

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANKH-KA-RA SMA-NTR F/K/A	:	DECISION
ANDRE WILLIAMS	:	DTA NO. 826765
	:	
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	:	
Years 2006 through 2009.	:	

Petitioner, Ankh-Ka-Ra Sma-Ntr, f/k/a Andre Williams, filed an exception to the determination of the Administrative Law Judge issued on June 11, 2015. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian J. McCann, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on October 21, 2015, the date that petitioner's reply brief was received.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner filed a timely petition following the issuance of four notices of deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have added a sentence to the Administrative Law Judge's finding of fact 1 to more fully reflect the record.

1. On February 26, 2015, the Division of Tax Appeals issued to petitioner, Ankh-Ka-Ra Sma-Ntr, formerly known as Andre Williams, a notice of intent to dismiss petition. The subject of the notice of intent was the timeliness of petitioner's protest of four notices of deficiency dated February 24, 2014, with assessment numbers, L-040623236-8, L-040623237-7, L-040623238-6 and L-040623239-5, respectively. Each of the four notices is addressed to petitioner, by his former name, Andre Williams, at 2266 5th Avenue Unit 513, New York, New York 10037-9426. Notice, L-040623236-8, assesses personal income tax for the year 2006 in the amount of \$5,808.00, plus penalty and interest. The second notice, L-040623237-7, assesses personal income tax for the year 2007 in the amount of \$6,052.00, plus penalty and interest. The third notice, L-040623238-6, assesses personal income tax for the year 2008 in the amount of \$929.00, plus penalty and interest. The final notice, L-040623239-5, assesses personal income tax for the year 2009 in the amount of \$1,948.00, plus penalty and interest. Each of the four notices explains that petitioner must file either a request for a conciliation conference or a petition for a Tax Appeals hearing by May 25, 2014.

2. Petitioner did not file a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services in protest of these notices.

3. Petitioner filed a petition with the Division of Tax Appeals, in protest of these notices, on January 28, 2015. In the petition, petitioner stated that the assessed amount of each notice was improperly attributed to him as the taxpayer.

4. In response to the notice of intent to dismiss and to prove mailing of the notices of deficiency under protest, the Division of Taxation (Division) submitted, among other documents, the following: (i) the petition of Ankh-Ka-Ra Sma-Ntr, formerly known as Andre Williams, dated January 28, 2015; (ii) a copy of the notice of intent to dismiss petition, dated February 26, 2015; (iii) an affidavit, dated April 30, 2015, of Heidi Corina, Legal Assistant in the Office of Counsel of the New York State Department of Taxation and Finance; (iv) an affidavit, dated April 24, 2015, of Mary Ellen Nagengast, Director of the Management Analysis and Project Services (MAPS) Bureau, which includes responsibility for the receipt and storage of certified mail records; (v) three pages of a “Certified Record for Presort Mail - Assessments Receivable” (CMR) postmarked February 24, 2014; (vi) an affidavit, dated April 21, 2015, of Bruce Peltier, Principal Mail and Supply Supervisor in the Division mail room; and (vii) a copy of the “Individual Taxpayer Profile Inquiry” for Andre Williams.

5. The affidavit of Mary Ellen Nagengast sets forth the Division’s general practice and procedure for processing statutory notices. Ms. Nagengast receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. The CMR is printed approximately ten days in advance of the anticipated date of mailing. Following the Division’s general practice, this date was manually changed on the first page of the CMR, in the upper right corner, to the actual mailing date of “2/24/14.” In addition, the pages of the CMR are banded together when the documents are delivered to the USPS and stay banded, unless ordered otherwise. The page numbers of the CMR run consecutively, beginning with “PAGE:1,” and are located in the upper right corner of each page.

6. Each notice is assigned a certified control number, which appears on a separate one-

page mailing cover sheet. The mailing cover sheet also bears a bar code, the taxpayer's mailing address, the Division's return address on the front and taxpayer assistance information on the back. In addition, the certified control number is listed on the CMR, under the heading "CERTIFIED NO." The assessment numbers are listed under the heading "REFERENCE NO.," while the names and addresses of the recipients are listed under "NAME OF ADDRESSEE, STREET AND PO ADDRESS."

7. The CMR contains 1,741 pages and lists 19,141 certified control numbers. Only pages 1, 198, and 1,741 are attached to Ms. Nagengast's affidavit. Portions of the CMR have been redacted to preserve the confidentiality of information relating to taxpayers not involved in this proceeding. A United States Postal Service (USPS) representative affixed a postmark to each attached page of the CMR and initialed the last page.

8. Page 198 of the CMR indicates four notices of deficiency with certified control numbers 7104 1002 9730 0161 7296, 7104 1002 9730 0161 7302, 7104 1002 9730 0161 7319, and 7104 1002 9730 0161 7326 were sent to "Andre Williams, 2266 5th Ave, Unit 513, New York, NY 10037-9426." The corresponding mailing cover sheets bear the same certified control numbers and petitioner's name and address.

9. The affidavit of Heidi Corina describes Ms. Corina's preparation of a "request for delivery information/return receipt after mailing," for each of the four notices of deficiency. The requests show that certified mail number 7104 1002 9730 0161 7296 was delivered on March 7, 2014 and signed for by an individual listing the recipient's address as "PO Box 513" and certified mail numbers 7104 1002 9730 0161 7302, 7104 1002 9730 0161 7319, and 7104 1002 9730 0161 7326 were delivered on March 3, 2014 and signed for by petitioner.

10. The affidavit of Bruce Peltier describes the Division's Mail Processing Center's (Center) general operations and procedures. The Center receives the notices in an area designated "Outgoing Certified Mail." A staff member operates a machine that puts each notice and mailing cover sheet into a windowed envelope. Then the staff member weighs, seals, and places postage on each envelope. The first and last pieces are checked against the information on the CMR. A clerk then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information listed on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York area. A USPS employee affixes a postmark and places his or her signature or initials on the CMR, indicating receipt by the post office. The Center requests that the USPS either circle the total number of received pieces or indicate the total number of received pieces by writing the number on the CMR. Here, each of the three included pages of the CMR contains a USPS postmark of February 24, 2014 and on page 1,741, the USPS employee wrote "19,141 pieces" and initialed under the preprinted information.

11. According to both the Nagengast and Peltier affidavits, a copy of each subject notice was mailed to petitioner on February 24, 2014.

12. According to the Corina affidavit, each subject notice was delivered to petitioner and signed for on either March 3, 2014 or March 7, 2014.

13. The individual taxpayer profile inquiry states the most recent address for Andre Williams as 2266 5th Ave, Unit 513, New York, NY 10037-9426.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed statutory and case law relevant to the timeliness

of protests of statutory notices. The Administrative Law Judge noted that, in such matters, the Division bears the burden of establishing that it properly issued the statutory notice by mailing the document to the taxpayer's last known address using certified or registered mail. The Administrative Law Judge found that, to meet this burden, the Division must establish its standard mailing procedure and that its procedure was followed in this specific case.

The Administrative Law Judge determined that while the Division had established its standard mailing procedure through affidavits submitted by Ms. Nagengast and Mr. Peltier, it had failed to prove that such standard procedure had been followed in issuing the subject notices. This was because the Division submitted only three pages of the 1,741-page CMR. The Administrative Law Judge thus determined that the Division failed to prove proper mailing of the subject notices.

The Administrative Law Judge found, however, that the Division did establish petitioner's actual receipt of the notices. Specifically, the Administrative Law Judge found that the Corina affidavit and the accompanying USPS delivery information established that the notices were delivered to petitioner as addressed on March 3, 2014 and March 7, 2014, respectively. The Administrative Law Judge concluded, that under such circumstances, the 90-day period for filing a petition or request for conciliation conference commenced on the date of petitioner's actual receipt of the notices (i.e., March 3, 2014 and March 7, 2014). Accordingly, petitioner had until June 2, 2014 and June 5, 2014 to file timely protests. As petitioner did not file his petition until January 28, 2015, the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition.

SUMMARY OF ARGUMENTS OF EXCEPTION

Petitioner asserts that the Administrative Law Judge failed to consider arguments raised in his petition and reasserts such arguments on exception. Specifically, petitioner asserts that employers are subject to personal income tax on wages paid to employees, and that employees are not subject to tax on such wages. Petitioner also contends that wages are not income and hence are not subject to income tax. Petitioner raises no argument regarding the timeliness of the petition.

The Division contends that the Administrative Law Judge properly determined that the subject petition was untimely filed. As to petitioner's arguments noted above, the Division notes that this Tribunal has previously rejected similar claims, citing *Matter of Nelson* (Tax Appeals Tribunal, April 21, 2011) and *Matter of Hyatt* (Tax Appeals Tribunal, November 12, 2009).

OPINION

The Administrative Law Judge's determination was issued following the Division of Tax Appeals' issuance to petitioner of a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The standard of review for such a notice is the same as that for a summary determination motion (*Matter of Victory Bagel Time, Inc.*, Tax Appeals Tribunal, September 13, 2012). Such a motion "shall 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" (20 NYCRR 3000.9 [b] [1]).

There is a 90-day statutory time limit for filing either a request for conciliation conference or a petition following the issuance of a notice of deficiency (Tax Law §§ 170 [3-a] [a]; 681 [b], 689 [b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed

beyond the 90-day time limit (*see e.g. Matter of Modica*, Tax Appeals Tribunal, October 1, 2015).

If the timeliness of a taxpayer's protest against a notice of deficiency or conciliation order is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of such notice or conciliation order (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). We agree with the Administrative Law Judge's conclusion that the Nagengast and Peltier affidavits establish the Division's standard mailing procedure. We also agree with the Administrative Law Judge's conclusion that the submission of a partial CMR is insufficient to establish that the Division's standard mailing procedure was followed (*see Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000).

Such an inadequacy in the evidence of mailing may be overcome by evidence of delivery (*see Matter of Chin*, Tax Appeals Tribunal, December 3, 2015). We agree with the Administrative Law Judge's conclusion that the Division has introduced adequate proof through the affidavit of Ms. Corina, the request for delivery information, and the USPS response that the notices of deficiency were delivered to petitioner's last known address, as claimed, on March 3, 2014 and March 7, 2014, respectively (*see Matter of Victory Bagel Time, Inc.*; *see also Matter of Chin*).

Under such circumstances, the 90-day period for filing a petition or request for conciliation conference commences with the date of delivery of the statutory notice (*Matter of Stickel*, Tax Appeals Tribunal, April 7, 2011). Petitioner filed his petition on January 28, 2015, more than 90 days from both the March 3, 2014 and March 7, 2014 dates of delivery. Petitioner's request was therefore untimely filed. Accordingly, the Division of Tax Appeals lacks jurisdiction to consider

the arguments raised in the petition and again in the exception (*Matter of Modica*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Ankh-Ka-Ra Sma-Ntr f/k/a Andre Williams is dismissed, with

prejudice.

DATED: Albany, New York
April 14, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr
James H. Tully, Jr.
Commissioner