

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MEHDI OSMAN HUSSEIN	:	DETERMINATION
	:	DTA NO. 821524
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
the Period Ended July 14, 2005.	:	

Petitioner, Mehdi Osman Hussein, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period ended July 14, 2005.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed June 19, 2007, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1)(I); (b)(1). Neither petitioner nor his representative (Robert McCreanor, Esq.) submitted a response to the Division's motion, although permitted to do so by July 19, 2007. Thus, the 90-day period for issuance of this determination began on July 19, 2007. After due consideration of the documents and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a notice of determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Mehdi Osman Hussein, a Notice of Determination, dated October 11, 2005, addressed to petitioner at a Long Island City, New York address. The notice bore assessment identification number L-026141825-6 and asserted penalty due of \$15,000.00 for the period ended July 14, 2005.

2. On October 19, 2006, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”), protesting the Notice of Determination dated October 11, 2005.

3. The Notice of Determination was based upon an investigation by the Tax Enforcement Bureau of the Department of Taxation and Finance of a grocery store owned by El-Shater Corporation located in Sunnyside, New York. Petitioner was the manager of the store. The investigation revealed that the grocery store was in possession of 180 pounds of untaxed tobacco and was selling tobacco products without a certificate of registration.

4. The Tax Enforcement Referral Report indicated petitioner’s address to be the Long Island City, New York address used on the Notice of Determination.

5. On November 10, 2006, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on October 11, 2005, but the request was not mailed until October 19, 2006, or in excess of 90 days, the request is late filed.

6. Notices of determination, such as the one 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 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 United States Postal Service (“USPS”) through return of the CMR to the CARTS Control Unit.

7. Each computer-generated notice of determination is predated 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 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, page one of the CMR stated an initial date of September 29, 2005 (“20052721700,” referring to the 272nd day of the year and time of day expressed on a 24-hour basis, or 5:00 P.M.) which was manually changed to “10/11/05” or October 11, 2005.

8. 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 counts the envelopes and verifies by a random review the names and certified mail numbers of up to 30 pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie

Center branch, where a postal employee accepts the envelopes into the custody of the USPS and affixes a dated postmark and his signature or initials to the CMR.

9. In the ordinary course of business, a Mail Processing Center employee picks up the CMR from the USPS on the following day and returns it to the CARTS Control Unit.

10. In the instant case, the CMR is a 24-page, fan-folded (connected) computer-generated document entitled “Certified Record for Presort Mail-Assessments Receivable.” This CMR lists 262 control numbers. Each such certified control number is assigned to an item of mail listed on the 24 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.

11. Information regarding the Notice of Determination issued to petitioner is contained on page 11 of the CMR. Corresponding to certified control number 7104 1002 9730 0873 5399 is notice number L-026141825, along with petitioner’s name and address, which is identical to that listed on the Tax Enforcement Referral Report.

12. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated October 11, 2005, and the initials of the postal employee, verifying receipt of the items.

13. The last page of the CMR, page 24, contains a preprinted entry of “262” corresponding to the heading “Total Pieces and Amounts.” The number “262” is circled, and to the right appear the aforementioned initials of a Postal Service employee and a postmark of the Colonie Center Branch of the USPS bearing the date “October 11, 2005.” These same initials appear on each page of the CMR.

14. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the number “262” indicate that all 262 pieces listed on the CMR were received at the post office.

15. In the ordinary course of business, the Division generally does not request, demand or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact “6” through “15” were established through the affidavits of Patricia Finn Sears, sworn to on June 12, 2007, and James Steven VanDerzee, sworn to on June 15, 2007. Ms. Sears is employed as the Supervisor of the Division’s CARTS Control Unit. Ms. Sears’s duties include supervising the processing of notices of determination. Mr. VanDerzee is employed as a Mail and Supply Supervisor in the Division’s Registry Unit. Mr. VanDerzee’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

17. On January 22, 2007, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated November 10, 2006.

CONCLUSIONS OF LAW

A. A motion for summary determination 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 (20 NYCRR 3000.9[b][1]).

B. Here, petitioner did not respond to the Division’s motion. In his petition he merely asserted that he never received the Notice of Determination because it was mailed to the wrong address. However, since petitioner did not appear on this motion and presented no evidence to contest the facts alleged in the Sears and VanDerzee affidavits and the address of petitioner as

shown on the Tax Enforcement Referral Report, those facts are deemed admitted (*see, Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Whelan v. GTE Sylvania, Inc.*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer subject to tax under Article 20 of the Tax Law if a return required under Article 20 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 Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

Tax Law § 481(b) provides the Division with the authority to assess penalties for the possession of unstamped cigarettes and other tobacco products. Penalties imposed pursuant to Tax Law § 481(b) are to be determined and reviewed in the same manner as that provided in section 478 of the Tax Law.

D. Where the taxpayer files a petition or request for conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper

mailing of the Notice of Determination (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 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 notices 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*).

E. The affidavits of two Division employees, Patricia Finn Sears and James VanDerzee, provide adequate proof of the Division's standard mailing procedure for the mailing of notices of determination by certified mail. The affidavits generally describe the various stages of producing and mailing notices of determination and, in addition, attest to the authenticity and accuracy of the copies of the Notice of Determination and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Sears and VanDerzee affidavits were followed with respect to the Notice of Determination issued to petitioner. Petitioner's name, address and the CMS No. appear on page 11 of the CMR, which bears a USPS date stamp of October 11, 2005 along with the initials of a Postal Service employee. There are 262 certified control numbers listed on the CMR, and the USPS employee indicated that he received 262 items for mailing. The Division has, therefore, established that it mailed the Notice of Determination to petitioner by certified mail on October 11, 2005 (*Matter of Cato, supra; Matter of DeWeese, supra*).

F. The request for conciliation conference was mailed on October 19, 2006. Accordingly, it is found that the request was filed more than 90 days after the mailing of the Notice of Determination. Since the request was not mailed to the Bureau of Conciliation and Mediation

Services within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Notice of Determination.

G. The petition of Mehdi Osman Hussein is dismissed with prejudice.

DATED:Troy, New York
October 18, 2007

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE