

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DENNIS BIANCO	:	DECISION
	:	DTA NO. 817245
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1990 through 1997.	:	

Petitioner Dennis Bianco, 1469 Lexington Avenue, New York, New York 10128-2525, filed an exception to the determination of the Administrative Law Judge issued on September 28, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation's Bureau of Conciliation and Mediation Services correctly denied petitioner's request for a conciliation conference on the basis that such request was not filed in a timely manner.

II. Whether petitioner has carried his burden of proving that the notice and demand issued by the Division of Taxation should not be upheld.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation (“Division”) issued to petitioner, Dennis Bianco, 1469 Lexington Avenue, New York, New York 10128-2525, seven notices of deficiency dated January 11, 1999, identified by Assessment ID Nos. L015476459, L015476460, L015476461, L015476463, L015476467, L015476472 and L015518586 and certified mail control numbers P 911 004 694, P 911 004 695, P 911 004 696, P 911 004 697, P 911 004 698, P 911 004 699, and P 911 004 700, asserting personal income tax due for the tax years 1990 through 1996, in the following amounts:

Assessment No.	Tax	Interest	Penalty	Total Amount Due
L015476459	\$936.00	\$131.27	\$477.30	\$1,544.57
L015476460	334.00	77.70	326.53	738.23
L015476461	868.00	381.78	762.42	2,012.20
L015476463	239.00	150.78	240.23	630.01
L015476467	3,858.00	2,040.40	3,350.02	9,248.42
L015476472	1,439.00	1,120.42	1,664.24	4,223.66
L015518586	2,812.00	949.11	1,511.28	5,272.39

The notices of deficiency are addressed to “1469 Lexington Ave, New York, NY 10128-2525.”

The notices of deficiency state that “You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 04/11/99.” Each notice then states, in part, “[i]f we do not receive a response to this notice by 04/11/99: This notice will become an assessment subject to collection action.”

The Division also issued to petitioner a Notice and Demand for Payment of Tax Due dated December 21, 1998, which petitioner protested. It was identified by Assessment ID No. L015949241 and asserted personal income tax due for the tax year 1997 in the amount of \$1,665.00, plus interest and penalty of \$81.77 and \$151.89, respectively, for a total amount due of \$1,898.66. It was issued as a result of petitioner's filing of his 1997 New York State personal income tax return without remittance of the tax as set forth on the return.

Petitioner made a request for a conciliation conference concerning the seven notices of deficiency and the notice and demand on April 13, 1999.

A Conciliation Order Dismissing Request, dated May 7, 1999, was issued by the Bureau of Conciliation and Mediation Services ("BCMS") bearing the following explanation:

The Tax Law requires that a request be filed within 90 Days from the date of the statutory notice. Since the notices were issued on December 21, 1998 and January 11, 1999, but the request was not mailed until April 13, 1999, or in excess of 90 days, the request is late filed.

A timely petition was filed by petitioner with the Division of Tax Appeals in protest of the Order on August 2, 1998.

Concerning the notices of deficiency, the Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter "CARTS") Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office. These affidavits describe the general procedures for the

preparation and mailing of the notices of deficiency, and describe how such procedures were followed in this case.

The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Zip +4 Minimum Discount Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for review and processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Then a mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. A random review of 30 or fewer pieces of certified mail is checked against the information on the CMR. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A USPS employee affixes a postmark and initials or a signature to the CMR indicating receipt of the mail listed on

the certified mail record and of the CMR itself. The employee of the Mail Processing Center also requests the USPS to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

In support of its position that the procedures outlined above were followed in this case, the Division has also submitted a copy of the CMR listing the notices at issue in this matter. The CMR consists of 28 pages with 11 entries on each page, with the exception of page 28 which bears 5 entries. It shows a printed date of "12/31/98" on each of the 28 pages. On page one the printed date has a line through it and above it is handwritten the date of "1-11-99." There is a consecutive listing of 302 certified control numbers beginning with P 911 004 623 and ending with P 911 004 924. On the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 302, which is circled. There is no amount next to "TOTAL PIECES RECEIVED AT POST OFFICE." There is a USPS postmark of January 11, 1999 on each of the 28 pages and initials under the number "302."

Petitioner's name is listed on pages 7 and 8 of the CMR. The certified numbers listed for the notices sent to petitioner are P 911 004 694 through P 911 004 700, which match the certified numbers shown at the top of the correspondence which accompanied petitioner's seven notices of deficiency. The notice numbers listed on the CMR for petitioner's notices are L 015476459, L 015476460, L 015476461, L 015476463, L 015476467, L 015476472, and L 015518586, which match the numbers appearing on the notices of deficiency. The name and address of petitioner is listed next and also corresponds to the information set forth on petitioner's notices. There is a USPS postmark of January 11, 1999 on pages 7 and 8 of the CMR.

The Division submitted as part of the record a copy of petitioner's resident income tax return for 1997, Form IT-201, which shows total New York State tax computed to be \$1,665.00.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that pursuant to Tax Law § 681(a), the Division is authorized to issue a Notice of Deficiency of income tax by mailing the notice to the taxpayer at his last known address by certified or registered mail. The Administrative Law Judge cited case law which provides that if the Notice of Deficiency has been properly issued, the notice is valid whether or not it is actually received by the taxpayer.

The Administrative Law Judge also stated that when a Notice of Deficiency is issued, a taxpayer has the option of filing a petition with the Division of Tax Appeals or, alternatively, requesting a conciliation conference with BCMS in order to seek a redetermination of the deficiency. Such petition or request must be filed within 90 days of the mailing of the Notice of

Deficiency. The Administrative Law Judge observed that if the Division claims that a taxpayer's protest against a notice was not timely filed, the Division must establish that it has properly mailed the notice as required. The Division may meet its burden of proof in this regard by providing evidence of its standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures. Additionally, the Division must prove that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge concluded that the affidavits of Ms. Mahon and Mr. Baisley, submitted by the Division in support of its position that the notices of deficiency were issued to petitioner on January 11, 1999, contained sufficient proof to establish the standard procedure of the Division for issuing notices. The Administrative Law Judge further concluded that these affidavits established that the Division followed its general issuance procedure on January 11, 1999 in the generation and mailing of petitioner's notices dated that day.

The Administrative Law Judge found that petitioner did not challenge the method of mailing the notices of deficiency, nor did he dispute their receipt. Petitioner was required to file his request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals within 90 days of January 11, 1999, or no later than April 12, 1999. Since his request was not made until April 13, 1999, the Administrative Law Judge concluded that it was time barred.

The Administrative Law Judge determined that the Notice and Demand, issued by the Division to petitioner pursuant to Tax Law § 692(b) for tax, penalty and interest for non-payment of the tax shown due on petitioner's 1997 return, was properly issued by the Division.

The Administrative Law Judge further concluded that petitioner's request for a BCMS conference concerning the Notice and Demand was not time barred. Accordingly, the Division was not required to prove the date of mailing of the notice. However, the Administrative Law Judge denied the petition with respect to the Notice and Demand, concluding that petitioner did not meet his burden to prove why he should not have to pay the Notice and Demand, which was based on self-assessed tax. The Administrative Law Judge rejected petitioner's explanation that his failure to pay was based on his inability to meet his financial obligations.

ARGUMENTS ON EXCEPTION

On exception, petitioner presents no arguments concerning the timeliness of his request for a conciliation conference or concerning the Notice and Demand.

OPINION

We affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and correctly applied the Tax Law and relevant case law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Dennis Bianco is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Dennis Bianco is denied with respect to the Notice and Demand

(Assessment No. L015949241) dated December 21, 1998; and

4. The petition of Dennis Bianco is hereby dismissed with respect to Notices of Deficiency Nos. L015476459, L015476460, L015476461, L015476463, L015476467, L015476472 and L015518586 dated January 11, 1999.

DATED: Troy, New York
May 31, 2001

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner