

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS DUNBAR	:	DECISION
	:	DTA NO. 819129
for Redetermination of Deficiencies or for Refund of	:	
New York State Personal Income Tax Under Article	:	
22 of the Tax Law for the Years 1998 and 1999.	:	

Petitioner Thomas Dunbar, 63 Stanford Avenue, Colonia, New Jersey 07067, filed an exception to the determination of the Administrative Law Judge issued on April 3, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

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

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

ISSUE

Whether petitioner's requests for conciliation conferences to challenge two notices of deficiency were filed in a timely manner.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "11" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

The Division of Taxation (“Division”) received from petitioner, Thomas Dunbar, two separate documents titled “Payment Document” (Form DTF-968.1). These documents, in their preprinted areas, identify petitioner by name, list his address as 63 Stanford Avenue, Colonia, N.J. 07067-2934, and reference assessment ID numbers L-020422060-8 and L-020422095-3, respectively, followed by (in each instance) petitioner’s social security number. Each of these documents indicates, in handwriting, petitioner’s disagreement with the referenced assessments and each requests a hearing. Each document is signed by petitioner and each is hand-dated July 1, 2002.

The single envelope in which the two payment documents were mailed bears a United States Postal Service (“USPS”) postmark dated July 8, 2002. One of the payment documents is stamped “Received New York State Dept of Tax & Fin–July 15, 2002–Proc-Rads Acc’t Srves C/O Protest.” The envelope, as well as each of the documents, also bears the receipt stamp of the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) indicating Albany, New York and the date July 19, 2002.

The record in this matter includes a copy of each of the challenged notices of deficiency. Each notice is addressed to petitioner, Thomas M. Dunbar, at 63 Stanford Avenue, Colonia, N.J. 07067-2934. In its upper right corner, each notice bears, *inter alia*, the following information:

YEAR	1998	1999
DOCUMENT NUMBER	54461175	74483496
DATE	03/04/02	03/04/02
ASSESSMENT I.D.	L-020422060-8	L-020422095-3
TAXPAYER I.D.	(petitioner’s SS No.)	(petitioner’s SS No.)

The notice for 1998 asserts total tax due in the amount of \$776.00, plus interest, and the notice for 1999 asserts total tax due in the amount of \$836.34, plus interest. Each notice provides, in its explanation and instructions section, that any prior disagreement submitted with respect to a Statement of Proposed Audit Changes “cannot be considered a disagreement with this notice,” and specifies that any protest against the notices must be filed by June 6, 2002.

The Division treated the foregoing payment documents and their statement of disagreement as requests for a conciliation conference. In turn, by a Conciliation Order Dismissing Request (CMS No. 192877) dated August 2, 2002, BCMS advised petitioner that his requests for a conciliation conference were denied. Specifically, the Order advised that the notices were issued on March 4, 2002, but that the requests were not mailed until July 8, 2002, thus leaving the requests untimely since they were mailed more than 90 days after the issuance of the notices.

Petitioner challenged this denial by filing a petition with the Division of Tax Appeals. The petition stated only that the Commissioner of Taxation “never scheduled conciliation conference as requested.”

In support of its position that the request was untimely, the Division submitted the affidavits of Geraldine Mahon and Daniel LaFar, employees of the Division, as well as a copy of the certified mail record (“CMR”) containing a list of the notices of deficiency allegedly issued by the Division on March 4, 2002.

The affidavit of Geraldine Mahon, principal clerk of the Division’s Case and Resource Tracking System (“CARTS”), sets forth the Division’s general procedure for preparing and mailing notices of deficiency. This procedure culminates in the mailing of the notices by USPS

certified mail and confirmation of the mailing through the receipt and retention of a postmarked copy of the CMR.

The computer-generated notices of deficiency are accompanied by a CMR entitled “Assessments Receivable, Certified Record for Non-Presort Mail.” The notices are predated with their anticipated date of mailing, while the CMR is dated in its upper left corner with the actual date of its printing, in this case February 20, 2002. The CMR is printed approximately ten days in advance of the anticipated mailing date of the notices, with such difference between the anticipated mailing date for the notices and the printing date of the CMR established to ensure that there is sufficient lead time for the notices to be manually reviewed and thereafter processed for postage and fees by the Division’s mechanical section prior to mailing. In this case, consistent with the Division’s procedure, the CMR printing date of February 20, 2002 has been lined through and the date “3/4/02” has been handwritten immediately above to indicate and confirm March 4, 2002 as the date of mailing.

A certified control number is assigned to each notice listed on the CMR. Each such certified control number is recorded on the CMR under the heading “Certified No.” Each such number is also recorded on its own separate one-page “Mailing Cover Sheet,” generated for each notice. This cover sheet (Form DTF-997) also bears a bar code, the taxpayer’s mailing address and the Division’s return address on its front, as well as taxpayer assistance information on its reverse side. CARTS also generates any enclosures referenced within the body of each notice, and these enclosures together with the mailing cover sheet, and the notice itself form a discrete unit within the batch of notices listed on the CMR. The mailing cover sheet is the first sheet in such unit.

The CMR for the block of notices issued by the Division on March 4, 2002 is a 15-page, fan-folded (connected) document, with its pages numbered sequentially “1” through “15.”

We modify finding of fact “11” of the Administrative Law Judge’s determination to read as follows:

There are 11 certified control numbers listed on each of the 15 pages of the CMR for March 4, 2002, for a total of 165 separate certified control numbers. The certified control number 7104 1002 9739 0075 0223 followed by reference (Assessment ID) number L-020422060, and the certified control number 7104 1002 9739 0075 0230 followed by reference (Assessment ID) number L-020422095, appear as the sixth and seventh entries on page one of the CMR for March 4, 2002. Each such entry is followed by “Dunbar - Thomas M, 63 Stanford Avenue, Colonia, N.J. 07067-2934,” and a listing of the amounts of postage and fees.¹ The CMR is date stamped March 4, 2002 on each of its pages by the Colonie Center branch of the USPS in Albany, New York and each page bears the initials of the postal employee. At the bottom of the last page of the CMR (page 15), the number “165” has been circled as the “Total Number of Pieces Listed,” accompanied by the initials of the postal employee to verify the receipt of 165 pieces of certified mail by the USPS.²

The affidavit of Daniel LaFar, Chief Mail Processing Clerk in the Division’s Mail Processing Center (“mailroom”), attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a piece of correspondence, including a statutory notice with its accompanying enclosures and mailing cover sheet, is placed in the “Outgoing Certified Mail” basket in the

¹ The portions of the CMR which pertain to taxpayers other than petitioner have been redacted to preserve the confidentiality of those other taxpayers.

²We modified finding of fact “11” by stating the correct certified control numbers for the two notices in issue.

mailroom, a member of the mailroom staff operates a machine which places each notice and its associated documents into a windowed envelope so that the address and certified control number on the mailing cover sheet shows through the envelope's windows. That staff member also weighs and seals each envelope and places postage and fee amounts thereon.

A mailroom clerk then checks the first and last pieces of mail listed on the CMR against the information contained on the CMR, and also performs a random review of 30 or fewer pieces of certified mail by checking the information on the envelopes against that appearing on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. Mr. LaFar's knowledge that the postal employee circled the number "165" on the CMR and initialed the same page to indicate the receipt of 165 pieces of certified mail is based on the fact that the Division's mailroom specifically requested that the postal employees 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. The CMR is the Division's record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division's mailroom, as followed in this case, the CMR is picked up at the post office by a member of Mr. LaFar's staff on the following day after its delivery and is then delivered to the originating office within the Division (here CARTS).

Petitioner's only communication in this matter subsequent to the filing of his petition has been a February 18, 2003 letter responding to a Notice to Schedule a Hearing, in which petitioner requests a hearing date of May 22, 2003 and includes a hearing memorandum setting

forth the substantive issues of the case. Petitioner did not file a response to the subject motion and its claim that his protests against the notices were not timely filed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 681(a) the Commissioner of Taxation and Finance may issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined by mailing the notice by certified or registered mail to the taxpayer at his last known address. The Administrative Law Judge observed that a taxpayer has 90 days after the issuance of a notice of deficiency to petition for an administrative hearing with the Division of Tax Appeals or to file a request for a conciliation conference with the Division's BCMS. If a taxpayer fails to file either a timely request for a conciliation conference or a petition contesting a notice of deficiency, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case.

The Administrative Law Judge pointed out that where the timeliness of a taxpayer's request is at issue, the Division bears the burden of proving proper mailing of the statutory notice by demonstrating the standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures and proving that the standard procedure was followed in this particular instance.

The Administrative Law Judge found that the Division introduced adequate proof of its standard mailing procedures and established that the particular notices at issue were actually mailed to petitioner on March 4, 2002. As a result, any protest against the notices was required to be filed within 90 days thereafter, or by June 6, 2002.

The Administrative Law Judge concluded that petitioner's requests for a conciliation conference were not filed until they were mailed on July 8, 2002, as borne out by the USPS postmark showing such date. The Administrative Law Judge noted that petitioner did not provide any documents or other evidence to establish that any protest occurred within the requisite 90-day time period. Since the requests were not timely filed, the Administrative Law Judge concluded that there was no jurisdiction to proceed with this matter. The Administrative Law Judge pointed out, however, that if petitioner paid the disputed tax, he could file a claim for refund within two years of payment and, if his claim was denied, he could proceed with a timely petition for a hearing to contest the refund denial.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that although he has followed the requirements of New York State, he believes that he cannot obtain a fair determination. Petitioner continues to focus his attention on the merits of his case rather than the timeliness issue addressed by the determination rendered below.

OPINION

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas Dunbar is denied;

2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Thomas Dunbar is dismissed.

DATED: Troy, New York
September 4, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner