

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEFFREY W. HANRETTY	:	DETERMINATION
	:	DTA NO. 822887
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income under Article 22 of the Tax	:	
Law for the Year 2007.	:	

Petitioner, Jeffrey W. Hanretty, 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 year 2007.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated July 8, 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 pro se, filed a response to the Division of Taxation's motion dated August 6, 2009, which date commenced the 90-day period for issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith and all pleadings in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) within 90 days after the issuance of the statutory notice.

FINDINGS OF FACT

1. A Notice of Deficiency (Assessment ID No. L-030504107-1), dated August 7, 2008, was issued by the Division of Taxation (Division) to petitioner, Jeffrey Hanretty, at 100 Genesee Street, New Hartford, New York 13413-2328. The notice asserted a penalty, pursuant to Tax Law § 685(g), in the amount of \$38,189.26, that was equal to the amount of withholding tax not paid by Kay-R Electric Corporation for the 2007 tax year. The Notice of Deficiency stated that the Division's records indicated that petitioner was an officer or responsible person of Kay-R Electric Corporation.

2. On December 5, 2008, BCMS received a Request for Conciliation Conference which was signed by petitioner and dated December 5, 2008. On the Request for Conciliation Conference, petitioner set forth his address as 8365 Seneca Turnpike, New Hartford, New York 13413.

3. On December 19, 2008, BCMS issued a Conciliation Order Dismissing Request (CMS No. 227412) 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 notice(s) was issued on August 7, 2008, but the request was not received until December 5, 2008, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

4. In response to the dismissal order, petitioner filed a petition seeking administrative review. The petition was dated February 9, 2009 and was received by the Division of Tax Appeals on February 12, 2009. The Division filed an answer dated April 22, 2009. The Division subsequently brought this motion, dated July 8, 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 protest of the statutory notice was filed more than 90 days from the date of the notice.

5. Notices of deficiency, such as the one 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, assessment numbers, and 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.

6. The CMR for the block of statutory notices issued on August 7, 2008, including the Notice of Deficiency issued to petitioner, consists of 45 connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service (USPS) and the pages remain connected when the document is returned to CARTS.

With respect to the CMR for the statutory notice mailed by certified mail on August 7, 2008, each of the pages consists of 11 entries with the exception of page 45 which contains 7 entries.

In the upper left corner of each page of the CMR is the Run number which signifies the date and time the CMR was produced. 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, "8-7-08" 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.

7. 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.

8. 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 August 7, 2008, the USPS employee initialed or signed page 45 of the CMR, affixed a postmark dated August 7, 2008 to each page of the CMR and circled the total number of pieces of certified mail received as 491 on page 45 of the CMR.

9. 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 37 of the CMR for August 7, 2008 indicates that a Notice of Deficiency with Notice No. L-030504107 was sent to “HANRETTY-JEFFREY, 100 GENESEE ST., NEW HARTFORD, NY 13413-2328” by certified mail using certified control number 7104 1002 9730 0787 6581. A USPS postmark and the initials of the USPS employee on each page of the CMR confirms that the Notice of Deficiency was sent on August 7, 2008.

10. 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.

11. The facts set forth in Findings of Fact 5 through 10 were established through affidavits of James Steven VanDerZee and Patricia Finn Sears, 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 notice of deficiency at issue herein.

The procedures described in Mr. VanDerZee's affidavit are the regular procedures followed by Mail Processing Center staff in the ordinary course of business when handling items to be sent by certified mail. Mr. VanDerZee stated that such procedures were followed on August 7, 2008 in mailing the piece of certified mail described in his affidavit.

12. The fact that the USPS employee circled the number "491" on the last page of the CMR for August 7, 2008 to indicate the number of pieces received was also established through the affidavit of Mr. VanDerZee whose knowledge is based upon his familiarity with the fact that the Mail Processing Center has requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing such number on the CMR.

13. The address of petitioner to which the statutory notices were mailed is the same address listed on petitioner's New York personal income tax return for 2006, dated on October 15, 2007.

14. Petitioner filed a response to the motion dated August 6, 2009. In the response, petitioner provided his own affidavit, sworn to on August 6, 2009, as well as documentary evidence to show that as of the date of the issuance of the Notice of Deficiency (August 7, 2008), petitioner no longer maintained his office at 100 Genesee Street, New Hartford, New York, and,

therefore, never received the Notice of Deficiency, dated August 7, 2008, which was sent by the Division to the Genesee Street address.

The evidence presented by petitioner includes a lease, dated November 1, 2007, for premises located at 8379 Seneca Turnpike, New Hartford, New York 13413, beginning on January 1, 2008. In addition, petitioner submitted: a deed, dated October 29, 2007, for the sale of the property at 100 Genesee Street, New Hartford, New York; a copy of a Yellow Book USA directory dated, June 10, 2008, which indicates that Jeffrey W. Hanretty, CPA & Associates was located at 8365 Seneca Turnpike, New Hartford, New York 13413; Evidence of Property Insurance, dated May 30, 2008, indicating that the insured was 8379 Seneca Turnpike LLC located at 8365 Seneca Turnpike, New Hartford, New York 13413, as well as various other pieces of correspondence from clients and vendors which indicate that petitioner's address was 8365 Seneca Turnpike, New Hartford, New York 13413 (the address set forth on petitioner's Request for Conciliation Conference) at or about the time of the issuance of the Notice of Deficiency at issue herein.

15. No evidence was presented to indicate that petitioner notified the Division of the change of address prior to the issuance of the Notice of Deficiency on August 7, 2008.

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*).

C. In the instant matter, petitioner presented no evidence to contest the facts asserted in the VanDerZee and Sears affidavits; consequently, those facts may be deemed admitted (*see Whelan v. GTE Sylvania* at 448, 449).

D. 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 determination* (*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).

E. 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).

F. 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 (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv*, Tax Appeals Tribunal, May 23, 1991).

G. 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.

H. The CMR for August 7, 2008 provides sufficient documentary proof to establish that a Notice of Deficiency, dated August 7, 2008, was mailed by certified mail to petitioner at 100 Genesee Street, New Hartford, New York 13413. The 45-page document listed 491 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated August 7, 2008 and the initials or signature of a USPS employee. The postal employee circled the number “491” 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 August 7, 2008.

I. As previously noted, Tax Law § 681 directs the Division to mail a notice of deficiency to a taxpayer at his or her last known address. Tax Law § 691(b) defines a taxpayer’s “last known address” as the address given in the last tax return filed by him or her, unless subsequently thereto, the taxpayer has notified the Division of a change in address.

The Division has established that the Notice of Deficiency dated August 7, 2008, was mailed to petitioner at the address given on his 2006 New York State personal income tax return, dated October 15, 2007, which was the last return filed by petitioner as of the date of issuance of the Notice of Deficiency on August 7, 2008. This address, as set forth on petitioner’s 2006 return was 100 Genesee Street, New Hartford, New York 13413, the address to which the Notice of Deficiency was mailed, by certified mail, on August 7, 2008. It is concluded, therefore, that the Notice of Deficiency at issue was properly addressed to petitioner at his last known address pursuant to Tax Law §§ 681 and 691(b).

J. Where a notice of deficiency has been properly mailed, Tax Law § 681 does not require actual receipt by the taxpayer (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). 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. Accordingly, even if petitioner did not receive the Notice of Deficiency as he claims, his petition, if not filed within 90 days from August 7, 2008, is untimely and must, therefore, be dismissed.

K. As noted above, petitioner's Request for Conciliation Conference was dated and received by BCMS on December 5, 2008. In order to timely protest the Notice of Deficiency issued on August 7, 2008, petitioner was required to file a petition or a request for a conciliation conference within 90 days of August 7, 2008, i.e., on or before November 5, 2008. Therefore, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*) and the petition must, therefore, be dismissed.¹

L. The Division of Taxation's motion for summary determination is granted and the petition of Jeffrey W. Hanretty is dismissed with prejudice.

DATED: Troy, New York
October 8, 2009

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE

¹ It should be noted, however, that petitioner is not entirely without recourse here, for he may pay the disputed tax deficiency and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).