

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANCIS PITONE	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 817076
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1996.	:	

Petitioner, Francis Pitone, 592 Bellmore Avenue, East Meadow, New York 11554, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law the year 1996.

The Division of Taxation, by its representative, Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated July 15, 1999 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner's representative, John T. Roesch, Esq., filed an affirmation in opposition on July 22, 1999, which date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was properly denied as untimely filed.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, Francis Pitone, a Notice of Deficiency dated August 10, 1998 and addressed to petitioner at “592 Bellmore Rd East Meadow, NY 11554-5457.” The notice bears assessment identification number L-015455566-5. The notice asserts a total amount due of \$1,695.96. As indicated by the computation summary section of the notice, this amount was comprised of 1996 New York State income tax assessed of \$1,812.00, plus interest and penalty, less payment or credit of \$495.00. A cover letter bearing certified mail control number P 911 205 122 accompanied the notice. This cover letter advised petitioner that a copy of the Notice of Deficiency had been issued to petitioner’s representative, John T. Roesch, Esq.

2. The Division issued a copy of the Notice of Deficiency dated August 10, 1998 to petitioner’s representative, John T. Roesch, Esq. The cover letter which accompanied the notice bears certified mail control number P 911 205 112.

3. Petitioner filed a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the 1996 income tax deficiency. Petitioner’s request is dated November 28, 1998 and was mailed to BCMS on December 1, 1998.

4. BCMS issued a Conciliation Order Dismissing Request to petitioners dated January 15, 1999. It states, in part:

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 August 10, 1998, but the request was not mailed until December 1, 1998, or in excess of 90 days, the request is late filed.

5. Notices of Deficiency, 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 deficiency 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.

6. Each computer-generated notice of deficiency 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.” The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is 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 is 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 lists an initial date of July 31, 1998, which has been manually changed to August 10, 1998.

7. After a notice of deficiency is placed in an area designated by the Division’s Mail Processing Center for “Outgoing Certified Mail,” a staffer 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 the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

8. 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 originating office (CARTS Control) within the Division.

9. The CMR relevant to this case is a 23-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." This CMR lists consecutive certified control numbers P 911 205 022 through P 911 205 264, inclusive. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 23 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

10. Information regarding the Notice of Deficiency issued to petitioner is contained on page 10 of the CMR. Specifically, corresponding to certified control number P 911 205 122 is notice number L 015455566, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Deficiency.

11. Information regarding the copy of the subject Notice of Deficiency issued to petitioner's representative is contained on page nine of the CMR. Specifically, corresponding to certified control number P 911 205 112 is notice number L 015455566, along with the name and address of petitioner's representative.

12. The notice numbers, names and addresses of addressees other than petitioner and his representative have been redacted from the CMR in order to comply with statutory privacy requirements.

13. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated August 10, 1998.

14. The last page of the CMR, page 23, contains a pre-printed entry of 243 under the heading “total pieces and amounts listed.” This page also contains the initials of a Postal Service employee. Immediately below the initials, the number 243 has been handwritten. It appears that both the initials and the number were written by the same hand.

15. Appearing immediately below the “total pieces” listing on page 23 is the listing “Total Pieces Received at Post Office.” No information appears after this listing.

16. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and handwritten “243” indicate that all 243 pieces listed on the CMR were received at the post office.

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

18. The facts set forth above in Findings of Fact “5” through “14”, “16” and “17” were established through the affidavits of Geraldine Mahon and and James Baisley. 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 deficiency. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

19. The fact that the Postal Service employee wrote the total number of pieces received on the CMR to indicate that this was, in fact, the number of pieces that were received by the post office (*see*, Finding of Fact “16”) was established through the affidavit of Mr. Baisley. Mr. Baisley’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.

20. The address on the subject Notice of Deficiency is the same as the address given on petitioner's filed 1996 and 1997 Resident Income Tax Returns (Form IT-201), both of which were signed by petitioner and dated February 25, 1997 and February 20, 1998, respectively.

21. As indicated in the computation section of the subject Notice of Deficiency, one of the adjustments made by the Division in its audit of petitioner's 1996 income tax return was to change petitioner's filing status from head of household, as claimed on the return, to married filing separately. Before the issuance of the notice, petitioner's representative provided the Division's auditor with a copy of a Judgment of Absolute Divorce entered on May 17, 1993 between petitioner and his former wife. In his affirmation filed in opposition to the Division's motion, petitioner's representative asserted that, upon receipt of the Notice of Deficiency, he spoke to the auditor regarding the Judgment of Divorce and that she advised him that a revised Notice of Deficiency would be issued. Petitioner's representative further asserted that his office mailed two envelopes to BCMS on November 3, 1998 and that, because of a clerical error, both envelopes contained petitioner's request for a conciliation conference with respect to the 1995 tax year. Petitioner submitted copies of two certified mail receipts and two return receipt postcards. Both return receipt postcards indicate that the article was mailed to BCMS and was received on November 5, 1998. The two receipts for certified mail appear to contain different handwriting. One receipt indicates that the article was sent to BCMS and bears an East Meadow, New York postmark dated November 3, 1998. The other receipt indicates that the article was sent to "N.Y. State Tax" and bears a North Bellmore, New York postmark dated November 3, 1998. Both receipts have the word "Pitone" written across the bottom.

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]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as [summary judgment] motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also, Matter of Service Merchandise, Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary judgment is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgment must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

As noted, a party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.9[b][1]). Such a showing can be made by “tendering sufficient

evidence to eliminate any material issue of fact from the case” (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595). On the other hand, one opposing a motion for summary determination:

must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York, supra*).

In this case, upon all of the proof presented, and pursuant to the following discussion, I conclude that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

B. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” In this case, the record is clear that the address listed on the subject Notice of Deficiency was petitioner’s last known address (*see*, Finding of Fact “20”). A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]).

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, 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” (*see, Matter of Katz*, Tax

Appeals Tribunal, November 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

D. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency (*see*, Finding of Fact “18”).

E. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the Notice of Deficiency at issue was mailed to petitioner on August 10, 1998. Specifically, this 23-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 23 pages of the CMR bear a U.S. Postal Service postmark dated August 10, 1998. Additionally, as part of the standard procedure for the issuance of notices of deficiency, a postal employee initialed page 23 of the CMR and wrote “243” on that page to indicate receipt by the post office of all 243 pieces of mail listed thereon (*cf., Matter of Roland*, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is sufficient to establish that the Division mailed the subject Notice of Deficiency on August 10, 1998. Petitioner’s request for a conciliation conference, mailed on December 1, 1998, was therefore untimely filed (*see*, Tax Law § 170[3- a][a]).

F. Even assuming for purposes of this motion that the allegations made in the affirmation in opposition filed by petitioner's representative are true (*see*, Finding of Fact "21"), such allegations do not give rise to a material and triable issue of fact in this matter. Specifically, while the auditor may have advised petitioner's representative that the Division would issue a revised Notice of Deficiency, petitioner was in no way misled or prejudiced by any such statements. Indeed, there is no allegation that the auditor stated that the August 10, 1998 notice was invalid or revoked or that petitioner did not need to file a timely protest of that notice. Furthermore, that petitioner was in no way prejudiced by any statements made by the auditor is shown by petitioner's representative's assertion that he attempted to file a request for conciliation conference on November 3, 1998. If successful, such request would have been timely. Finally, that petitioner's representative may have attempted to timely file a request for conciliation conference clearly does not give rise to a material and triable issue of fact. Accordingly, even if allegations made in petitioner's motion papers are true, such facts do not preclude the granting of the Division's motion herein.

G. In his motion papers petitioner requested that the Division of Tax Appeals grant petitioner leave to file a late request for conciliation conference with respect to 1996, or in the alternative, to require the Division to issue a revised Notice of Deficiency for 1996 wherein petitioner's filing status is changed to head of household and the tax liability adjusted accordingly. Absent a timely filed protest, the Division of Tax Appeals has no jurisdiction over this matter (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). The Division of Tax Appeals thus has no authority to grant either of these forms of relief. It should be noted, however, that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his

request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 689[c]; 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

H. The petition of Francis Pitone is dismissed.

DATED: Troy, New York
October 21, 1999

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE