

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WILLIAM HELTON : DETERMINATION
for Revision of a Determination or for Refund of Tax on : DTA NO. 819517
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 a petition 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.

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. Accordingly, the 90-day period for the issuance of this order commenced on November 3, 2003,¹ the date petitioner's time to serve a response to the Division's motion expired. Based upon the motion papers, the affidavits and

¹ The 30 days allowed for petitioner's response to the Division's motion expired on Sunday November 2, 2003. Therefore, petitioner's response was due by November 3, 2003.

documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

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

1. 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.”

2. 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.”

3. 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.²

4. 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.

5. 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.

6. 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.

² 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. The facts set forth above in Findings of Fact “6” through “15” 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.

17. 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.

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

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

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]).

B. Here, petitioner did not respond to the Division's motion; he is therefore 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; *John Wm. Costello Assoc. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Mahon and LaFar affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173).

C. Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination for additional tax or penalties due under Article 20. A taxpayer 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* (*see*, Tax Law §§ 478, 170[3-a][a]).

D. 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).

E. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedure through the affidavits of Ms. Mahon and Mr. LaFar, Division employees involved in and processing knowledge of the process of generating and issuing (mailing) notices of determination (*see*, Finding of Fact "16").

G. The CMR provides sufficient documentary proof to establish that the Notice of Determination dated December 9, 2002 was mailed as addressed on December 9, 2002. This 35-

page document lists 376 certified control numbers with corresponding names and addresses. While one entry on this document has been deleted, or pulled, such deletion is noted and explained in the affidavits. The CMR bears a U.S. Postal Service postmark date of December 9, 2002 and the illegible signature or initials of a Postal Service employee on each page. Additionally, a postal employee circled the handwritten number “375” appearing next to the “Total Pieces Received At Post Office” heading on page 35 of the CMR to specifically indicate receipt by the post office of 375 of the 376 pieces listed on the CMR (*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 Determination on December 9, 2002.

H. 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 is not sufficient to invalidate the notice. The law in New York is clear; defects on the face of the notice will not invalidate the notice, absent evidence of harm or prejudice to the petitioner (***Matter of Agosto v. Tax Commn.***, 68 NY2d 891, 508 NYS2d 934; ***Matter of Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892; ***Matter of A & J Parking Corp.***, Tax Appeals Tribunal, April 9, 1992). There is no claim that petitioner did not receive the notice bearing the incorrect name of William Heiton rather than William Helton. Nor is there any claim that petitioner was unaware of the basis of the penalty being asserted, his possession of untaxed cigarettes on August 8, 2002. He was neither confused nor prejudiced by the error on the notice.

I. As noted herein, the envelope in which petitioner’s request for a conciliation conference was filed is not part of the record. However, petitioner’s request for conciliation could not have

been filed earlier than April 4, 2003, the date petitioner signed the request. This date falls beyond the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed (*see*, Tax Law §§ 478, 170[3-a][a]).

J. The Division of Taxation's motion for summary determination is granted, and the petition of William Helton is dismissed with prejudice.

DATED: Troy, New York
January 22, 2004

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE