

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| GOLDEN EAGLE TRADING CORP. | : | DETERMINATION |
| | : | DTA NO. 816841 |
| for Revision of a Determination or for Refund | : | |
| of Tax on Alcoholic Beverages under Article 18 | : | |
| of the Tax Law for the Period April 1, 1995 through | : | |
| May 31, 1997. | : | |

Petitioner, Golden Eagle Trading Corp., Attn: Thomas Shiu, VP, 17 Pike Street, P.O. Box 303, New York, New York 10002, filed a petition for revision of a determination or for refund of tax on alcoholic beverages under Article 18 of the Tax Law for the period April 1, 1995 through May 31, 1997.

On March 23, 1999, the Division of Taxation ("Division"), by its representative Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), brought a Motion for Summary Determination seeking dismissal of the petition in the above-referenced matter, pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to timely file either a request for a conciliation conference or a petition contesting the statutory notices at issue. Petitioner, appearing by its vice-president, Thomas Shiu, responded in opposition to the Division's motion by submitting letters dated April 14, 1999 and April 29, 1999. The 90-day period for issuance of this determination commenced on April 22, 1999 pursuant to section 3000.5(d) of the Rules. Based upon the motion papers, affidavits and documents submitted therewith, petitioner's letters in response, and

all pleadings and related documents submitted in connection with this matter, Dennis M. Galliher, Administrative Law Judge, issues the following determination.

ISSUE

Whether petitioner filed a timely protest challenging two notices of determination issued by the Division of Taxation.

FINDINGS OF FACT

1. At issue on this motion are two notices of determination, dated May 8, 1998 and addressed to petitioner, Golden Eagle Trading Corp., at 17 Pike Street, P.O. Box 303, New York, New York 10002. These notices bear assessment numbers L 014953598 and L 014953694, and certified mail control numbers P 911 206 840 and P 911 206 841, respectively. These notices assess tax on alcoholic beverages in the aggregate amount of \$19,286.46 for the period April 1, 1995 through May 31, 1997, plus penalty and interest.

2. Petitioner filed a Request for a Conciliation Conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS") for each of the notices of determination. Each request form was dated as signed on August 8, 1998. The envelope in which the request forms were mailed, by first class mail, bears an August 17, 1998 United States Postal Service ("USPS") postmark, and also bears an August 19, 1998 BCMS indate stamp. An accompanying letter setting forth the substantive basis for petitioner's challenge against the notices is dated as signed by petitioner's president on August 8, 1998 and bears an August 19, 1998 BCMS indate stamp.

3. By a Conciliation Order (CMS No. 170076) dated September 18, 1998, petitioner's requests for a conciliation conference were denied on the basis that such requests had been filed in excess of 90 days after the May 8, 1998 date set forth on the face of each of the notices.

4. Notices of determination, such as those at issue herein, 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 computer printout entitled "Assessments Receivable, Certified Record For Non-Presort Manual Mail" (hereinafter "Certified Mail Record" or "CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also lists a separate certified control number assigned to each notice of determination.

5. The certified control number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its computer 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 consists of one page, and it bears an initial printed date of 4/28/98 in its upper left hand corner which has been manually crossed out and replaced by the handwritten date 5/8/98 located immediately above the printed date.

6. All notices targeted for manual review are printed in one run. Each unit (within the Division) which has selected notices for manual review receives a separate and complete CMR for its notices. In this case, the notices selected for manual review by Audit Div-C.O.-FACCTS-Commodities were printed on page one of the CMR. Page one consists of four entries, including two entries for petitioner.¹ The notation on the CMR which states "Mail Room: Return Listing

¹The portions of the CMR which pertain to taxpayers other than petitioner have been redacted to preserve the confidentiality of those other taxpayers.

to CARTS Control Unit” indicates that the notices listed on such CMR were to be sent to Audit Div-C.O.-FACCTS-Commodities, the unit listed on the face of the CMR, for manual review before being returned to the CARTS Control Unit and mailed.

7. The unit performing the manual review of the notices receives the notices from the CARTS Control Unit, together with the accompanying CMR. The notices listed on the CMR are reviewed for accuracy, and are thereafter inserted into individual windowed envelopes. The CMR is wrapped around the envelopes and the bundled notices, envelopes and CMR are returned to the CARTS Control Unit. The returned documents are then sent to the “Outgoing Certified Mail” area in the Division’s Mail Processing Center (“mailroom”) for mailing.

8. After a notice of determination is placed in the Division’s mailroom “Outgoing Certified Mail” basket, a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to one of the various branch offices of the United States Postal Service (“USPS”) located in the Albany, New York area, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and/or his signature or initials to the CMR. The USPS has been request by the Mail Processing Center to 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. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the CMR. In the ordinary course of business, a

mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office within the Division. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The Division generally does not request, demand, or retain individual return receipts with regard to certified or registered mail.

9. The CMR in this case is a one-page computer-generated document entitled "Assessments Receivable-Certified Record For Non-Presort Manual Mail." This CMR, attested to as a true and accurate copy of the Division's CMR for May 8, 1998, lists consecutive certified control numbers P 911 206 839 through P 911 206 842, inclusive. Each such certified control number is assigned to an item of mail listed on the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR herein lists four items of mail next to the category "Total Pieces and Amounts Listed," corresponding to the four certified control numbers listed on the CMR. Information regarding the notices of determination pertaining to petitioner is set forth as the second and third listed notices on the CMR, with notice number L 014953598 corresponding to certified control number P 911 206 840 and notice number L 014953694 corresponding to certified control number P 911 206 841. Petitioner's name and address are listed next to each notice. As noted previously, the certified control numbers on the CMR run consecutively, and there are no marks, indications of other evidence that any of the listed items have been deleted or "pulled" from the listing.

10. In addition to the foregoing, the CMR bears the postmark of the Colonie Center Branch of the USPS, dated May 8, 1998 , and also includes the handwritten number "4" followed by the initials "SD" immediately below the listing "Total Pieces Received At Post Office."

11. The facts set forth above were established through two affidavits dated January 22, 1999 made by Geraldine Mahon and James Baisley, respectively, through an affidavit dated March 18, 1999 made by Heinz Ruppert, and upon review of the CMR and the notices of determination at issue herein. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit, whose duties include supervising the processing of notices of determination such as the ones at issue herein. Mr. Baisley is employed as a Principal Mail and Supply Clerk in the Division's mailroom, whose duties include supervising mailroom staff in delivering outgoing mail to branch offices of the USPS. Mr. Ruppert is employed as a Tax Technician I in Miscellaneous Tax, the Division unit referred to as "Audit Div-C.O.-FACCTS-Commodities," whose duties include receiving and manually reviewing notices of determination and accompanying CMRs.

12. Petitioner challenged the denial of its requests for a conciliation conference by filing a petition, postmarked November 30, 1998, challenging the merits of the assessments underlying the notices of determination. A preceding letter from petitioner, postmarked September 25, 1998 and requesting petition forms and the rules of practice and procedure, stated in part, that the late filing (of the conference requests) was due to illness of petitioner's president and because the "letter" (again, presumably, the conference requests) was misplaced. Petitioner submitted two letters, dated April 14, 1999 and April 29, 1999, respectively, in response to the Division's motion for summary determination. These letters again request a conference and each includes the same one-page invoice reflecting goods sold to petitioner by Nan Yang Trading Company Incorporated.

CONCLUSIONS OF LAW

A. Tax Law § 430 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer subject to Article 18 of the Tax Law if a return required under Article 18 is incorrect or insufficient. Pursuant to such section, the determination “shall finally and irrevocably fix the tax” assessed by such notice, 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, with the time period for filing such a request also being 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conciliation conference within the 90-day period is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Tax Law § 434-a(2) provides as follows:

[a]ny notice authorized or required under this article may be given by mailing it to the person for whom it is intended, in a postpaid envelope addressed to such person at the address given by him in his application for registration as a distributor or in the last return filed by him under this article or, if no application or return has been filed, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of its receipt by the person to whom addressed. Any period of time, which is determined according to the provisions of this article, for the giving of notice shall commence to run from the date of mailing of such notice.

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

USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

When a notice is found to have been properly mailed by the Division, a presumption arises that the notice was received by the person to whom it was addressed (Tax Law § 434-a[2]; *see, Engel v. Lichterman*, 95 AD2d 536, 467 NYS2d 642, 643, *affd* 62 NY2d 943, 479 NYS2d 188; *Matter of Katz, supra*). However, the “presumption of receipt” 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 (*see, e.g., Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). In turn, the mailing evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices 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*).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Messrs. Ruppert and Baisley, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) notices of determination under Article 18 of the Tax Law. Furthermore, the Division has offered adequate proof to establish the fact that the particular notices at issue were actually mailed to petitioner on May 8, 1998, the date appearing on the face of the notices. Specifically, the affidavits together with the CMR show the total number of pieces of mail received by the USPS, including pieces of mail addressed to petitioner, and the postmarks on the CMR, in turn, show the date of mailing as May 8, 1998 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is noted that the figure “4”, which is equal to the number

of pieces of mail listed on the CMR, is handwritten and initialed on the CMR directly beneath the listing "Total Pieces Received At Post Office." In addition, there is a USPS postmark for May 8, 1998 affixed directly beneath such listing and writing. The Division's affiant states that this information indicates the number of pieces of mail received by the USPS, and states that he knows this to be the case because the Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by either circling or writing the number on the CMR. In short the affidavits, the CMR and the notices, consistent in all respects as to the information listed thereon, provide direct documentary evidence confirming the May 8, 1998 date and fact of mailing of the subject notices. Accordingly, consistent with the reasoning in *Roland (supra)*, the Division has met its burden of proof on the question of actual mailing in this case.

E. Since the Division has established May 8, 1998 as the issuance date of the notices, any protest by petitioner against such notices had to have been filed by August 6, 1998 (i.e., within 90 days after May 8, 1998) in order to have been timely. Petitioner's response to the Division's motion consists of the submission of an invoice together with statements concerning the merits of the case, to wit, whether the notices correctly assess tax against petitioner. There is no argument advanced that petitioner protested the notices by filing either a request for a conciliation conference or a petition within 90 days of the May 8, 1998 issuance date of the notices. In fact, petitioner's September 25, 1998 letter requesting petition forms contains an apparent admission that the conciliation request was filed late. Most importantly, the requests are dated as signed August 8, 1998, are postmarked August 18, 1998 and are indate stamped as received by BCMS on August 19, 1998. All of these dates fall after the August 6, 1998 date by which a protest had to have been filed in order to have been timely.

F. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party. Here, there are no material issues of fact. That is, the Division has tendered evidence establishing proper mailing of the notices, and there was no protest thereafter within 90 days as required, thus leaving the assessments fixed, final and irrevocable with no jurisdiction over such notices in this forum. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division is entitled to summary determination with respect to the notices.

G. The Division's motion for summary determination is granted and the petition of Golden Eagle Trading Corp. is hereby dismissed.

DATED: Troy, New York
June 24, 1999

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE