

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
WAYNE WAHRSAGER	:	DETERMINATION
	:	DTA NO. 821409
for Redetermination of Deficiencies or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Period December 30,	:	
2000 through December 28, 2001.	:	
	:	

Petitioner, Wayne Wahrsager, 1609 Lakeview Drive, Hewlett, New York 11557, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period December 30, 2000 through December 28, 2001.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated March 2, 2007 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(a)(i); (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on April 2, 2007, the due date for petitioner's response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order by the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (“Division”) is the timeliness of petitioner’s petition to the Division of Tax Appeals following issuance of a Conciliation Order issued by the Bureau of Conciliation and Mediation Services (“BCMS”) dated August 4, 2006.

2. Petitioner, Wayne Wahrsager, filed a timely request for a conciliation conference with BCMS in protest of notices of deficiency L-025339869, L-025339870, L-025339871 and L-025339872.

3. Petitioner’s request for conference listed the following as his address:

1609 Lakeview Drive
Hewlett, New York 11557-1817

4. Subsequently, on January 17, 2006, a power of attorney form was filed with BCMS on behalf of petitioner. Petitioner’s name and address as indicated above were contained in the taxpayer information section of the power of attorney. Petitioner’s representative’s name and address on the form were as follows:

Gary Schwartz
456 Links Dr East
Oceanside, NY 11572

5. Gary Schwartz appeared at the conciliation conference held on May 3, 2006 on behalf of petitioner.

6. BCMS subsequently issued a Conciliation Order to petitioner (CMS No. 209909) dated August 4, 2006, which denied petitioner's request and sustained notices of deficiency L-025339869, L-025339870, L-025339871 and L-025339872.

7. On November 4, 2006, petitioner filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated August 4, 2006. The petition was filed by certified mail in an envelope bearing a United States Postal Service ("USPS") date stamp of November 4, 2006.

8. In support of its motion, the Division submitted the affidavits of James Steven VanDerzee, Robert Farrelly and Heidi Corina, all employees of the Division. The Division also submitted a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on August 4, 2006, a copy of the subject August 4, 2006 Conciliation Order, a copy of the petition and envelope in which it was mailed by certified mail and a copy of Postal Form 3811-A and the USPS response thereto.

9. The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, sets forth the Division's general procedure for preparing and mailing conciliation orders. This procedure culminates in the mailing of the orders by USPS certified mail and confirmation of the mailing through receipt of a postmarked copy of the CMR by BCMS.

10. The BCMS Data Management Services Unit prepares the conciliation orders and the accompanying cover letter, predated with the intended date of mailing, and forwards them to the conciliation conferee for signature. The conferee in turn forwards the order and cover letter to a BCMS clerk assigned to process the conciliation orders.

11. The name, mailing address, order date and BCMS number for each conciliation order to be issued are electronically sent to the Division's Advanced Function Printing Unit (AFP). For each mailing, the AFP Unit assigns a certified control number and produces a cover sheet that indicates the BCMS return address, date of mailing, taxpayer's name, mailing address, BCMS number, certified control number, and certified control number bar code.

12. The AFP Unit also produces a computer-generated document entitled "Certified Record for Presort Mail - BCMS Cert Letter." The CMR is a listing of taxpayers and representatives to whom conciliation orders are sent by certified mail on a particular day. The certified control numbers are recorded on the CMR under the heading "Certified No." The BCMS numbers are recorded on the CMR under the heading "Reference No." and are preceded by three zeros. The AFP Unit prints the CMR and cover sheets via a printer located in BCMS, and these documents are delivered to the BCMS clerk assigned to process conciliation orders.

13. The clerk, as part of her regular duties, associates each cover sheet, conciliation order, and cover letter. The clerk verifies the names and addresses of taxpayers with the information listed on the CMR and on the cover sheet. The clerk then folds and places the cover sheet, cover letter, and conciliation order into a three-windowed envelope where the BCMS return address, certified control number, bar code, and name and address of the taxpayer appear.

14. On the last page of the CMR the BCMS clerk stamps "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" and also stamps "Mailroom: Return Listing To: BCMS Bldg 9 Rm 180 Att: Conference Unit."

15. The BCMS clerk also writes the date of mailing of the conciliation orders listed on the CMR at the top of each page of the CMR. In this case "8/4/06" is written in the upper right corner of each page of the CMR.

16. The CMR, along with the cover sheets, cover letters, and conciliation orders are picked up in BCMS by an employee of the Division's Mail Processing Center.

17. Mr. Farrelly attested to the truth and accuracy of the copy of the seven-page CMR attached to his affidavit which contains a list of the conciliation orders assertedly issued by the Division on August 4, 2006. This CMR lists 68 certified control numbers and there are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the seven 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.

18. Information regarding the Conciliation Order issued to petitioner is contained on page four of the CMR. Specifically, corresponding to certified control number 7104 1002 9730 1342 7265 is reference/CMS number 000209909, along with the following address:

Wayne Wahrsager
1609 Lakeview Drive
Hewlett, NY 11557-1817

19. Page four of the CMR also contains information regarding a conciliation order issued to petitioner's representative. Specifically, corresponding to certified control number 7104 1002 9730 1342 7272 is reference/CMS number 000209909 along with the name and address of petitioner's representative as follows:

Gary Schwartz
456 Linds Drive
East Oceanside, NY 11572

20. The affidavit of James Steven VanDerzee, Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center, attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a conciliation order is placed in the "Outgoing Certified Mail"

basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the envelopes. A clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR.

Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A postal employee affixes a postmark and signs or initials the CMR indicating receipt by the post office.

21. In this particular instance, the postal employee affixed a postmark dated August 4, 2006 and his or her initials to each page of the seven-page CMR. The postal employee also wrote the number "68" on page 7 of the CMR where it states "total pieces received at post office."

22. The CMR is the Division's record of receipt, by the USPS, for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, the CMR is picked up at the post office by a member of Mr. VanDerzee's staff on the following day after its initial delivery and is then delivered to the originating office, in this case BCMS. The CMR is maintained by BCMS in the regular course of business.

23. Based upon his review of the affidavit of Robert Farrelly, the exhibits attached thereto and the CMR, Mr. VanDerzee states that on August 4, 2006, an employee of the Mail Processing Center delivered a piece of certified mail addressed to Wayne Wahrsager, 1609 Lakeview Drive, Hewlett, New York 11557-1817 and a piece of certified mail addressed to Gary Schwartz, 456 Linds Drive, East Oceanside, New York 11572, to a branch of the USPS in Albany, New York in sealed envelopes for delivery by certified mail. He states that he can also determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the post office on

August 4, 2006 for the records of BCMS. Mr. VanDerzee asserts that the procedures described in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail and that these procedures were followed in mailing the pieces of certified mail to petitioner and his representative on August 4, 2006.

24. The Division sent a Request for Delivery Information/Return Receipt After Mailing form (USPS Form 3811-A) to the Claims and Inquiry office of the USPS - Albany General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, requesting delivery information on the Conciliation Order mailed to petitioner's representative, Gary Schwartz. The Division received a response from the USPS which stated that certified mail number 7104 1002 9730 1342 7272 was delivered on August 7, 2006 in Oceanside, New York 11572.

The response also shows the scanned signature image of the recipient as "Joanne Schwartz" above the handwritten name "Joanne Schwartz" and the address of the recipient has been written in as "456 Links Dr."

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. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal

provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New*

York Univ. Med. Ctr., 64 NY2d 851, 853, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 382, 206 NYS2d 879, 881).

“To defeat a motion for summary judgment, the opponent must produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 449, 582 NYS2d 170, 173 *citing Zuckerman v. City of New York, supra*).

C. In the instant matter, 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; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioner presented no evidence to contest the facts alleged in the Farrelly, VanDerzee and Corina affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania, supra*).

D. A petition contesting a notice of deficiency of personal income tax due must be filed within 90 days after the date of mailing of the notice (Tax Law § 689[b]). In the alternative, 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]). A Conciliation Order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days from the date of the issuance of the Conciliation Order (Tax Law § 170[3-a][e]). A Conciliation Order is “issued” within the meaning of Tax Law § 170(3-a)(e) at the time of its mailing to the taxpayer (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals, which has no authority to consider a petition which is not filed within 90 days of the issuance of a Conciliation Order (*Matter of Cato, supra; Matter of DeWeese, supra*).

E. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the Conciliation Order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

F. The affidavits of two Division employees, Robert Farrelly and James Steven VanDerzee, provide adequate proof of the Division’s standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the Conciliation Order and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Farrelly

and VanDerzee affidavits were followed with respect to the Conciliation Order issued to petitioner and his representative. Petitioner's and his representative's names, addresses and the CMS No. appear on page four of the CMR which bears a USPS date stamp of August 4, 2006 along with the initials of a Postal Service employee. There are 68 certified control numbers listed on the CMR, and the USPS employee indicated that he received 68 items for mailing. The Division has, therefore, established that it mailed the Conciliation Order to petitioner and his representative by certified mail on August 4, 2006 (*Matter of Cato, supra; Matter of DeWeese, supra*).

The Division has also introduced adequate proof through the affidavit of Ms. Corina, the Request for Delivery Information/Return Receipt After Mailing form and the USPS response that the Conciliation Order was delivered to petitioner's representative at his address.

G. The petition was mailed on November 4, 2006. The statutory period for filing a petition to the Conciliation Order expired on November 2, 2006. Accordingly, it is found that the petition was filed more than 90 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

H. Finally, it is noted 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 conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

I. The Division of Taxation's motion for summary determination is granted and the petition of Wayne Wahrsager is dismissed with prejudice.

DATED: Troy, New York
June 21, 2007

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE