

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
F. PAUL MUCCIGROSSO	:	DETERMINATION
	:	DTA NO. 822425
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	:	
September 1, 2001 through June 30, 2003.	:	

Petitioner, F. Paul Muccigrosso, 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 September 1, 2001 through June 30, 2003.

The Division of Taxation by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed June 2, 2009 seeking dismissal of the petition or, in the alternative, summary determination in its favor in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, Esq., dated June 1, 2009, and annexed exhibits supporting the motion. On June 26, 2009 petitioner, appearing by Duke, Holzman, Photiadis & Gresens, LLP (Gary M. Kanaley, Esq., of counsel), filed a one-page answer in response to the motion. Accordingly, the 90-day period for issuance of this determination commenced on July 2, 2009, i.e., the date on which petitioner's time to serve a response to the motion expired. After due consideration of the affidavit and annexed exhibits, the answer to the motion, and all pleadings filed in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

FINDINGS OF FACT

1. The Division of Tax Appeals received from petitioner, F. Paul Muccigrosso, a petition challenging five notices of deficiency, as follows:

Notice Number	Tax Period Ended	Penalty Amount (excluding interest)
L-023828145-2	12/31/01	\$2,673.00
L-023828144-3	09/30/02	\$2,279.21
L-023828143-4	12/31/02	\$1,169.88
L-023828142-5	03/31/03	\$1,468.21
L-023838141-6	06/30/03	\$1,284.59

Each of the notices is dated May 17, 2004, and each asserts petitioner is a person responsible for a penalty equal to the unpaid withholding taxes, plus interest thereon, of Tabula Rasa, Inc. The petition is signed by petitioners' representative, and is hand-dated July 24, 2008. The envelope in which the petition was mailed, by certified mail, bears a postmark date of July 24, 2008 and, like the petition itself, is stamped as received by the Division of Tax Appeals July 28, 2008.¹

The petition indicates that a conciliation conference with the Division of Taxation's (Division) Bureau of Conciliation and Mediation Services (BCMS) was not requested by petitioner.

2. The subject motion seeks dismissal of the petition or summary determination on the basis that the petition was not filed with the Division of Tax Appeals, as required by statute,

¹ Correspondence from the Division of Tax Appeals to petitioner's representative dated July 31, 2008 reveals that additional documentation and corrections were necessary before the petition could be processed. Submission of this additional information appears to have been made on August 18, 2008, as born out by the single front page of the petition which reflects the receipt stamp of the Division of Tax Appeals bearing this date.

within 90 days after the date on which the above-described notices of deficiency were issued.

Hence, evidence concerning the dates of issuance of the subject notices of deficiency is relevant and is set forth hereinafter.

3. With its motion papers, the Division, to show proof of mailing of the notices dated May 17, 2004, provided the following: (i) an affidavit, dated January 14, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated January 13, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) a "Certified Record for Presort Mail – Assessments Receivable" (CMR) postmarked May 17, 2004; and (iv) a computer transcript as well as a copy of petitioner's New York State personal income tax return (Form IT-201) for the year 2003 showing that such return was dated March 10, 2004 and had been filed on March 11, 2004.

4. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR bears, in its upper left corner, the date and time the CMR was produced. Following the Division's general practice, this date is manually changed to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front, and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified NO." The assessment numbers are listed under the heading entitled

“Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street and PO Address.”

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor in the Division’s Mail Processing Center (Center), describes the Center’s general operations and procedures. The Center receives the notices and places them in an “Outgoing Certified Mail” area. Each notice is accompanied by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The staff member checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York area. A USPS employee affixes a postmark and also places his or her signature on the CMR indicating receipt by the post office. The Center further requests that the USPS employee either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR.

6. The CMR in this matter is a 26-page document listing 276 certified control numbers. Each such certified control number was assigned to an item of mail listed on the pages of each such CMR. Specifically, corresponding to each listed certified control number was a reference number, and the name and address of the addressee. The preprinted date on the CMR in this matter is listed as 20041261732, which corresponds to May 10, 2004 at 5:32 P.M. This date has been manually changed to May 17, 2004, to reflect the actual date of mailing of the notices listed on the CMR.

7. Information regarding the notices at issue herein is contained on page 22 of the CMR, including the following respective certified numbers and associated reference numbers:

CERTIFIED NUMBER	REFERENCE NUMBER
7104 1002 9730 0067 9233	L-023828141
7104 1002 9730 0067 9240	L-023828142
7104 1002 9730 0067 9257	L-023828143
7104 1002 9730 0067 9264	L-023828144
7104 1002 9730 0067 9271	L-023828145

Each of these individual entries is followed by petitioner's name and address in Lancaster, New York.

8. In this matter, the postal employee affixed the postmark of the Colonie Center branch office of the USPS, zip code 12205, dated May 17, 2004, and his or her initials to each of the 26 pages of the CMR, including the last page thereof on which the postal employee also circled the preprinted number 276 appearing next to the printed statement, "TOTAL PIECES AND AMOUNTS," and directly above and to the right of the printed statement, "TOTAL PIECES RECEIVED AT POST OFFICE," in compliance with the Division's specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR in order to indicate the number of pieces of mail actually received at the post office.

9. The CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, each CMR is picked up at the post office by a staff member of the Mail Processing Center on the following day after its initial delivery and is then delivered to the

originating office, in this case CARTS, and each CMR is then maintained by the Division in the regular course of its business.

10. The address listed for petitioner on the CMR and on each of the notices matches the address listed on petitioner's income tax return dated March 10, 2004 and filed March 11, 2004, and represents petitioner's last known address when the notices at issue herein were issued.

11. The petition filed in this matter alleges that petitioner never received proper notice of the assessments and that petitioner was not a person responsible for the unpaid taxes owed by the entity Tabula Rasa, Inc. Petitioner responded to the subject motion on June 26, 2009, stating that "all evidence must be disclosed in its entirety." Petitioner noted that this matter was commenced as a small claims proceeding on May 13, 2009, that petitioner elected to discontinue the small claims proceeding prior to its conclusion, and requested that the petition be transferred to an administrative law judge such that a hearing would be conducted by an administrative law judge pursuant to section 3000.13(g) of the Tax Appeals Tribunal's Rules and Regulations. Petitioner's response did not address the proof or propriety of the Division's mailing of the subject notices of deficiency.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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 (20 NYCRR 3000.9[b][1]).

B. Petitioner offered no arguments or evidence to counter the Division's motion regarding the issue of the timeliness of petitioner's protest, including no evidence to contest the facts alleged by the VanDerZee and Sears affidavits, and those facts may be deemed admitted. Thus,

petitioner is deemed to have conceded that no question of fact requiring a hearing on the issue of timeliness exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). In turn, upon all of the proof presented, the Division is entitled to a determination in its favor and its motion for summary determination in its favor will be granted for the reasons that follow.

C. Where the timeliness of a petition is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing of a notice of deficiency, by certified or registered mail, to petitioner's last known address (Tax Law § 681[a]); *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notices, the Division must make the following showing:

First, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

D. It is the mailing date of the notice which triggers the 90-day period for the filing of a petition. A notice is mailed when it is delivered to the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

E. In this case, the Division has met its burden of establishing proper mailing. The affidavits submitted by the Division adequately describe the Division's general mailing procedures as well as the relevant mailing record in this case, and thereby establish that the

general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the mailing address appearing on the notices and on the CMR conforms with the address on petitioner's personal income tax return filed immediately prior to the date of mailing of the notices, thus satisfying the "last known address" requirement of Tax Law § 681(a). In short, the Division has established that it mailed the notices to petitioner, as claimed, on May 17, 2004 by certified mail addressed to his last known address (*see Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). Accordingly, the 90-day period within which petitioner could file either a Request for a Conciliation Conference with BCMS or a petition with the Division of Tax Appeals commenced on May 17, 2004 (Tax Law § 170[3-a][a]; § 681[b]). Since the petition itself specifies that a conciliation conference was not requested, the only remaining question is whether the petition in this matter was filed within 90 days after May 17, 2004.

F. The petition in this matter was not filed until it was mailed on July 24, 2008 and was therefore clearly not filed in a timely manner. Petitioner has not provided any documents or other evidence to establish that any protest against the notices occurred within the requisite 90-day time period. Since a protest was not timely filed there is no jurisdiction to proceed with this matter.

G. The Division of Taxation's motion for Summary Determination dated June 2, 2009 is granted and the petition of F. Paul Muccigrosso is hereby dismissed.

DATED: Troy, New York
October 1, 2009

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE