addressed to petitioner at 401 James St., Utica, NY 13501, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail.

The Division also submitted the affidavit of Heidi Corina, a legal assistant in the Division’s Office of Counsel involved in preparing United States Postal Form 3811-A to request return receipts after mailing certified mail. Ms. Corina attested to the request she made to the Postal Service for delivery information on the certified mail sent to petitioner. Specifically, the Form 3811-A detailed that certified mail no. 7104 1002 9730 1320 1346 was delivered on May 5, 2009 at 12:43 P.M. to petitioner’s Utica address. It also shows the scanned signature image of the recipient, which appears as “Sam Ali” with “401 James St.” written, as well.

Petitioner responded to the Division’s motion to dismiss on July 2, 2010, asserting first that, the statute of limitations should never have begun to run because the auditor had not actually finished his audit at the time of the issuance of the Notice of Determination in dispute.

Alternatively, petitioner argued that the notice date of “05/04/2009,” in the upper right corner of the Notice of Determination was hardly visible to the naked eye upon reading,

ultimately confusing petitioner because the date of payment was in bold print and the notice date was not.

Petitioner does not dispute that he did in fact receive the Notice of Determination at issue in this case.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination shall be granted if it is established that no material and triable issue of fact is presented and that a determination can be issued, as a matter of law, in favor of any party.

The Administrative Law Judge observed that a taxpayer has 90 days after the issuance of a notice of determination to file a petition for a hearing or to file a request for a conciliation conference with BCMS. The Administrative Law Judge noted that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received any written notice of a determination of tax due. If a taxpayer fails to file either a timely request for a conciliation conference or a petition protesting a notice of determination, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case.

The Administrative Law Judge cited applicable case law holding that in order to prove the fact and date of mailing of a statutory notice, the Division has the burden to provide evidence of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedure, as well as proof that the standard procedure was followed in the particular instance in question. The Administrative Law Judge found that in this case, the Division introduced adequate proof of its general mailing procedures and established that the general mailing procedure was followed. The Administrative Law Judge concluded that the

Division had proven that the Notice of Determination was properly mailed on May 4, 2009 to petitioner at his last known address.

The Administrative Law Judge noted that petitioner does not dispute receiving the Notice of Determination, rather that he misread the notice date or that the statute of limitations should not have begun to run until the audit was properly completed. The Administrative Law Judge concluded that petitioner's argument that the notice date was not in bold print and hardly visible does not carry any weight since the notice specifically detailed, in bold print, the date by which petitioner had to respond.

The Administrative Law Judge determined that petitioner's argument that the audit was not completed is an issue that could have been addressed at the hearing; however due to petitioner's late filing, the Division of Tax Appeals has no jurisdiction to address this issue.

As petitioner's request for a conciliation conference was not mailed until August 18, 2009, which was beyond the 90-day period, the Administrative Law Judge held that the Division of Tax Appeals has no jurisdiction over this matter and summary determination was granted in favor of the Division.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues, as he did below, that the statute of limitations should never have begun to run because the auditor had not finished his audit at the time of the issuance of the Notice of Determination. Petitioner also argues that the notice date of "5/4/09," in the upper right hand corner of the Notice of Determination was "hardly visible to the naked eye" upon reading, confusing petitioner because the payment due date was in bold print and the notice date was not.

The Division contends that the Administrative Law Judge correctly decided the relevant issues and that the determination should be affirmed for the reasons stated therein.

OPINION

We affirm the order of the Administrative Law Judge.

The Tax Law provides with regard to sales and use taxes that:

After ninety days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing (Tax Law § 1138[a]).

In the alternative, a taxpayer may also, within the same 90 day period, file a request for a conciliation conference with (“BCMS”) (*see* Tax Law § § 170[3-a], 2006[4]; 20 NYCRR 4000.3[c]). If a taxpayer first elects to file a request for conciliation with BCMS, the conciliation orders are binding upon the Department and the taxpayer unless a petition is filed with the Division of Tax Appeals within 90 days after the conciliation order is issued (*see* Tax Law § 170[3-a][e], NYCRR 4000.3[c], 4000.6[b]).

A notice of determination is mailed when it is delivered into the custody of the United States Postal Service for mailing (*see Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). When the timeliness of a petition is at issue, the Division must establish proper mailing of the notice of determination to petitioner (*see Matter of Novar TV & Air Conditioner Sales & Serv., supra*). We find that the Division has met its burden to establish proper mailing of the notice of determination to petitioner on May 4, 2009 by submitting affidavits describing its general mailing record, which showed that the procedure was followed in this case (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal,

November 25, 1992).

We next address petitioner's argument that the notice date is "hardly visible to the naked eye."

Tax Law § 1138(a)(2) provides that:

Whenever such tax is estimated as provided for in the section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days (emphasis added).

We find that the notice at issue here clearly apprised petitioner that the tax was estimated; that the tax may be challenged through a hearing process; and that a petition had to be challenged within ninety days. Specifically, the notice stated in bold face type in the center of the page, that: "You may challenge this Notice through a hearing process by filing a Request for a Conciliation Conference or a Petition for a Division of Tax Appeals hearing by 08/02/09 (90 days from the date of this Notice)." Further, even though the notice date is not required to be in bold face type, it detailed in bold face type the date by which petitioner had to respond (08/02/09).

We need not address petitioner's argument that the statute of limitations never should have begun to run because the auditor had not actually finished his audit at the time of the issuance of the Notice of Determination. Due to petitioner's late filing, the Division of Tax Appeals does not have jurisdiction to address this issue. Accordingly, this conclusion renders moot the remaining issue as to the audit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Fathi Hamood is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Fathi Hamood is dismissed.

DATED: Troy, New York
April 7, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner