

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
MICHAEL PERSICO	:	DETERMINATION
	:	DTA NOS. 823776
	:	AND 823777
for Redetermination of Deficiencies or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Period July 1, 2008 through June 30, 2009 and	:	
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for	:	
Period September 1, 2008 through November 30, 2009.	:	

Petitioner, Michael Persico, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the period July 1, 2008 through June 30, 2009 and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 2008 through November 30, 2009.

The Division of Taxation (Division) by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated February 15, 2011 for an order directing the entry of summary determination in favor of the Division on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notices of deficiency and notices of determination. Petitioner did not submit a response in opposition to the proposed dismissal. The 90-day period for issuance of this determination began on March 17, 2011, the date that petitioner's response was due. On June 1, 2011, the due date for issuance of this order was extended to August 22, 2011 pursuant to 20 NYCRR 3000.5(d). After due consideration of the affidavits and documents submitted, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for a Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of notices of deficiency and notices of determination.

FINDINGS OF FACT

1. The Division issued six notices of determination and four notices of deficiency, dated February 12, 2010, to petitioner, Michael Persico. The notices of deficiency asserted that withholding tax was due from petitioner as a responsible officer or responsible person of D & P Market Place LLC. The asserted deficiencies of withholding tax were as follows:

Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
06/30/09	\$0.00	\$0.00	\$9,743.47	\$0.00	\$9,743.47
03/31/09	0.00	0.00	8,670.42	0.00	8,670.42
12/31/08	0.00	0.00	11,067.23	0.00	11,067.23
09/30/08	0.00	0.00	6,736.31	0.00	6,736.31

2. Copies of each of the foregoing notices were also sent to petitioner's representative, Wind, Wind & Simowitz.

3. The Division also issued to petitioner the following notices of determination of sales and use taxes due, dated February 12, 2010:

Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
11/30/09	\$37,250.20	\$1,131.18	\$4,376.12	\$0.00	\$42,757.50
08/31/09	37,167.73	2,505.04	5,450.90	0.00	45,123.67
05/31/09	32,022.16	3,132.80	5,443.75	0.00	40,598.71
08/31/08	17,098.36	3,766.51	4,445.51	0.00	25,310.38
02/28/09	27,447.44	3,824.24	5,489.44	0.00	36,761.14
11/30/08	27,861.76	4,971.50	6,408.10	0.00	39,241.36

4. On July 6, 2010, petitioner mailed a Request for Conciliation Conference via Federal Express to the Bureau of Conciliation and Mediation Services (BCMS). The request referred to each of the notices listed above. Upon receipt of the request on July 7, 2010, BCMS assigned the four withholding tax notices to one case and the six sales tax notices to another. With respect to the withholding tax notices, BCMS issued a Conciliation Order Dismissing Request, dated July 23, 2010, which stated:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice(s) were issued on February 12, 2010, but the request was not mailed until July 6, 2010, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

5. On the same day that the foregoing order was issued, BCMS also issued a Conciliation Order that dismissed the request and denied a conciliation conference with respect to the notices that assessed sales and use taxes. The language employed in the second order was identical to the language used in the first order.

6. On August 6, 2010, the Division of Tax Appeals received petitions that challenged the conclusion that the foregoing requests were untimely.

7. To show proof of proper mailing of the ten notices dated February 12, 2010, the Division provided, among other things: (i) an affidavit, dated February 8, 2011, of Bruce Peltier, the mail and supply supervisor of the staff of the Division's mail processing center; (ii) an affidavit, dated February 3, 2011, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); and (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked February 12, 2010.

8. The affidavit of Patricia Finn Sears set forth the Division's general practice and procedure for processing statutory notices. The notices are predated with the anticipated date of mailing. With respect to the notices dated February 12, 2010, each page of the 42-page CMR lists an initial date that 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 "2/12/10," to reflect the actual mailing date.

9. All notices are 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 Division's 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."

10. The first page of the CMR of February 12, 2010 shows that four notices of deficiency bearing that date (L-033320881, L-033320882, L-033320883 and L-033320884) were sent to petitioner's representative, Wind, Wind & Simowitz, 855 Avenue of the Americas, Suite 425, New York, New York 10001, by certified mail. The certified control numbers, assessment identification numbers and address as listed on the CMR all correspond to the information on the mailing cover sheets and the February 12, 2010 notices of deficiency.

11. Page 21 of the CMR shows that six notices of determination with notice numbers L-033320875, L-033320876, L-033320877, L-033320878, L-033320879 and L-033320880 were sent to petitioner at the address shown on petitioner's New York State Resident Income Tax Return for 2008. The return bore a date of October 15, 2009. The control numbers, assessment identification numbers and addresses as listed on the CMR all correspond to the information on the mailing cover sheets and the February 12, 2010 notices of determination.

12. Page 22 of the CMR indicates that four notices of deficiency with notice numbers L-033320881, L-033320882, L-033320883 and L-033320884 were sent to petitioner at the address shown on petitioner's New York State Resident Income Tax Return for 2008. The control numbers, assessment identification numbers and address as listed on the CMR all correspond to the information on the mailing cover sheets and the February 12, 2010 notices of deficiency.

13. Copies of the four withholding tax notices were sent to petitioner's representative since there was a power of attorney on file with the Division for that tax. However, the power of attorney on file did not address sales tax so copies of the six sales tax notices were not sent to the representative.

14. The Peltier affidavit describes the general operations and procedures of the Division's Mail Processing Center. 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 and mailing cover sheet 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 last page of the CMR.

15. A review of the CMR submitted by the Division confirms that a USPS employee affixed a postmark and his or her initials on each page. On the final page, corresponding to "Total Pieces and Amounts," is the preprinted number 454. In addition, the Postal Service employee initialed the page and wrote 454. The USPS postmarks are from the Colonie Center branch and each bears the date February 12, 2010. The affixation of the postmarks, the Postal Service employee's initials, and the writing of the number 454 indicating that all such pieces were received, confirm that the notices of determination dated February 12, 2010 were received by the USPS on that date.

16. Petitioner's 2008 New York resident income tax return, dated October 15, 2009, reported petitioner's address as 1202 77th Street, Brooklyn, New York 11228. This was the last return filed by petitioner prior to the issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioner.

17. In his petitions, it is explained that petitioner did not receive the notices dated February 12, 2010. However, he responded to the nine notices and demands for payment of tax due, dated June 7, 2010, by sending them to his representative for a response. At this time, a power of attorney was prepared and filed with the Division. Petitioner also states that if he had received the notices, he would not have been able to respond in a timely manner because he was incarcerated from March 9, 2010 to May 19, 2010.

18. Petitioner did not respond to the motion for summary determination.

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. In the instant matter, petitioner did not respond to the Division's motion or submit any evidence to contest the facts set forth in Attorney Matthews's affirmation and attached exhibits. Consequently those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *John William Costello Assoc. v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). Since no question of fact requiring a hearing exists, summary determination may be granted in this matter.

C. Where the timeliness of a Request for Conciliation Conference is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of mailing to petitioner's last known address (Tax Law § 1147[a][1]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). To meet its burden, the Division must show proof of a standard procedure used by the Division for the issuance of statutory notices by one with

knowledge of the relevant procedures, and must also show proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

D. Here, the Division introduced sufficient proof to establish proper mailing of the ten statutory notices at issue to petitioner's last known address on the date claimed. The submitted affidavits and the CMRs establish the Division's standard mailing procedure and that the procedure was followed (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, petitioner's address on the notices, the corresponding mailing cover sheets and the CMRs conforms with the address he reported on his New York personal income tax return filed prior to the issuance of the subject statutory notices, thereby satisfying the requirements of Tax Law § 1138(a)(1); § 1147(a)(1). Thus, it is concluded that the Division properly mailed the February 12, 2010 notices, and 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 this date (Tax Law § 170[3-a][a]; § 1138[a][1]; § 1147[a][1]).

E. Petitioner's Request for Conciliation Conference was filed on July 6, 2010. This date falls after the 90-day period of limitations for the filing of such a request. Petitioner's request was therefore untimely filed. Thus, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Rotondi Industries*, Tax Appeals Tribunal, July 6, 2006). It is noted that the 90-day period of limitations is not tolled by either a failure to receive the statutory notice (*see Matter of Daskalis*, Tax Appeals Tribunal, August 19, 2004) or a period of incarceration (*see Matter of Matt Petroleum Corporation*, Tax Appeals Tribunal, January 20, 2000).

F. The Division of Taxation's motion for summary determination is granted, and the petitions of Michael Persico are dismissed.

DATED: Troy, New York
June 23, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE