

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>FATHI HAMOOD</b>	:	DETERMINATION
	:	DTA NO. 823375
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 September 1, 2005	:	
through May 31, 2008.	:	

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Petitioner, Fathi Hamood, 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 September 1, 2005 through May 31, 2008.

On June 1, 2010, the Division of Taxation filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Accompanying the motion to dismiss, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Petitioner filed his response to the motion on July 2, 2010. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on July 2, 2010. After due consideration of the documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely request for conciliation conference following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. Petitioner, Fathi Hamood, was issued Notice of Determination L-031886401-1 dated May 4, 2009 by the Division of Taxation (Division).

2. In protest of the Notice of Determination, petitioner requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request was dated August 17, 2009 and mailed on August 18, 2009 to BCMS.

3. Following this request, BCMS issued a Conciliation Order Dismissing Request, CMS No. 234617, on September 4, 2009 denying petitioner's request for a conciliation conference because, having filed for conciliation conference on August 18, 2009, petitioner had allowed 107 days to elapse between the issuance of the Notice of Determination and subsequent request.

4. Petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Notice of Determination at issue. The petition was date stamped received on November 27, 2009.

5. Petitioner's last known address was 401 James St., Utica, NY 13501, for purposes of issuing the Notice of Determination at issue on May 4, 2009. The Division provided a copy of petitioner's latest DTF-719 and sales tax return, which confirmed the address.

6. The Division provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the Division. CARTS refers to the Division's computer system for generating documents, including notices of determination issued to taxpayers. The computer-generated statutory notices are predated with the anticipated date of mailing and each is assigned a certified control number.

7. Each batch of statutory notices is accompanied by a computer printout entitled “Certified Record for Presort Mail-Assessments Receivable.” It lists each notice in the order the notice was generated, and each notice’s certified control number appears under the first heading, “Certified No.” The assessment numbers are listed under the second heading, “Reference No.” and the names and addresses of the taxpayers are listed under the third heading, “Name of Addressee, Street and PO Address,” while the remaining heading lists postage and fees.

8. On page 23 of the CMR, Notice of Determination L-031886401 is indicated as being sent to Fathi Hamood, 401 James St., Utica, NY 13501, by certified mail using control number 7104 1002 9730 1320 1346.

9. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division’s Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of determination is placed in the “Outgoing Certified Mail” area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A certified mail record (CMR) is also received by the MPC 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 the information contained on the CMR and then performs a random check of up to 30 pieces of the certified mail listed.

10. Following this review, a member of the MPC staff 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 will also either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.

11. The CMR for the notice issued on May 4, 2009 to petitioner consisted of 28 pages. A Division employee stamped “Post Office Hand write total # of pieces and initial. Do Not stamp over written areas” on page 28.

12. A review of the CMR confirms that a USPS employee initialed or signed all 28 pages of the CMR, affixed a postmark to each page of the CMR and wrote and circled the total number of pieces of certified mail received. Page 28 of the CMR listed 298 pieces of mail.

13. Mr. Peltier attested that, on May 4, 2009, an employee of the MPC delivered one piece of certified mail addressed to petitioner at 401 James St., Utica, NY 13501, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail.

14. The Division also submitted the affidavit of Heidi Corina, a legal assistant in the Division’s Office of Counsel involved in preparing United States Postal Form 3811-A to request return receipts after mailing certified mail. Ms. Corina attested to the request she made to the Postal Service for delivery information on the certified mail sent to petitioner. Specifically, the Form 3811-A detailed that certified mail no. 7104 1002 9730 1320 1346 was delivered on May 5, 2009 at 12:43 P.M. to petitioner’s Utica address. It also shows the scanned signature image of the recipient, which appears as “Sam Ali” with “401 James St.” written as well.

15. Petitioner responded to Division’s motion to dismiss on July 2, 2010, asserting that first, the statute of limitations should never have begun to run because the auditor had not actually finished his audit at the time of the issuance of the Notice of Determination in dispute.

16. Alternatively, petitioner argues that the notice date of “05/04/2009,” in the upper right corner of the Notice of Determination was hardly visible to the naked eye upon reading, ultimately confusing petitioner because the date of payment was in bold print and the notice date was not.

17. Petitioner does not dispute that he did in fact receive the Notice of Determination at issue in this case.

### ***CONCLUSIONS OF LAW***

A. A motion for summary determination shall be granted:

if, upon all 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 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(a)(1) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of determination of tax due. As an alternative to filing a petition, the taxpayer “may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services” (20 NYCRR 4000.3[a]).

C. Tax Law § 170(3-a) provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed.

The filing of a written request, and one conformed copy, with BCMS “suspends the running of the period of limitations for the filing of a petition for a hearing” (20 NYCRR 4000.3[c]).

Pursuant to these provisions, petitioner had 90 days from the date the assessment was issued (May 4, 2009) to either request a conciliation conference or file a petition for a hearing, but failed to do either within the allowable time requirement.

D. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop, Inc.*, Tax Appeals Tribunal, January 6, 1989).

E. Where the timeliness of a taxpayer’s protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (*see 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 (*Matter of Katz*). 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).

G. Tax Law § 1147(a)(1) provides “any notice . . . may be given by mailing the same to the person for whom it is intended . . . at the address given in the last return filed.”

H. In this case, the Division has introduced adequate evidence of its standard mailing procedures through the affidavits of Patricia Finn Sears and Bruce Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of determination.

I. The production of the CMR by the Division constitutes sufficient documentary evidence to establish the subject Notice of Determination was mailed as addressed to petitioner on May 4, 2009. The CMR listed: (1) name and address, (2) a corresponding certified control number, (3) U.S. Postal Service postmarks dated May 4, 2009, and (4) a postal employee’s handwritten initials and documentation of the total number of pieces. Subsequently, the CMR has been properly completed, therefore, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

J. The Division provided adequate proof that the notice was sent to petitioner’s last known address, by providing petitioner’s latest DTF-719 and sales tax return.

K. Conclusively, petitioner does not dispute receiving the Notice of Determination, only that he misread the notice date or, alternatively, that the statute of limitations should not have began to run until the audit was properly completed. Regarding petitioner’s claim that the notice date “is hardly visible to the naked eye,” a closer inspection of the notice shows that in the middle of the page, in bold print, was the statement “[y]ou may challenge this Notice through a

hearing process by filing a Request for Conciliation Conference or a Petition for a Division of Tax Appeals hearing by 08/02/09 (90 days from the date of this Notice).” Petitioner’s argument that he filed late because the notice date was not in bold and hardly visible does not carry any weight because the notice specifically detailed, in bold print, the date by which petitioner had to respond. Although it is unfortunate that petitioner did not properly read the notice at issue, the notice date in the top right hand corner of the document was not the only means by which to determine when petitioner was required to respond.

Second, and perhaps most importantly, Tax Law § 1138 only requires that the notice “shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days.” These requirements have been met and petitioner’s contention that the notice date should have been in bold print is of no merit.

L. Petitioner’s second argument is unsupported because Tax Law § 1138 specifically states that a party has 90 days from the issuance of the statutory notice to request a conciliation conference with BCMS or a petition with the Division of Tax Appeals, not the completion of the audit. Petitioner’s argument that the audit was not completed is a substantive issue that could have been addressed at hearing; however, due to petitioner’s late filing the Division of Tax Appeals no longer has jurisdiction to address this issue. Had petitioner filed in an appropriate time frame, he would have been able to dispute the audit process or outcome.

M. Therefore, based upon the facts of this case and the provisions and cases cited, petitioner had 90 days from the issuance of the Notice of Determination (May 4, 2009) to either



file with BCMS for conciliation conference or file a petition with the Division of Tax Appeals, yet he failed to do either.

N. The Division's motion for summary determination is granted, and the petition of Fathi Hamood is hereby dismissed.

DATED: Troy, New York  
September 2, 2010

/s/ Daniel J. Ranalli  
ADMINISTRATIVE LAW JUDGE