

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARTHUR M. ABDUR-RAZZAAQ	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 819269
Personal Income Tax under Article 22 of the Tax	:	
Law and the New York City Administrative Code for	:	
the Year 1998.	:	

Petitioner, Arthur M. Abdur-Razzaaq, P.O. Box 1765, Manhattanville Station, New York, New York 10027, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1998.

The Division of Taxation, by its representative Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel), brought a motion dated March 6, 2003, seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Pursuant to section 3000.5(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal petitioner had 30 days to file a response to the motion. Petitioner, appearing *pro se*, did not file a response. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules began on April 5, 2003. Based upon the motion papers, the affidavits submitted therewith and all pleadings and documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation is entitled to summary determination in its favor because petitioner failed to file a petition or request for a conciliation conference within 90 days of the issuance of the notice of deficiency.

FINDINGS OF FACT

1. On November 21, 2002, the Division of Tax Appeals received a petition dated November 15, 2002, challenging a Warrant issued to petitioner, Arthur M. Abdurrazzaq, dated October 11, 2002. Petitioner stated that he was never afforded any form of procedural due process. The Warrant was addressed to petitioner at 272 W. 127th, #3, New York, NY 10027-2957, and referenced Assessment ID Number L-019387843-4, concerning the period ending December 31, 1998, asserting tax due in the amount of \$4,775.00, plus penalty and interest in the amounts of \$262.57 and \$1,288.09, respectively, for a total assessment of \$6,325.66.

2. In response to the petition, the Division of Taxation (“Division”) filed a Motion for Summary Determination on the grounds that petitioner failed to file a request for a conciliation conference or file a petition for a hearing within 90 days of the issuance of the notice of deficiency. In support of the motion, the Division submitted, among other things, an affidavit from Geraldine Mahon which attests to the regular procedures followed by the Case and Resource Tracking System (“CARTS”) with respect to the processing of statutory notices prior to their shipment to the Division’s Mechanical Section for mailing. Ms. Mahon, who is employed as the Principal Clerk in the CARTS Control Unit, has duties which include supervising the processing of notices of deficiency and determination such as the one at issue herein. Ms. Mahon describes the general or regular process involved in the computer generation of notices and the subsequent mailing of such notices. More specifically, Ms. Mahon describes

the computer preparation of notices of determination to include the simultaneous preparation of a certified mailing record. The certified mailing record is a computer-generated document entitled "Assessments Receivable, Certified Record for Non-Presort Mail" consisting, in this case, of 32 pages. The certified mailing record lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number.

3. Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the certified mailing record under the heading "Certified No." The certified mailing record carries an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial date on the certified mailing record is 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 and page 32 of the certified mailing record list an initial date of June 22, 2001, which has been manually changed to July 2, 2001.

4. Attached as an exhibit to Ms. Mahon's affidavit in this case is the 32-page certified mailing record listing, *inter alia*, the notice at issue herein. The certified mailing record in this case lists 352 control numbers. Each such certified control number is assigned to an item of mail listed on the 32 pages of the certified mailing record. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The certified mailing record herein lists 352 items of mail corresponding to the 352 certified control numbers listed thereon, and there are no deletions from the list.

5. Attached as an exhibit to Ms. Mahon's affidavit is a Notice of Deficiency dated July 2, 2001, addressed to "Abdurrazzaq-Arthur M, 272 W 127 St#3, New York, NY 10027-2957," identified as Assessment #L-019387843-4, asserting additional personal income tax due in the amount of \$4,775.00, plus interest of \$855.97, for a total of \$5,630.97. The notice is attached to what appears to be a copy of the mailing envelope, on which number 7104 1002 9739 0028 6296 is printed.

6. Information regarding the notice of deficiency at issue is contained on page 10 of the certified mailing record. Specifically, corresponding to certified control number 7104 1002 9739 0028 6296 is notice number L019387843. Along with such entry is a listing of petitioner's name and address, which is identical to that listed on the subject notice of deficiency, attached as Exhibit "B" to Ms. Mahon's affidavit. It is noted that the notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the certified mailing record for purposes of compliance with statutory privacy requirements.

7. The certified mailing record bears a United States Postal Service ("USPS") stamp dated July 2, 2001 on pages 1 through 31. Although the stamp on page 32 is not completely legible, the preprinted date in the upper left corner is changed manually, as is page 1, to reflect the date July 2, 2001. Ms. Mahon's affidavit indicates that a Postal Service employee affixed a USPS stamp dated July 2, 2002 to each page, circled the number "352" next to "Total Pieces and Amount Listed" and initialed on or near each USPS stamp on the certified mailing record.

8. Appearing immediately beneath the "Total Pieces and Amount Listed" listing is the confirmatory listing "Total Pieces Received At Post Office." No information appears after this listing.

9. The Mahon affidavit notes finally that the Division does not request, demand or retain return receipts from certified or registered mail.

10. In support of its position of proper mailing the Division provided the affidavit of Daniel B. LaFar, who is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. LaFar's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the United States Postal Service. After a notice is placed in the Mail Processing Center's "Outgoing Certified Mail" basket, a staff member weighs and seals each envelope and affixes postage and fee amounts thereon. A mail processing clerk checks the first and last pieces of certified mail listed against the certified mailing record, then performs a random review of 30 or fewer pieces of certified mail by checking those envelopes against the information contained on the certified mailing record. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and the associated certified mailing record to one of the various branch offices of the USPS located in the Albany, New York area. There a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark and his signature or initials to the certified mailing record, indicating receipt of the mail listed on the certified mail record and of the certified mail record itself. The USPS has also been requested by the Mail Processing Center to 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. In this case the postal employee initialed pages 1 through 32 of the certified mail record, affixed a postmark to each page of the record and circled the "total pieces" figure on page 32 to indicate that 352 pieces were received by the Postal Service. In the ordinary course of business a Mail Processing Center employee picks up the certified mailing record from the Postal Service on the

following day and returns the certified mailing record to the originating office (CARTS Control) within the Division.

11. The Division submitted as part of the record a Taxpayer Identification Record, indicating the last known address it had in its record for petitioner as 272 West 127th Street, #3, New York, New York. The Taxpayer Identification Record, dated March 3, 2003, bears the date May 9, 1994 across from the term “posted.”

12. The Division’s evidence of petitioner’s last known address also included the front page of a petition filed with the Division of Tax Appeals on another matter, date stamped as received June 28, 2002. It shows petitioner’s address as 272 West 127th Street.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, *shall recite all the material facts and show that there is no material issue of fact*, and that the facts mandate a determination in the moving party's favor. The *motion shall be granted if*, upon all the papers and proof submitted, *the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented* and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (emphasis added).

B. Section 3000.9(c) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the

case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

C. Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

D. 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*).

E. 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 Roland*, Tax Appeals Tribunal, February 22, 1996).

F. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the 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 timely responded 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).

The required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and Mr. LaFar in support of its position that the notices of deficiency were issued to petitioner on July 2, 2001, and such affidavits contain sufficient proof to establish the standard procedure of the Division for issuing such notices (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name

and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

Second, the Division established that the general issuance procedure was followed on July 2, 2001 in the generation and mailing of petitioner's notice dated that day. Specifically, the affidavits of Ms. Mahon and Mr. LaFar, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as July 2, 2001 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Finally, it is noted that the figure "352" on the last page of the July 2, 2001 CMR, signifying the total number of pieces of mail listed, has been circled and a Postal Service employee has initialed near the date stamp. As in *Matter of Roland (supra)*, the Postal Service employee circled this figure to indicate the number of pieces of mail received by the USPS on July 2, 2001. In addition, and unlike the situation in *Roland*, the affiant (here Mr. LaFar) also states the basis of his knowledge for this proposition. The Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has met its burden of proof on the question of actual mailing in this case as to the notice of deficiency.

G. Petitioner's argument that he has not been afforded procedural due process is without merit. The proof of mailing and delivery submitted by the Division proves that proper mailing procedures were in fact followed in this case. The notice mailed to petitioner clearly stated that "If we do not receive a response to this notice by 09/30/01: This notice will become an assessment subject to collection action." Accordingly, the notice of deficiency, and the method

used by the Division for mailing, met the standards for procedural due process, and is upheld (Tax Law § 681[a], [b]; § 689[b]). Petitioner was then required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of July 2, 2001, or no later than September 30, 2001. Since the request was not made until November 16, 2001, it is time barred.

H. Section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.9[b][1]) provides that a motion for summary determination shall be granted if the administrative law judge finds that it has been established sufficiently that no material issue of fact exists and that, therefore, the administrative law judge can, as a matter of law, issue a determination in favor of any party.

In the instant matter there are no material issues of fact. Further, petitioner did not respond to the Division's motion for summary determination. Accordingly, pursuant to the foregoing discussion and section 3000.9(b)(1) of the Rules, the Division of Taxation is entitled to summary determination in this matter.

I. The Division's motion for summary determination is hereby granted and the petition of Arthur M. Abdur-Razzaaq is dismissed.

DATED: Troy, New York
July 3, 2003

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE