

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>ANTHONY S. THACKER</b>	:	DETERMINATION
		DTA NO. 816805
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 March 1, 1996 through February 28, 1997.	:	

---

Petitioner, Anthony S. Thacker, 5930 Beechcraft Street, New Orleans, Louisiana 70126, 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 March 1, 1996 through February 28, 1997.

On March 19, 1999, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing within 90 days of the mailing of certain notices of determination issued pursuant to Articles 28 and 29 of the Tax Law. Petitioner filed no response to the motion. Accordingly, the 90-day period for the issuance of this determination began on April 19, 1999, 30 days from the date of filing of the motion. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation is entitled to summary determination and dismissal of the petition on the ground that petitioner failed to request a conciliation conference or petition for a hearing within 90 days of the mailing of a notice of determination to petitioner.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, Anthony S. Thacker, six notices of determination of sales and use taxes due, dated March 30, 1998, notice numbers: L-014758045-5, L-014758046-4, L-014758047-3, L-014758048-2, L-014758049-1, L-014758050-1 (hereinafter these numbers will be referred to by the last three digits of the nine digits after the “L” in each notice number). The notices explain that these assessments were issued to petitioner because the Division’s records showed him to be an officer or responsible person of Guardian Securities, Inc.

2. The Division issued to petitioner a Liability Cancellation Notice, dated June 25, 1998, canceling two of the assessments, 045 and 046, based on correspondence from petitioner.

3. Apparently, petitioner had timely protested assessments 045 and 046, and the Division canceled those assessments based on information provided by petitioner. However, correspondence from petitioner to BCMS indicates that his initial protest did not include assessments 047, 048, 049 and 050. In a letter dated June 20, 1998, petitioner states: “I am writing you concerning a correspondence acknowledgment notice that I received from you dated May 18, 1998. After carefully reviewing this notice, I discovered that the correspondence did not cover all of the initial assessments that were previously sent to me.” Although this letter is dated June 20, 1998, the Postal Service postmark on the envelope in which it was mailed is July 10, 1998. The letter and a Request for Conciliation Conference for each of the four assessment

numbers that remain in dispute were received by BCMS, and the date stamps on these documents indicate that BCMS received them on July 14, 1998.

4. BCMS issued to petitioner a Conciliation Order Dismissing Request, dated August 7, 1998, denying his request for a conference. The order states that the request is denied because it was not made within 90 days of the issuance of the statutory notices.

5. On November 4, 1998, petitioner filed a petition with the Division of Tax Appeals. His petition does not address the issue of the timeliness of his requests for a conciliation conference.

6. On March 19, 1999, the Division filed the instant motion for summary determination seeking an order dismissing the petition and sustaining the statutory notices on the ground that the Division of Tax Appeals lacks jurisdiction over the petition because the requests for a conciliation conference were not filed within 90 days of the issuance of the statutory notices. The Division's motion was accompanied by affidavits and other documents which establish that the Division mailed the subject notices of determination to petitioner on March 31, 1998 by United States Postal Service ("USPS") certified mail.

7. The Division submitted the affidavit of Geraldine Mahon, Principal Clerk of the CARTS Control Unit of the Department of Taxation and Finance, to describe the Division's ordinary procedure for preparing notices of determination and notices of deficiency for mailing. The word "CARTS" is an acronym for Case and Resource Tracking System and refers to the Division's computerized record keeping system. Among other things, CARTS produces the statutory notices which are mailed to taxpayers.

8. Ms. Mahon's regular duties include supervision of the processing of notices of deficiency and notices of determination prior to their shipment to the Division's Mechanical Section for mailing. Ms. Mahon receives a computer printout, entitled Certified Record for Non-

Presort Mail and the corresponding notices of determination which are listed on the certified mail record. The Division refers to the former document as its "certified mail record." When it is received by Ms. Mahon, the certified mail record bears the date on which it was printed on the top left hand corner of each page. The notices to be mailed are assigned a certified mail control number which appears in a column under the heading "CERTIFIED NO." The identification numbers of the notices are listed in a second column under the heading "NOTICE NUMBER." The notice numbers listed on the certified mail record correspond to the assessment identification numbers shown on each notice. Each notice number is followed by the name of the addressee and the address to which the notice is being mailed.

9. The Division placed in evidence a copy of the certified mail record on which the notices of determination issued to petitioner are listed. The certified mail record was printed with the date "3/21/98" on each page. On the first page, that date was crossed out and the date "3/31/98" was handwritten in its place. Ms. Mahon states that the certified mail record is ordinarily printed approximately 10 days in advance of the anticipated date of mailing of the notices. The handwritten change in the date is made by Division personnel to conform to the actual date that the certified mail record, along with the notices, are delivered to the possession of the USPS. Ms. Mahon states that the copy placed in evidence is a true and accurate copy of the certified mail record of notices mailed on March 31, 1998 which is maintained by the Division.

10. Ms. Mahon states that the certified mail record consists of 23 fan-folded, connected, numbered pages. All pages are connected when the document is delivered into the possession of the USPS. The pages remain connected when the document is returned to Ms. Mahon's office after mailing of the notices and stay connected unless she requests that the pages be separated. The copy of the certified mail record placed in evidence consists of 23 numbered pages. All

names and addresses in the record have been redacted except those relating to petitioner. The certified mail control numbers on this document run consecutively from P 911 206 163 through P 911 206 414. Each page of the 23-page document bears a USPS, Colonie Center, date stamp of March 31, 1998.

11. Page 22 of the certified mail record shows an article of certified mail, certified mail number P 911 206 404, addressed to Thacker-Anthony S, 5930 Beechcraft Street, New Orleans, LA 70126-3868. On page 23 of the certified mail record, five more pieces of certified mail addressed to petitioner are listed (certified number P 911 206 405 through P 911 206 409). The certified mail control numbers and notice identification numbers on the certified mail record correspond to those on the notices of determination issued to petitioner.

12. In the regular course of business and as a common office practice, the Division does not request or retain certified mail return receipts.

13. In a second affidavit, James Baisley, Chief Processing Clerk in the Division's Mail Processing Center, described the Division's ordinary procedure for delivering outgoing mail to the USPS.

14. After receipt of the certified mail record and notices, a member of Mr. Baisley's staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and places postage and fee amounts on each envelope. A clerk then checks the first and last pieces of certified mail against the information contained on the certified mail record. The same clerk then randomly reviews 30 or fewer pieces of certified mail listed on the certified mail record by checking the envelopes against the corresponding information appearing in the certified mail record.

15. Mr. Baisley states that a member of his staff delivers the certified mail record and the envelopes to a branch of the USPS located in the Albany, New York area. A postal employee affixes a postmark and either his or her signature or initials to the certified mail record. The affixation of the postmark and the signature and initials of the employee establish receipt by the Postal Service.

16. A USPS date stamp of March 31, 1998 appears on each page of the certified mail record entered in evidence. The same initials appear at the bottom of the first and last page. The last line of the certified mail record states: "TOTAL PIECES RECEIVED AT POST OFFICE." No information has been entered on the document next to this line. The line above it states: "TOTAL PIECES AND AMOUNTS LISTED 252." The number "252" has been circled. In his affidavit, Mr. Baisley states that the USPS has been requested by the Division to circle the total number of pieces received or to enter the total number received in the place indicated. The circling of the number indicates that this was the total number of pieces received at the post office.

17. The certified mail record is left in the custody of the USPS when the notices are delivered to its possession. It is normally picked up by a member of the Mail Processing Center staff on the day following delivery and returned to the originating office. The certified mail record is the Division's record of receipt by the USPS of pieces of certified mail.

### ***CONCLUSIONS OF LAW***

A. The Division moves for summary determination based on petitioner's failure to file a request for a conciliation conference within 90 days of the mailing of a notice of determination to him at his last known address. 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]).

Here, petitioner elected not to respond to the Division's motion, thus he is deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, 36 NY2d at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, I find that no material and triable issue of fact is presented, and the Division is entitled to a determination in its favor.

B. A petition contesting a notice of determination of sales and use taxes due must be filed within 90 days after the giving of notice of such determination (Tax Law § 1138[a][1]). The Division is required to mail the notice by certified or registered mail, and mailing of the notice is presumptive evidence of its receipt by the person to whom it is addressed (Tax Law § 1147[a][1]). 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 (*see*, Tax Law § 170[3-a][a]). The filing of a petition or a request for a conference within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

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 fact and date of mailing of the notice (*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).

The Division is not required to produce employees who personally recall the mailing of each individual notice of determination. Rather, the act of mailing may be proven by evidence of the Division's standard mailing procedure, corroborated by direct testimony or documentary evidence of actual mailing (*Matter of Katz, supra*; *Matter of Novar TV & Air Conditioning Sales & Serv., supra*). A properly completed Postal Service Form 3877, reflecting Postal Service receipt of the items listed on the form, represents direct documentary evidence of the date and fact of mailing (*Matter of Air Flex Custom Furniture, supra*; *see also, Coleman v. Commr.*, 94 TC 82; *Wheat v. Commr.*, 63 TCM [CCH] 2955). The CMR used by the Division contains most of the significant elements of the Postal Service Form 3877 and serves the same purpose.

The affidavits of two Division employees, Geraldine Mahon and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing of notices of determination by certified mail. The affidavits generally describe the various stages of producing and mailing notices of determination and the certified mail records used as evidence of delivery of items of certified mail to the USPS. The Mahon affidavit attests to the authenticity and accuracy of the copy of the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Mahon and Baisley affidavits were followed with respect to the notices of determination issued to petitioner. The Division's primary piece of evidence is the certified mail record. This form



indicates that the Division is required to have a postal clerk write in the number of pieces of mail received in the space provided for that information on the certified mail record. Mr. Baisley states that the USPS has been told that an employee may, in the alternative, circle the number of pieces listed to show the number of pieces received. Thus, the evidence shows that the Division's standard procedure was followed in this case. Moreover, the circled number on the certified mail record constitutes evidence that the 252 notices listed on the certified mail record were delivered to the United States Postal Service for mailing, including the six notices addressed to petitioner. Consequently, the Division is entitled to rely on the presumption of receipt of the notice by petitioner (Tax Law § 1147[a][1]).

Petitioner's letter to BCMS establishes that he actually received the six notices.

Inasmuch as these notices were mailed to him on March 31, 1998, he was required to request a conciliation conference or petition for a hearing no later than June 29, 1998. Unfortunately, he responded to only two of the notices within the 90-day statutory period. He did not request a conciliation conference regarding notice numbers 047, 048, 049 and 050 until July 10, 1998.

C. The motion of the Division of Taxation for an order of summary determination is granted, and the petition of Anthony S. Thacker is dismissed with prejudice.

DATED: Troy, New York  
June 24, 1999

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE