

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

GEORGE J. GODFREY :

for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1998.

DECISION
DTA NO. 819464

Petitioner George J. Godfrey, 300 East 75th Street, Apartment 21-0, New York, New York 10021, filed an exception to the determination of the Administrative Law Judge issued on November 20, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner timely filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services ("BCMS").

FINDINGS OF FACT

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

The Division of Taxation (“Division”) issued to petitioner, George J. Godfrey, a Notice of Deficiency dated March 4, 2002. It was addressed to petitioner at 333 Rector PL 10Q, New York, NY 10280-1423. The notice bore assessment identification number L-020668242-4 and asserted that tax was due in the amount of \$45,549.92 plus interest in the amount of \$10,363.39 and penalty in the amount of \$8,915.69, for a balance due of \$64,829.00.

On March 5, 2003, petitioner mailed by United States Postal Service Express Mail a Request for Conciliation Conference.

On March 28, 2003, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

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 March 4, 2002, but the request was not mailed until March 5, 2003, or in excess of 90 days, the request is late filed.

Petitioner filed a petition with the Division of Tax Appeals. It was dated April 19, 2003 and was received on April 25, 2003. The United States Postal Service postmark on the envelope was not legible.

Notices of deficiency, such as the one at issue herein, were computer-generated by the Division’s computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record (“CMR”). The CMR listed those taxpayers to whom notices of deficiency were being mailed and also included, for each such notice, a separate certified control number. The pages of the CMR remained connected to each other before and after acceptance of the notices by the United

States Postal Service through return of the CMR to the CARTS Control Unit. CARTS also generates a Mailing Cover Sheet with the corresponding certified number for each notice. The Mailing Cover Sheet contains a bar code, the taxpayer's mailing address, the Division's return address and taxpayer assistance information.

Each computer-generated notice of deficiency was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading "Certified No." The CMR listed an initial date, the date of its printing, in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of February 21, 2002 which was manually changed to March 4, 2002.

After a notice of deficiency was placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer placed the statutory notice and associated documents into a windowed envelope, weighed and sealed each envelope, affixed postage and placed fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance

the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the Postal Service and affixed a dated postmark or his signature or initials, or both, to the CMR.

In the ordinary course of business a Mail Processing Center employee picked up the CMR from the post office on the following day and returned it to the CARTS Control unit.

In the instant case, the CMR was a 22-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." All pages were connected when the postmarked document was returned after mailing. This CMR lists 238 control numbers. Each such certified control number was assigned to an item of mail listed on the 22 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

Information regarding the Notice of Deficiency issued to petitioner was contained on page 8 of the CMR. Corresponding to certified control number 7104 1002 9739 0075 6522 was notice number L 020668242, along with petitioner's name and an address, which was identical to that listed on the subject Notice of Deficiency.

Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated March 4, 2002, and the initials of the postal employee, verifying receipt of the items.

The last page of the CMR, page 22, contained a printed entry of "238" corresponding to the statement "Total Pieces and Amounts Listed." This printed entry was manually circled and, at the top of the page, the postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee appear. These same initials appeared on each page of the CMR.

The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the “238” indicated that all 238 pieces listed on the CMR were received at the post office.

The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Daniel LaFar. The basis of Mr. LaFar’s knowledge of this fact is that the Division’s Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

The facts set forth above were established through the affidavits of Geraldine Mahon and Daniel LaFar. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of deficiency. Mr. LaFar was employed as a Principal Mail and Supply Clerk in the Division’s Mail Processing Center. Mr. LaFar’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

On July 10, 2001, the Division received a completed audit questionnaire and documents. The audit questionnaire stated that petitioner’s address was 333 Rector Place, Apt# 10Q, New York, NY.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination may be granted if, upon all the papers and proof submitted, the Administrative Law Judge finds that no material and triable issue of fact is presented and, as a matter of law, a determination can be issued in favor of any party. The Administrative Law Judge observed that a petition contesting a notice of deficiency or a request for a conciliation conference with BCMS must be filed within 90 days after the date of mailing of the notice as a prerequisite to the jurisdiction of the Division of Tax Appeals.

The Administrative Law Judge cited relevant case law establishing that when the taxpayer files a request for conference, but the timeliness of the request is at issue, the Division has the burden of proving proper mailing of the notice by providing adequate proof of a standard procedure used by the Division for the issuance of notices and proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge concluded that the affidavits of two Division employees, Geraldine Mahon and Daniel LaFar, provided adequate proof of the Division's standard mailing procedure for the mailing of statutory notices like the one mailed to petitioner as well as that the general mailing procedures described in the Mahon and LaFar affidavits were followed with respect to the notice issued to petitioner.

The Administrative Law Judge noted that where an envelope containing a request for a conference bears a United States Postal Service postmark, the date of the USPS postmark is deemed the date of filing. The Administrative Law Judge found that the envelope containing petitioner's request indicated a USPS postmark dated March 5, 2003. Since the Division mailed

the notice on March 4, 2002 and a request challenging this notice was not mailed until March 5, 2003, the Administrative Law Judge determined that the request was not filed within the requisite 90-day period. Based on this finding, the Administrative Law Judge concluded that the Division of Tax Appeals does not have jurisdiction to consider the merits of the arguments in the petition. The Administrative Law Judge pointed out, however, that petitioner may obtain review of his position by paying the tax and filing a claim for a refund within the prescribed period.

The Administrative Law Judge found that since petitioner presented no evidence to contest the facts alleged in the Division's affidavits, those facts may be deemed admitted. While petitioner pointed out that the date on the affidavit of Jacob Schmookler is apparently in error, the defect is of no consequence because petitioner did not dispute the facts set forth in that affidavit. Therefore, the Administrative Law Judge concluded that there was no material and triable issue of fact presented and the Division was entitled to summary determination in its favor.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he submitted a request for a conciliation conference within 90 days of his receipt of the notice of deficiency. Due to the damage suffered by the United States Postal Service in New York City following the events of September 11, 2001, however, petitioner claims that he did not receive the notice in a timely manner. Petitioner claims that at the time the notice of deficiency was mailed to him, he no longer lived at the address to which it was mailed. Petitioner also presents arguments relating to the merits of his case.

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 for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of George J. Godfrey is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of George J. Godfrey is dismissed.

DATED: Troy, New York
July 29, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner