

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANKH-KA-RA SMA-NTR F/K/A	:	DETERMINATION
ANDRE WILLIAMS	:	DTA NO. 826765
	:	
for Redetermination of Deficiency or for Refund of	:	
New York State and New York City Personal	:	
Income Taxes under Article 22 of the Tax Law and	:	
the New York City Administrative Code for the	:	
Years 2006 through 2009.	:	

Petitioner, Ankh-Ka-Ra Sma-Ntr formerly known as Andre Williams, filed a petition for redetermination of a deficiency or for a refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 2006 through 2009.

On February 26, 2015, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On May 11, 2015, petitioner, appearing pro se, submitted a response in opposition to the dismissal. On May 12, 2015, the Division of Taxation, by Amanda Hiller, Esq. (Leo Gabovich), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 12, 2015. After due consideration of the documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition following the issuance of four notices of deficiency.

FINDINGS OF FACT

1. The subject of the Notice of Intent to Dismiss is the timeliness of petitioner's protest of four notices of deficiency dated February 24, 2014, with assessment numbers, L-040623236-8, L-

040623237-7, L-040623238-6, and L-040623239-5, respectively. Each of the four notices is addressed to petitioner, by his former name, Andre Williams, at 2266 5th Avenue Unit 513, New York, New York 10037-9426. Notice, L-040623236-8, assesses personal income tax for the year 2006 in the amount of \$5,808.00, plus interest and penalty. The second notice, L-040623237-7, assesses personal income tax for the year 2007 in the amount of \$6,052.00, plus penalty and interest. The third notice, L-040623238-6, assesses personal income tax for the year 2008 in the amount of \$929.00, plus penalty and interest. The final notice, L-040623239-5, assesses personal income tax for the year 2009 in the amount of \$1,948.00, plus penalty and interest. Each of the four notices explains petitioner must file a request for either a conciliation conference or a petition for a Tax Appeals hearing by May 25, 2014.

2. Petitioner did not file a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services in protest of these notices.

3. Petitioner filed a petition, with the Division of Tax Appeals, in protest of these notices on January 28, 2015. In the petition, petitioner stated the assessed amount of each notice was improperly attributed to him as the taxpayer.

4. In response to the Notice of Intent to Dismiss and to prove mailing of the notices of deficiency under protest, the Division submitted, among other documents, the following: (i) the petition of Ankh-Ka-Ra Sma-Ntr, formerly known as Andre Williams, dated January 28, 2015; (ii) a copy of the Notice of Intent to Dismiss Petition, dated February 26, 2015; (iii) an affidavit, dated April 30, 2015, of Heidi Corina, Legal Assistant in the Office of Counsel of the New York State Department of Taxation and Finance; (iv) an affidavit, dated April 24, 2015, of Mary Ellen Nagengast, Director of the Management Analysis and Project Services (MAPS) Bureau, which includes being responsible for the receipt and storage of certified mail records; (v) three pages of a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 24, 2014; (vi) an affidavit, dated April 21, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division mail room; and (vii) a copy of the "Individual Taxpayer Profile

Inquiry” for Andre Williams.

5. The affidavit of Mary Ellen Nagengast sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is printed approximately ten days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first page of the CMR, in the upper right corner, to the actual mailing date of “2/24/14.” In addition, the pages of the CMR are banded together when the documents are delivered to the USPS and stay banded, unless ordered otherwise. The page numbers of the CMR run consecutively, beginning with “PAGE:1,” and are located in the upper right corner of each page.

6. Each notice is assigned a certified control number, which appears on a separate one-page mailing cover sheet. The mailing cover sheet also bears a bar code, the taxpayer’s mailing address, the Division’s return address on the front and taxpayer assistance information on the back. In addition, the certified control number is listed on the CMR, under the heading “CERTIFIED NO.” The assessment numbers are listed under the heading “REFERENCE NO.,” while the names and addresses of the recipients are listed under “NAME OF ADDRESSEE, STREET AND PO ADDRESS.”

7. The CMR contains 1,741 pages and lists 19,141 certified control numbers. Only pages 1, 198, and 1,741 are attached to Ms. Nagengast’s affidavit and portions of the CMR have been redacted to preserve the confidentiality of information relating to taxpayers not involved in this proceeding. A United States Postal Service (USPS) representative affixed a postmark to each attached page of the CMR and initialed the last page.

8. Page 198 of the CMR indicates four notices of deficiency with certified control numbers 7104 1002 9730 0161 7296, 7104 1002 9730 0161 7302, 7104 1002 9730 0161 7319, and 7104 1002 9730 0161 7326 were sent to “Andre Williams, 2266 5th Ave, Unit 513, New York, NY 10037-9426.” The corresponding mailing cover sheets bear the same certified control

numbers and petitioner's name and address.

9. The affidavit of Heidi Corina describes Ms. Corina's preparation of a "Request for Delivery Information/Return Receipt After Mailing," for each of the four notices of deficiency. The requests show that certified mail number 7104 1002 9730 0161 7296 was delivered on March 7, 2014 and signed for by an individual listing the recipient's address as "PO Box 513" and certified mail numbers 7104 1002 9730 0161 7302, 7104 1002 9730 0161 7319, and 7104 1002 9730 0161 7326 were delivered on March 3, 2014 and signed for by petitioner.

10. The affidavit of Bruce Peltier describes the Division's Mail Processing Center's (Center) general operations and procedures. The Center receives the notices in an area designated "Outgoing Certified Mail." A staff member operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Then, the staff member weighs, seals, and places postage on each envelope. The first and last pieces are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York area. A USPS employee affixes a postmark and places his or her signature or initials on the CMR, indicating receipt by the post office. The Center requests the USPS either circle the total number of received pieces or indicate the total number of received pieces by writing the number on the CMR. Here, each of the three included pages of the CMR contains a USPS postmark of February 24, 2014 and on page 1,741, the USPS employee wrote "19,141 pieces" and initialed under the preprinted information.

11. According to both the Nagengast and Peltier affidavits, a copy of each subject notice was mailed to petitioner on February 24, 2014.

12. According to the Corina affidavit, each subject notice was delivered to petitioner and signed for on either March 3, 2014 or March 7, 2014.

13. The Individual Taxpayer Profile Inquiry states the most recent address for Andre

Williams as 2266 5th Ave, Unit 513, New York, NY 10037-9426.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a Notice of Deficiency (Tax Law §§ 681[b]; 689[b]). It is well established the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and accordingly, protests filed even one day late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996).

B. Where, as here, the timeliness of a petition or a request for a conciliation conference is at issue, the initial inquiry is whether or not the Division has carried its burden of demonstrating the fact and date of mailing to the 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 both the fact and the date of mailing of the subject notices, the Division must show the following:

“first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice[s] 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*).

In the present matter, however, the Division does not rely upon the date of issuance of the statutory notices, but rather the date of receipt of the notices by the taxpayer. Under these circumstances, the 90-day period for filing either a petition or a request for a conciliation conference commences with the date of actual notice (*see Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

C. The Division has not offered sufficient proof to establish mailing the statutory notices on February 24, 2014 to petitioner's last known address. The CMR submitted contains only three of the 1,741 pages and was thus incomplete. Here, the record shows petitioner received

actual notice of the subject notices of deficiency on March 3, 2014 and March 7, 2014, respectively. Specifically, the Nagengast and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets, as well as on the CMR, and the inclusion of such mailing cover sheets, along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheet related to each notice mailed to petitioner confirms the control numbers listed thereon are consistent with the control numbers listed on the CMR and the USPS responses to the Division's request for delivery information. The documentation provided to the division by the USPS shows the articles of mail bearing such certified control numbers were delivered to petitioner's address and signed for on March 3, 2014 and March 7, 2014, respectively. Petitioner, thus, received actual notice of the subject notices of deficiency on those dates.

D. Where there is a flaw in proof of mailing, such flaw may be overcome by other evidence of mailing in the record (*see Matter of Rywin, Inc.*, Tax Appeals Tribunal, April 24, 2008). The Division has provided the necessary additional evidence in this matter. Specifically, the USPS delivery information accompanying the Corina affidavit shows copies of the notices at issue, addressed to petitioner, which were also listed on the CMR, were delivered, as addressed, on March 3, 2014 and March 7, 2014. This evidence establishes the fact of receipt of the subject notices, as claimed, on March 3, 2014 and March 7, 2014 (*see Matter of Winner's Garage, Inc.*, Tax Appeals Tribunal, May 20, 2010). Additionally, petitioner does not contest receipt of the notices.

E. In response to the notice of intent to dismiss the petition, petitioner submitted an affirmation, which asserts that the employer is the liable party for the payment of taxes on wages. Petitioner further asserts he is not the properly identified party to withhold the tax in question and as such he has not been made liable to pay the imposed tax. Petitioner also requested he be allowed to pursue this matter in the interest of justice.

F. Where the Division fails to establish proper mailing of a statutory notice, the 90-day period for filing either a petition or a request for conciliation conference is tolled until the date of actual notice (*Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008; *Matter of Riehm*). Here, the period within which to challenge the notices commenced to run on the date of such actual receipt of the notices by petitioner, i.e., March 3, 2014 or March 7, 2014, and petitioner was required to file either a Request for Conciliation Conference with BCMS or a petition with the Division of Tax Appeals, within 90 days thereafter (*Matter of Agosto v. Tax Commission of the State of New York*, 68 NY2d 891, 508 NYS2d 934 [1986], *revg* 118 AD2d 894, 499 NYS2d 457 [1986]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990). Thus, petitioner had until June 2, 2014¹ and June 5, 2014 to file a timely protest. The petition was not filed until January 28, 2015 or 331 and 327 days later, respectively. Therefore, petitioner's request for a hearing is untimely and the Division of Tax Appeals is without jurisdiction (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006).

G. The petition of Ankh-Ka-Ra Sma-Ntr, formerly known as, Andre Williams, is hereby dismissed.

DATED: Albany, New York
June 11, 2015

/s/ Daniel J. Ranalli
SUPERVISING ADMINISTRATIVE LAW JUDGE

¹ The actual 90-day date would have been June 1, 2014, but since that was a Sunday, the date is moved to Monday, thus, June 2, 2014.