

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YAHYA AHMED	:	ORDER
	:	DTA NO. 828353
	:	
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period May 19, 2016.	:	

Petitioner, Yahya Ahmed, 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 19, 2016.

A hearing was commenced before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on August 7, 2019. The Division of Taxation, by its representative, Amanda Hiller, Esq. (Brian D. Evans, Esq., of counsel), moved for summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Lazzaro Law Firm, PC (Lance Lazzaro, Esq., of counsel), declined the opportunity to respond to the motion and relied on the arguments set forth in the petition. Therefore, the hearing date of August 7, 2019, began the 90-day period for issuance of this order.

ISSUE

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

FINDINGS OF FACT

1. The subject of the motion by the Division of Taxation (Division) is the timeliness of petitioner's protest of a notice of determination, dated March 16, 2017, and bearing assessment

identification number L-046133559 (notice). The notice is addressed to petitioner, Yahya Ahmed, at an address in Brooklyn, New York.

2. Petitioner filed a request for conciliation conference (request) dated July 18, 2017, with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice.

3. On August 11, 2017, BCMS issued a conciliation order dismissing request (conciliation order) to petitioner. The conciliation order determined that petitioner's protest of the notice was untimely and stated, in part:

“The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) was issued on March 16, 2017, but the request was not received until July 24, 2017, or in excess of 90 days, the request is late filed.”¹

4. Petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order on September 11, 2017.

5. In support of the motion and to show proof of proper mailing of the notice, the Division submitted into evidence: (i) an affidavit, dated July 25, 2019, of Deena Picard, a Data Processing Fiscal Systems Auditor 3 and the Acting Director of the Division's Management Analysis and Project Services Bureau (MAPS); (ii) a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked March 16, 2017; (iii) an affidavit, dated July 31, 2017, of Fred Ramundo, a supervisor in the Division's mail room; (iv) a copy of the notice mailed to petitioner with the associated mailing cover sheet; and (v) a copy of petitioner's 2016

¹ Although the conciliation order states that the request was filed on July 24, 2017, the Division did not submit the request as part of its exhibits. As such, there is no date stamp to indicate receipt by BCMS or an envelope that contained the request. As the request was dated July 18, 2017, that is the deemed date of filing the request for purposes of this motion.

New York State resident income tax return, form IT-201, dated January 17, 2017. The tax return dated January 17, 2017, was the last return filed with the Division by petitioner before the notice was issued. Petitioner's address listed on the return is the same Brooklyn, New York, address as listed on the notice.

6. The affidavit of Deena Picard, who has been in her current position since February 2006 and Acting Director since May 2017, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Picard is the Acting Director of MAPS, which is responsible for the receipt and storage of CMRs, and is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. The Run is indicated in the upper left corner starting on page 1 and on each subsequent page of the CMR. The Run signifies the date and time the certified mail record was produced by year, Julian day of the year and military time of day. The original date and time of "20170681700" was the date and time that the entire certified mail record was printed.² In the upper right corner of page 1 and of the last page of the CMR, the date the notices were mailed was handwritten to reflect the actual mailing date of the notices. There was no explanation provided for the handwritten notation date of "3/10/17" that was located in the upper left corner of page 1 and of the last page. In addition, as described by Ms. Picard, generally all pages of the CMR are banded together when the documents are delivered into the possession of the United States Postal Service (USPS) and remain so when returned to the Division. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run

² Although not explained in the affidavit, it appears that "20170681700" is March 9, 2017.

consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

7. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

8. The CMR in the present matter consists of 16 pages and lists 171 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries with the exception of page 16, which contains 6 entries. Ms. Picard notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark, dated March 16, 2017, to each page of the CMR, wrote the number "171" on page 16 next to the heading "Total Pieces Received at Post Office," and initialed or signed page 16.

9. Page 6 of the CMR indicates that a notice with certified control number 7104 1002 9730 0102 5077 and reference number L-046133559 was mailed to petitioner at the Brooklyn, New York, address listed on the notice. The corresponding mailing cover sheet, attached to the Picard affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

10. The affidavit of Fred Ramundo, a supervisor in the Division's mail room, describes

the mail room's general operations and procedures. Mr. Ramundo has been in this position since 2013 and, as a result, is familiar with the practices of the mail room with regard to statutory notices. The mail room receives the notices and places them in an "Outgoing Certified Mail" area. Mr. Ramundo confirms that a mailing cover sheet precedes each notice. A staff member receives the notices and mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The first and last pieces of mail are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. Mr. Ramundo affirms that this procedure was followed in mailing the notice at issue to petitioner. He states this belief based upon the documents as well as a review of the Picard affidavit. Since the Picard affidavit was dated more than two years after the affidavit of Mr. Ramundo, the Picard affidavit cannot be a basis for his belief that the procedure was actually followed in this case.

11. Petitioner relies on his petition in opposition to the Division's motion. Petitioner's representative stated on the record that petitioner was out of the country when the notice was issued to him. However, although present at the hearing, petitioner did not testify to this fact. Attached to the petition are four pages of a passport that reflect date stamps from various places.

However, most of the stamps are illegible and there is no indication that this passport belongs to petitioner. Lastly, attached to the petition was a notice and demand for assessment number L-046133559 dated June 30, 2017. Although not expressly argued, it appears that receipt of the notice of demand was the first time that petitioner was aware of the notice of determination dated March 16, 2017.

12. The Division introduced a copy of a USPS tracking result from a search conducted on October 26, 2017, of the certified control number associated with the notice in this matter. The USPS tracking result indicates that the item associated with 71041002973001025077 was unclaimed and returned to sender on April 10, 2017.

CONCLUSIONS OF LAW

A. Tax Law § 478 authorizes the Division to issue a notice of determination for cigarette tax due. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from date of mailing of such notice (*see* Tax Law § 478). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with BCMS “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003). A petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where, as here, the timeliness of a taxpayer’s request for a conciliation conference is

in question, the initial inquiry is whether the Division has carried its burden of demonstrating the date and fact of mailing the subject statutory notice to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This means that the Division must show proof of a standard mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). 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).

C. The CMR in this case is defective. As set forth in finding of fact 6, there are two additional handwritten dates placed on the CMR that have not been addressed by the Picard affidavit. Since the placement of these dates is not addressed, it is determined that the original CMR has been altered in a way that is not within the standard mailing procedures for personnel in the Division's mail room. Additionally, the handwritten date is not a reflection of the Julian date indicated by the run information that is set forth in the upper left corner of the CMR.

Moreover, the Ramundo affidavit relies on both the CMR and the Picard affidavit for his conclusion that the procedures for mailing the notice were followed in this instance. As set forth in finding of fact 10, Mr. Ramundo could not have based his conclusions on a review of the Picard affidavit since it was created after his own affidavit. Additionally, the Ramundo affidavit failed to address the inconsistency of the additional handwritten notations placed on the CMR. Therefore, the Division has not offered proof sufficient to establish the proper mailing of the statutory notice.

D. The Division of Taxation's motion for summary determination is denied and the hearing in this matter shall be continued to a date mutually convenient to the parties.

DATED: Albany, New York
October 10, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE