

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERIC WHITE	:	ORDER
	:	DTA NO. 825763
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for	:	
the Period December 3, 2012.	:	

Petitioner, Eric White, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period December 3, 2012.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel) brought a motion filed January 10, 2014, seeking an order of dismissal or, in the alternative, summary determination in the above referenced matter pursuant to Tax Law § 2006.6 and sections 3000.9(a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Michele W. Milavec, Esq., dated January 9, 2014, and annexed exhibits supporting the motion. On February 17, 2014, upon extension, petitioner, appearing by Lipsitz Green Scime Cambria LLP (Jeffrey F. Reina, Esq., of counsel) submitted the affidavit of Eric White, the affidavit of Jeffrey F. Reina, Esq., and additional documents in opposition to the motion, which date commenced the 90-day period for issuance of this order.

After due consideration of the motion, the affidavits and documents submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with 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 protest of a Notice of Determination dated December 20, 2012 and addressed to petitioner, Eric White as follows: "Eric White & Aaron Pierce DBA ERW Wholesale, 1525 Cayuga Rd., Irving, NY 1408-9574."

2. The Notice of Determination bore audit identification number X-285525827-1¹ and asserted penalty of \$1,259,250.00 due pursuant to Article 20 of the Tax Law.² In explanation, the notice states that "[o]n 12/03/12, you were found to be in possession and/or control of unstamped or unlawfully stamped cigarettes, and/or untaxed tobacco products."

3. On April 26, 2013, the Division issued to "Eric White & Aaron Pierce" a Notice and Demand for Payment of Tax Due (assessment identification number L-038992902-3) assessing penalty in the amount of \$1,259,250.00 for the tax period ended December 3, 2012. This Notice and Demand bore the Cayuga Road, Irving, New York, address.

4. On May 16, 2013, petitioner's representative, Jeffrey F. Reina, Esq., sent a letter and attachments to the Division's "Audit Div - Desk Audit FACCTS Cig/Tobacco" Bureau. In his letter, Mr. Reina wrote as follows:

¹ No assessment identification number appears on this Notice of Determination.

² The Division's address listed on this Notice of Determination was:
"New York State Department of
Taxation and Finance
Audit Div-TDAB-Cigarette Tax
W A Harriman State Campus
Albany NY 12227-0001."

We are returning the enclosed "Notice and Demand for Payment of Tax Due." The taxpayer never received any prior notices or documentation from you asserting the penalty embodied therein and completely disagrees and disputes same.

A duly executed Power of Attorney is also enclosed for the undersigned.

We respectfully request that you cancel the penalty amount purportedly assessed and contact the undersigned as soon as possible.

Enclosures included, among other items, a duly executed power of attorney form, and the Payment Document on which the "Disagreement With Findings Section" was signed by Mr. Reina, as power of attorney, and a "Notice Attachment." On the power of attorney form, petitioner's address is listed as 11157 Old Lake Shore Road, Irving, New York 14081.

5. Petitioner's representative's disagreement letter, and the accompanying enclosures, was forward to the Division's Bureau of Conciliation and Mediation Services (BCMS), which received the same on May 23, 2013.

6. On June 14, 2013, BCMS issued a Conciliation Order Dismissing Request to Eric White & Aaron Pierce DBA ERW Wholesale. The order determined that the protest of Notice Number L 038992902 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(s) was issued on December 20, 2012, but the request was not mailed until May 16, 2013, or in excess of 90 days, the request is late filed.

7. On July 8, 2013, a petition was filed with the Division of Tax Appeals, in which it was asserted, among other things, that petitioner never received a statutory notice purportedly issued on December 20, 2012; that petitioner's protest of the Cigarette Tax penalties on May 16, 2013 was timely; and that the Conciliation Order dismissing the request was not valid. The petition,

lists petitioner's address as 11157 Old Lake Shore Road, Irving, New York 14081. This petition was signed and dated by one of petitioner's representatives, Jeffrey F. Reina, Esq.

8. In support of its motion for summary determination, the Division submitted, among other items: (i) the affidavits of Denise Fox and Bruce Peltier, employees of the Division; (ii) a copy of the Notice of Determination; (iii) a copy of a one-page certified mailing record; and (iv) a copy of a 2008 New York State Application for Automatic Extension of Time to File Partnerships and Fiduciaries (Form IT-370-PF).

9. The affidavit of Denise Fox, a Keyboard Specialist in the Division's Cigarette Tax Unit/Transaction Desk Audit Bureau,³ sets forth the Cigarette Tax Unit's mailing procedures for the certified mailings of notices of determination, "as conducted in the regular course of business, in December of 2012."

10. Tax Technicians prepare the notices of determination. The notices of determination are given to the keyboard specialist in the Cigarette Tax Unit. The keyboard specialist inserts each Notice of Determination into an envelope along with a blank Request for Conciliation Conference (CMS-1) and a copy of The New York State Tax Audit - Your Rights and Responsibilities (Publication 130-D). The keyboard specialist addresses the mailing envelope, and the green United States Postal Service (USPS) Domestic Return Receipt (PS Form 3811). The keyboard specialist then affixes the certified mail number sticker from the Certified Mail Receipt (PS Form 3800) to the USPS Domestic Return Receipt.

11. The keyboard specialist creates a certified mailing record by opening the computer application and selecting "certified" or "registered" to indicate the type of mail to be sent. The

³ Ms. Fox has been employed by the Division for 31 years, and has held her current position as a Keyboard Specialist for the past 31 years.

keyboard specialist then enters information on the certified mailing record. This information includes “the Name, Street, and Post Office Address with Zip Code of the addressee, the article number of each envelope, all certified numbers with spaces, and total number of pieces listed by sender.” Two copies of the certified mailing record are printed. One copy is wrapped around the envelopes containing the Notice of Determination, the CMS-1, and the Publication 130-D, to be sent to the US Post Office. The envelopes wrapped in the certified mailing record are placed in a designated bin to be retrieved by a mail room employee. The other copy of the certified mailing record is retained in a file by month within the Cigarette Tax Unit. Ms. Fox avers that the U.S. Post Office adds the postage amount to the copy of the certified mailing record, writes in the total number of pieces received at the post office and signs or initials the certified mailing record then returns it to the Cigarette Tax Unit as confirmation of receipt.

12. Attached to Ms. Fox’s affidavit as Exhibit A is a copy of a Notice of Determination, dated December 20, 2012, addressed as follows: “Eric White & Aaron Pierce DBA ERW Wholesale, 1525 Cayuga Rd, Irving NY 14081-9574.” Attached to Ms. Fox’s affidavit as Exhibit B is a copy of a one-page certified mailing record. The following title appears at the top of this certified mailing record: “STATE OF NEW YORK - DEPT. OF TAXATION AND FINANCE, T.T.T.B./CIGARETTE TAX AUDIT - W.A. HARRIMAN CAMPUS - ALBANY, NY 12227.” Directly below the title of this certified mailing record, on the left and right sides appear the following: “Certified Mail Date: December 20, 2012,” and “Cigarette Tax Unit: Denise Fox,” respectively. This certified mailing record contains an unnamed vertical column, listing lines numbered 1 through 15, and columns labeled “ARTICLE #,” “NAME,” “ADDRESS,” CITY, STATE, ZIP,” “POSTAGE,” “FEE,” and “RR FEE.” There are five certified numbers listed in the vertical column labeled “Article #” on this certified mailing

record. There are no deletions from the list. Each certified number is assigned to an item of mail listed on the one-page certified mailing record. Specifically, corresponding to each listed certified number is the name, address, city, state and zip code of the addressee.⁴ On line numbered “1,” under the columns labeled “Postage,” “Fee,” and “RR Fee,” handwritten amounts “.65,” “2.95,” and “2.55,” respectively, are listed. Beneath each of those three amounts is a handwritten vertical line that runs down through numbered lines “2” through “5.” The line numbered “3” on this one-page certified mailing record contains certified number 7009 2820 0001 3551 2522, addressed to “ERIC WHITE & AARON PIERCE, 1525 CAYUGA RD, IRVING, NY 14081.” At the bottom of the one-page certified mailing record, the phrases “TOTAL # OF PIECES,” “TOTAL # OF PIECES AT POST OFFICE” and “POSTMASTER, PER (Name of Receiving employee)” appear.

13. Based on her knowledge of the Cigarette Tax Unit’s certified mailing procedures, as well as a review of the certified mailing record in this matter, Ms. Fox avers that “this is the procedure that was followed for mailing the piece of certified mail described in Exhibit A.”

14. The affidavit of Bruce Peltier, a supervisor in the Division’s mail room since 1999 and currently a Principal Mail and Supply Supervisor in the Division’s Mail Processing Center (Center) attests to the regular procedures followed by the Center staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. Statutory notices that are ready for mailing to taxpayers are received by the Center in an area designated for “Outgoing Certified Mail.” A certified mail record is also received by the Center for each batch of statutory notices. A member of the staff weighs and seals each envelope and places postage and fee

⁴ Portions of Exhibit B have been redacted to protect the confidentiality of other taxpayers.

amounts on the envelopes. The first and last pieces of certified mail listed on the certified mail record are checked against the information listed on the certified mail record. A clerk then performs a review of the pieces of certified mail listed on the certified mail record by checking those envelopes against the information contained on the certified mail record. Thereafter, a member of the staff delivers the stamped envelopes to a branch of the USPS in Albany, New York. A USPS employee affixes a postmark and his or her initials or signature to the certified mail record, indicating receipt by the post office. The Center further requested that the USPS either circle the number of pieces received or indicate the number of pieces received by writing the number of pieces received on the certified mail record.

15. In this particular instance, the postal employee affixed a postmark dated December 20, 2012 of the Colonie Center branch of the USPS to this one-page certified mail record. At the bottom of this certified mail record, corresponding to "Total # of Pieces" is the preprinted number 5. The postal employee wrote number "5" next to "Total # Pieces Received at Post Office" and his or her illegible signature or initials next to "Postmaster, Per (Name of receiving Employee)" at the bottom of this one-page certified mail record.

16. The certified mail record is the Division's record of receipt, by the USPS, for pieces of certified mail. As a matter of standard procedure, to insure accountability, the certified mail record 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 certified mail record. The certified mail record is then picked up at the post office by a member of Mr. Peltier's staff on the following day and is then delivered to the originating office, in this case Cigarette Tax Audit Division.

17. Based upon his review of the affidavit of Denise Fox, the exhibits attached thereto and the certified mail record, Mr. Peltier attests that on December 20, 2012, an employee of the Mail Processing Center delivered a piece of certified mail addressed to “ERIC WHITE, 1525 CAYUGA RD., IRVING, NY 14081,” to the USPS in Albany, New York in a sealed postpaid window envelope for delivery by certified mail. He further attests that “the name of Eric White and his address, as set forth on the statutory notice, would have been displayed in the windows of the envelope.” Mr. Peltier alleges that he can also determine that a member of his staff obtained a copy of the certified mail record delivered to and accepted by the post office on December 20, 2012 for the records of Cigarette Tax Audit Division. Mr. Peltier 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 piece of certified mail to petitioner on December 20, 2012.

18. Included with the Division’s motion, is a copy of a 2008 New York State Application for Automatic Extension of Time to File Partnerships and Fiduciaries (Form IT-370-PF) that lists ERW Wholesale’s address as 1525 Cayuga Road, Irving, New York 14081. The following paid preparer information appears on the back of this IT-370-PF for the year 2008: R A Mercer & Co PC, 6455 Lake Avenue, Orchard Park, New York 14127.

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. The motion shall be denied if any

party shows facts sufficient to require a hearing of any material and triable issue of fact (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. Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990 [1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229 [1965], *affd* 26 AD2d 729 [1966]). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such facts exist” (*Daliendo v. Johnson*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” 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 (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94 [1968]; *Gerard v. Inglese*, 11 AD2d 381, 382, 206 NYS2d 879, 881 [1960]).

C. Tax Law § 481(b) provides the Division with the authority to assess penalties for the possession of unstamped cigarettes and other tobacco products. Penalties imposed pursuant to Tax Law § 481(b) are to be determined and reviewed in the same manner as that provided in section 478 of the Tax Law.

Tax Law § 478 authorizes the Division of Taxation to issue a Notice of Determination to a taxpayer subject to tax under Article 20 of the Tax Law if a return required under Article 20 is incorrect or insufficient. Pursuant to such section, the determination “shall finally and irrevocably fix the tax” assessed by such notice, unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. As an alternative to filing a petition in the Division of Tax Appeals, a taxpayer may request a conciliation conference in BCMS, with the time period for filing such a request also being 90 days (Tax Law § 170[3-a][a]). The filing of a petition or a request for a conciliation conference within the 90-day period is a jurisdictional prerequisite which, if not met, precludes the Division of Tax Appeals from hearing the merits of a case (*Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

D. Where the taxpayer files a petition or request for conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the Notice of Determination (*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 is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of 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 in question (*see Matter of Katz*; *Matter of Novar TV & Air Conditioner Sales & Serv.*).

E. From all the evidence submitted on this motion, there is no doubt that material and triable issues of fact exist. In support of its contention that the Notice of Determination was

properly mailed, the Division submitted the affidavits of Ms. Fox and Mr. Peltier and a copy of the December 20, 2012 one-page certified mailing record. There are gaps in the general procedures for producing and mailing notices of determination set forth in Ms. Fox's affidavit. While Ms. Fox explains that the keyboard specialist inserts each Notice of Determination into an envelope with a blank Request for Conciliation Conference and a copy of Publication 130-D, she fails to identify the document used by the keyboard specialist to address the mailing envelope and the Return Receipt. Ms. Fox also failed to articulate the manner of affixation of the certified mail sticker and the Return Receipt to the mailing envelope. In addition, while Ms. Fox explains that the post office adds the postage amount to the copy of the certified mailing record, writes in the total number of pieces received and signs or initials the certified mail record then returns it to the Cigarette Tax Unit as confirmation of receipt, she failed to explain the basis of this knowledge. There is also a gap in the procedures articulated in Mr. Peltier's affidavit. Although he explains the Mail Processing Center's procedures for mailing pieces of certified mail, Mr. Peltier failed to articulate the procedures followed when return receipt services are requested at the time of mailing of statutory notices. In addition, Mr. Peltier attested that an employee of the Mail Processing Center delivered one piece of certified mail addressed to petitioner to the USPS in Albany, New York, in a sealed postpaid window envelope for delivery by certified mail. The basis of Mr. Peltier's attestation was his review of Ms. Fox's affidavit, including the exhibits attached thereto, as well as his personal knowledge of the procedures of the Mail Processing Center. However, Ms. Fox, in her affidavit, explained that the Cigarette Tax Unit keyboard specialist addressed the mailing envelope. This glaring inconsistency calls into question the worth of Mr. Peltier's affidavit. Accordingly, the Division's motion is denied.

F. The Division of Taxation's motion to dismiss or for summary determination is denied, and a hearing on the issues will be scheduled in due course.

DATED: Albany, New York
May 15, 2014

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE