

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HOOVER CHAVEZ	:	ORDER
	:	DTA NO. 822822
for Redetermination of Deficiencies 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	:	
Years 2004 through 2006.	:	

Petitioner, Hoover Chavez, filed a petition for redetermination of deficiencies 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 years 2004 through 2006.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated July 14, 2009, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with other affidavits and exhibits in support of the motion. Petitioner, appearing by Leonard Fein, CPA, filed a response to the Division of Taxation's motion on August 5, 2009. Accordingly, the 90-day period for issuance of this determination commenced on August 5, 2009. Based upon the motion papers, the affidavits and documents submitted therewith and all pleadings in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file requests for conciliation conferences with the Bureau of Conciliation and Mediation Services (BCMS) or petitions with the Division of Tax Appeals within 90 days after the issuance of the statutory notices.

FINDINGS OF FACT

1. A Notice of Deficiency (Assessment ID No. L-029747886), dated April 7, 2008, was issued by the Division of Taxation (Division) to petitioner, Hoover Chavez, at 10222 Park S LN, Richmond Hill, NY 11418-1131. The notice asserted a deficiency of New York State and New York City personal income tax totaling \$7,071.97, plus interest, for the year 2004.

2. Two notices of deficiency (Assessment ID Nos. L-029718838 and L-029747888), both dated May 12, 2008, were issued by the Division to petitioner, Hoover Chavez, at 10222 Park S LN, Richmond Hill, NY 11418-1131. The notices asserted deficiencies of New York State and New York City personal income tax totaling \$2,153.78, plus interest, for the year 2005 and \$7,109.70, plus interest, for the year 2006.

3. On December 22, 2008, BCMS received three requests for conciliation conference from petitioner which were signed by petitioner and dated December 18, 2008. The requests list the notice/assessment identification numbers as L-029747886, L-029718838 and L-029747888 and provide a basis as to why the notices were incorrect. As the notice identification numbers were listed on the three requests for conciliation conference and petitioner was aware of the reasons for the issuance of the notices, it is clear that petitioner had notice and was made aware of the existence and basis of the assessments at issue herein. There is no evidence in the record, however, as to the date on which petitioner received such notice.

4. On January 9, 2009, BCMS issued a Conciliation Order Dismissing Request (CMS No. 227660) which stated as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notices were issued on May 12, 2008 and April 7, 2008, but the request was not received until December 22, 2008, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

5. In response to the dismissal order, petitioner filed a petition seeking administrative review. The petition was filed on January 20, 2009 and was received by the Division of Tax Appeals on January 22, 2009. The Division brought this motion, dated July 14, 2009, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner's protests of the statutory notices were filed more than 90 days from the date of the notices.

6. Notices of deficiency, such as the ones at issue, are computer-generated by the Division's Case and Resource Tracking System (CARTS). The notices are predated with the anticipated date of mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code and the taxpayer's mailing address.

Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (CMR). The CMR lists each statutory notice in the order that it was generated in the batch. The certified control numbers, the assessment numbers and the names and addresses of the taxpayers are listed

on the CMR. Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

7. The CMR for the block of statutory notices issued on April 7, 2008, including the notice of deficiency issued to petitioner consists of 126 cut sheet pages. All pages are banded when the documents are delivered into the possession of the United States Postal Service (USPS) and the pages remain banded when the documents are returned to CARTS, unless ordered otherwise by the supervisor of the Refunds, Deposits, Overpayments and Control Units, including the CARTS Control Unit.

With respect to the CMR for the statutory notice mailed by certified mail on April 7, 2008, each of the pages consists of 11 entries with the exception of page 126 which contains 3 entries.

The CMR is printed approximately ten days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed, processed for postage, etc., by the Division's Mail Processing Center. In the upper left corner of page one of the CMR, the date the notices were mailed, "4/7/08" was handwritten by personnel in the Mail Processing Center. This change was made in order to ensure that the date on the CMR conformed with the actual date that the statutory notices and CMR were delivered into the possession of the USPS.

8. The CMR for the block of statutory notices issued on May 12, 2008, including the notices of deficiency issued to petitioner consists of 713 cut sheet pages. All pages are banded when the documents are delivered into the possession of the USPS and the pages remain banded when the documents are returned to CARTS, unless ordered otherwise by the supervisor of the Refunds, Deposits, Overpayments and Control Units, including the CARTS Control Unit.

With respect to the CMR for the statutory notices mailed by certified mail on May 12, 2008, each of the pages consists of 11 entries with the exception of page 190 which contains 10 entries, page 548 which contains 10 entries and page 713 which contains 9 entries. Pages 190 and 548 contain 10 entries as a result of one of the original 11 entries being crossed out.

The CMR is printed approximately ten days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed, processed for postage, etc., by the Division's Mail Processing Center. In the upper left corner of page one of the CMR, the date the notices were mailed, "5/12/08" was handwritten by personnel in the Mail Processing Center. This change was made in order to ensure that the date on the CMR conformed with the actual date that the statutory notices and CMR were delivered into the possession of the USPS.

9. Statutory notices that are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for "Outgoing Certified Mail." Each notice in the batch is preceded by a Mailing Cover Sheet and accompanied by any required enclosures. A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the Mail Processing Center staff puts each statutory notice and the associated documents into a windowed envelope. The staff member then weighs and seals each envelope and places postage and fee amounts on such envelope.

A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then 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. Once the review of the CMR and the envelopes is

completed, a member of the Mail Processing Center staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area.

10. The postal service representative then affixes a U.S. postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR. In the case of the certified mail to be mailed on April 7, 2008, the USPS employee initialed or signed page 126 of the CMR, affixed a postmark dated April 7, 2008 to each page of the CMR and circled the total number of pieces of certified mail received as 1,378 on page 126 of the CMR. In the case of the certified mail to be mailed on May 12, 2008, the USPS employee initialed or signed page 713 of the CMR, affixed a postmark dated May 12, 2008 to each page of the CMR, corrected the preprinted total pieces received amount to reflect the two items which were crossed out and wrote the total number of pieces of certified mail received as 7,839 on page 713 of the CMR.

11. The reduction on the May 12, 2008 CMR of the total number of pieces received at the USPS from 7,841 to 7,839 indicates that two pieces had been “pulled” from the mailing record. A piece of mail may be pulled for any number of reasons, including but not limited to, a discrepancy in a name or address. Any piece of mail so pulled will be segregated from the remaining group of statutory notices for correction and issuance at another time. The May 12, 2008 CMR reflects that two pieces of mail were pulled from pages 190 and 548. These pieces of mail had been assigned certified control numbers 7104 1002 9730 0717 4953 and 7104 1002 9730 0721 4345. A line was placed through the entries for these taxpayers after the statutory notices were pulled. These deletions are reflected in the change of the total pieces received at the Post Office on page 713 of the certified mail record. No such mark is made on or near the listings for petitioner.

12. As a matter of standard procedure, to ensure accountability, the CMR may be left overnight at the USPS to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the CMR. The CMR is picked up at the USPS the following day by a member of the Mail Processing Center staff whereupon it is delivered to the CARTS Control Unit.

Page 59 of the CMR for April 7, 2008 indicates that a notice of deficiency with Notice No. L-02947886 was sent to "CHAVEZ-HOOVER, 10222 PARK S LN, RICHMOND HILL, NY 11418-1131" by certified mail using certified control number 7104 1002 9730 0685 3828. A USPS postmark on each page of the CMR confirms that the notice of deficiency was sent on April 7, 2008. Page 416 of the CMR for May 12, 2008 indicates that two notices of deficiency with Notice Nos. L-029718838 and L-029747888 were sent to "CHAVEZ-HOOVER, 10222 PARK S LN, RICHMOND HILL, NY 11418-1131" by certified mail using certified control numbers 7104 1002 9730 0719 9741 and 7104 1002 9730 0719 9758. A USPS postmark on each page of the CMR confirms that the notices of deficiency were sent on May 12, 2008.

13. In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

14. The Division sent two requests for a return receipt after mailing (USPS Form 3811-A) to the Consumer Affairs Office of the USPS - Albany General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, requesting delivery information on the notices of deficiency described above. The Division received a response from the USPS which stated that certified mail number 7104 1002 9730 0685 3828 was undeliverable and was returned to the Division on May 8, 2008. The Division received two further responses from the USPS which stated that certified mail

numbers 7104 1002 9730 0719 9741 and 7104 1002 9730 0719 9758 were also undeliverable and were returned to the Division on June 13, 2008.

15. The facts set forth in Findings of Fact 5 through 14 were established through affidavits of James Steven VanDerZee, Patricia Finn Sears and Heidi Corina, employees of the Division. Mr. VanDerZee is employed as a Mail and Supply Supervisor in the Division's Registry Unit. His duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

Ms. Sears is employed as the supervisor of the Division's CARTS Control Unit. Her duties include supervising the processing of statutory notices such as the notices of deficiency at issue herein.

Ms. Corina is employed as Legal Assistant 2 in the Division's Office of Counsel. Her duties include preparing USPS forms 3811-A to request return receipts after mailing registered, certified, insured and express mail.

16. The address of petitioner to which the statutory notices were mailed is the same address listed on the Division's Electronic Return Transcript for the 2007 personal income tax return electronically filed by petitioner on February 10, 2008. However, the transcript indicates petitioner's address as listed on two wage and tax statements, form W-2, to be 102-22 Park Lane South. The inclusion of the hyphen also appears on petitioner's three requests for conciliation conference, petition to the Division of Tax Appeals and power of attorney.

17. Petitioner contends in his Answer to the Division's Notice of Motion to Dismiss that there is a distinction in the address to which the notices of deficiency were mailed, 10222 Park South Lane, and petitioner's actual address, 102-22 South Park Lane and that therefore, the Division did not mail the notices to petitioner's last known address. In support, petitioner

provided the first page of his Resident Income Tax Return, form IT-201, for the years 2004, 2005 and 2006 showing his address to be 102-22 Park Lane South. Petitioner's Resident Income Tax Return for the year 2007 was not provided.

18. Addresses in Queens, New York, are generally written with three fields that indicate location. The first field is a numeric field indicating the lower-numbered cross street. This is followed by a hyphen and then a numeric field indicating the house number. This field is assigned to locate a building on a block. Each time a street or an avenue is crossed, the house number goes back to "01."

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all 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. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). 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, 94 [1968]; *Museums at Stony Brook v. Village of*

Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179 [1989]). 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, 881 [1960]).

“To defeat a motion for summary judgment, the opponent must also produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992] *citing Zuckerman*). In order to decide whether such an issue exists, a discussion of the relevant substantive law is appropriate.

C. Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. This section further provides that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.”

A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of such deficiency or, alternatively, file a request for conciliation conference with BCMS *within 90 days of the mailing of the notice of deficiency* (*see* Tax Law § 689[b]; § 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. 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 of the notice. Where a notice is found to have been properly mailed, “a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail” (*see Matter of Katz*, Tax Appeals

Tribunal, November 14, 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).

E. 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 the particular instance (*Matter of United Water New York*, Tax Appeals Tribunal, April 4, 2004; *see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerZee, Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency.

G. The CMR for April 7, 2008 provides sufficient documentary proof to establish that a notice of deficiency, dated April 7, 2008, was mailed by certified mail to petitioner. The 126-page document listed 1,378 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated April 7, 2008 and the initials or signature of a USPS employee. The postal employee wrote and circled the number “1,378” on the last page of the CMR to indicate the number of pieces of certified mail received at the post office. Accordingly, the Division has established that it mailed the notice of deficiency to petitioner as claimed on April 7, 2008 (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

The CMR for May 12, 2008 provides sufficient documentary proof to establish that two notices of deficiency, dated May 12, 2008, were mailed by certified mail to petitioner. The 713-page document originally listed 7,841 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated May 12, 2008 and the initials or signature of a USPS employee. The postal employee wrote and circled the number “7,839” on the last page of the CMR to indicate the number of pieces of certified mail received at the post office. The reduction of the total number of pieces of certified mail received at the post office as compared to the original number on the CMR accurately reflects that two pieces of mail were pulled, neither of which were the notices mailed to petitioner. Accordingly, the Division has established that it mailed two notices of deficiency to petitioner as claimed on May 12, 2008 (*see Matter of Rakusin*).

H. Petitioner does not dispute that the notices were mailed as addressed on April 7, 2008 and May 12, 2008. Rather, petitioner contends that the notices were not mailed to the correct address and that in fact he never received them. It has been established through the responses of the USPS to the requests for a return receipt after mailing (USPS Form 3811-A), that the three notices mailed to petitioner were considered to be undeliverable and were returned to the Division.

I. As previously noted, Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. This section further requires that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” Here, the record shows that the notices were mailed to petitioner without the hyphen in the number portion of his address, that the notices were considered undeliverable by the USPS and were returned to the Division, that the Electronic

Return Transcript of petitioner's 2007 personal income tax return indicates no hyphen in the address and that petitioner's wage and tax statements for the year 2007 contain the hyphen. It is also noted that the hyphen is generally part of an address in Queens, New York, and separates the lower-numbered cross street and the house number. In addition, as the notices of deficiency were identified on the three requests for conciliation conference, it is clear that petitioner at some time was made aware of the existence of the assessments at issue herein. Taken together, this evidence is sufficient to raise material and triable issues of fact as to whether the Division mailed the notices of deficiency to petitioner's "last known address" and when petitioner received notice of such assessments (*see* 20 NYCRR 3000.9[b][1]).

J. In accordance with Conclusion of Law I, the Division of Taxation's Motion for Summary Determination is denied. A hearing will be scheduled in due course.

DATED: Troy, New York
October 8, 2009

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE