

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM HELTON	:	DECISION
	:	DTA NO. 819517
for Revision of a Determination or for Refund of Tax on	:	
Cigarettes and Tobacco Products under Article 20 of the	:	
Tax Law for the Period August 8, 2002.	:	

Petitioner William Helton, 1925 McGraw Avenue, Bronx, New York 10462-7975, filed an exception to the determination of the Administrative Law Judge issued on January 22, 2004. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a reply brief. 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 filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

The Division of Taxation ("Division") issued a Notice of Determination, dated December 9, 2002, which was addressed as follows: "WILLIAM HEITON [sic], 1925 MCGRAW AVE, BRONX, NY 10462-7975." The notice bore assessment identification number L-021861817-4 and assessed a penalty in the amount of \$3,630.00 for the period August 8, 2002. The notice provides, in its computation section, the following explanation: "[o]n 08/08/02, you were found to be in possession of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products. Therefore, penalty is imposed under article 20 of the New York State Tax Law."

The Division received from petitioner, William Helton, a document titled "Request for Conciliation Conference" (Form DTF-996.30). The request form, in its preprinted area is addressed as follows: "WILLIAM HEITON [sic], 1925 MCGRAW AVE, BRONX, NY 10462-7975," and references assessment ID number L-021861817-4. William Helton's signature and the handwritten date of "4 - 4 - 03" appear at the bottom of the request form. The basis of the disagreement is not set forth on the request form. A separate sheet contains petitioner's request for a conciliation conference and his statement of disagreement with the assessment. This handwritten statement is signed by "Will Helton."

The request form and the separate sheet, each bear the receipt stamp of the Division's Bureau of Conciliation and Mediation Services ("BCMS") indicating Albany, New York and the

date April 14, 2003. There is no copy of the envelope used to mail the Request for Conciliation Conference.¹

A Conciliation Order Dismissing Request, dated May 2, 2003, was issued to “William Heiton” [sic] by BCMS, bearing the following explanation:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on December 9, 2002, but the request was not mailed until April 11, 2003, or in excess of 90 days, the request is late filed.

On June 12, 2003, the Division of Tax Appeals received the petition of William Helton, dated June 1, 2003, seeking review of the determination issued in this matter. The petition addresses only the merits of the tax assessment, not the issue of the timeliness of his request for conciliation conference. Petitioner’s address is listed as 1925 McGraw Ave., Bronx, NY 10462 on both the petition and the envelope used to mail the petition.

We make the following additional finding of fact.

On October 3, 2003, the Division of Taxation, by its representative, Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), filed a motion for an order granting summary determination to the Division of Taxation pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the grounds that petitioner failed to file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals for an administrative hearing within 90 days of the issuance of a Notice of Determination to petitioner. Petitioner, appearing *pro se*, did not respond to the Division of Taxation’s motion.

¹ Although Ms. Helm’s affidavit states that a copy of the envelope used to mail the Request for Conciliation Conference to the Division is attached to her affidavit, it is not. Rather, the record includes a photocopy of an envelope, in which the petition was mailed to the Division of Tax Appeals, that bears the United States Postal Service (“USPS”) postmark of June 10, 2003.

Notices of determination, such as the one at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

CARTS also generates a one-page Mailing Cover Sheet with the corresponding certified number for each notice. This cover sheet (Form DTF-997) also bears a bar code, the taxpayer's mailing address and the Division's return address on its front, as well as taxpayer assistance information on its reverse side. In addition, CARTS generates any enclosures referenced within the body of each notice, and these enclosures, together with the mailing cover sheet and the notice itself, form a discrete unit within the batch of notices listed on the CMR. The mailing cover sheet is the first sheet in the unit.

Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." Initially, the CMR is dated with the year, Julian day and military time of its printing in its upper left hand corner, in this case 20023331700, or November 29, 2002 at 5:00 P.M. The CMR is printed approximately ten days in advance of the anticipated mailing date of the notices in order to ensure that there is sufficient lead time for the notices to be manually reviewed and thereafter processed for postage and fees by the Division's Mail Processing Center prior to mailing. In the upper left hand corner of page 1 of the CMR, the

actual date of mailing of the notices is handwritten by Division personnel. In this case, the date of “12/9” has been handwritten in the upper left hand corner of page 1 to indicate and confirm December 9th as the date of mailing.

After a notice of determination is placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer places the statutory notice and associated documents into a window envelope, weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center Clerk then counts the envelopes and verifies 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 delivers the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service located in the Albany, New York area, in this instance the Colonie Center branch, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or initials, or both, to the CMR.

In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the CARTS Control Unit.

In the instant case, the CMR is a 35-page, fan-folded (connected) computer-generated document entitled “Assessments Receivable Certified Record for Presort Non-Qualified Mail.” All pages are connected when the postmarked document is returned after mailing. This CMR lists 376 certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified number is a notice number, the name and address of the addressee, and postage and fee amounts. Each page of the CMR contains 11 entries with the exception of page 27 which contains 10 entries (one of the original entries, certified number

7104 1002 9730 1894 0415, has been crossed out) and the last page 35 which contains only 2 entries for a total of 375 entries. The crossed out item represents an article of mail which was removed or “pulled” from the group of items being mailed.

Information regarding the subject Notice of Determination is contained on page 8 of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1893 8544 is notice number L 021861817, along with the name and address, “William Heiton, [sic] 1925 McGraw Ave., Bronx, NY 10462-7975,” which is identical to that listed on the subject Notice of Determination. The notice numbers, names and addresses of other taxpayers to whom statutory notices were issued, as reflected on the CMR in question, have been redacted to preserve the confidentiality of information relating to such other taxpayers.

The CMR is date stamped December 9, 2002 on each of its pages by the Colonie Center branch of the USPS in Albany, New York and each page bears the illegible signature or initials of a Postal Service employee.

The last page of the CMR, page 35, contains a pre-printed entry of 376 as the “Total Pieces and Amounts Listed.” This figure has been manually crossed out and beneath it, corresponding to the listing “Total Pieces Received at Post Office,” the handwritten number “375” appears. In addition, this handwritten figure has been manually circled and beneath it is the illegible signature or initials of a Postal Service employee.

The affixation of the Postal Service postmark, the crossed-out “376,” the signature or initials of the Postal Service employee, and the handwritten number “375,” as described above, indicate, consistently with the deletion by cross out of one item of “pulled” mail as described,

that 375 out of 376 pieces of mail initially listed on the CMR were received into the custody of the USPS on December 9, 2002.

The facts set forth above were established through affidavits of Geraldine Mahon and Daniel LaFar. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties include supervising the processing of notices of determination. Mr. LaFar is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. LaFar's duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

The fact that the Postal Service employee circled the total number of pieces received on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. LaFar. Mr. LaFar's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

The Division generally does not request, demand or retain return receipts from certified or registered mail.

The address on the subject Notice of Determination is the same as the address listed on the petition filed in this matter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that a motion for summary determination may be granted if, upon all the papers and proof submitted, it has been established sufficiently 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. As petitioner did not respond to the Division's motion and presented no evidence to contest the facts alleged in the Mahon and LaFar affidavits, the Administrative Law Judge found that he was deemed to have admitted those facts and to have conceded that no question of fact requiring a hearing exists.

The Administrative Law Judge noted that a taxpayer who seeks a revision of a Notice of Determination for additional tax or penalties due under Article 20 of the Tax Law may file a petition with the Division of Tax Appeals seeking revision of such determination, or alternatively, a request for conciliation conference with BCMS, *within 90 days of the mailing of the notice of determination.*

Where the Division claims a taxpayer's protest against a notice was not timely filed, the Administrative Law Judge observed that the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail. The Administrative Law Judge pointed out that the burden of demonstrating proper mailing rests with the Division, which may meet this burden by providing evidence of its standard procedure for the issuance of statutory notices by one with knowledge of the relevant procedures, and proof that the standard procedure was followed in this particular instance.

The Administrative Law Judge found that the Division provided sufficient evidence to establish that it properly mailed the subject Notice of Determination to petitioner on December 9, 2002.

The Administrative Law Judge found that while the notice of determination erroneously states that petitioner's name is William "Heiton" rather than William "Helton," this error in the

spelling of petitioner's last name was not sufficient to invalidate the notice. Further, the Administrative Law Judge noted that there was no claim that petitioner did not receive the notice nor any claim that petitioner was unaware that the basis of the penalty being asserted was his possession of untaxed cigarettes on August 8, 2002.

The Administrative Law Judge concluded that petitioner's request for a conciliation conference could not have been filed earlier than April 4, 2003, the date petitioner signed the request and this date falls beyond the 90-day period of limitations for the filing of such a request. Therefore, the Administrative Law Judge determined that petitioner's request was untimely filed. The Administrative Law Judge granted the Division of Taxation's motion for summary determination and dismissed the petition of William Helton with prejudice.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the misprint of his name on the Notice of Determination caused a delay in his receipt of the notice, leaving him insufficient time to retain an attorney or respond in a timely fashion.

OPINION

Petitioner has offered no evidence below, and no argument on exception, which demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William Helton is denied;

2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of William Helton is dismissed.

DATED: Troy, New York
September 30, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner