

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSE A. TORRES : DETERMINATION
 : DTA NO. 822574
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 2006. :
:

Petitioner, Jose A. Torres, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2006.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated March 4, 2009, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with other affidavits and exhibits in support of the motion. Petitioner, appearing pro se, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination commenced on April 3, 2009. Based upon the motion papers, the affidavits and documents submitted therewith and all pleadings in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation on the basis that petitioner did not file a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) or a petition with the Division of Tax Appeals within 90 days after the issuance of the statutory notice.

FINDINGS OF FACT

1. A Notice of Deficiency (Assessment ID No. L-029728537-3), dated April 17, 2008, was issued by the Division of Taxation (Division) to petitioner, Jose A. Torres, at 15 E. Funston Avenue, Apt. 7A, Spring Valley, New York 10977-5773. The notice asserted a deficiency of New York State and New York City personal income tax totaling \$1,539.00, plus interest, for a total amount due of \$1,679.03 for the year 2006.

2. On September 4, 2008, BCMS received a Request for Conciliation Conference from petitioner which was signed by petitioner and dated September 1, 2008.

3. On September 19, 2008, BCMS issued a Conciliation Order Dismissing Request (CMS No. 225851) which stated as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on April 17, 2008, but the request was not received until September 4, 2008, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

4. In response to the dismissal order, petitioner filed a petition seeking administrative review. The petition was filed on October 8, 2008 and was received by the Division of Tax Appeals on October 10, 2008. The Division filed an answer dated December 24, 2008. The Division subsequently brought this motion, dated March 4, 2009, seeking dismissal of the

petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioner's protest of the statutory notice was filed more than 90 days from the date of the notice.

5. Notices of deficiency, such as the one at issue, are computer-generated by the Division's Case and Resource Tracking System (CARTS). The notices are predated with the anticipated date of mailing, and each notice is assigned a certified control number. The certified control number for each notice appears on a separate one-page "Mailing Cover Sheet" that is generated by CARTS for each statutory notice. The Mailing Cover Sheet, form DTF-997, also bears a bar code and the taxpayer's mailing address.

Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (CMR). The CMR lists each statutory notice in the order that it was generated in the batch. The certified control numbers, the assessment numbers and the names and addresses of the taxpayers are listed on the CMR. Each CMR and associated batch of statutory notices are forwarded to the Mail Processing Center together.

6. The CMR for the block of statutory notices issued on April 17, 2008, including the Notice of Deficiency issued to petitioner consists of 19 connected pages. All pages are connected when the document is delivered into the possession of the United States Postal Service (USPS) and the pages remain connected when the document is returned to CARTS.

With respect to the CMR for the statutory notice mailed by certified mail on April 17, 2008, each of the pages consists of 11 entries with the exception of page 19 which contains 6 entries.

The CMR is printed approximately ten days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed, processed for postage, etc., by the Division's Mail Processing Center. In the upper left corner of page one of the CMR, the date the notices were mailed, "4/17/08" was handwritten by personnel in the Mail Processing Center. This change was made in order to ensure that the date on the CMR conformed with the actual date that the statutory notices and CMR were delivered into the possession of the USPS.

7. Statutory notices that are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for "Outgoing Certified Mail." Each notice in the batch is preceded by a Mailing Cover Sheet and accompanied by any required enclosures. A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the Mail Processing Center staff puts each statutory notice and the associated documents into a windowed envelope. The staff member then weighs and seals each envelope and places postage and fee amounts on such envelope.

A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Once the review of the CMR and the envelopes is completed, a member of the Mail Processing Center staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area.

8. The postal service representative then affixes a U.S. postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR. In the case of the certified mail to be mailed on April 17, 2008, the USPS employee initialed or signed page 19 of

the CMR, affixed a postmark dated April 17, 2008 to each page of the CMR and wrote and circled the total number of pieces of certified mail received as 204 on page 19 of the CMR.

9. As a matter of standard procedure, to ensure accountability, the CMR may be left overnight at the USPS to enable the postal employee sufficient time to process the certified mail and make the appropriate notations on the CMR. The CMR is picked up at the USPS the following day by a member of the Mail Processing Center staff whereupon it is delivered to the CARTS Control Unit.

Page 5 of the CMR for April 17, 2008 indicates that a Notice of Deficiency with Notice No. L-029728537 was sent to “TORRES-JOSE A, 15 E FUNSTON AVE APT 7A., SPRING VALLEY, NY 10977-5773” by certified mail using certified control number 7104 1002 9730 0689 7983. A USPS postmark on each page of the CMR confirms that the Notice of Deficiency was sent on April 17, 2008.

10. In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS.

11. The Division sent a request for a return receipt after mailing (USPS Form 3811-A) to the Consumer Affairs Office of the USPS - Albany General Mail Facility, 30 Old Karner Rd., Albany, NY 12288, requesting delivery information on the Notice of Deficiency described above. The Division received a response from the USPS which stated that certified mail number 7104 1002 9730 0689 7983 was delivered on May 8, 2008 to petitioner's Spring Valley, New York, address. The response also shows the scanned signature image of the recipient as that of petitioner.

12. The facts set forth in Findings of Fact 5 through 11 were established through affidavits of James Steven VanDerZee, Patricia Finn Sears and Heidi Corina, employees of the

Division. Mr. VanDerZee is employed as a Mail and Supply Supervisor in the Division's Registry Unit. His duties included supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

Ms. Sears is employed as the supervisor of the Division's CARTS Control Unit. Her duties include supervising the processing of statutory notices such as the notice of deficiency at issue herein.

Ms. Corina is employed as Legal Assistant 2 in the Division's Office of Counsel. Her duties include preparing USPS forms 3811-A to request return receipts after mailing registered, certified, insured and express mail.

13. The address of petitioner to which the statutory notices were mailed is the same address listed on petitioner's New York personal income tax returns for 2007, electronically filed on January 24, 2008.

14. As previously noted, petitioner failed to respond to the Division's motion.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all 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, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 598 [1980]). 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, 94 [1968]; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]). 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, 206 NYS2d 879, 881 [1960]).

“To defeat a motion for summary judgment, the opponent must also 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, 582 NYS2d 170, 173 [1992] *citing Zuckerman*).

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 [1975]; *Costello Assocs. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, 326 [1984]). Moreover, petitioner presented no evidence to contest the facts asserted in the VanDerZee, Sears and Corina affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden* at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania* at 448, 449).

D. Tax Law § 681(a) authorizes the Division to issue a notice of deficiency to a taxpayer where a deficiency in personal income tax has been determined. This section further provides

that the notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.”

A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of such deficiency or, alternatively, file a request for conciliation conference with BCMS *within 90 days of the mailing of the notice of deficiency* (*see* Tax Law § 689[b]; § 170[3-a][a]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any protest filed beyond this 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. 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 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).

F. 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 the particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv*, Tax Appeals Tribunal, May 23, 1991).

G. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Sears and Mr. VanDerZee, Division employees involved in and

possessing knowledge of the process of generating and issuing (mailing) notices of determination.

H. The CMR for April 17, 2008 provides sufficient documentary proof to establish that a Notice of Deficiency, dated April 17, 2008, was mailed by certified mail to petitioner at his last known address. The 19-page document listed 204 certified control numbers with corresponding names and addresses. Each page of the CMR bears a USPS postmark dated April 17, 2008 and the initials or signature of a USPS employee. The postal employee wrote and circled the number “204” on the last page of the CMR to indicate the number of pieces of certified mail received at the post office. Accordingly, the Division has established that it mailed the Notice of Deficiency to petitioner as claimed on April 17, 2008. This fact of mailing is further corroborated by the information confirming subsequent delivery, as provided via USPS Form 3811-A (*see* Finding of Fact 11).

I. As noted above, petitioner’s letter requesting a conciliation conference was mailed on September 1, 2008. In order to timely protest the Notice of Deficiency issued on April 17, 2008, petitioner was required to file a petition or a request for a conciliation conference within 90 days of April 17, 2008, i.e., on or before July 16, 2008. Therefore, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner’s protest (*Matter of Sak Smoke Shop*) and the petition must, therefore, be dismissed.

J. The Division of Taxation’s motion for summary determination is granted and the petition of Jose A. Torres is dismissed with prejudice.

DATED: Troy, New York
June 25, 2009

/s/ Brian L. Friedman _____
ADMINISTRATIVE LAW JUDGE