

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JONATHAN C. CRANE : **DETERMINATION**
AND SUSAN S. CRANE : DTA NO. 815909
:
for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law :
for the Years 1992 and 1993. :

Petitioners, Jonathan C. Crane and Susan S. Crane, Box 508, Woodstock, Vermont 05091, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1992 and 1993.

On September 18, 1997, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that petitioners failed to file a request for a conciliation conference within 90 days of the mailing of a notice of deficiency issued pursuant to Article 22 of the Tax Law. Petitioners' time to respond to the motion expired on October 18, 1997 which began the 90-day period for the issuance of this determination. Petitioners appear on their own behalf. The Division of Taxation appears by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel). Based on the pleadings and motion papers, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation

because petitioners did not request a conciliation conference within 90 days after the mailing of a notice of deficiency of personal income tax.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, Jonathan C. Crane,¹ a Notice of Deficiency dated November 8, 1996 asserting tax deficiencies for the years 1992 and 1993 of \$63,227.35 plus interest.

2. Petitioner faxed a copy of a Request for Conciliation Conference to the Division's Bureau of Conciliation and Mediation Services ("BCMS") which was received by BCMS on February 6, 1997, 90 days from the date of the Notice of Deficiency.

3. On February 7, 1997, BCMS received the original Request for Conciliation Conference which was delivered by courier service (DHL Worldwide Express). The Shipment Airwaybill indicates that the request was received by DHL Express for delivery to BCMS on February 6, 1997.

4. In a letter to petitioner dated February 14, 1997, John E. Skorenski, Conciliation Conferee, states:

“On February 6, 1997, the Bureau of Conciliation and Mediation Services received a Request for Conciliation Conference by facsimile transmission (fax) in the above matter.

“Pursuant to the Tax Law and Regulations, a Request for Conciliation Conference is to be filed directly with this Bureau either in person or by mail. These provisions do not allow for this filing of Requests by fax. Therefore,

¹ Although a petition was filed in the names of Jonathan C. Crane and Susan S. Crane, there is only one Notice of Deficiency in issue and, as stated, only Mr. Crane's name appears on the notice. None of the facts or issues presented in this motion relate to Mrs. Crane. The term “petitioner” will be used in this determination to refer to Mr. Crane.

your Request cannot be accepted, and no further action with regard to it can be taken by this Bureau.”

5. BCMS issued to petitioner a Conciliation Order Dismissing Request, dated March 21, 1997, (CMS No. 159642). It states:

"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 November 8, 1996, but the request was not received until February 7, 1991 [sic], or in excess of 90 days, the request is late filed."

6. On June 18, 1997, petitioners filed a petition in the Division of Tax Appeals. The petition addresses both the merits of the Division's tax assessment and the Division's claim that the request for a conciliation conference was untimely. The petition notes that the form used to request a conciliation conference does not state that filing by fax is unacceptable. It also states that an assistant of Mr. Crane asked if overnight mail was acceptable and he was informed (presumably by someone in the Division) that it was.

7. In its answer to the petition, the Division asserts that petitioners are not entitled to a hearing on the merits because the request for a conciliation conference was not filed within 90 days of the mailing of the Notice of Deficiency. The Division then filed the instant motion for summary determination which was accompanied by affidavits and other documents which establish that the Notice of Deficiency was mailed to petitioner on November 8, 1996.

Petitioners did not reply to the Division's motion.

8. The Division submitted the affidavit of Geraldine Mahon, Principal Clerk of the CARTS Control Unit of the Department of Taxation and Finance, to describe the Division's ordinary procedure for preparing notices of determination and notices of deficiency for mailing. The word "CARTS" is an acronym for Case and Resource Tracking System and refers to the Division's computerized recordkeeping system. Among other things, CARTS produces the

statutory notices which are mailed to taxpayers.

9. Ms. Mahon's regular duties include supervision of the processing of notices of deficiency and notices of determination prior to their shipment to the Division's Mechanical Section for mailing. Ms. Mahon receives a computer printout, entitled Certified Record for Non-Presort Mail, which the Division refers to as its "certified mail record" and the corresponding notices of deficiency which are listed on the certified mail record. When it is received by Ms. Mahon, the certified mail record bears the date on which it was printed on the top left hand corner of each page. The notices to be mailed are assigned a certified mail control number which appears in a column under the heading "CERTIFIED NO". The identification number of the notices are listed in a second column under the heading "NOTICE NUMBER". The notice numbers listed on the certified mail record correspond to the assessment identification numbers shown on each notice. Each notice number is followed by the name of the addressee and the address to which the notice is being mailed.

10. The Division placed in evidence a copy of the certified mail record on which the Notice of Deficiency issued to petitioner is listed. The certified mail record was printed with the date October 30, 1996 on each page. On the first page, that date was crossed out and the date November 8, 1996 was handwritten in its place. Ms. Mahon states that the certified mail record is ordinarily printed approximately 10 days in advance of the anticipated date of mailing of the notices. The handwritten change in the date is made by Division personnel to conform to the actual date that the certified mail record, along with the notices, are delivered to the possession of the United States Postal Service.

11. Ms. Mahon states that the certified mail record consists of 17 fan folded, connected, numbered pages. All pages are connected when the document is delivered into the possession

of the United States Postal Service. The pages remain connected when the document is returned to Ms. Mahon's office after mailing of the notices and stay connected unless she requests that the pages be separated. The copy of the certified mail record placed in evidence consists of 17 numbered pages. All names and addresses in the record have been redacted except those relating to petitioner. The certified mail control numbers on this document run consecutively from P 911 204 478 through P 911 204 654. Each page of the 17-page document bears a United States Postal Service, Colonie, New York, date stamp of November 8, 1996.

12. Page 1 of the certified mail record shows an article of certified mail, certified mail number P 911 204 479, addressed to Crane-Jonathan C., PO Box 508, Woodstock, VT 05091-0508. The notice number is shown as L 012845154. The certified mail control number and assessment identification numbers on the Notice of Deficiency issued to petitioner correspond to the numbers on the certified mail record.

13. In the regular course of business and as a common office practice, the Division does not request or retain certified mail return receipts.

14. In a second affidavit, James Baisley, Chief Processing Clerk in the Division's Mail Processing Center, described the Division's ordinary procedure for delivering outgoing mail to the United States Postal Service.

15. After receipt of the certified mail record and notices, a member of Mr. Baisley's staff counts the envelopes and verifies that the names and certified mail numbers on the envelopes are identical to the corresponding information appearing in the certified mail record. Each envelope is weighed and sealed and the appropriate postage and fees are placed on each one.

16. Mr. Baisley states that a member of his staff delivers the certified mail record and the envelopes to the Colonie Branch of the United States Postal Service where a postal

employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service.

17. On the copy of the certified mail record entered in evidence, a United States Postal Service date stamp of November 8, 1996 appears on each page of the certified mail record. A signature appears at the bottom of the last page. The last line of the certified mail record states: "TOTAL PIECES RECEIVED AT POST OFFICE". No information has been entered on the document next to this line. The line above it states: "TOTAL PIECES AND AMOUNTS LISTED 177". The number "177" has been circled. In his affidavit, Mr. Baisley states that a postal employee "circled the total number of pieces and signed the certified mail record to indicate that this was the total number of pieces received at the Post Office." He also states that the source of his knowledge of this fact is "that the Department's Mail Processing Center specifically requested that postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces received on the mail record."

18. The certified mail record is left in the custody of the United States Postal Service when the notices are delivered to its possession. It is normally picked up by a member of the Mail Processing Center staff on the day following delivery and returned to the originating office. The certified mail record is the Division's record of receipt by the United States Postal Service of pieces of certified mail.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

"if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party" (20 NYCRR 3000.9[b][1]).

Here, petitioners elected not to respond to the Division's motion, thus they are deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioners presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, 36 NY2d at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, I find that no material and triable issue of fact is presented, and the Division is entitled to a determination in its favor.

B. A petition contesting a notice of deficiency of personal income tax must be filed within 90 days after the mailing of the notice by certified mail to the taxpayer's last known address (Tax Law § 681[a],[b]; § 689[b]). As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see, Tax Law § 170[3-a][a]*). The filing of a petition or a request for a conference within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the fact and date of mailing of the notice (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). In this proceeding, petitioner does not contest the Division's assertion that the Notice of Deficiency addressed to Mr. Crane was mailed on

November 8, 1996; moreover, the Division's proof of mailing proves that fact. Therefore, petitioner was required to file his Request for Conciliation Conference with BCMS within 90 days of November 8, 1996, or no later than February 6, 1997.

C. The regulations governing the filing of requests for conciliation conferences state that a request for conference may be made by filing a written request "either in person at the offices in Albany" or by mail (20 NYCRR 4000.3 [a]; *see also*, 20 NYCRR 4000.7[a][1][i]). In this case, the original document was received on February 7, 1997, delivered by a courier service. Where the filing of a document is not accomplished by United States Postal Service mail delivery, the document is deemed filed on the date of receipt by BCMS (20 NYCRR 4000.7[a][1][ii]). Since the request was delivered by courier service and received 91 days after the mailing of the Notice of Deficiency, it was not filed within the 90-day statutory period. The only remaining issue is whether the Division's receipt of a facsimile on February 6, 1997 satisfies the filing requirement of section 4000.7(a)(1) of the Division's regulations.

The Division's regulations state that the filing of a document may be made "by delivery in person during business hours to [BCMS's] Albany offices" (20 NYCRR 4000.7[a][1][i]). A fax transmission cannot be said to be delivery "in person"; therefore, that provision of the regulation does not apply. Where personal delivery is made "by courier, delivery messenger or similar service", the date of receipt is deemed to be the date of filing (20 NYCRR 4000.7[a][1][i]). Inasmuch as BCMS received a fax copy of the request on February 6, 1997, it might be argued that filing of the request was made by "similar service" on the 90th day. However, the Tax Appeals Tribunal rejected this reasoning in a proceeding similar to this one where it was asked to construe its own regulations (*Matter of Rubo Sales Corp.*, Tax Appeals Tribunal, February 25, 1993). Since the wording of the relevant Division

regulations is identical to the wording of the Tribunal regulations considered in *Rubo*, it is reasonable to give the two regulations an identical interpretation.

Section 3000.17(a)(1) of the Tax Appeals Tribunal Rules of Practice and Procedure governing the filing of exceptions states, as pertinent, that a party may take exception to the determination of an administrative law judge within 30 days after notice of the determination is given “by filing an exception with the secretary” (20 NYCRR 3000.17[a][1]). Where delivery of the exception is made by courier, delivery messenger or similar services, the date of delivery is deemed to be the date of filing (20 NYCRR 3000.22[a][1], formerly 3000.16[a][1]). In *Matter of Rubo Sales Corp.* (*supra*), the petitioner argued that transmission of an exception to the Secretary of the Tax Appeals Tribunal by fax constitutes delivery by a service similar to courier or delivery messenger and thus satisfies the filing requirement of former section 3000.11(a)(1) of the rules (renumbered without change as 3000.17[a][1]). The Tax Appeals Tribunal held that the regulation requires actual physical delivery of the document and that fax transmission does not constitute actual physical delivery. Implicit in the Tribunal's holding is the premise that the original document, rather than a facsimile, must be filed to satisfy the requirement of actual physical delivery. Apparently, the Division construes its own regulations in the same way. Consequently, I must find that petitioner's Request for Conciliation Conference was not filed within 90 days of the mailing of the Notice of Deficiency.

D. The motion of the Division of Taxation for summary determination in its favor is granted, and the petition of Jonathan C. Crane and Susan S. Crane is dismissed with prejudice.

DATED: Troy, New York
January 8, 1998

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE