

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALEXANDER COZIER	:	ORDER
	:	DTA NO. 822587
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
the Year 2008.	:	

Petitioner, Alexander Cozier, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the year 2008.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated December 26, 2008, on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was untimely filed. The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents dated January 15, 2009 in support of the proposed dismissal. Petitioner, appearing by Alfred D. Cooper, Sr., Esq., submitted a response dated January 16, 2009 in opposition to the proposed dismissal. The 90-day period to issue this order thus commenced on January 16, 2009. Based upon the pleadings in this matter, and the affidavits and documents submitted by both the Division of Taxation and petitioner, Catherine M. Bennett, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed timely a petition with the Division of Tax Appeals.

FINDINGS OF FACT

1. Petitioner filed a petition dated October 16, 2008, which was received by the Division of Tax Appeals on October 27, 2008. The envelope in which the petition was mailed shows a date of mailing of October 25, 2008. The petition asserts that a penalty was assessed without due process, that petitioner never received the original notice, dated May 19, 2008, that the matter of the possession of cigarettes is currently in the process of settlement with the Nassau County District Attorney's office, and that a penalty in the amount of \$179,250.00 is a cruel and unusual hardship.

2. In reviewing the petition, the Petition Intake Unit of the Division of Tax Appeals determined that the petition failed to include a copy of the statutory notice being protested. Petitioner's representative was asked to provide the same and direction was given as to whom to call at the Division of Taxation (Division) to obtain a copy.

3. Petitioner thereafter obtained a copy of the Notice of Determination and mailed it, along with a Notice and Demand for Payment dated September 8, 2008, to the Division of Tax Appeals.

4. In its further review of the petition and the documents submitted, the Petition Intake Unit of the Division of Tax Appeals determined that the petition appeared to have been filed late and notified petitioner of its finding by a Notice of Intent to Dismiss dated December 26, 2008. The notice advised petitioner that the petition was filed on October 25, 2008, its date of mailing, which appeared to be 159 days after the issuance of the Notice of Determination dated May 19, 2008.

5. The Division included in its response, dated January 15, 2009, in support of the proposed dismissal, proof of mailing on May 19, 2008, of the Notice of Determination. The

Division's proof of mailing consisted of (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 Refunds, Deposits, Overpayments and Control Unit, (iii) a 25-page Certified Record for Presort Mail-Assessments Receivable (CMR) and (iv) an electronic return transcript for petitioner's 2007 personal income tax return, Form IT-201, showing an electronic postmark date of March 31, 2008.

6. The affidavit of Ms. Sears sets forth the Division's general practice and procedure for processing statutory notices prior to their shipment to the Division's mail processing center. Further, it explains that the CMR for statutory notices issued on May 19, 2008 shows that a Notice of Determination dated May 19, 2008, with reference to assessment number L-030066175, was sent to petitioner at 4 Murray Lane, Coram, NY 11727-4019, by certified mail using certified control number 7104 1002 9730 0737 7118 on May 19, 2008, as indicated by an affixed United States postmark.

7. The affidavit of James Steven VanDerZee, the mail and supply supervisor, describes the operations and procedures followed by the mail processing center. After the statutory notices are placed in an "Outgoing Certified Mail" basket, a member of Mr. VanDerZee's staff weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to a branch of the United States Postal Service in Albany, New York. A postal employee affixes a postmark and also may place his or her initials or signature on the certified mail record indicating receipt by the post office. Here the postal employee affixed a postmark to each page of the

certified mail record, circled the number “269” beside the “Total pieces received at post office” and initialed or signed the certified mail record on that page to indicate that there were 269 total pieces, including the one addressed to petitioner, received at the post office on May 19, 2008.

8. Petitioner’s Coram, New York, address on the petition, the CMR, the notice of determination and its cover sheet matches the address listed on petitioner’s 2007 personal income tax return: 4 Murray Lane, Coram, NY 11727-4019. This was the last return petitioner filed with the Division before the issuance of the notice.

9. In response to the Notice of Intent to Dismiss Petition, petitioner submitted an affidavit in opposition, attesting that he has continuously resided at 4 Murray Lane, Coram, NY 11727 since 1999, and never received the Notice of Determination in issue. He maintains that the first notice he received concerning the penalty asserted was a Notice and Demand for Payment dated September 29, 2008.

Petitioner provided a second affidavit in support of his claimed nonreceipt of the statutory notice: that of his aunt, with whom petitioner has resided continuously since 1999. She also had no recollection of petitioner’s receipt of the mail representing the statutory notice during the month of May, 2008.

CONCLUSIONS OF LAW

A. Tax Law § 478 provides, in relevant part, as follows:

Any determination [of tax due on cigarettes and tobacco products] made pursuant to this section shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within ninety days after the giving of notice of such determination, petition the division of tax appeals for a hearing.

The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

B. Where, as here, the timeliness of a taxpayer's petition following the issuance of a statutory notice is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by 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). When a notice is found to have been properly mailed by the Division to a petitioner's last known address by certified or registered mail, the petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

C. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*).

In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Patricia Finn Sears and James Steven VanDerZee, Division employees

involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

The Division also presented sufficient documentary proof, i.e., the respective CMR, to establish that the subject Notice of Determination was mailed as addressed to petitioner on the date claimed. Specifically, with respect to the notice in issue, the CMR lists a certified control number with petitioner's name and address, and bears U.S. Postal Service postmarks dated May 19, 2008. Additionally, a postal employee circled "269" as the "total pieces received at post office" and added his or her initials to the CMR to indicate receipt by the post office of all pieces of mail listed thereon.

D. The Division has established that the Notice of Determination dated May 19, 2008 was mailed to petitioner at the address given on his 2007 New York return, electronically filed March 31, 2008, which was the last return filed by petitioner as of the date of issuance of the May 19, 2008 notice. In addition, petitioner's own affidavit and that of his aunt state that the address to which the notice was mailed has been his address, and where he has received his mail, continuously since 1999. Here, the Division's response in support of the proposed dismissal of the alleged untimely petition included adequate documentary evidence which established that the notice in this case was properly mailed to petitioner at the correct address on May 19, 2008. Accordingly, the Division has established that it mailed the subject notice as claimed on May 19, 2008.

E. Where a notice of determination has been properly mailed, actual receipt by the taxpayer is not required (*Matter of Malpica*). The statutory scheme thus places the risk of nondelivery upon the taxpayer, and the 90-day period in which to file a protest is not tolled where a properly mailed notice is not delivered to the taxpayer. Petitioner has offered no evidence to

counter the Division's motion regarding the issue of the timeliness of petitioner's protest. His claim of nonreceipt is simply insufficient. Accordingly, even if petitioner did not receive the Notice of Determination dated May 19, 2008 as he claimed, his petition protesting that notice was nevertheless untimely and must, therefore, be dismissed. Since a petition was not timely filed as required by statute, there is no jurisdiction to proceed with this matter (Tax Law § 2006[4]).

F. The petition of Alexander Cozier is hereby dismissed.

DATED:Troy, New York
April 9, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE