

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANGELO DELSIGNORE	:	
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 1993 and for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1991 through February 28, 1995.	:	DECISION DTA NO. 818157

Petitioner Angelo DelSignore, 914 Pierce Avenue, Bronx, New York 10462, filed an exception to the determination of the Administrative Law Judge issued on November 27, 2002. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation did not file a brief in opposition to petitioner's exception. Oral argument was not requested.

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

ISSUE

Whether the Division of Taxation is entitled to summary determination in its favor because petitioner failed to file a petition or request for a conciliation conference within 90 days of the issuance of the notices of deficiency and determination.

FINDINGS OF FACT

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

On November 17, 2000, the Division of Tax Appeals received a petition challenging notices which asserted deficiencies of personal income tax and assessed deficiencies of sales and use tax.

In response to the petition, the Division of Taxation ("Division") filed a Motion for Summary Determination on the grounds that petitioner failed to file a request for a conciliation conference or file a petition for a hearing within 90 days of the issuance of the notices of determination or notices of deficiency. In support of the motion, the Division submitted, among other things, an affidavit from Geraldine Mahon which attests to the regular procedures followed by the Case and Resource Tracking System ("CARTS") with respect to the processing of statutory notices prior to their shipment to the Division's Mechanical Section for mailing.

As part of Ms. Mahon's regular duties, she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the "certified mail record." Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

The certified mail record pertaining to the mailing at issue consisted of 27 fan-folded (connected) pages and included the notices issued to Angelo DelSignore on November 17, 1995. The certified mail record has all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon. The certified control numbers run consecutively and there are 11 entries on each

page with the exception of page 27 which contains 10 entries. Portions of the certified mail record have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

In the upper left hand corner of the first page of the certified mail record the date November 8, 1995 was manually changed to November 17, 1995. The original date of November 8, 1995 was the date that the certified mail record was printed. The certified mail record is printed approximately 10 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 and processed for postage by the Division's Mechanical Section. The handwritten change of the date from November 8, 1995 to November 17, 1995 was made by personnel in the Division's Mail Processing Center. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered to the U.S. Postal Service.

Each statutory notice is placed in an envelope by Division personnel and delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this instance, a Postal Service representative initialed page 27 of the certified mail record, wrote the total number of pieces received at the post office on the same page and affixed a postmark to each page of the certified mail record. 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. The procedures followed and described are the normal and regular procedures of the CARTS control unit.

As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered the certified mail record and a copy of each of the notices. On its face, the information on the certified mail record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled “NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR PRESORT QUALIFIED MAIL.” The upper right-hand corners of the pages are consecutively numbered from page 1 to page 27. The upper left-hand corner of each page contains the printed date of “11/08/95.” On the first page, this date was crossed out and a new date of “11-17-95” was written above the original printed date. Each of the pages contains columns labeled “Certified No.,” “Notice number,” “Name of Addressee, Street and P.O. Address,” “Postage,” “Fee” and “RR Fee.” Certified numbers are listed in a vertical column on the left side of each page. Pages six and seven contain entries which set forth petitioner's name and address, notice numbers L 011383103¹ through L 011383109 and L 011383113 using control numbers P 911 171 357 through P 911 171 363 and P 911 171 367. The notice numbers correspond with the ones found on the notices which are attached to the affidavit of Ms. Mahon. On page 27, the “total pieces and amounts listed” is stated to be 296. Also, the number 296 is handwritten and initialed adjacent to the line for “total pieces received at post office.” In addition, the total fee of \$325.60 is consistent with the mailing of 296 pieces of mail at a fee of \$1.10 per item. A date stamp appears on each page of the certified mail record which accompanied the affidavit of Geraldine Mahon. With the exception of pages 6, 7 and 18,

¹ Assessments L-011383103 and L-011744209 were not protested but were listed on the Consolidated Statement of Tax Liabilities attached to the petition. These assessments were paid in full. Although assessment L-011383103 is not in issue, it was mentioned above because it is part of a series of notices which were mailed at the same time.

the stamp is sufficiently legible to determine that it bears the date of “November 17, 1995” and was from the Colonie Center Branch of the United States Postal Service. Although it is clear that a stamp was placed on pages six and seven of the certified mail record, portions of the stamp are not legible.

As exhibits, the Division offered copies of the notices which were dated November 17, 1995. The first notice was a Notice of Estimated Determination which listed assessment number L-011383103-3 and assessed sales and use tax in the amount of \$16,266.46. The Division then offered six notices of determination which assessed sales and use tax as follows: assessment number L-011383104-2 in the amount of \$2,276.31, assessment number L-011383105-1 in the amount of \$3,003.25, assessment number L-011383106-9 in the amount of \$2,009.05, assessment number L-011383107-8 in the amount of \$13,199.36, assessment number L-011383108-7 in the amount of \$15,788.54, and assessment number L-011383109-6 in the amount of \$13,941.92. Lastly, the Division offered a Notice of Deficiency which asserted a deficiency of withholding tax, in the amount of \$333.40 (assessment number L-011383113-3).

The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service (“USPS”). Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for outgoing certified mail. A certified mail record is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine, which places each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes.

A mail processing clerk checks the first and last pieces of certified mail listed on the certified mail record against the information contained on the certified mail record. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the certified mail record by checking those envelopes against the information contained on the certified mail record.

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. A USPS employee will then affix a postmark and his or her initials or signature to the certified mail record indicating receipt of the mail listed on the certified mail record and of the certified mail record itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the certified mail record is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the certified mail record. On the following day, the certified mail record is picked up at the USPS by a member of the Mail Processing Center staff, whereupon it is delivered to the Carts Control Unit. The certified mail record retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The foregoing procedures were the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and these procedures were followed on November 17, 1995.

The Division also presented a set of documents with respect to the mailing of a Notice of Determination, assessment number L-011380231, on November 20, 1995. However, after the

motion was filed, petitioner's representative advised the Division of Tax Appeals that this notice was canceled by the Audit Division. Thereafter, the Audit Division confirmed that the notice had been canceled and was not in issue.

Angelo and Antonina DelSignore filed a New York State personal income tax return for the year 1994 which stated that petitioner's address was 914 Pierce Avenue, Bronx, New York 10462-4007. This is the same address which appears on the notices and certified mail record of November 17, 1995.

The petition of Mr. DelSignore was received by the Division of Tax Appeals on November 17, 2000. The postmark on the envelope used to mail the petition is illegible. Among other things, the petition stated that the 90-day period to protest a notice did not begin because the taxpayer never received a copy of the notice of determination. It was asserted that he became aware of the liability through collection proceedings.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a party may move for summary determination after issue has been joined. The motion shall be granted if upon all the papers and proof submitted, the Administrative Law Judge finds that no material and triable issue of fact is presented. However, the motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact.

The Administrative Law Judge observed that pursuant to Tax Law § 689(b) and § 1138(a)(1), a petition contesting the notices at issue herein had to be filed within 90 days after the date of mailing of the notices. Unless a petition is filed within 90 days of the issuance of a notice, the Division of Tax Appeals has no authority to consider the petition.

The Administrative Law Judge stated that where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the notices. In this regard, the Division must prove the standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures and also prove that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge determined that the affidavits of Geraldine Mahon and James Baisley provided adequate proof of the Division's standard mailing procedure for the mailing of statutory notices like the ones mailed to petitioner. The Administrative Law Judge also found that these affidavits established that the standard mailing procedure was followed with respect to the notices issued to petitioner by certified mail on November 17, 1995.

The Administrative Law Judge rejected petitioner's argument that the affidavits of Mrs. Mahon and Mr. Baisley are deficient because they did not establish that the notices in issue were actually mailed to petitioner. The Administrative Law Judge cited applicable case law which established that there was no requirement to produce employees with personal knowledge of the mailing of each individual notice of determination.

The Administrative Law Judge also rejected petitioner's argument that the Division's proof was deficient because pages six and seven of the certified mail log of November 17, 1995 lacked initials or a legible postal stamp to substantiate the mailing. The Administrative Law Judge concluded that flaws in the postmark were outweighed by other considerations. The Administrative Law Judge noted that it is clear that a stamp was placed on each page of the certified mail record and, with the exception of one other page, the stamp was legible. Further, at the time the certified mail record was brought to the post office, all of the pages were

connected and they remained connected when the document was returned to the Division. The Administrative Law Judge concluded that under these circumstances, the only reasonable inference to draw was that the same stamp was used on each page of the mail record and that the stamp was placed on each of the pages of the mail record at the same place and time.

The Administrative Law Judge did not accept petitioner's position that the proof of mailing was insufficient because it was unclear whose initials appeared on the last page of the mailing log. The Administrative Law Judge found it reasonable to conclude that the initials belonged to an employee of the Postal Service and there was no requirement that the Division be able to identify the person whose initials appeared on the certified mail record.

The Administrative Law Judge also concluded that despite the slight discrepancy between the affidavits of Mr. LaFar and Ms. Mahon regarding whether the standard practice is for a signature or initials to be placed on the certified mail record, the difference was insignificant. As it was standard practice for a postal employee to indicate by his or her initials or signature or stamp that the Postal Service received the indicated number of pieces of mail, the Administrative Law Judge found that the standard practice was followed herein.

The Administrative Law Judge concluded that since the Division established that the notices in issue were mailed on November 17, 1995 and that the petitioner filed his petition with the Division of Tax Appeals on November 17, 2000, the petition was untimely.

The Administrative Law Judge granted the motion of the Division for summary determination and dismissed the petition of Angelo DelSignore with respect to assessments numbered L-011383104-2; L-011383105-1; L-011383106-9; L-011383107-8; L-011383108-7; L-011383109-6; and L-011383113-3. The Administrative Law Judge rendered no

determination with respect to the Division's motion for summary determination regarding notice number L-011380231 because he found that the issues raised by the motion were moot.

ARGUMENTS ON EXCEPTION

On exception, petitioner questions how Ms. Mahon, whose affidavit was submitted by the Division as proof of its mailing of the notices, could possibly know which notices were actually mailed on November 17, 1995 when the certified mail log for that date was printed on November 8, 1995 and may have listed documents that were not actually mailed. Petitioner also argues that the proof of mailing is defective because there are no initials on pages six or seven of the certified mail log where the notices issued to Angelo DeISignore are listed in order to substantiate the mailing or determine whether certain notices were pulled for corrections. Petitioner further asserts that the stamp on pages six and seven of the November 17, 1995 certified mail record, which does not identify the post office or the purported postal employee's initials or the date, does not rise to the level of proof to show actual mailing.

Petitioner maintains that the affidavit of Mr. Baisley, submitted by the Division as proof of the mailing of the notices, is deficient because he cannot attest six years after the fact that a procedure actually occurred since he did not review the mail log on a contemporary basis. Petitioner alleges that it is not clear that pages six and seven of the certified mail log were stamped by the United States Postal Service or whether the letters on page 27 of that log bear a postal employee's initials or someone else's. Therefore, petitioner questions whether the affidavits of mailing are sufficient in light of *Matter of McNamara* (Tax Appeals Tribunal, January 30, 1997 [wherein it was found that an unclear postage meter stamp and extraneous markings on an envelope which was purported to contain the notice mailed to the taxpayer

presented material and triable issues of fact concerning the date on which the notice was mailed]). Petitioner also questions whether a signature of a postal employee is required or whether initials are sufficient.

OPINION

Petitioner has provided the same arguments on exception that were considered and rejected by the Administrative Law Judge. We find that the Administrative Law Judge adequately and correctly addressed the issues presented to him and petitioner has presented no evidence below or argument on exception to cause us to modify the Administrative Law Judge's determination in any respect. Thus, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Angelo DelSignore is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Angelo DelSignore is dismissed.

DATED: Troy, New York
May 1, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner