

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ABOUELKIER GAD : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 816100
and Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period September 1, 1990 through :
February 28, 1994. :
:

Petitioner, Abouelkier Gad, 7 Prospect Avenue, Sidney, New York 13838, filed a petition 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, 1990 through February 28, 1994.

On May 21, 1998 and May 26, 1998, respectively, petitioner appearing by George R. Silvernell, Esq., and the Division of Taxation appearing by Steven U. Teitelbaum, Esq., (Andrew S. Haber, Esq., of counsel), consented to have the controversy determined on submission without a hearing with all briefs to be submitted by November 18, 1998, which date began the six-month period for the issuance of this determination.

Upon review of the documents and pleadings submitted in connection with the matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was properly denied as untimely filed.

FINDINGS OF FACT

1. At issue in this matter are twelve notices of determination which the Division of Taxation ("Division") claims to have issued to petitioner on the following dates: Notices of Determination Nos. L007460144, L007450145, L007460146, L007460147, L007460148, L007460149 and L007460150 on June 14, 1993; Notice of Determination No. L007486794 on June 17, 1993; and Notices of Estimated Determination Nos. L009449157, L009449158, and

L009449160 on September 1, 1994. None of the subject notices were submitted into the record by either party.

2. Petitioner filed a Request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") upon learning that several tax warrants, representing the assessed taxes in issue, had been filed against real estate he owned which he was attempting to sell.

3. By a Conciliation Order (CMS No. 161490) dated June 6, 1997, petitioner's request for a conciliation conference was denied on the basis that such request had been filed in excess of 90 days after the June 14, 1993, June 17, 1993 and September 1, 1994 dates set forth on the faces of the respective notices.

4. Petitioner filed a timely petition on September 4, 1997, which was received by the Division of Tax Appeals on September 8, 1997. With regard to the timeliness issue, the petition noted: "The Petitioner did not timely receive copies of the Notices of Assessment and only became aware [sic] them when he learned of the docketing of judgments against him at the time an abstract of title was prepared for him." The Division filed its answer on November 6, 1997.

5. In support of his position, petitioner submitted a sworn affidavit attesting to the above noted facts, and the affidavit of his representative, George R. Silvernell, Esq., who described petitioner's practice as a client of bringing all legal documents and formal notices to him for review and assistance, since petitioner's ability to read and comprehend such documents was very limited.

6. The only document submitted by the Division was a Hearing Memorandum.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed, or if a return when filed is incorrect or insufficient. Pursuant to Tax Law § 1138(a)(1) such a determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition

with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 1147(a)(1) provides that a Notice of Determination shall 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 a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (*Id.*)

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice, and the Division bears the burden of proving both the fact and date of mailing (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). 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" (*see, Matter of Katz, supra*). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of demonstrating proper mailing rests with the Division (*id.*). The petitioner, in turn, has the right to rebut this presumption (*Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517).

D. The Division may meet its burden of establishing proper mailing by providing evidence

of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices of determination by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

E. In this case, the Division has introduced no proof of its standard mailing procedures or proof that the notices identified in Finding of Fact "1" were properly issued to petitioner on their respective dates. Since petitioner's argument is essentially one which asserts his due process rights and the Division has not overcome petitioner's allegation that he did not receive the notices by proof of proper mailing, petitioner cannot be precluded from the opportunity to contest such notices on the merits.

F. The petition of Abouelkier Gad is granted to the extent that this matter will be scheduled in due course for a hearing on the merits before the Division of Tax Appeals.

DATED: Troy, New York
March 25, 1999

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE