

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RONALD RATTIEN : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 823381
New York State and New York City Personal Income :
Tax under Articles 22 of the Tax Law and the New York :
City Administrative Code for the Year 2001. :
:

Petitioner, Ronald Rattien, 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 New York City Administrative Code for the year 2001.

On April 12, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated April 12, 2010, and annexed exhibits supporting the motion. 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 May 12, 2010, the due date for petitioner's response. After due consideration of the affidavits and documents presented, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for a conciliation conference following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioner's protest of a Notice of Deficiency dated October 6, 2005 and addressed to petitioner, Ronald Rattien, at a Bronx, New York, address. The notice asserted New York State and New York City income tax for the year 2001 in the amount of \$2,105.30, plus penalty and interest, for a balance due of \$3,406.47. By his request for conciliation conference, filed on October 1, 2009, petitioner protested the notice, numbered L-025949108-3.

2. On October 16, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioner. The order determined that petitioner's protest of the subject notice was untimely and stated, in part:

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 October 6, 2005, but the request was not received until October 1, 2009, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the Notice of Deficiency dated October 6, 2005, the Division provided the following: (i) an affidavit, dated April 5, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated April 5, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked October 6, 2005; and (iv) a copy of

petitioner's undated personal income tax return for the year 2001, mailed to the Division on December 4, 2004.

4. The affidavit of Patricia Finn Sears sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, each page of the 29-page CMR lists an initial date, which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "10/6/05," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified control number of each notice is listed on a separate one-page "Mailing Cover Sheet," which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The assessment numbers are listed under the heading entitled "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street and PO Address." Page 9 of the CMR contains information on the subject notice and establishes that on October 6, 2005 a notice with the control number 7104 1002 9730 0872 7240 was sent to petitioner at a Bronx, New York, address that is the same as that listed on petitioner's 2001 income tax return.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each

statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30 pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her initials or signature on the CMR indicating receipt by the post office. The Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 313. Below this number, "313" has been handwritten and the page is postmarked and initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date October 6, 2005, confirming that the notices were mailed on that date.

6. The Bronx, New York, address on the CMR, the Mailing Cover Sheet and the October 6, 2005 Notice of Deficiency matches the address listed on petitioner's personal income tax return for 2001. Petitioner mailed an undated copy of this return to the Division on December 4, 2004. This is the last return petitioner filed with the Division before the issuance of the subject notice of deficiency.

CONCLUSIONS OF LAW

A. A motion for summary determination shall 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. Where, as here, the timeliness of a petition or request for conciliation conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing by certified or registered mail to petitioner's last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and the date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice 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 (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

C. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., October 6, 2005, to petitioner's last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of Dewese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the CMR, the Mailing Cover Sheet and the October 6, 2005 Notice of Deficiency conforms with the address listed on petitioner's 2001 personal income tax return, which is the last return petitioner filed with the Division before the issuance of the subject Notice of Deficiency and thereby satisfies the "last known address" requirement in Tax Law § 681(a). Accordingly, the subject notice was properly mailed and thus, the statutory 90-day time

limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on October 6, 2005 (Tax Law § 170[3-a][a]; § 681[b]).

D. While the notice was mailed on October 6, 2005, the request was not filed until October 1, 2009, which is well beyond the 90-day period of limitations. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation (*see Matter of American Woodcraft, Inc.* Tax Appeals Tribunal, May 15, 2003).

E. 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 [1984]).

F. The Division's motion for summary determination is granted, and the petition of Ronald Rattien is dismissed.¹

DATED: Troy, New York
August 12, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE

¹ Petitioner may not be without some remedy, for he may pay the disputed tax and file a claim for refund (Tax Law § 687). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).