

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EASTERN CARRIERS, INC.	:	DECISION
	:	DTA NO. 815542
for Redetermination of a Deficiency or for Refund of	:	
Corporation Tax under Article 9 of the Tax Law for the	:	
Years 1981 through 1994.	:	

Petitioner Eastern Carriers, Inc., Attn: William M. McDaniel, Vice-President, P.O. Box 8499, Greenville, South Carolina 29604, filed an exception to the determination of the Administrative Law Judge issued on July 17, 1997. Petitioner appeared by its vice-president, William M. McDaniel. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James P. Connolly, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner timely filed either a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals contesting certain notices of deficiency of corporation tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

At issue on this motion are three notices of deficiency, each dated July 31, 1995 and addressed to petitioner, Eastern Carriers, Inc., at P.O. Box 8499, Greenville, South Carolina 29604-8499. Respectively, these notices bear assessment identification numbers L-010685525, L-010685526 and L-010685527. These notices also, respectively, bear certified mail control numbers P 911 205 019, P 911 205 020 and P 911 205 021. These notices assert corporation tax deficiencies under Tax Law Article 9, sections 183, 184 and 184(a), respectively, in the aggregate amount of \$17,096.26, including penalty and interest to the alleged date of issuance of the notices. Under the heading "Explanation and Instructions", each of the notices contains the statement "[a] field audit of your records has disclosed an additional tax due." In addition, each of the notices states, in bold type on its face, "NOTE: You must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 10/29/95."

Petitioner challenged the above-notices by its submission of Form DTF-968.4 ("Payment Document") to the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). Form DTF-968.4 is a Division form on which a taxpayer can indicate either agreement or disagreement with the Division's action. In this case, petitioner indicated its disagreement with the above-described notices by inserting an "x" in the "I DISAGREE" section of the form, followed by a listing of the assessment identification numbers and dollar amounts of the three notices in question. Petitioner provided the following statement on the face of the form in explanation of its disagreement:

No hearing no tax payment. I have not been provided a hearing. I formally wrote my disagreement with letter dated 6/9/95 and with an official protest dated 11/25/95 and with another protest dated 4/22/96. Eastern Carriers, Inc. (ECI) incurred a complete change of ownership in 7/91. NY State consistently failed from 1982 to 1993 to provide to provide [sic] corp tax forms for filing tax returns while making threatening [sic] demands from 1990 to 1992, despite my request for forms. NOTE: A HEARING WILL BE NECESSARY IN ACCORDANCE WITH MY PREVIOUS CORRESPONDENCE. I WILL MEET WITH A NY STATE OFFICIAL IN NEW YORK OR DISCUSS THE MATTER BY CONFERENCE PHONE OR BOTH. IF AFTER THE HEARING A DETERMINATION IS MADE THAT ECI OWES ANY OR ALL OF THIS TAX, I REQUEST A PAYMENT PLAN. ECI OPERATES 25 TRACTORS NOW (RATHER THAN FIFTY) AND IS NOT ABLE TO PAY ALL AT ONCE. IF THE AMOUNT IF [sic] REDUCED A GREAT DEAL, THEN PERHAPS A SINGLE PAYMENT CAN BE MADE. BUT A HEARING WILL BE REQUIRED.

The above Form DTF-968.4 is signed by petitioner's vice-president, William McDaniel, and is dated June 15, 1996. The envelope in which the form was mailed bears a machine metered (Pitney Bowes) postmark date of June 15, 1996, but does not bear a United State Postal Service ("USPS") postmark. The face of the form is indate stamped as received by BCMS on June 27, 1996.

By a Conciliation Order (CMS No. 156265) dated September 13, 1996, petitioner's request for a conference per the above-Form DTF-968.4 was denied on the basis that such request had been filed in excess of 90 days after the July 31, 1995 date set forth on the face of each of the foregoing notices. Petitioner continued its challenge by filing a petition. The Division, in turn, filed its answer to the petition alleging, inter alia, that petitioner had failed to timely protest the notices. Thereafter, the Division brought the subject motion for summary determination.

To establish proof of mailing of the notices of deficiency on July 31, 1995, the Division submitted (i) a March 11, 1997 affidavit of Geraldine Mahon, the principal clerk of the Division's

Case and Resource Tracking System ("CARTS") control unit, and an attached photocopy of a nine page fan-folded (connected) certified mail record, and (ii) a March 11, 1997 affidavit of James Baisley, the chief processing clerk of the Division's mail processing center.

The affidavit of Geraldine Mahon sets forth the Division's general practice and procedure for processing notices of deficiency generated by CARTS. According to Ms. Mahon, she receives from CARTS (i) a computer printout entitled "Assessments Receivable-Certified Record for Non-Presort Mail" ("certified mail record") and (ii) the corresponding notices of deficiency generated by CARTS. The notices are predated with the anticipated date of mailing. Each notice is assigned a "certified control number" which is recorded on the certified mail record under the heading "Certified No." The name and address of the person to whom the notice is to be mailed on a particular day is also recorded on the certified mail record. On the certified mail record included in the record herein, the names of taxpayers other than petitioner have been redacted to preserve confidentiality.

Ms. Mahon's affidavit further states that she examined the certified mail record issued by the Department of Taxation and Finance for July 31, 1995 which, according to Ms. Mahon, establishes that the three notices of deficiency at issue were sent to petitioner at P.O. Box 8499, Greenville, South Carolina 29604-8499 by certified mail using certified control numbers P 911 205 019, P 911 205 020 and P 911 205 021, respectively. Ms. Mahon points out that these same certified control numbers are recorded on the face of each of the corresponding notices. The certified control numbers on the certified mail record run consecutively, with eleven entries on each of the first eight pages and five entries on the ninth and final page, with no deletions therefrom, thus resulting in 93 pieces of certified mail. Ms. Mahon states that the USPS postmark appearing on each page of the certified mail record, including specifically page nine of

the certified mail record on which the three notices of deficiency at issue appear, confirms that such notices were sent on July 31, 1995.

The affidavit of James Baisley, the chief processing clerk in the Division's mail processing center, describes the operations and procedures followed by the mail processing center. Mr. Baisley states that after the notices are placed in an "Outgoing Certified Mail" basket, they are retrieved by a member of his staff who weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to the Colonie Center Branch of the USPS in Albany, New York. A postal employee affixes a postmark and also may place his or her signature on the certified mail record indicating receipt by the post office. A review of the certified mail record at issue shows that the postal employee affixed a postmark to every page of the certified mail record, circled the total number of pieces of mail, and signed the certified mail record to indicate that 93 was the total number of pieces received at the post office. Mr. Baisley states that his knowledge that the postal employee circled the "Total Number of Pieces" for the purpose of indicating that 93 pieces were received at the post office is based on the fact that the Division's mail processing center specifically requested that postal employees either circle the number of pieces received or write the number of pieces received on the mail record to indicate the total number of pieces received by the USPS. The certified mail record is picked up by a mail and supply room employee the day after its delivery to the post office and returned to the originating office, in this case the CARTS control unit. Mr. Baisley, from his own review of the certified mail record, confirms Ms. Mahon's statement that the general mailing procedures were followed in this case.

In response to the motion, petitioner submitted a letter, dated and mailed on May 26, 1997, together with a copy of the petition. Petitioner's letter states that petitioner objects to the motion for summary determination based on the reasons set forth in its petition, noting that "[t]he Department was put on notice of Eastern Carriers, Inc.'s objection to this tax bill long below [sic] the stated date in the Motion for Summary Judgment."

Petitioner alleges, in its petition, that the Division failed to respond to or acknowledge letters allegedly sent by petitioner on November 25, 1995 and April 22, 1996 "protesting any pending tax liability and requesting a hearing." Petitioner goes on to allege that the Division was placed on notice of petitioner's disagreement via letters to the Division's auditor dated June 9, 1995 and July 28, 1995. Petitioner states that:

These letters were not written on the proper Department forms (non [sic] were available to ECI at that time) and also were not specifically in response to the 7/31/95 Notices of Deficiency. Nevertheless, an equitable argument can be presented by the petitioner that the Department was clearly on notice of ECI's disagreement with the assessment prior to 10/29/95.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that when the Division claims that a taxpayer's protest is not timely filed, the Division bears the burden of proving both the fact and date of mailing of the statutory notice. This burden may be met by providing evidence of the Division's standard mailing procedure and that the standard procedure was followed in this particular instance. The Administrative Law Judge concluded that the Division introduced adequate proof of its standard mailing procedures through the affidavits of its employees and the Division also offered adequate proof to establish the fact that the particular notices in question were mailed to petitioner on July 31, 1995, the date appearing on the face of the notices. The Administrative Law Judge noted that the Division was not required to produce employees who

personally recalled the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing was sufficient.

As a result, the Administrative Law Judge concluded that petitioner was required to request a conciliation conference or file a petition for a hearing within 90 days after July 31, 1995 in order for such request or petition to be considered timely. The Administrative Law Judge determined that petitioner did not file either a request for a conciliation conference or a petition for a hearing in a timely manner. Thus, documents filed after this 90-day period were properly rejected by the Division as untimely. As to the letters allegedly sent by petitioner on June 9, 1995 and on July 28, 1995, the Administrative Law Judge concluded that they would not have been timely protests even if they had been shown to have been mailed on the dates claimed by petitioner because they would have been premature. As a result, the Administrative Law Judge concluded that the Division of Tax Appeals was without jurisdiction to address the merits of petitioner's claim and granted the Division's motion for summary determination with respect to such notices.

ARGUMENTS ON EXCEPTION

In its exception, petitioner argues that the Administrative Law Judge failed to acknowledge that the Division was put on notice of petitioner's objection to the assessment by correspondence dated June 9, 1995 and July 28, 1995. These letters were mailed and filed with the Division, argues petitioner, prior to October 29, 1995. Further, petitioner contends that additional correspondence to the Division was mailed by petitioner on November 25, 1995. Thus, petitioner concludes that the Administrative Law Judge's reference only to the April 22, 1996 protest is not in accord with the facts.

Further, petitioner argues that there has been no evidence presented that petitioner ever received the tax notices at issue. Thus, the Division cannot rely on a forfeiture of petitioner's right to a hearing that is measured from the date of mailing.

Petitioner also offers arguments concerning the merits of its petition.

OPINION

In the determination of the Administrative Law Judge, each of the arguments presented on exception concerning the alleged protest letters, their dates of mailing and their effect of providing notice to the Division of petitioner's disagreement with the notices of deficiency were considered and found to be without merit. We find that the Administrative Law Judge adequately and completely addressed each of these issues and we affirm his determination for the reasons stated therein.

In addition, petitioner argues on exception that proof of mailing of the tax notices is not proof of receipt by petitioner. While this argument is correct, it is of no help to petitioner. Tax Law § 1081(a) requires the Division to send a notice by certified or registered mail when it determines that there is a deficiency of corporate tax. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (*see, Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d 653, 355 NYS2d 384 [interpreting comparable provisions relating to a deficiency of income tax]). In effect, if the notice is properly mailed, the statute places the risk of non-delivery on the taxpayer. Once the statutory notice is properly mailed, the taxpayer has 90 days within which to request a conciliation conference or petition for a hearing.

As a result of petitioner's failure to timely protest the notices of deficiency at issue, we have no jurisdiction to consider the merits of petitioner's claim (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

According, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eastern Carriers, Inc. is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Eastern Carriers, Inc. is dismissed.

DATED: Troy, New York
April 2, 1998

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner