

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN DASKALIS	:	DECISION
	:	DTA NO. 819503
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the	:	
Period Ended June 30, 2001.	:	

Petitioner John Daskalis, 36-45 202nd Street, Bayside, New York 11361-1119, filed an exception to the determination of the Administrative Law Judge issued on January 15, 2004. Petitioner appeared by Eric W. Olson, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner timely filed a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Deficiency.

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, John Daskalis, a Notice of Deficiency, dated January 22, 2002, addressed to petitioner at “36-45 202 Street, Bayside, NY 11361-1119.” The notice bore assessment identification number L-020502769-4 and asserted a total amount due of \$430,000.00. As indicated by the computation summary section of the notice, this amount consisted wholly of withholding tax for the period ended March 31, 2001.¹

On February 11, 2003, petitioner filed a Request for Conciliation Conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the Notice of Deficiency dated January 22, 2002.

On February 28, 2003, BCMS issued a Conciliation Order Dismissing Request to petitioner. The order stated, in part, as follows:

The Tax law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on January 22, 2002, but the request was not received until February 14, 2003, or in excess of 90 days, the request is late filed.

Notices of deficiency, such as the one at issue herein, were computer-generated by the Division’s Computerized Case and Resource Tracking System (“CARTS”) Control Unit. The computer preparation of such notices also included the preparation of a certified mail record (“CMR”). The CMR listed those taxpayers to whom notices of deficiency were being mailed and also included, for each such notice, a separate certified control number. The pages of the

¹Although petitioner protested two notices in his petition, the Division has conceded in its answer that the second notice, number L-020502768-5, had been paid in full and was no longer in issue.

CMR remained connected to each other before and after acceptance of the notices by the United States Postal Service (“USPS”) through return of the CMR to the CARTS Control Unit.

Each computer-generated notice of deficiency was pre-dated with its anticipated mailing date, and each was assigned a certified control number. This number was recorded on the CMR under the heading “Certified No.” The CMR listed an initial date (the date of its printing) in its upper left hand corner which was approximately 10 days earlier than the anticipated mailing date for the notices. This period was provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR was manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case, page 1 of the CMR listed an initial date of January 9, 2002 which was manually changed to January 22, 2002.

After a notice of deficiency was placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer weighed and sealed each envelope and affixed postage and fee amounts thereon. A Mail Processing Center clerk then counted the envelopes and verified by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivered the stamped envelopes and associated CMR to one of the various branch offices of the USPS located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepted the envelopes into the custody of the USPS and affixed a dated postmark or his signature or initials, or both, to the CMR.

In the ordinary course of business, a Mail Processing Center employee picked up the CMR from the USPS on the following day and returned it to the CARTS Control Unit.

In the instant case, the CMR was a 34-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Non-Presort Mail.” All pages were connected when the document was delivered into the possession of the USPS and remained connected when the postmarked document was returned after mailing. This CMR listed 371 control numbers. Each such certified control number was assigned to an item of mail listed on the 34 pages of the CMR. Specifically, corresponding to each listed certified control number was a notice number, the name and address of the addressee, and postage and fee amounts.

Information regarding the Notices of Deficiency issued to petitioner was contained on page 14 of the CMR. Corresponding to certified control number 7104 1002 9739 0066 9181 was notice number L 020502768 and corresponding to certified control number 7104 1002 9739 0066 9198 was notice number L 020502769, along with petitioner’s name and address, which was identical to that listed on the subject Notice of Deficiency.²

Each page of the CMR bore the postmark of the Colonie Center Branch of the U.S. Postal Service, dated January 22, 2002, and the initials of the postal employee, verifying receipt of the items.

The last page of the CMR, page 34, contained a preprinted entry of “371” corresponding to the heading “Total Pieces and Amounts Listed.” This preprinted entry was manually circled and beneath it was the aforementioned postmark of the Colonie Center Branch of the USPS and the initials of a Postal Service employee. These same initials appeared on each page of the CMR.

²As noted above, the former notice is not in issue herein.

The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circling of the “371” indicated that all 371 pieces listed on the CMR were received at the post office.

In the ordinary course of business, the Division generally did not request, demand or retain return receipts from certified or registered mail.

The facts set forth above were established through the affidavits of Geraldine Mahon and Daniel LaFar. Ms. Mahon was employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties included supervising the processing of notices of deficiency. Mr. LaFar was employed as a Principal Mail and Supply Clerk in the Division’s Mail Processing Center. Mr. LaFar’s duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

The address on the subject Notice of Deficiency, 36-45 202 Street, Bayside, NY 11361-1119, was the same as the address provided on petitioner’s New York State Resident Income Tax Return for the year 2000, filed electronically on April 15, 2001, the last return filed before the notices herein were issued. In addition, the same address was used by petitioner on his power of attorney form, dated August 16, 2000.

Petitioner does not deny receiving the notices of deficiency herein, but claims he received them in June of 2002.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination may 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 and, as a matter of law, a determination can be issued in favor of any party.

The Administrative Law Judge observed that pursuant to Tax Law § 681(a), the Division of Taxation may mail a Notice of Deficiency to a taxpayer by certified or registered mail to the taxpayer at his last known address in or out of this state where the tax commissioner determines that there is a deficiency. The Administrative Law Judge found that in this case, the address listed on the subject Notice of Deficiency was petitioner's last known address as indicated by the address provided on his New York State Resident Income Tax Return for the year 2000.

The Administrative Law Judge also stated that a petition contesting a notice of deficiency or a request for a conciliation conference with BCMS must be filed within 90 days after the date of mailing of the notice as a prerequisite to the jurisdiction of the Division of Tax Appeals over the merits of the case. The Administrative Law Judge cited relevant case law establishing that when the timeliness of a taxpayer's protest of a notice is at issue, the Division has the burden of proving proper mailing of the notice by providing evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing. Where proper mailing is established, a presumption of delivery arises. The Administrative Law Judge found that the Division introduced adequate proof of its standard mailing procedures and also presented sufficient documentary proof to establish that the Notice of Deficiency in issue was mailed to petitioner on January 22, 2002.

The Administrative Law Judge noted that in petitioner's response to the Division's motion, he did not deny receiving the notice in issue. Rather, petitioner merely averred that he did not receive the notice for approximately six months after it was mailed by the Division. The

Administrative Law Judge rejected petitioner's unsubstantiated allegation that he did not receive the notice in issue until June of 2002 as being of no consequence. Moreover, the Administrative Law Judge found that petitioner presented no evidence to contest the facts alleged in the Mahon and LaFar affidavits. The Administrative Law Judge found that petitioner's statement did not rebut the presumption of delivery established through proof of a standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing.

The Administrative Law Judge found that petitioner's request for a conciliation conference was filed on February 11, 2003, over a year after the date of mailing of the Notice of Deficiency, and, therefore, the request was untimely filed. As a result, the Administrative Law Judge concluded that the Division was entitled to summary determination herein.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he did not receive the Notice of Deficiency until June 2002. Further, petitioner claims that he did not receive the Administrative Law Judge's determination, which was sent via certified mail, despite three attempts at delivery. Petitioner maintains that his failure to receive the determination sent via certified mail rebuts the presumption of receipt of the notices of deficiency mailed to him on January 22, 2002.

OPINION

Pursuant to the records of the Division of Tax Appeals, petitioner failed to claim the envelope containing the Administrative Law Judge's determination which was sent to petitioner by certified mail on January 15, 2004 after three delivery attempts were made. This has no bearing on whether or not the Division of Taxation properly mailed the Notice of Deficiency at issue to him in January 2002. Further, even if petitioner's time to protest the subject Notice of

Deficiency by filing a petition with the Division of Tax Appeals or requesting a conciliation conference with the Bureau of Conciliation and Mediation Services did not start to run until the date he alleges he actually received said notice, petitioner's request for a conciliation conference would still have been untimely.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant 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. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED: Troy, New York
August 19, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner