

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL KINAHAN	:	DETERMINATION
		DTA NO. 823338
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 2005.	:	

Petitioner, Michael Kinahan, 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 2005.

On April 13, 2010, 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 April 12, 2010, and annexed exhibits supporting the motion. Petitioner, appearing pro se, did not respond to the motion of the Division of Taxation within 30 days thereafter (Tax Law § 3000.5[b]). Accordingly, the 90-day period for issuance of this determination commenced on May 13, 2010, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavit, annexed exhibits, and all pleadings and proceedings had herein, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Michael Kinahan, at his Williston Park, New York, address, a Notice of Deficiency, dated April 6, 2009, which asserted additional New York State personal income tax due for the year 2005 in the amount of \$328.63, plus penalty and interest, for a balance due of \$436.11. By a request for conciliation conference, dated September 28, 2009 and mailed September 29, 2009, petitioner protested the notice numbered L-031321468.

2. On October 16, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request (CMS No. 235315) 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(s) was issued on April 6, 2009, but the request was not mailed until September 29, 2009, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the notice dated April 6, 2009, the Division provided the following: (i) an affidavit, dated April 5, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (ii) an affidavit, dated April 5, 2010, 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 April 6, 2009; (iv) a copy of petitioner's 2008 New York State personal income tax return (form IT-201), dated February 6, 2009, which was the last

filing from petitioner prior to the issuance of the Notice of Deficiency, and (v) an affidavit, dated April 5, 2010, of Heidi Corina, a legal assistant in the Division's Office of Counsel together with United States Postal Service (USPS) form 3811-A.

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 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 and last pages of the CMR to "4/6/09," 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, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. Page 138 of the CMR contains information on the subject notice (L-031321468) and establishes that on April 6, 2009 a notice with the control number 7104 1002 9730 1308 8176 was sent to petitioner at his Williston Park, New York, address.¹

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 Mail Processing Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is

¹ The CMR in this case consists of 255 pages containing entries for 2,803 pieces of certified mail. Due to the size of the CMR and the fact that proof of delivery in addition to proof of mailing has been provided, the proof of mailing includes only the first and last pages of the CMR along with the page (138) containing the entry for the notice issued to petitioner.

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 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 information contained on the CMR. A member of the Mail Processing 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 to the CMR. On page 255, corresponding to "Total Pieces and Amounts," is the preprinted number 2803. The number 2803 is handwritten on page 255 and the page is initialed, confirming that all notices were received. The USPS postmark is from the Albany New York GMF (General Mail Facility) and bears the date April 6, 2009, confirming that the notices were mailed on that date.

6. Petitioner's Williston Park, New York address on the CMR and the Mailing Cover Sheet matches the address listed on his New York State personal income tax return for the year 2008. This is the most recent return that petitioners filed with the Division before the issuance of the subject Notice of Deficiency.

7. As noted, the request for conciliation conference was dated September 28, 2009 and was mailed on September 29, 2009. A stamp shows that the request was received by BCMS on October 21, 2009.

8. The affidavit of Heidi Corina, a legal assistant in the Division's office of counsel, details her filing of USPS form 3811-A (Request for Delivery Information/Return Receipt After Mailing) in this matter. Filing USPS form 3811-A commences a process by which post-mailing

return receipt delivery confirmation information may obtained from the USPS with regard to a mailing made by registered, certified, insured or express mail. In this matter, the form 3811-A sought such information for an item mailed by the Division under certified number 7104 1002 9730 1308 8176 on April 6, 2009 from the Albany, New York, GMF office of the USPS to petitioner at his Williston Park, New York, address. In response, the USPS confirmed delivery of the item of certified mail in question to petitioner at his Williston Park, New York, address on April 8, 2009 at 12:58 P.M.

CONCLUSIONS OF LAW

A. A motion for summary determination shall 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. In the instant matter, petitioner did not respond to the Division's motion and, therefore, has conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioner has submitted no evidence to contest the facts alleged by the VanDerZee and Sears affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division's motion will be granted for the reasons set forth below.

C. Where the timeliness of a petition or a request for conciliation conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing 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 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*).

D. 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., April 6, 2009, 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 DeWeese*, 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 2008 which satisfies the "last known address" requirement in Tax Law § 681(a). It is concluded that 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 April 6, 2009 (Tax Law § 170[3-a][a]; § 681[b]).

E. The documents show that the notice was mailed on April 6, 2009, but petitioner's request for conciliation conference was not mailed until September 29, 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.)²

F. Finally, it is observed that petitioner is not entirely without recourse. That is, petitioner may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioner may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

G. The Division of Taxation's motion for summary determination is granted, and the petition of Michael Kinahan is dismissed.

DATED: Troy, New York
June 17, 2010

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

² It is further observed that the information provided via USPS form 3811-A confirms that delivery, and thus petitioner's actual receipt of the notice, occurred on April 8, 2009. In turn, September 29, 2009 falls well beyond 90 days after such date of actual receipt.