

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ROBERT P. MCDONALD, JR.** : DETERMINATION  
for Revision of a Determination or for Refund of Sales and : NOS. 817852 AND  
Use Taxes under Articles 28 and 29 of the Tax Law for the : 817853  
Period September 1, 1996 through February 28, 1997. :

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Petitioner, Robert P. McDonald, Jr., 414 Elizabeth Street, Ogdensburg, New York 13669-2702, 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, 1996 through February 28, 1997.

On August 22, 2000, the Division of Taxation, by its representative, Barbara G. Billett, Esq. (Andrew S. Haber, Esq., of counsel), brought a motion for summary determination seeking dismissal of the petition in the above-referenced matter pursuant to section 3000.9(a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, on the ground that petitioner failed to file a petition within 90 days after the issuance of a Conciliation Order. Petitioner, appearing *pro se*, had 30 days, or until September 21, 2000, within which to respond to the Division's motion. Petitioner did not respond to the motion. The 90-day period for issuance of this determination commenced on September 21, 2000 pursuant to section 3000.5(d) of the Rules. After review of the motion papers, affidavits and documents submitted therewith, and all pleadings and related documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, issues the following determination.

***ISSUE***

Whether petitioner filed a petition with the Division of Tax Appeals within 90 days after the issuance of a Conciliation Order.

***FINDINGS OF FACT***

1. On May 10, 1999, the Bureau of Conciliation and Mediation Services (“BCMS”) of the Division of Taxation (“Division”) received a Request for Conciliation Conference from petitioner.<sup>1</sup> The request sought a conciliation conference for Assessment No. L-016261233-6 which was issued to petitioner in the amount of \$3,270.82, plus penalty and interest, for the period ended February 28, 1997. Apparently, BCMS deemed the request to include Assessment No. L-016261234-5 which was issued to petitioner in the amount of \$6,750.66, plus penalty and interest, for the period ended November 30, 1996.

2. On October 22, 1999, BCMS issued a Conciliation Order (CMS No. 175117) which denied petitioner’s request and sustained the statutory notices issued with regard to Notice Nos. L016261233 and L016261234.

3. On May 22, 2000, the Division issued a Notice and Demand for Payment of Tax Due, pertaining to Assessment No. L-016261233-6, in the amount of \$3,270.82, plus penalty and interest, for a total amount due of \$5,512.67 for the period ended February 28, 1997. A Consolidated Statement of Tax Liabilities, also dated May 22, 2000, was issued to petitioner which advised petitioner that in addition to the assessment set forth on the notice and demand, tax was also due in the amount of \$6,750.66, plus penalty and interest, for a total amount due of \$11,048.44 for the period ended November 30, 1996 (Assessment No. L-016261234-5).

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<sup>1</sup> The record does not disclose the date of the Notice of Determination which was issued to petitioner.

4. On June 7, 2000, the Division of Tax Appeals received two petitions from petitioner, one referencing Assessment No. L-016261233-6 and the other Assessment No. L-016261234-5. Each was dated May 31, 2000 and was signed by petitioner. The envelope containing the petitions bore a postmark of June 3, 2000.

5. In support of its motion for summary determination, the Division submitted: an affidavit of its representative, Andrew S. Haber, Esq.; the Division's answer to the petitions dated July 20, 2000; the affidavits of Michael J. Sampone and James Baisley, employees of the Division; a copy of the Division's certified mail record for conciliation orders issued October 22, 2000; the conciliation order, dated October 22, 2000, issued to petitioner by BCMS (CMS No. 175117); petitioner's Request for Conciliation Conference received by BCMS on May 10, 1999 and a photocopy of the envelope in which it was mailed; the two petitions dated May 31, 2000 and a photocopy of the envelope in which the petitions were mailed; and the Notice and Demand for Payment of Tax Due and the Consolidated Statement of Tax Liabilities, each dated May 22, 2000.

6. The affidavit of Michael J. Sampone, Assistant Director of BCMS, sets forth the general procedure for preparing and mailing conciliation orders which are sent by certified mail. The word processing unit in BCMS prepares the conciliation orders and the certified mail record ("CMR") which is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day.

The word processing unit forwards the conciliation orders and the CMR to a clerk in BCMS assigned to process the conciliation orders. The clerk, as part of her regular duties, verifies the names and addresses of taxpayers who are listed on the CMR. A certified control number is assigned to each conciliation order listed on the CMR. The clerk then affixes the

sequential certified control number stickers to envelopes for each listed taxpayer or representative and records on the CMR, under the heading "Certified No.," the certified control number from each envelope next to the appropriate name.

The conciliation orders and the CMR are then picked up at BCMS by an employee of the Division's Mail Processing Center. Each page of a CMR is a separate and individual CMR for the conciliation orders listed on that page only and each page contains spaces to record the "Total Number of Pieces Listed by Sender" and the "Total Number of Pieces Received at Post Office" for conciliation orders listed on just that page. There is also a space on each individual CMR for the receiving postal employee to initial.

7. The copy of the three-page CMR attached to Mr. Sampone's affidavit contains a list of the conciliation orders which the Division asserts were issued on October 22, 1999 including, on page three, an order addressed to petitioner, Robert P. McDonald, 414 Elizabeth Street 2, Ogdensburg, NY 13669-2702. The certified control numbers on page three of the CMR run consecutively from Z 418 087 896 through Z 418 087 906 (there were no deletions) for a total of 11 items of certified mail. The certified control number corresponding to the entry listing petitioner's name and address is Z 418 087 906. On page one of the CMR, the certified control numbers run consecutively from Z 418 087 869 through Z 418 087 882 (there were 14 items on the page with no deletions); on page two of the CMR, the certified control numbers run consecutively from Z 418 087 883 through Z 418 087 895 (there were 13 items on the page with no deletions). Each page of the CMR contains a postmark of October 22, 1999 by the Colonie Center branch of the United States Postal Service ("USPS") in Albany, New York. At the bottom of page three, the page on which petitioner's name, address and certified control number are listed, the number "11" has been filled in as the "Total Number of Pieces Listed by Sender"

and the number "11" has also been filled in as the "Total Number of Pieces Received at Post Office." Each page of the CMR also contains the initials of the postal employee who received the pieces of mail.

8. The Division's Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed thereto to show the date of mailing. The CMR is kept by BCMS as a permanent record. The procedures described in Mr. Sampone's affidavit were the normal and regular procedures of BCMS on October 22, 1999.

9. The affidavit of James Baisley, Chief Mail Processing Clerk of the Division's Mail Processing Center, sets forth the operations and procedures of the Mail Processing Center. Mr. Baisley supervises the entire Mail Processing Center staff including the staff that delivers outgoing mail to branch offices of the USPS.

After a piece of correspondence is placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. Thereafter, a member of the staff delivers the sealed, stamped envelopes to the Colonie Center Branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. In this case, the postal employee affixed a postmark to the CMR, wrote in the number "11" in the "Total Number of Pieces Received at Post Office" and initialed the CMR to indicate that 11 pieces were the total number of pieces received at the post office. Mr. Baisley's knowledge that the postal employee wrote in the number "11" and initialed the page to indicate receipt of 11 pieces of certified mail is based on the fact that the Division's Mail Processing Center specifically requested that the postal

employees either circle the number of pieces received or indicate the total number of pieces received by writing that number on the CMR.

10. The CMR is the Division's record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office on the following day and is delivered to the originating office by a member of Mr. Baisley's staff. Based upon a review of the CMR, Mr. Baisley was able to determine that a member of his staff obtained a copy of the CMR with the postmark, delivered to and accepted by the USPS on October 22, 1999, for the records of BCMS. The procedures described in Mr. Baisley's affidavit were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and these procedures were followed in the mailing of certified mail on October 22, 1999.

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

A. A conciliation order shall become binding upon the person who requested the conciliation conference (as well as upon the Division) unless a petition is filed with the Division of Tax Appeals within 90 days after the issuance of the conciliation order (Tax Law § 170 [3-a][e]; 20 NYCRR 4000.5[c][4]). Where a taxpayer fails to file a timely petition contesting a conciliation order, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where, as here, a taxpayer files a petition, but the timeliness of the petition is an issue, the Division has the burden of proving proper mailing of the conciliation order (*Matter of Novar*

*TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). An order is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When an order is found to have been properly mailed by the Division, a presumption arises that the order was received by the person to whom it was addressed (*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 previously 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).

The mailing evidence required by the Division to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the order by one with knowledge of the relevant procedures and, second, there must be proof that the standard procedure was followed in the matter at issue (*see, Matter of Katz, supra; Matter of Novar TV& Air Conditioner Sales & Serv., supra*).

C. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Division employees, Michael J. Sampone and James Baisley, who were knowledgeable of and involved in the process of generating, reviewing or issuing conciliation orders. In addition, the Division has offered adequate proof by means of these affidavits and the CMR to establish that this particular conciliation order was mailed, by certified mail, to petitioner on October 22, 1999. The affidavits describe the steps involved in producing and mailing conciliation orders and further attest to the authenticity and accuracy of the copies of the conciliation order and the CMR submitted by the Division as evidence of actual mailing. The

affidavits and supporting documents have established that petitioner's name and address appear on page three of the CMR which bears a USPS postmark of October 22, 1999 and the initials of a postal employee. There are 11 certified control numbers listed on page three of the CMR and the postal employee who initialed the CMR indicated, by writing the number "11" and placing his initials thereon, that he received 11 items for mailing. Accordingly, it is hereby determined that the Division has established that it mailed the conciliation order to petitioner, by certified mail, on October 22, 1999.

D. As previously noted, the conciliation order which denied petitioner's request and sustained the statutory notices issued by the Division became binding upon petitioner unless it can be shown that, within 90 days after the issuance of the conciliation order, he filed a petition with the Division of Tax Appeals. Because the Division has established that the conciliation order was issued on October 22, 1999, official notice is taken that the 90-day period for filing a petition with the Division of Tax Appeals expired on January 20, 2000.

The petitions filed in this matter were received by the Division of Tax Appeals on June 7, 2000. The postmark on the envelope in which the petitions were mailed bore a postmark of June 3, 2000. The petitions were signed by petitioner and were dated May 31, 2000. Since none of these dates fell within the 90-day period which expired on January 20, 2000, it is clear that petitioner failed to file timely petitions; therefore, the conciliation order is binding upon petitioner and the Division of Tax Appeals is without jurisdiction to consider the merits of petitioner's claims as set forth on the petitions.

E. 20 NYCRR 3000.9(b)(1) provides that 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.

F. In this matter, petitioner did not respond to the Division's motion for summary determination. Accordingly, 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). Petitioner did not contend that the order was improperly addressed or mailed nor did he allege that he did not receive it. Therefore, based upon the Division's having established that it mailed the conciliation order by certified mail to petitioner on October 22, 1999 and upon petitioner's failure to respond to the Division's motion for summary determination, I must conclude that there is no material and triable issue of fact herein and, as such, the Division is entitled to a determination in its favor.

G. The Division's motion for summary determination is granted and the petitions of Robert P. McDonald, Jr. are hereby dismissed.

DATED: Troy, New York  
November 30, 2000

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE