

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**ABDULLAH ALAWLAQI** : DETERMINATION  
for Revision of a Determination or for Refund of Cigarette : DTA NO. 822111  
Tax under Article 20 of the Tax Law for the Period :  
October 26, 2005. :

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Petitioner, Abdullah Alawlaqi, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period October 26, 2005.

The Division of Taxation, appearing by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated July 2, 2008, 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 David H. Swyer, Esq., had 30 days, or until August 4, 2008, which was extended until October 3, 2008, to respond to the motion, but did not do so. Thus, October 3, 2008 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 November 13, 2006, and addressed to petitioner, Abdullah Alawlaqi, 1572 Second Ave., Apt 2N, New York, New York 10028-2615.

2. The Notice of Determination assessed a penalty in the amount of \$52,500.00 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-027920046-8, 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 1598 6111.

3. Petitioner's representative submitted correspondence dated September 25, 2007 to the Division's Protest Unit. The correspondence had an indated stamp by BCMS of October 19, 2007, and was deemed a request for a conciliation conference. A copy of the mailing envelope containing the request bore an unclear U.S. Postal Service postmark.

4. On November 2, 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 was issued on

November 16, 2006, but the request was not received until October 19, 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, David H. Swyer, Esq., on January 29, 2008, was received by the Division of Tax Appeals on February 4, 2008. The petition asserted that petitioner filed a timely request for a conciliation conference on November 15, 2006.

6. In response to the petition, the Division filed an answer dated April 9, 2008, indicating that the protest of the notice in issue was untimely before both BCMS and the Division of Tax Appeals.

7. The Division subsequently brought this motion, dated July 2, 2008, 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 November 13, 2006; a copy of the September 25, 2007 correspondence deemed to be a request for a conciliation conference filed by petitioner and a copy of the envelope in which it was mailed; the Conciliation Order Dismissing Request; a copy of the first two pages of petitioner's Resident Income Tax Return for 2005; 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. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears is the supervisor of the Division's Refunds, Deposits, Overpayments and Control Units, which includes the CARTS Control Unit of the New York State Department of Taxation and Finance. CARTS refers to the Division's computer system for generating documents that include, but are not limited to, notices of determination issued to taxpayers. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, page 2 of the 25-page CMR contains information on the notice in issue and lists an initial date of November 2, 2006.<sup>1</sup> Taxpayer addresses, certified control numbers, and reference numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and accompanying cover sheet, respectively, while the address appears on both. Page 2 of the CMR establishes that a notice with the control number 7104 1002 9730 1598 6111 and reference number L 027920046 was sent to petitioner at his address, 1572 Second Avenue, Apt. 2N, New York, New York 10028-2615.

9. The affidavit of James Steven VanDerZee, the principal mail and supply supervisor in the Division's Registry Unit, describes that unit's general operations and procedures. Mr. VanDerZee's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS. As to the type of notice in issue, a staff member delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The Center further requests that the

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<sup>1</sup> The CMR specifically states "20063061712" or year 2006, day 306 at 5:12 PM. Following general practices, this date was manually changed to the actual mailing date of "11-13-06," or November 13, 2006.

USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirmed that a USPS employee stamped pages 1 through 25 of the CMR with the USPS postmark. On the final page, corresponding to “Total Pieces and Amounts,” is the printed number 274, which has been circled. A short distance to the right, below the number, are the handwritten initials of the USPS employee and the handwritten number “274,” confirming that all notices were received by the USPS. The USPS postmark is from the Colonie Center branch and bears the date November 13, 2006, confirming that the notices were mailed on that date.

10. Petitioner’s New York City address on the CMR, the notice and its cover sheet matches the address listed on petitioner’s 2005 personal income tax return: 1572 Second Avenue, Apt. 2N, New York, New York 10028. According to the Division’s records, this was the last return petitioner filed with the Division before the issuance of the 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]).

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 [1<sup>st</sup> 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* at 544, 369 NYS2d at 671 [1975]).

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; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). 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 notices of determination. The CMR provides sufficient documentary proof to establish that the Notice of Determination, dated November 13, 2006, was mailed as addressed on that date. Each page of this 25-page document bears a U.S. Postal Service postmark dated November 13, 2006. A postal employee wrote the number "274" beside the "total pieces received" heading, thereby indicating that all 274 pieces listed on the CMR were received at the post office. The notice addressed to petitioner was among the 274 pieces so listed on page 2 of the CMR.

Accordingly, the Division has established that it mailed the subject Notice of Determination as claimed on November 13, 2006.

G. 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.*) Here, the Division offered petitioner’s last filed income tax return as evidence of petitioner’s address in its records, and petitioner has not offered any evidence to the contrary.

H. Petitioner maintains that he filed a timely request for a conciliation conference on November 15, 2006; however, he has offered no proof of the same in the record. As noted herein, the correspondence submitted by petitioner’s representative dated September 25, 2007 was deemed petitioner’s request for a conciliation conference, and was deemed filed on October 19, 2007. 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]).

I. The Division of Taxation's motion for summary determination is granted, and the petition of Abdulah Alawlaqi is dismissed.

DATED: Troy, New York  
December 18, 2008

/s/ Catherine M. Bennett  
ADMINISTRATIVE LAW JUDGE