

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RUPERT MOORE** : DETERMINATION  
for Revision of a Determination or for Refund of Sales and : DTA NO. 817863  
Use Taxes under Articles 28 and 29 of the Tax Law for the :  
Period December 1, 1990 through February 28, 1995. :

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Petitioner, Rupert Moore, P.O. Box 80345, Brooklyn, New York 11208, 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 December 1, 1990 through February 28, 1995.

On August 23, 2000, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel) filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation pursuant to sections 3000.5, 3000.9(a) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the grounds that petitioner failed to file a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination to petitioner. The Division of Taxation submitted a Notice of Motion and the affidavit of Andrew S. Haber, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley in support of its motion. Petitioner, appearing *pro se*, filed a response to the motion on September 18, 2000, which date commenced the 90-day period for the issuance of this determination. Based on the motion papers, the affidavits and documents submitted therewith, the response by petitioner and

all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals within 90 days after the issuance of the Notice of Determination to petitioner.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to Rupert Moore, a Notice of Determination dated November 9, 1995 which was addressed to petitioner at “205 ATKINS AVE, BROOKLYN, NY 11208-2427.” The notice bears assessment identification number L-011275315-9 and at the top of the notice is certified control number P 911 206 257. The notice assessed a total amount of \$71,913.64, which consisted of tax due in the amount of \$41,099.17, plus interest of \$18,889.73 and penalty of \$11,924.74 for the period December 1, 1990 through February 28, 1995. The notice was issued to petitioner as a responsible person of “Rupert Moore Gen Ptr.”

2. By letter dated December 22, 1997, petitioner requested a courtesy conference with the Division’s New York City audit group concerning a Notice of Determination bearing assessment identification number L011275315-9, as well as an additional assessment bearing the identification number L011271654-5.<sup>1</sup>

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<sup>1</sup> The record is silent as to the date of issuance of this notice. However, this assessment identification number references a Notice of Determination asserting sales and use taxes for the the period ending February 28, 1995.

3. As a result of the courtesy conference and an audit of petitioner's records, on April 30, 1998, the Division issued a Statement of Proposed Audit Adjustment reducing the assessment for the period December 1, 1990 through February 28, 1995 to a total tax due in the amount of \$21,936.73, plus interest in the amount of \$13,782.07.

4. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") in protest of Notice of Determination L 011275315-9. However, that notice's date of issuance is listed as April 30, 1998 on the request form. The request form signed by petitioner is dated January 28, 2000. The envelope in which the request form was mailed, by certified mail, bears a January 28, 2000 United States Postal Service ("USPS") postmark, and also bears a stamp indicating receipt by BCMS on February 1, 2000. On the request form, petitioner's address is listed as 205 Atkins Ave., Brooklyn, New York 11208-2427.

The following was set forth in the request as the basis for the disagreement with the Notice of Determination:

The Assesment [sic] ID above is based on my having been assesed [sic] as a responsible partner of a partnership, which did not exist. And I have proof that I never had a partnership. I only did business as a propreitor [sic]. The employer identification number assigned to this partnership was never applied for by me or anyone else. When I had my Courtesy Conference before the NYC metro audit section I was told that if I could prove that I was not a partnership, the assessment, would be cancelled. I have proof now, and I had proof then, no partnership ever existed under my name.

5. On March 31, 2000, BCMS issued a Conciliation Order Dismissing Request (CMS No. 179488) to petitioner. The order states, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on November 9, 1995, but the request was not mailed until January 28, 2000, or in excess of 90 days, the request is late filed.

6. On May 26, 2000, petitioner filed a petition with the Division of Tax Appeals seeking a revision of the determination issued in this matter and a refund of a \$2,000.00 payment which has been applied to this assessment. The assertion in the petition addresses the merits of the case.

7. Notices of determination, such as the one at issue herein, are computer-generated by the Division's Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit.

8. Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "CERTIFIED NO." The CMR lists an initial date (the date of its 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 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, page 1 of the CMR lists a printing date of "10/31/95," which has been manually changed to "11-9-95."

9. After a notice of determination is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first

and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. An employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate the total number of pieces received.

10. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

11. The CMR relevant to this matter is a 17-page, fan-folded (connected) computer-generated document entitled "ASSESSMENTS RECEIVABLE CERTIFIED RECORD FOR NON-PRESORT MAIL." This CMR lists consecutive certified control numbers P 911 206 182 through P 911 206 367. Each page contains 11 entries, with the exception of the last page (page 17) which contains 10 entries. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 17 pages of 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.<sup>2</sup>

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<sup>2</sup> The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

12. The information concerning the Notice of Determination issued to petitioner is contained on page 7 of the CMR. Review of page 7 of the CMR indicates that a Notice of Determination, with notice number L 011275315, was sent to “MOORE-RUPERT, 205 ATKINS AVE, BROOKLYN, NY 11208-2427,” by certified mail using control number P 911 206 257.

13. Each page of the CMR bears the postmark of the Colonie Center Branch of the USPS, dated November 9, 1995.

14. The last page of the CMR, page 17, contains a pre-printed entry of 186 corresponding to the heading “TOTAL PIECES AND AMOUNTS LISTED.” This pre-printed entry has been manually circled and beneath it in the bottom right hand corner is the signature of a Postal Service representative. The Postal Service representative’s signature also appears in the bottom right hand corner on page 2 of the CMR.

15. The affixation of the Postal Service postmarks, the signature of the Postal Service representative appearing on two pages of the CMR and the circling of the “186” indicate that all 186 pieces listed on the CMR were received at the post office.

16. In the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

17. The facts set forth above in Findings of Fact “7” through “16” were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties include supervising the processing of notices of determination. Mr. Baisley is employed as the Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

18. Attached to the Division's motion papers is a copy of a Notification of Sale, Transfer or Assignment in Bulk dated August 3, 1995, prepared and signed by Lyndon Rudder, the purchaser of the assets of petitioner's liquor store. Review of the notice indicates that petitioner's home address was 205 Atkins Avenue, Brooklyn, New York 11208. This notice was received by the Division's Sales Tax Audit Section on August 7, 1995.

***SUMMARY OF THE PARTIES' POSITIONS***

19. In response to the Division's motion for summary determination, petitioner submitted a letter and various documents, the majority of which pertain to the merits of the case. In his letter, petitioner asserts that he did not request a conciliation conference or file a petition with the Division of Tax Appeals within 90 days of issuance of the Notice of Determination at issue because he never received it. He argues that he responded to any notices which he received, as evidenced by the timely filing of his response to the present motion. Petitioner further contends that the Division should produce a return receipt bearing his signature in support of its position that he received the subject Notice of Determination. He asserts that there is no basis for dismissing his petition and the Division's motion should be denied.

20. The Division argues that petitioner has failed to prove that he timely protested the Notice of Determination. It contends that its redetermination of the tax assessed in this matter neither entitles petitioner to a hearing on such redetermination, nor in any way reopens the merits of the underlying assessment.

***CONCLUSIONS OF LAW***

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also, Matter of Service Merchandise, Co., Inc.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgment must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick &*



*Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Tax Law § 1138(a)(1)<sup>3</sup> provides, in pertinent part, that:

[n]otice of such determination shall be given to the person liable for the collection or 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 giving of notice of such determination, shall apply to the division of tax appeals for a hearing. . . .

As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services. The time period for filing such request is also 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

C. 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 notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." (*Id.*) In this case, the record is clear that the address listed on the subject Notice of Determination was petitioner's last known address (*see*, Finding of Fact "18").

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<sup>3</sup> Tax Law § 1138(a)(1) has been amended since the years in question. Such amendments did not affect the 90-day requirement.

D. 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 date and fact of mailing of the statutory notice (*Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

In the present matter, the affidavits of two Division employees, Geraldine Mahon (Principal Clerk of the CARTS Control Unit) and James Baisley (Chief Mail Processing Clerk in the Division's Mail Processing Center) provide adequate proof of the Division's standard procedures for the mailing, by certified mail, of notices of determination (*see, Matter of Roland, supra*). The affidavits show that, as each notice is generated, a certified control number is assigned to it. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

The Division established that the general issuance procedure was followed on November 9, 1995 in the generation and mailing of petitioner's Notice of Determination. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmark on the CMR, in turn, shows the date of mailing as November 9, 1995 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal. February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purpose of establishing

the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient.

Finally, it is noted that the figure "186" on the last page of the November 9, 1995 CMR, signifying the total number of pieces of mail involved, has been circled and the signature of a Postal Service representative appears directly beneath the circled figure. As in *Matter of Roland (supra)*, the postal employee circled this figure to indicate the number of pieces of mail received by the USPS on November 9, 1995. In addition, and unlike the situation in *Roland*, the affiant, Mr. Baisley, states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has established that the Notice of Determination was mailed on November 9, 1995.

E. Where it has been found that the Notice of Determination was properly addressed to petitioner's last known address, the presumption of receipt arises when the Division demonstrates that it has a routine office practice and procedure for mailing the notice and that the notice was in fact properly addressed and mailed (*Matter of T. J. Gulf, Inc. v. State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97). In the instant matter, the Division has presented sufficient evidence to establish that it mailed a Notice of Determination to petitioner at his last known address on November 9, 1995. The taxpayer has the right to rebut the presumption, but rebuttal must consist of more than a mere denial of receipt (*id.*; *Matter of American Cars-R-Us, Inc. v. State Tax Commn.*, 147 AD2d 795, 537 NYS2d 672). In his response to the Division's motion, petitioner denies receipt of the Notice of Determination in issue. Petitioner failed to

submit any evidence to rebut the presumption of receipt other than his general denial in his response to the Division's motion for summary determination. Petitioner's mere assertion of nonreceipt is not enough, there must be substantive evidence. Petitioner has failed to carry his burden of proving nonreceipt of the Notice of Determination.

Accordingly, petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of November 9, 1995, or no later than February 7, 1996. Since the request was not made until January 28, 2000, it is time barred. It is noted that petitioner's request for a conciliation conference referenced Notice of Determination (L 011275315-9) dated April 30, 1998. As a result of the courtesy conference, the Division, on its own motion, redetermined the amount of tax claimed to be due in this matter (Tax Law § 1138[a][3][B]). The redetermination by the Division took place long after the 90-day period of time to apply for a hearing had expired. At the expiration of that 90-day period, petitioner's liability for tax was finally and irrevocably established by Tax Law § 1138 (*see, Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998).

F. The only issue of fact raised was the nonreceipt of the Notice of Determination by petitioner. Since the Division has sufficiently refuted such nonreceipt by its proof, and petitioner has submitted nothing further, the issue is found to be irrelevant as a matter of law. Such result leaves this matter a proper one for summary determination.

G. The Division of Taxation's motion for summary determination is granted and the petition of Rupert Moore is hereby dismissed.

DATED: Troy, New York  
December 14, 2000

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE