

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RICHARD E. GRISOFE D/B/A R.G. HAWK AIR : DETERMINATION
CONDITIONING AND APPLIANCE SERVICE : DTA NO. 818078
:
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, 1992 through August 31, 1995.
:
_____ :

Petitioner, Richard E. Grisofe d/b/a R.G. Hawk Air Conditioning and Appliance Service, 76 Walbar Street, Rochester, New York 14609, 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, 1992 through August 31, 1995.

On January 26, 2001, the Division of Taxation, by its representative, Barbara G. Billet, Esq. (Michael P. McKinley, 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 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals for an administrative hearing within 90 days of the issuance of a Notice of Determination to petitioner. Petitioner, appearing *pro se*, did not respond to the motion. Accordingly, the 90-day period for the issuance of this determination commenced on February 26, 2001, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. Based upon the motion papers,

the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, 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 a Notice of Determination to petitioner.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to Richard E. Grisofe d/b/a R.G. Hawk Air Conditioning and Appliance Service (“petitioner”), a Notice of Determination dated March 8, 1999, which was addressed to this petitioner at “76 Walbar Street, Rochester, NY 14609-3703.” The notice bears assessment identification number L-016098998-5. The notice assessed a total amount of \$10,417.99 which consisted of tax due in the amount of \$4,631.11, plus interest of \$3,849.99 and penalty of \$1,936.89.

2. In support of its motion for summary determination, the Division submitted: its answer to the petition; an affidavit of its representative, Michael P. McKinley, Esq.; affidavits of Geraldine Mahon and James Baisley, employees of the Division; a copy of the Division’s certified mail record for March 8, 1999; a copy of the Notice of Determination issued to petitioner; a copy of the first two pages of petitioner’s 1997 New York State personal income tax return, a copy of the petition which was received by the Division of Tax Appeals on August 31, 2000; and a copy of the envelope postmarked August 29, 2000 which was used to mail the petition.

3. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division's general procedure for processing notices of deficiency and determination prior to shipment to the Division's mechanical unit for mailing.

Ms. Mahon receives a computer printout or certified mail record ("CMR") and the corresponding statutory notices, each predated with the anticipated date of mailing and each notice assigned a certified control number. The CMR for the block of notices issued on March 8, 1999, including the notice issued to petitioner, consisted of 33 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service ("USPS"). The pages remain connected when the CMR is returned to Ms. Mahon's office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on March 8, 1999, including the Notice of Determination issued to petitioner, bears certified control numbers which run consecutively. Each page contains 11 entries, with the exception of the last page (page 33) which contains 10 entries.

In the upper left hand corner of page 1 of the CMR, the date "02/25/99" was manually changed to "3/8/99." The original date of 02/25/99 was the date that the entire CMR was printed. The CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mechanical Section. The handwritten change of the date from 02/25/99 to 3/8/99 was made by personnel in the Division's Mail Processing Center. The change was made to ensure that the date

on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature and a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative signed page 33 of the CMR, affixed a postmark to each page of the CMR and circled "362" on page 33 to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Page 33 of the CMR indicates that a Notice of Determination, with notice number L 016098998, was sent to "RICHARD E. GRISOFE, 76 WALBAR ST., ROCHESTER, NY 14609-3703," by certified mail using control number P 911 004 998. A U.S. postmark on each page of the CMR confirms that the Notice of Determination was sent on March 8, 1999.

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. These procedures were the normal and regular procedures of the CARTS Control Unit on March 8, 1999.

4. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center. He supervises the entire Mail Processing Center staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelope and

places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then 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.

A member of the staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS was requested 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 CMR. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employee to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS on the following day by a member of the staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

A USPS employee signed the last page of the CMR, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. The last page of the CMR indicates that 362 pieces were delivered to the USPS.

These procedures were the regular procedures followed by the Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail and these procedures were followed on March 8, 1999.

5. Attached to the Division's motion papers was a copy of the first two pages of petitioner's 1997 resident income tax return (form IT-201) which indicates that his address was

76 Walbar Street, Rochester, NY 14609-3703. This return was signed by petitioner on April 15, 1998.

6. On August 31, 2000, the Division of Tax Appeals received a petition from petitioner. The petition was dated August 28, 2000 and was signed by petitioner. Attached to the petition was a typewritten explanation which stated, in part, that “I would first like to apologize for the delay in my responding. I was under the impression my accountant had handled this matter.” Petitioner also set forth in this explanation various medical and financial difficulties which he had undergone during the years 1994 and 1995. The petition was sent certified mail by petitioner in an envelope which bore a USPS postmark of August 29, 2000.

7. In its answer to petitioner’s petition, dated December 21, 2000, the Division stated, among other things, that the Notice of Determination was mailed to petitioner at 76 Walbar Street, Rochester, New York 14609-3703, that this address was the same address as indicated on petitioner’s 1997 personal income tax return and that petitioner had failed to file a request for a conciliation conference or a petition with the Division of Tax Appeals as provided in the Tax Law.

CONCLUSIONS OF LAW

A. 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]).

B. Tax Law § 1138 (former [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 such section, such 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 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 a 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.” The mailing of such notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*) The evidence in this record indicates that the Notice of Determination was sent to petitioner at the address indicated on the return filed by him during the year in which the notice was issued. In his petition filed with the Division of Tax Appeals, petitioner did not contend that the address to which the Notice of Determination was sent was incorrect or that he did not receive the notice. It must be found, therefore, that the Division complied with the provisions of Tax Law § 1147(a)(1) since there is no evidence that, subsequent to the filing of his return for 1997, petitioner ever notified the Division of a different address to which statutory notices or other correspondence should be sent.

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 of the Division 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. The affidavits generally describe the procedures employed and further attest to the authenticity and accuracy of the copy of the Notice of Determination and the certified mail record submitted as evidence of actual mailing of the notice to petitioner. The documents and affidavits also establish that the general mailing procedures described by Ms. Mahon and Mr. Baisley were followed with respect to the notice issued to petitioner.

Petitioner's name and address appear on page 33 of the CMR which bears a USPS postmark of March 8, 1999. There are 362 certified control numbers listed on the 33 pages of the CMR and the USPS employee who signed the CMR on the last page thereof indicated that he or she received 362 items for mailing. The Division has, therefore, established that it mailed a Notice of Determination to petitioner, by certified mail, on March 8, 1999. Accordingly, the 90-day period for the filing of petitioner's Request for Conciliation Conference commenced on March 8, 1999; official notice is taken that such 90-day period expired on June 7, 1999.

E. As indicated in Finding of Fact “6”, the petition filed by petitioner was not mailed until August 29, 2000, a date which is more than 14 months after the expiration of the 90-day period for the filing of a request for a conciliation conference or a petition for an administrative hearing. The 90-day period for filing the petition is absolute and there is no provision in the Tax Law for waiver or extension of such period (*see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, 661-662, *lv denied and appeal dismissed* 72 NY2d 938, 532 NYS2d 845; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Despite the fact that the Division’s answer clearly raised the issue that petitioner had failed to file a request for a conciliation conference or file a petition with the Division of Tax Appeals and, accordingly, that the Division of Tax Appeals had no jurisdiction over this matter, petitioner failed to respond to the Division’s motion or provide any evidence to controvert the Division’s position. Since petitioner did not respond to the Division’s motion, he is deemed to have conceded that no question of fact exists which would require a hearing (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325).

F. The Division of Taxation’s motion for summary determination is granted and the petition of Richard E. Grisofe d/b/a R.G. Hawk Air Conditioning and Appliance Service is hereby dismissed.

DATED: Troy, New York
April 19, 2001

/s/ Brian Friedman
ADMINISTRATIVE LAW JUDGE