

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN DININO¹ : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 816529
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Period :
July 1, 1985 through December 31, 1986. :
:

Petitioner, John DiNino, 16 Lorna Lane, Monsey, New York 10952, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the period July 1, 1985 through December 31, 1986.

On February 9, 1999 and February 13, 1999, respectively, the Division of Taxation, appearing by Terrence M. Boyle, Esq. (Christina L. Siefert, Esq., of counsel), and petitioner, appearing *pro se*, waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by June 2, 1999, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

¹ Petitioner's name is captioned John "DiNino." His name also appears to be spelled as "Dineno," "DiNeno," "DeNino" and "Deninio" in other documents in the record, including several handwritten documents submitted by petitioner. In each instance, petitioner's address remains the same, to wit, 16 Lorna Lane, Monsey, New York 10952.

ISSUE

Whether the Division of Taxation's Bureau of Conciliation and Mediation Services correctly denied petitioner's request for a conciliation conference on the basis that such request was not filed in a timely manner.

FINDINGS OF FACT

1. At issue in this matter is a Notice of Deficiency dated August 10, 1990 and addressed to petitioner, John DiNino, 16 Lorna Lane, Monsey, New York 10952. This notice asserts a penalty in the aggregate amount of \$1,874.00 against petitioner, pursuant to Tax Law § 685(g), as a person required to collect, truthfully account for and pay over withholding tax with respect to an entity known as Route 17 Collision Corp. An accompanying Statement of Deficiency, also dated August 10, 1990 and addressed to petitioner, reveals the specific withholding tax periods and penalty amounts to be as follows:

| <u>Withholding Tax Period</u> | <u>Amount</u> |
|--|-------------------|
| July 1, 1985 through December 31, 1985 | \$1,038.00 |
| December 1, 1986 through December 31, 1986 | <u>836.00</u> |
| Total | <u>\$1,874.00</u> |

2. Petitioner filed a Request for a Conciliation Conference with the Division of Taxation's ("Division") Bureau of Conciliation and Mediation Services ("BCMS"). This request is dated February 23, 1998, and the envelope in which it was sent via United States Postal Service ("USPS") first class mail bears a February 23, 1998 USPS postmark. Both the request and the envelope bear a BCMS indate receipt stamp of February 26, 1998.

3. By a Conciliation Order (CMS No. 167177) dated April 10, 1998, petitioner's request for a conciliation conference was denied on the following basis:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on August 10, 1990, but the request was not mailed until February 23, 1998, or in excess of 90 days, the request is late filed.

The captioned portion of the Order lists the “Year/Period” at issue as “7/1/85 - 12/31/86,” and lists the “Notice Number(s)” at issue as “L006330838 [and] L006330839.”

4. Petitioner continued his challenge by filing a petition with the Division of Tax Appeals. This petition alleged that petitioner did not own the corporation (presumably Route 17 Collision Corp.), that the corporation was closed, and that petitioner was not notified of the “assessment” against him until, as stated in his request for a conciliation conference, petitioner learned that a lien had been placed against him. Finally, petitioner maintains that the “assessment” violates the three-year statute of limitations on assessment.

5. The Division’s answer to the petition states that “[n]otices of [d]eficiency (Not. Nos. L006330838 and L006330839 [converted from ANS87247301 and ANS87247302], both dated 08/10/90) were issued to the petitioner, as a responsible officer of Route 17 Collision Corp. . . .” The answer goes on to state that petitioner’s request for a conciliation conference, mailed February 23, 1998, was denied as untimely because it was not filed within 90 days from the date of the statutory notices. The answer asserts that petitioner is not entitled to a hearing on the merits but rather only, at this point, to a hearing on the issue of the timeliness of the protest. The answer concludes with a request that the petition be denied and the assessments be sustained in full.

6. In support of its claim that petitioner’s request was not filed within 90 days and was therefore untimely, the Division submitted a January 25, 1999 affidavit made by Theodore

Eckler, together with attached documents, and a January 25, 1999 affidavit made by James Baisley, together with an attached document.

7. Mr. Eckler has been employed in the Division's Tax Compliance Division ("TCD") since 1982, and is familiar with the TCD's former procedures for mailing notices of deficiency. A copy of a notice of deficiency addressed to petitioner, and described more fully hereinafter, is attached to Mr. Eckler's affidavit. According to Mr. Eckler, a TCD clerk prepared this notice, as well as a certified mail record ("CMR") for the notice. The CMR, a one-page USPS document bearing form number "PS Form 3877," is also attached to Mr. Eckler's affidavit and is described more fully hereinafter.

8. According to Mr. Eckler's affidavit, the taxpayer's name and address was written on the CMR and all notices listed on the CMR were proofread and deposited into envelopes addressed to their intended recipients. Blank power of attorney and conciliation conference request forms were also inserted in each envelope. A certified mail number was listed on each envelope and was entered on the CMR. The unsealed envelopes were then transferred by a TCD clerk to the Division's outgoing mail unit for delivery to the USPS. Mr. Eckler states that the CMR was to be stamped by the USPS and returned to the TCD.

9. In this case, the certified mail number "539129" appears on the CMR under the column heading "Number of Article." Immediately to the right of this certified mail number is the listing "John DiNeno, 16 Lorna Lane, Monsey, N.Y." under the column heading "Name of Addressee, Street and Post Office Address."² Postage and fee amounts are listed in the next two columns. The CMR is hand-dated "8-10-90" in its upper middle section, and also bears, in its middle right

² The names and addresses of the other taxpayers listed on the CMR have been redacted to protect the confidentiality of those other taxpayers.

section, an August 10, 1990 postmark. Mr. Eckler states that this postmark is not the Division's stamp and is unlike any stamp used by the Division.

10. In its lower left area, the CMR bears the handwritten number "15" under each of the headings "Total Number of Pieces Listed by Sender" and "Total Number of Pieces Received at Post Office." The CMR also bears handwritten initials under the heading "Postmaster, Per (Name of Receiving Employee)." Mr. Eckler states that if any of the notices listed on the CMR were not included in the mailing, it was TCD's practice to cross out the listing of that notice on the CMR and to exclude postage charges for such notice. He notes that there are no names or addresses crossed out on the CMR in this case, and that postage and fees were charged for all notices listed on the CMR. The CMR lists consecutive certified numbers 539122 through 539136, for a total of 15 items. Finally, Mr. Eckler states, at paragraph 11 of his affidavit that the notice addressed to petitioner was returned to the Division as unclaimed.

11. Attached to Mr. Eckler's affidavit but not described therein, is a photocopy of what appears to be a window envelope bearing the Division's return address. The face of this document bears a stamped heading "CERTIFIED NO," followed by the handwritten number "539129." In addition, there is a partial stamped heading "UNC," presumably signifying "unclaimed," followed by the handwritten date "8/13/90." Also appearing are two stamped dates, to wit, "SEP 7 1990" and "SEP 15 1990." The upper right corner of this document reflects a Pitney Bowes machine metered postage stamp for Albany, New York dated August 10, 1990.

12. The affidavit of James Baisley, who has been the Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom"), formerly known as the Outgoing Mail Unit, since 1994, attests to the regular procedures followed by the mailroom in the ordinary course of

its business of delivering outgoing mail to branches of the USPS, and to his familiarity with the operations and procedures of the mailroom. Mr. Baisley states that after a letter is placed in the outgoing certified mail basket in the mailroom, a member of his staff weighs and seals each envelope and places postage and fee amounts on the envelope. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the CMR. Once the envelopes are stamped, a member of the mailroom staff delivers them to the Roesselville branch of the USPS in Albany. In turn, the postal employee affixes either a postmark or his or her initials or signature to the CMR to indicate receipt of the envelopes by the USPS. Mr. Baisley explains that the CMR becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In the Division's ordinary course of business, the CMR is picked up at the post office the following day and delivered to the originating office, here the TCD, by a mailroom staff member. Mr. Baisley's affidavit notes the Division specifically requested that the USPS indicate the number of pieces of mail received by either circling the number of pieces or, as in this case, by writing the number of pieces received by the USPS, on the CMR. Attached to Mr. Baisley's affidavit, but not discussed therein, is a copy of Form TP-153 B ("Vendor Registration Information"), listing John Dineno, 16 Lorna Lane, Monsey, New York 10952 as "Sec/Treas." of Route 17 Collision Corporation.

13. Based on the foregoing affidavits and documents, Messrs. Eckler and Baisley take the position that the notice of deficiency attached to Mr. Eckler's affidavit was issued to petitioner on August 10, 1990. In turn, the Division maintains that since the conciliation request was not

filed until February 23, 1998, there was no timely protest against such notice and the petition should be dismissed.

14. The Notice of Deficiency included with the Division's submitted documents is a one-page document addressed to John Dineno, 16 Lorna Lane, Monsey, New York 10952. It bears a stamped date "AUG 10, 1990" on its upper right area. At its lower section, the notice lists the following information:

| | |
|-----------------------|-------------|
| "Taxable Year(s) | 1985, 1986 |
| Identification number | 133182328 |
| Penalty | \$1,874.00 |
| Total | \$1,874.00" |

This document does not bear any assessment number or numbers.

15. The Statement of Deficiency included with the Division's submitted documents is also a one-page document addressed in the same manner and bearing the same date stamp. It lists "Employer Identification Number 133182328" and "Re: Route 17 Collision Corp." in its upper right area. The statement includes two paragraphs setting forth the provisions of Tax Law § 685(g) and (n), relating to the imposition of the penalty for failure to collect, account for and pay over withholding taxes, as well as a one-line third paragraph which states:

"Available information indicates that you are liable to a penalty under Section 685(g), computed as follows:

| <u>WITHHOLDING TAX PERIOD</u> | <u>AMOUNT</u> |
|-------------------------------|---------------|
| 07/01/85 - 12/31/85 | \$1,038.00 |
| 12/01/86 - 12/31/86 | <u>836.00</u> |
| Total | \$1,874.00" |

This Statement of Deficiency, like the Notice of Deficiency, does not bear any assessment number or numbers. Its upper center section bears the handwritten addition "Rec 11/19/90 @ Nixi." The significance of this writing, if any, is not further explained.

16. Petitioner takes the position, in both his conciliation conference request and his petition, that the liability was not asserted against him within three years of the time periods in issue and thus is barred by the statute of limitations. In this regard, petitioner maintains that he was not aware of the liability in question until some 10 years after the periods in issue. Petitioner also asserts that he did not own Route 17 Collision Corp. Petitioner notes that the photocopy of the envelope in which the notice was allegedly mailed contains no address on its face. He further observes that while Mr. Baisley affirms he has been the Chief Mail Processing Clerk since 1994, he offers no explanation as to how he would know of the mailing procedures in place some four years earlier (1990) when the notice was allegedly mailed. Finally, petitioner questions why there is no evidence in the record concerning another individual who was, according to petitioner, the president of Route 17 Collision Corp. and a person who should be pursued instead of petitioner with regard to the unpaid withholding taxes in question.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." The statute does not require actual receipt by the taxpayer. Where the Division establishes that its statutory notice of deficiency has been properly issued, that is sent by certified or registered mail to the taxpayer's last known address, the notice is valid and

sufficient whether or not actually received. (*See, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *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 667, 355 NYS2d 1028; *compare, Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places risk of nondelivery on the taxpayer (*see, Matter of Malpica, supra*).

B. In response to a notice of deficiency, a taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency or, alternatively, may request a conciliation conference with the BCMS, within 90 days of the mailing of the notice of deficiency (Tax Law § 689[b]; § 170[3-a][a]; *see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Where a taxpayer fails to file a timely protest, the Division of Tax Appeals has no jurisdiction to decide the merits of a notice of deficiency (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. As noted above, under Tax Law Article 22, where the Division establishes that it has properly mailed a notice, as required, the only remaining question is whether petitioner in turn timely responds in protest thereto. It is well settled that the Division bears the burden of proving proper mailing of a notice (*Matter of Katz, supra*). The Division may meet this burden by providing 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).

D. Review of the evidence in this case reveals several inconsistencies and unanswered questions with regard to the issue of mailing. First, the record contains only one notice of deficiency, accompanied by a statement of deficiency. The affidavit of Mr. Eckler describes the mailing of this one notice of deficiency, and offers nothing with regard to the statement of deficiency. Neither the notice of deficiency nor the statement of deficiency bears an assessment number or a notice number. In clear contrast, the Conciliation Order and the Division's answer to the petition specify *two* notices of deficiency, and further specify assessment numbers (L006330838 and L006330839) with respect to each. In fact, the Division's answer not only lists these two separate assessment numbers, but further states that these numbers are "converted" from other numbers ("converted from ANS87247301 and ANS87247302"). The record, however, contains no such notices bearing assessment numbers, nor is there any explanation regarding such numbers or the significance, if any, of "converted" assessment numbers.

Petitioner also points out that the photocopy of the envelope allegedly used to mail the notice (or notices) shows no name or address on its face. With regard to this observation, the photocopy in the record is of average quality at best. However, it appears as though the envelope was a window envelope, and that the address on a document within such an envelope would be visible through such window. In contrast again, however, the Eckler affidavit speaks specifically of an *addressed* envelope (*see* Finding of Fact "7"). In fact, the face of the envelope in the record bears the same certified number as is on the CMR, thus lending weight to the argument that what was represented on the CMR was mailed in the envelope. However, there is no explanation in either of the affidavits or other Division evidence to explain that a window envelope was used or, more importantly, to overcome the inconsistent evidence as to what was mailed within such an

envelope. The affidavits speak only of the mailing of a single notice of deficiency, while the other evidence as described refers to the existence of two notices of deficiency. It may be that two notices were mailed in one window envelope, and that such two “notices” were the notice of deficiency and statement of deficiency in the record. It is also possible that two separate notices of deficiency were mailed, as is indicated by the answer and conciliation order, either in one envelope or via separate mailings. In any event, the evidence in the record does not explain this inconsistency, or support any definitive conclusion as to precisely what notice or notices may have been mailed to petitioner.

E. In addition to the foregoing, the Eckler affidavit also notes that the notice (or notices) was returned to the Division as unclaimed. The fact that the Division was able to photocopy and offer the envelope in which the mailing was made supports this statement. However, there is no further information provided concerning any additional mailing or re mailing efforts which may have been undertaken by the Division with regard to the notice (or notices). Furthermore, it is at least noteworthy that Mr. Baisley, who has been the Chief Mail Processing Clerk since 1994, provides no information in his affidavit to explain how he would be in a position to describe the Division’s usual procedure followed for mailings in 1990, some four years earlier.

F. In sum, the evidence provided does not establish that the two specific notices of deficiency described in the Division’s answer and in the conciliation order, and identified therein by specific assessment numbers, were the items mailed by the Division to petitioner on August 10, 1990. While the dollar amount in issue per the conciliation order matches the dollar amount on the statement of deficiency and the notice of deficiency in evidence, these latter documents have no tie-in by assessment number to the two notices of deficiency identified in the answer and

the Conciliation Order, nor is the mailing evidence consistent with the claims set forth in the answer. Given these facts, together with the other unexplained inconsistencies and lack of information, it cannot be concluded that the Division has established proper mailing in this case. Accordingly, it cannot be said that petitioner's conciliation request was not timely filed.³

G. The petition of John DiNino is granted to the extent that the matter is remanded to the Bureau of Conciliation and Mediation Services for a conciliation conference.

DATED: Troy, New York
December 2, 1999

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

³ The three-year statute of limitations on assessment of taxes does not bar the imposition of a penalty on one who has allegedly failed to collect and pay withholding taxes (*Wolfstich v. New York State Tax Commn.*, 106 AD2d 745, 483 NYS2d 779), and petitioner's argument in this vein would appear unavailing.