

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANK PECORARO : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 823006
of New York State Personal Income Tax under :
Article 22 of the Tax Law for the Year 2004. :

Petitioner, Frank Pecoraro, 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 2004.

On September 22, 2009, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated September 22, 2009, and annexed exhibits supporting the motion. Petitioner filed an affidavit, together with annexed documents, in opposition to the motion on October 14, 2009, which date commenced the 90-day period for issuance of this determination. After due consideration of the affidavits and documents presented by the parties, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Frank Pecoraro, at his New City, New York, address, a Notice of Deficiency, dated September 22, 2008, which asserted New York State personal income tax for the year 2004 in the amount of \$861.81 plus penalty and interest for a balance due of \$1,353.89. By his request for conciliation conference, dated January 5, 2009, petitioner protested the notice, numbered L-030267983-7.

2. On January 23, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on September 22, 2008, but the request was not mailed until January 5, 2009, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the notice dated September 22, 2008, the Division provided the following: (i) an affidavit, dated September 18, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated September 16, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 22, 2008; and (iv) a copy of petitioner's personal income tax return for the year 2005, dated May 12, 2008, which was the last filing from petitioner prior to the issuance of the notice.

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. Here, each page of the 16-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "9/22/08," 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." Page 6 of the CMR contains information on the subject notice and establishes that on September 22, 2008 a notice with the control number 7104 1002 9730 0855 5799 was sent to petitioner at his New City, New York, address.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded 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 first and last pieces of mail listed on the CMR are

checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the 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 initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 170. This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date September 22, 2008, confirming that the notices were mailed on that date.

6. Petitioner's New City, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his personal income tax return for 2005. This is the last return that petitioner filed with the Division before the issuance of the subject notice of deficiency. The same address is listed on petitioner's request for conciliation conference and petition.

7. As noted, the request for conciliation conference was dated January 5, 2009. A stamp shows that the request was received by BCMS on January 7, 2009.

CONCLUSIONS OF LAW

A. A motion for summary determination shall 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. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing 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 notice, 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*).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., September 22, 2008, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioner's personal income tax return for 2005 which satisfies the "last known address" requirement in Tax Law § 681(a). Accordingly, the notice was properly mailed and thus, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a

petition with the Division of Tax Appeals commenced on September 22, 2008 (Tax Law § 170[3-a][a]; § 681[b]).

D. The documents show that the notice was mailed on September 22, 2008, but the Request was not mailed until January 5, 2009, which is well beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*See Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

E. In his petition and papers filed in opposition to the instant motion, petitioner posited various legal arguments with respect to the jurisdictional and substantive issues presented in this matter. Petitioner submitted no evidence regarding the issuance of the September 22, 2008 Notice of Deficiency or the timeliness of his request for conciliation conference. With respect to the timeliness of his request, petitioner argued that the 150-day limitations period as provided in Tax Law § 681(b) applies in this case and that therefore his request was timely. This contention is meritless, as the 150-day limitations period applies where a notice is “addressed to a person outside of the United States” (Tax Law § 681[b]). Since petitioner’s protest is untimely, this determination does not address petitioner’s claims regarding the merits of the assessment.

F. The Division’s motion for summary determination is granted, and the petition of Frank Pecoraro is dismissed.

DATED: Troy, New York
December 23, 2009

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE