

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>ARMAND GARCIA</b>	:	<b>DETERMINATION</b>
		<b>DTA NO. 818115</b>
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 June 1, 1989 through August 31, 1991.	:	

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Petitioner, Armand Garcia, 4080 Throgs Neck Expressway, Bronx, New York 10473, 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 June 1, 1989 through August 31, 1991.

The Division of Taxation appearing by Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel) brought a motion for summary determination pursuant to 20 NYCRR 3000.5 and 3000.9(b) on the ground that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax Appeals within 90 days of the issuance of the notice of determination. The Division of Taxation submitted a Notice of Motion and the affidavit of Michael P. McKinley, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley, in support of its motion. Petitioner did not respond to the motion as permitted by April 9, 2001, which date began the 90-day period for issuance of this determination.

Upon review of the pleadings, affidavits and documents submitted in support of the motion of the Division of Taxation, Gary R. Palmer, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation is entitled to an order granting summary determination in its favor on the ground that petitioner failed to timely file his request for a conciliation conference with the Bureau of Conciliation and Mediation Services.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, Armand Garcia, a Notice of Determination dated March 28, 1994, identified by Assessment ID No. L008602190 and bearing certified mail control number P 911 204 263. Such notice asserted additional sales and use taxes due for the period June 1, 1989 through August 31, 1991, in the amount of \$12,715.43 plus penalty and interest of \$3,814.67 and \$6,564.93, respectively, for a total amount due of \$23,095.03.

The Notice of Determination is addressed to petitioner as follows: “Garcia-Armand, 4080 Throgs Neck Exp Way, Bronx, NY 10473.” The notice states that “This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law. Our records indicate that you are/were an Officer/Responsible Person of: ARMANDO DELI & GROCERY INC.” The notice further advises that, “[y]ou must file the Request for Conciliation Conference or a Petition for a Tax Appeals Hearing by 06/26/94.”

2. Petitioner filed a Request for Conciliation Conference on July 19, 2000 regarding assessment identification number L008602190.

3. A Conciliation Order Dismissing Request, dated August 4, 2000, was issued by the Bureau of Conciliation and Mediation Services (“BCMS”), bearing the following explanation:

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 March 24, 1994, but the request was not mailed until July 19, 2000, or in excess of 90 days, the request is late filed.

Petitioner filed a petition with the Division of Tax Appeals in protest of the order, which petition is dated November 1, 2000 and in-dated by the Division of Tax Appeals on November 6, 2000. The petition addresses the merits of the tax assessment, but not the timeliness issue.

4. The Division submitted the affidavit of Geraldine Mahon, an employee of the Division familiar with the processing of notices of determination by the Division's CARTS Control Unit, who describes the routine office procedures used by the Division to prepare such notices for mailing. It also submitted the affidavit of James Baisley, Chief Mail Processing Clerk of the Mail Processing Center of the Division since 1994, who was fully familiar with the operations and procedures of the Mail Processing Center, and whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the preparation and mailing of the notice in issue, and describe how such procedures were followed in this case.

5. The general process for issuing and mailing notices of determination and notices of deficiency in 1994 began with the computer generation of the notices and a listing of the taxpayers to whom such notices were to be sent by certified mail on a particular day, hereinafter referred to as the Certified Mail Record ("CMR"). A certified control number was assigned to each notice and listed on the CMR. In this case, certified control number P 911 204 263 was used for the Notice of Determination mailed to Armand Garcia, and this number appears on both the CMR and the Notice of Determination.

The statutory notices were picked up by an employee of the Division's Mail Processing Center and delivered to a branch of the United States Postal Service ("USPS") in Albany, New York (in this case the Roessleville Branch of the USPS). The CMR for the notices mailed on March 25, 1994 consists of 15 pages, and the notice mailed to petitioner at 4080 Throgs Neck Exp Way, Bronx, NY on March 25, 1994,<sup>1</sup> is listed on page 3. The other 163 items mailed were redacted to preserve the confidentiality of information concerning other taxpayers. The total number of pieces listed is 164.

On each individual page of the CMR a postal employee affixed a USPS stamp from the Roessleville Branch of the USPS in Albany bearing the date of March 25, 1994, circled the number 164 on page 15 to indicate the number of pieces received and initialed page 15 of the CMR. The Division's employee specifically requested the postal employees to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record.

The Division's Mail Processing Center returned a copy of the CMR to the Division with the postmark affixed on each page showing the date of mailing, which is retained as a permanent record. The CMR was kept by the Division in the regular course of its business.

6. The Division included in the record the affidavit of Arthur Richards, Tax Auditor I, sworn to February 9, 2001. Mr. Richards was the sales tax auditor assigned to conduct the audit of Armando Deli and Grocery, Inc., for the period June 1, 1989 to August 31, 1991. On May 14, 1992 Mr. Richards spoke by telephone with the corporation's accountant who

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<sup>1</sup>The affidavits and the CMR state the mailing date of the statutory notice to be March 25, 1994, while the conciliation order identifies the date of mailing as March 24, 1994. This discrepancy has no impact on the outcome of this case and is, therefore, disregarded.

informed Mr. Richards that petitioner's address was 4080 Throgs Neck Expressway, Bronx, New York 10473, and gave Mr. Richards Mr. Garcia's social security number.

7. The Division also included in the record the certification of the Assistant to the Commissioner for Regulatory Affairs of the New York State Department of Taxation and Finance which established that a search of the personal income tax files of the Department for petitioner's personal income tax returns for tax years 1992 and 1993 was conducted and that no such personal income tax returns were located for 1992 or 1993.

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

8. Neither petitioner nor his attorney, Jose L. Massas, addressed the timeliness issue in any of petitioner's submitted documents. Nor did they file a response to the Division's motion for summary determination.

9. The Division argues that the Division of Tax Appeals lacks jurisdiction to hear and determine this matter by reason of petitioner's failure to file a request for a conciliation conference within 90 days of the issuance of the notice of determination as required by Tax Law § 170(3-a[a]), or petitioner's failure to file a petition with the Division of Tax Appeals protesting the notice within the said 90-day period in accordance with Tax Law § 1138(a)(1). The Division further asks that an order of summary determination be granted on the basis that there are no material and triable issues of fact requiring a hearing.

### ***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 the 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 constrained by the following guidelines:

The motion shall 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006 [6]).

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner failed to file a timely request for a conciliation conference or petition for a tax appeals hearing. The laws addressing the issuance and mailing of notices of determination and deficiency and the procedures to timely protest the same follow.

Tax Law § 1138(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 Tax Law § 1138(a)(1), as in effect during the period in issue, 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.<sup>2</sup> As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference in the BCMS. 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 a conference within the 90-day period 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 a notice “shall be presumptive evidence of the receipt of the same by the person to whom addressed.” (*Id.*) However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division. 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*,

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<sup>2</sup> Section 1138(a)(1), as amended by Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997, as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect (*see* McKinney’s Cons Law of NY, Book 1, Statutes § 51[b]). Since the notice in this case pertains to the time period June 1, 1989 through August 31, 1991, the amendment to Tax Law § 1138(a)(1) does not apply.

Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered into the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see, Matter of Katz, supra*).

The required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Geraldine Mahon and James Baisley in support of its position that the Notice of Determination was issued to petitioner on March 25, 1994, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such notices (*see, Matter of Roland, supra*). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the names and addresses of the taxpayers to whom the notices were issued, the assessment numbers of the notices and the certified control numbers assigned to the notices.

Second, the Division established that the general issuance procedure was followed on March 25, 1994 in the generation and mailing of petitioner’s notice dated March 28, 1994. 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 each page of the CMR, in turn, shows the date of mailing as March 25, 1994 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).



Finally, it is noted that the figure “164” on the bottom of page 15 of the March 25, 1994 CMR, signifying the total number of pieces of mail involved, has been circled and a Postal Service employee has initialed next to the 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 March 25, 1994. 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 March 25, 1994.

Furthermore, the Division has established that it mailed the notice to petitioner on March 25, 1994 at his last known address, which address was acquired by the Division's auditor, Mr. Richards, from the accountant for the corporation of which petitioner was purported to be a responsible person.

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 March 25, 1994, or no later than June 23, 1994.<sup>3</sup> Since the request was not made until July 19, 2000, it is time barred.

D. Inasmuch as there are no material and triable issues of fact, and the Division has carried its burden of proving proper mailing, the Division of Taxation's motion for summary determination is granted as to Notice of Determination L008602190 dated March 28, 1994.

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<sup>3</sup> The notice advised that the request or petition was due by June 26, 1994. However, since the request was six years late, this discrepancy is irrelevant.

E. The petition of Armand Garcia is dismissed.

DATED: Troy, New York  
May 10, 2001

/s/ Gary R. Palmer  
ADMINISTRATIVE LAW JUDGE