

STATE OF NEW YORK
DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| WESTWOOD AT CORAM CO. | : | DETERMINATION DTA NO. 810153 |
| for Revision of a Determination or for Refund of Tax on Gains Derived from Certain Real Property Transfers under Article 31-B of the Tax Law. | : | |

Petitioner, Westwood at Coram Co., 870 Jericho Turnpike, Nesconset, New York 11767, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

On October 6, 1992 and October 16, 1992, respectively, petitioner by its duly authorized representative, Rothstein and Weinstein, Esqs. (Michael L. Weinstein, Esq., of counsel), and the Division of Taxation by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by February 1, 1993. The Division of Taxation submitted documents on November 30, 1992. Petitioner submitted a brief with attached documents on January 4, 1993. The Division of Taxation submitted a responding letter brief on February 10, 1993.¹

Petitioner did not submit a reply brief. After due consideration of the documents and briefs submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was timely filed.

¹Each party's brief was submitted slightly after the filing date therefor as specified in the Waiver of Hearing form as executed. Although no extensions of time were formally sought or granted, neither party has objected to the other's slightly late filing. Accordingly, and in my discretion, said briefs will be accepted and included as part of the record.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Westwood at Coram Co., a Notice of Determination and Demand for Payment of Tax Due under Tax Law Article 31-B ("gains tax"), assessing additional tax due, plus penalty and interest, in the aggregate amount of \$55,220.22. This notice was dated March 28, 1991 on its face, and carried assessment I.D. number L-002406987-1. The notice carries petitioner's name and address as "Westwood at Coram Co., 870 Jericho Turnpike, Nesconset, New York 11767-1021".

In response to the above notice, petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Said request carries the typewritten date June 17, 1991.² The envelope accompanying the request does not bear a United States Postal Service postmark. It does, however, bear a June 26, 1991 machine-metered (Pitney-Bowes) date stamp. The request, as well as an accompanying cover letter dated June 26, 1991, each carry a BCMS indate

stamp showing receipt of such documents on July 8, 1991. The cover letter and mailing envelope each reflect certified mail number P-842-233-973.

By a Conciliation Order dated October 18, 1991, BCMS dismissed petitioner's conciliation conference request as late filed (i.e., filed more than 90 days after the issuance date on the face of the notice of determination).

In order to establish the date and method of mailing the subject notice of determination, the Division introduced an affidavit made by one Donna Biondo, who served as Head Clerk in the Division's computerized Case and Resource Tracking System ("CARTS") control unit. Ms. Biondo's duties included supervising the mailing of notices of determination such as that at issue. Ms. Biondo's affidavit describes the general or regular process involved in the computer

²The signature on the request is not legible. However, it resembles the signature of petitioner's representative, Michael Weinstein, Esq., as such signature appears on other documents herein.

generation of gains tax notices of determination, the subsequent manual review thereof and, ultimately, mailing of such notices. More specifically, Ms. Biondo's affidavit describes the computer preparation of notices of determination, together with the simultaneous preparation of a certified mailing record. The certified mailing record is a fan-folded (connected), computer-generated document consisting, in this case, of 30 pages. The certified mailing record lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The affidavit describes the assignment of sequential certified control numbers for each notice on the certified mailing record. The pages of the certified mail record remain connected to each other before and after acceptance of the notices by the Postal Service.

As described in the Biondo affidavit, each computer-generated notice of determination is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the certified mail record under the heading "Certified Number". The affidavit describes the certified mail record as carrying an initial date (the date of its printing) 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 certified mailing record is manually changed at the time of mailing to conform the certified mailing record to the actual mailing date of the notices.

Attached as an exhibit to Ms. Biondo's affidavit in this case was the 30-page certified mail record encompassing, inter alia, the notice at issue. The certified mail record includes the certified control number P000801260, which number corresponds with the number printed in the upper right hand corner of the subject notice.³ This information is found at page 27 of the certified mail record, as is information listing petitioner's name and address, the amount of postage affixed and the certified mailing fee for the document at issue. The certified mail

³The names of taxpayers other than petitioner herein have been redacted from the certified mailing record for purposes of compliance with statutory privacy requirements.

record also reflects a (typed) printing date of March 18, 1991 in the upper left hand corner of each page of the document. At page 30, this printing date has been stricken and manually changed to March 28, 1991. The certified mail record also bears, at page 30, a United States Postal Service postmark date stamp of March 28, 1991, together with a signature affixed directly beneath such postmark date stamp. On this score, the Biondo affidavit

explains that when the notices, placed in envelopes and carrying appropriate postage, are delivered to the Post Office, the Postal Service representative verifies the receipt of a properly-addressed envelope for each name on the certified mail record and thereafter signs and/or postmark stamps the certified mail record to confirm the same. Also appearing on page 30 in the upper left hand corner is a handwritten notation "1 of 3". The affidavit explains this notation to mean the certified mail record described herein, using certified numbers P000800966 through P000801287 (denominated a "block"), was one of three separate certified mailing records "blocks") used by the Division in conjunction with mailing notices on March 28, 1991.⁴ The Biondo affidavit notes finally that, as an office practice, the Division does not request, obtain or retain return receipts for certified or registered mailing, but rather relies on the certified mail record as stamped and signed by the Postal Service.

Petitioner specifically concedes and raises no challenge to the Division's claim of proper mailing of the subject notice on March 28, 1991, nor is receipt of such notice disputed. Rather, petitioner alleges that the conciliation request was mailed, together with a power of attorney, by certified mail, return receipt requested, on June 26, 1991, which date is the 90th day after March 28, 1991.

Attached to petitioner's brief is a copy of the transmittal letter accompanying the conciliation request, together with the certified mail

⁴The "block" of certified mail numbers covered by the 30-page certified mailing record spans P000800966 through P000801287, a total of 322 separate certified numbers. This matches the total number of pieces (of mail) listed on such record, as well as the total \$322.00 amount of certified mailing fees (at \$1.00 per piece of mail) imposed.

domestic return receipt form (PS Form 3811) stamp-signed as received by the Division. Also attached is a certified mail receipt (PS Form 3800), denominated as petitioner's "office receipt". The former receipt, though signed for received, is undated. The latter receipt carries a space at its bottom labeled "postmark or date", in which the handwritten date "6/26/91" appears. There is no affidavit or other evidence detailing who affixed this handwritten date to the PS Form 3800, or further detailing the specifics surrounding the mailing of the request form at issue. Rather, petitioner's representative, by brief, states in argument as follows:

"It is the practice of my office not to deliver Certified Mail to the post office since it [is] some distance away but to prepare our own Certified receipt cards and to note on each and every receipt retained by the office in the space marked 'Postmark or Date' the date of mailing. This is our office procedure."

CONCLUSIONS OF LAW

A. Tax Law § 1444 addresses the authority of the Commissioner of Taxation and Finance to make determinations of gains tax due, and also sets out a taxpayer's right to challenge such assessments:

"[n]otice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after the giving of notice of such determination, shall petition the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (Tax Law § 1444.1).

B. As an alternative to requesting a formal hearing, a taxpayer may request an informal conciliation conference between the taxpayer, a representative of the Division and a conciliation conferee (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 20 NYCRR 4000.5[c]). The time for filing a request for conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment which, in this case, is 90 days (Tax Law §§ 170[3-a][a]; 1444.1; see, 20 NYCRR 4000.3[c]). Failure to timely file a request for conciliation conference (or a petition) bars the Division of Tax Appeals from entertaining a case.

C. Where the timeliness of a filed petition or request for a conciliation conference is at issue, the Division must prove proper mailing of the subject notice (see, Matter of Katz, Tax

Appeals Tribunal, November 14, 1991). The Division may prove such mailing by providing evidence as to its standard mailing procedures, together with direct testimony or documentary evidence that such procedures were followed with regard to the particular mailing in question (Matter of Katz, *supra*; *see also*, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

D. The evidence submitted by the Division, as detailed above, establishes that the notice at issue in this proceeding was mailed to petitioner on March 28, 1991. On this score, the Division has offered proof to establish such March 28, 1991 mailing date by explaining its standardized mailing procedures, and also by showing direct documentary evidence that this procedure was followed in conducting the particular mailing at issue herein. More specifically, the Biondo affidavit details the Division's standard mailing procedures. Coupling this affidavit with the entire 30-page certified mail record bearing the Postal Service date stamp and signature, as well as the balance of information as described which is consistent in all respects with the information carried on the face of the notice at issue, serves as direct documentary evidence confirming the March 28, 1991 date and fact of mailing (*see*, Matter of Novar TV & Air Conditioner Sales & Serv., *supra*; Matter of Bryant Tool & Supply, Tax Appeals Tribunal, July 30, 1992). In fact, petitioner has conceded to the Division's proper issuance of the notice on March 28, 1991 and to petitioner's receipt of the notice thereafter. Accordingly, and as petitioner tacitly admits, any challenge to the statutory notice, either in the form of a request for conciliation conference or a petition to the Division of Tax Appeals, had to be filed within 90 days of March 28, 1991; to wit, by June 26, 1991 (*see*, Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*).

E. Petitioner's evidence falls short of proving that the request for conference was in fact mailed on June 26, 1991, as alleged, or on any other date before June 26, 1991. A document received after expiration of the statutory time period will be deemed timely if sent via the United States Postal Service and the envelope in which the document was mailed bears a Postal Service postmark date which falls within the statutory time period (Matter of Stage Delicatessen

East, Tax Appeals Tribunal, March 9, 1989). Here, the request itself bears the typewritten date June 17, 1991. In turn, the cover letter accompanying the request is dated June 26, 1991, and the envelope containing the request is stamped with a machine-metered postmark dated June 26, 1991. However, there is no U.S. Postal Service postmark on the envelope, and the envelope and request each bear a BCMS indate stamp indicating delivery on July 8, 1991, some 12 days after June 26, 1991. Furthermore, there is no postmark on petitioner's certified mailing receipt (PS Form 3800); there is only the handwritten notation, "6/26/91", with no evidence to explain who affixed the same. In short, there is no proof as to when, in fact, the request was mailed.

Based upon these facts, the request for conciliation conference must be deemed filed when received (20 NYCRR 4000.7[a][1]). In turn, since the July 8, 1991 date the request was received by BCMS was more than 90 days after the issuance of the notice of determination, the request was properly determined to be untimely. Finally, although the machine-metered postmark falls within the 90-day period, there is no argument or evidence from which to conclude that delivery some 12 days after the due date falls within the time that a document mailed and postmarked by the United States Postal Service would be received at the address to which it was mailed (Matter of Harron's Electric Service, Tax Appeals Tribunal, February 19, 1988). Hence, petitioner's request for a conference was not timely filed.

F. The petition of Westwood at Coram Co. is hereby dismissed.

DATED: Troy, New York
June 3, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE