

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRANK PECORARO	:	DECISION
	:	DTA NO. 823006
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 2004.	:	

Petitioner, Frank Pecoraro, filed an exception to the determination of the Administrative Law Judge issued on December 23, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, 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. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this decision.

ISSUE

Whether the Administrative Law Judge properly granted the Division of Taxation's motion for summary determination on the ground that petitioner failed to file a timely request for a conciliation conference 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, Frank Pecoraro, at his New City, New York, address, a Notice of Deficiency, dated September 22, 2008, which asserted New York State personal income tax for the year 2004 in the amount of \$861.81 plus penalty and interest for a balance due of \$1,353.89. By his request for conciliation conference, dated January 5, 2009, petitioner protested the notice, numbered L-030267983-7.

On January 23, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, in part:

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 September 22, 2008, but the request was not mailed until January 5, 2009, or in excess of 90 days, the request is late filed.

To show proof of proper mailing of the notice dated September 22, 2008, the Division provided the following: (i) an affidavit, dated September 18, 2009, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (ii) an affidavit, dated September 16, 2009, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked September 22, 2008; and (iv) a copy of petitioner's personal income tax return for the year 2005, dated May 12, 2008, which was the last filing from petitioner prior to the issuance of the notice.

The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices, as follows. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the 16-page CMR lists an initial date, which is

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 to "9/22/08," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." Page 6 of the CMR contains information on the subject notice and establishes that on September 22, 2008 a notice with the control number 7104 1002 9730 0855 5799 was sent to petitioner at his New City, New York, address.

The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center (Center), describes the Center's general operations and procedures, as follows. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New

York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 170. This number is circled and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date September 22, 2008, confirming that the notices were mailed on that date.

Petitioner's New City, New York, address on the CMR and Mailing Cover Sheet matches the address listed on his personal income tax return for 2005. This is the last return that petitioner filed with the Division before the issuance of the subject notice of deficiency. The same address is listed on petitioner's request for conciliation conference and petition.

As noted, the request for conciliation conference was dated January 5, 2009. A stamp shows that the request was received by BCMS on January 7, 2009.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a motion for summary determination shall be granted if it is established that no material and triable issue of fact is presented and that a determination can be issued, as a matter of law, in favor of any party.

The Administrative Law Judge observed that where the Division claims that a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on whether the Division

can demonstrate proper mailing of the notice by certified or registered mail to petitioner's last known address.

The Administrative Law Judge cited applicable case law holding that in order to prove the fact and date of mailing of a statutory notice, the Division had the burden to provide evidence of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedure, as well as proof that the standard procedure was followed in the particular instance in question.

The Administrative Law Judge found that in this case, the Division introduced adequate proof of its general mailing procedures and established that the general mailing procedure was followed. The Administrative Law Judge concluded that the Division had proven that the statutory notice was mailed on September 22, 2008 to petitioner at his last known address.

The Administrative Law Judge determined that as the notice was properly mailed, the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on September 22, 2008. As petitioner's request for a conciliation conference was not mailed until January 5, 2009, which was well beyond the 90-day period, the Administrative Law Judge held that the Division of Tax Appeals had no jurisdiction over this matter and summary determination must be granted in favor of the Division.

The Administrative Law Judge considered the arguments presented by petitioner in opposition to the Division's motion to be meritless. The Administrative Law Judge noted that petitioner submitted no evidence regarding the issuance of the September 22, 2008 Notice of Deficiency or the timeliness of his request for a conciliation conference.

As a result, the Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the determination rendered by the Administrative Law Judge focuses entirely on the mailing of the deficiency. Petitioner states that the notice was issued to him in error and, thus, he addresses the merits of his petition. He does not address the timeliness issue.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. The Division filed a motion for summary determination seeking dismissal of this matter for lack of jurisdiction. The Division's motion was supported by the detailed affidavits of its employees showing proper mailing of the Notice of Deficiency issued to petitioner on September 22, 2008 to petitioner's last known address. To prevail on this motion, petitioner was required to come forward with facts and documentation sufficient to defeat the Division's motion (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Petitioner provided an affidavit concerning the merits of his claim, but did not address either the issuance of the statutory notice or the mailing of his request for a conciliation conference. As a result, it was not sufficient to defeat the Division's motion.

We find that the Administrative Law Judge has fully and correctly addressed the issue raised in this matter and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the

Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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

DATED:Troy, New York
April 29, 2010

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner