

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARTEM YUKHANOV	:	DETERMINATION
	:	DTA NO. 821720
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period	:	
May 7, 2006.	:	

Petitioner, Artem Yukhanov, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period May 7, 2006.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated September 18, 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) and (b). The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with exhibits attached thereto in support of the motion. Petitioner, appearing by Isaac Sternheim & Co.(Isaac Sternheim, CPA), had 30 days, or until October 18, 2007, to respond to the motion but did not do so. Thus, October 18, 2007 began the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for a Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's Request for Conciliation Conference filed in response to a Notice of Determination dated December 8, 2006, and addressed to petitioner, Artem Yukhanov, 1331 40th Street, Apt 1R, Brooklyn, New York 11218-3536.

2. The Notice of Determination assessed a penalty in the amount of \$15,750.00 under Article 20 of the Tax Law. Such penalty was imposed due to the alleged possession by petitioner of unstamped or unlawfully stamped cigarettes and/or untaxed tobacco products. The notice bears assessment identification number L-028011503-2 and the corresponding mailing cover sheet (form DTF-997) bears petitioner's name and address as listed above and certified mail control number 7104 1002 9730 1675 7789.

3. Petitioner filed a Request for Conciliation Conference which was signed by Isaac Sternheim, CPA, petitioner's representative, and was dated April 20, 2007. The mailing envelope containing the Request for Conciliation Conference bore a U.S. Postal Service postmark of April 20, 2007, and the Request for Conciliation Conference was received by the Division's Bureau of Conciliation and Mediation Services (BCMS) on April 23, 2007, as evidenced by the indated stamp of BCMS.

4. On May 11, 2007, BCMS issued a Conciliation Order Dismissing Request (CMS No. 219099) which denied petitioner's request for a conciliation conference, stating:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on December 8, 2006, but the request was not received until April 23, 2007, or in excess of 90 days, the request is late filed.

5. A petition seeking administrative review, signed and dated by petitioner's representative, Isaac Sternheim, CPA, on May 15, 2007, was received by the Division of Tax Appeals on May 23, 2007. The petition asserted that petitioner never received the original Notice of Determination. The petition bore the same address for petitioner as the Notice of Determination.

6. In response to the petition, the Division filed an answer dated July 25, 2007, indicating that on October 19, 2006 petitioner pled guilty to the underlying violation in Suffolk County Court and agreed to pay the associated penalty of \$1,650.00 in restitution to the Division for transporting untaxed cigarettes. The penalty has been paid.

7. The Division subsequently brought this motion, dated September 18, 2007, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner's protest of the statutory notice was filed more than 90 days from the date of issuance of the statutory notice.

In support of its motion for summary determination, the Division submitted: the petition filed with the Division of Tax Appeals; the answer of the Division; a copy of the Notice of Determination allegedly sent to petitioner; a copy of the certified mail record (CMR) containing a list of statutory notices allegedly issued by the Division on December 8, 2006; a copy of the Request for Conciliation Conference filed by petitioner and the envelope in which it was mailed; the Conciliation Order Dismissing Request; a copy of the Tax Enforcement Referral Report; and

the affidavits of John E. Matthews, Esq., the Division's representative, as well as affidavits of James Steven Vanderzee and Patricia Finn Sears, employees of the Division.

8. Notices of determination, such as the one at issue, are computer-generated by the Division's Case and Resource Tracking System (CARTS). The notices are predated with the anticipated date of mailing, and each statutory notice is assigned a certified control number. The certified number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code and the taxpayer's mailing address.

Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (CMR). The CMR lists each statutory notice in the order that it is generated in the batch. Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

9. The CMR for the block of statutory notices issued on December 8, 2006, including the Notice of Determination issued to petitioner, consisted of 12 connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service (USPS) and the pages remain connected when the postmarked document is returned to CARTS. With respect to the CMR prepared for the statutory notices mailed by certified mail on December 8, 2006, each of the pages consists of 11 entries with the exception of the last page, page 12, which contains 1 entry. According to the CMR, the total number of statutory notices mailed was 122.

10. Each statutory notice is placed in an envelope by Division personnel, and the envelopes are then delivered into the possession of a USPS representative. The postal representative then affixes his or her initials or signature and a USPS postmark to a page or pages

of the CMR. In this case, the postal representative affixed a postmark to each page of the CMR and beside each postmark initialed each of the 12 pages of the CMR. The USPS employee further indicated the total number of pieces received by writing the number of pieces on the CMR.

11. Page eight of the CMR indicates that a Notice of Determination with Notice No. L-028011503 was sent to “ARTEM YUKHANOV, 1331 40TH STREET APT 1R, BROOKLYN, NY 11218-3536” by certified mail using control number “7104 1002 97301675 7789.” A USPS postmark on each page of the CMR confirms that the Notice of Determination was sent on December 8, 2006. The copy of the corresponding Notice of Determination bears the assessment identification number of “L-028011503 ” and the certified control number of “7104 1002 97301675 7789,” which are identical to the numbers that appear on the CMR.

12. Statutory notices that are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for “Outgoing Certified Mail.” Each notice in the batch is preceded by a Mailing Cover Sheet and accompanied by any required enclosures. A CMR is also received by the Mail Processing Center for each batch of statutory notices.

A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against information contained on the CMR. The clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Once the review of the CMR and envelopes is completed, a member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area.

13. As a matter of standard procedure, to ensure accountability, the CMR may be left overnight at the USPS to afford the postal employee sufficient time to process the certified mail

and make the appropriate notations on the CMR. The CMR is then picked up at the USPS the following day by a member of the Mail Processing Center staff, whereupon it is delivered to the CARTS Control Unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

14. The facts set forth in Findings of Fact "8" through "13" were established through the affidavits of Patricia Finn Sears and James Steven Vanderzee. Ms. Sears is the supervisor of the Division's CARTS Control Unit, the Division's computer system for generating documents that include, but are not limited to, notices of determination issued to taxpayers. 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. The procedures described in the aforesaid affidavits are the regular procedures followed by the CARTS Control Unit and the Mail Processing Center, respectively, and Ms. Sears and Mr. Vanderzee stated that such procedures were followed in preparing and mailing the Notice of Determination at issue herein.

15. The Division included with its motion papers a copy of a Tax Enforcement Referral Report dated May 18, 2006, in which petitioner's address was listed as 1331 40th Street, Apt. 1R, Brooklyn, NY 11218. This information appeared to be acquired from petitioner's driver's license. Petitioner did not file any tax returns after this date and before the issuance of the subject Notice of Determination.

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. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR § 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 441, 293 NYS2d 93 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879 [2d Dept 1960]).

“To defeat a motion for summary judgment the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 [1st Dept 1992], *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, petitioner did not respond to the Division’s motion; he is therefore 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 [1975]; *Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1st Dept 1984]). Moreover, petitioner presented no evidence to contest the facts alleged in the Sears and Vanderzee affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671 [1975]; *Whelan v. GTE Sylvania, supra*).

D. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Article 20. A taxpayer may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination* (*see* Tax Law §§ 478, 170[3-a][b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. 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" (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). 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 (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

F. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the

relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. Vanderzee, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (*see* Finding of Fact “14”).

H. The CMR provides sufficient documentary proof to establish that the Notice of Determination dated December 8, 2006 was mailed as addressed on December 8, 2006. Each page of this 12-page document bears a U.S. Postal Service postmark dated December 8, 2006 and the initials of a Postal Service employee. A postal employee wrote the number “122” below the “total pieces received” heading, thereby indicating that all 122 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 122 pieces so listed on page 8 of the CMR. Accordingly, the Division has established that it mailed the subject Notice of Determination as claimed on December 8, 2006.

I. Tax Law § 480-a(2)(d) provides that the provisions of Article 28 of the Tax Law relating to the personal liability for the tax, administration, collection and determination of tax shall apply to Article 20 of the Tax Law in the same manner and with the same force and effect as if those provisions of Article 28 had been fully incorporated into Article 20. Tax Law § 1147(a)(1), contained within Article 28, 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 the provisions of [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.*)

J. Here, a Tax Enforcement Referral Report indicated that petitioner’s address as of May 18, 2006 was 1331 40th Street, Apt. 1R, Brooklyn, New York 11218, and petitioner was identified with his driver’s license, presumably with the same address. Further, the Division’s records did not indicate that petitioner filed any tax returns after this date and before the issuance of the subject Notice of Determination, nor did petitioner offer any evidence of returns filed with the Division with a different mailing address, or any other evidence indicating another mailing address. In addition, the petition filed in this matter on May 15, 2007 also bore the same address as the Tax Enforcement Referral Report and the notice herein. Accordingly, the Division has shown that the subject Notice of Determination was properly mailed to petitioner at his last known address on December 8, 2006, and petitioner has not offered any evidence to the contrary.

K. As noted herein, petitioner’s request for a conciliation conference was filed on April 20, 2006. This date falls well beyond the 90-day period of limitations for the filing of such a request. Petitioner’s request was therefore untimely filed (*see* Tax Law §§ 478, 170[3-a][b]).

L. The Division of Taxation’s motion for summary determination is granted, and the petition of Artem Yukhanov is dismissed.

DATED: Troy, New York
January 10, 2008

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE