

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHRISTIAN J. MILACH	:	DECISION
	:	DTA No. 806736
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985, 1986 and	:	
1987	:	

Petitioner Christian J. Milach, 634 Bread and Cheese Hollow Road, Northport, New York 11768 filed an exception to the order of the Chief Administrative Law Judge issued on July 18, 1991 with respect to his petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985, 1986 and 1987. Petitioner appeared by Frank J. Laurino, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Oral argument, requested by petitioner, was denied.

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

ISSUE

Whether petitioner timely filed a request for a conciliation conference.

FINDINGS OF FACT

We find the facts as determined by the Chief Administrative Law Judge except for findings of fact "4" and "5" which have been modified. The Chief Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Christian J. Milach, was president of Cold Spring Concrete Corporation during the years 1985 through 1987. The corporation eventually became insolvent and filed a petition in bankruptcy under Chapter 11. Pursuant to the terms of a performance bond, Integrity Insurance

Company subsequently paid creditors for expenses incurred by Cold Spring Concrete Corp. However, the State of New York was not paid for withholding taxes which had accrued during the years at issue.

On December 21, 1988, the Division of Taxation ("Division") issued a Notice of Deficiency ("notice") and a Statement of Deficiency ("statement") to petitioner, based upon Tax Law § 685(g), asserting penalty due in the amount of \$130,312.87 for willful failure to collect and pay over withholding taxes.

The notice specified, in part, that:

"the deficiency will become an assessment subject to collection... unless you do one of the following within 90 days from the date of this notice...

1. Request a conciliation conference according to Section 170.3-a of the Tax Law,

or

2. File a petition for hearing according to Sections 1089 and 2008 of the Tax Law and the Rules of Practice and Procedure of the Tax Appeals Tribunal."

We modify finding of fact "4" of the Chief Administrative Law Judge's order to read as follows:

The Division submitted into evidence an affidavit of Michael J. O'Reilly, manager of the Central Processing Section of the Tax Compliance Division since March 14, 1985. Mr. O'Reilly's duties include: supervising the generation and issuance of statements and notices, asserting penalties due pursuant to section 685(g) of the Tax Law, and maintaining certified mail records of the addresses to which statements and notices have been sent. Mr. O'Reilly explained the procedure by which notices and statements are generated and issued: "[o]nce the Notice and Statement have been prepared, we place them in an envelope for mailing and affix the proper certified mail documentation." He concluded by declaring, "[a]fter reviewing [the evidence], I am certain that the Notice of

Deficiency and Statement of Deficiency were mailed by certified mail on December 21, 1988."¹

We modify finding of fact "5" of the Chief Administrative Law Judge's order to read as follows:

Included with the motion papers was a copy of a certified mail record -- U.S. Postal Form 3877 -- from the Tax Compliance Division which indicated that the ninth piece of mail, designated by control number 539074, was mailed by certified mail to Christian Milach, 634 Bread and Cheese Hollow Road, Northport, New York on December 21, 1988. This address precisely matches the addresses on both the notice and statement actually received by petitioner.²

In response to the notice and statement, petitioner sent a request for a conciliation conference to the Tax Compliance Division by way of Federal Express on March 23, 1989.³

¹The Chief Administrative Law Judge's finding of fact "4" read as follows:

"The Division submitted into evidence an affidavit of Michael J. O'Reilly, manager of the Central Processing Section of the Tax Compliance Division since March 14, 1985. Mr. O'Reilly's duties include: supervising the generation and issuance of statements and notices, asserting penalties due pursuant to section 685(g) of the Tax Law, and maintaining certified mail records of the addresses to which statements and notices have been sent. Mr. O'Reilly explained the procedure by which notices and statements are generated and issued. He concluded by declaring, '[a]fter reviewing [the evidence], I am certain that the Notice of Deficiency and Statement of Deficiency were mailed by certified mail on December 21, 1988.'"

This fact was modified to more accurately reflect the record.

²The Chief Administrative Law Judge's finding of fact "5" read as follows:

"Included with the motion papers was a copy of a certified mail record from the Tax Compliance Division which indicated that nine pages were mailed by certified mail to Christian Milach, 634 Bread and Cheese Hollow Road, Northport, New York (control number 539074) on December 21, 1988. This address precisely matches the addresses on both the notice and statement actually received by petitioner."

This fact was modified to more accurately reflect the record.

³On the same date, petitioner sent a petition for hearing to the Division of Tax Appeals also by Federal Express. This petition was received on March 24, 1989 and referred to the Bureau of Conciliation and Mediation Services.

Such request listed petitioner's address as 634 Bread and Cheese Hollow Road, Northport, New York 11768.

In his request, petitioner asserted that he was not a person required to collect taxes and that the corporation had been unable to maintain a trust fund for the purpose of paying withholding taxes, due to its insolvency. Petitioner claimed that his failure to pay withholding taxes did not result from any willfulness on his own part, but from the breach of a contract by the City of New York. He also produced evidence to prove that he had satisfied the penalties imposed for the period August 1, 1985 through December 31, 1986.

The request was received by the Tax Compliance Division on March 24, 1989 and forwarded to the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS subsequently dismissed the request as untimely. On July 21, 1989 the Division of Tax Appeals acknowledged receipt of a petition in response to the BCMS dismissal order and informed petitioner that it had been forwarded to the Law Bureau for preparation of an answer. The Division refused to answer the petition on the ground that it was untimely filed.

By Notice of Motion, dated May 20, 1991, the Division sought dismissal of the petition based upon failure to file a request for conference or petition for hearing within 90 days of the issuance of the Notice of Deficiency.

In his cross motion, dated June 7, 1991, petitioner admitted receiving the notice on December 24, 1988 and sending the request by express messenger on March 23, 1989.

OPINION

The Chief Administrative Law Judge determined that the Division had successfully demonstrated that it mailed the notice of deficiency to petitioner on December 21, 1988. Based on this, the Chief Administrative Law Judge determined that petitioner's request for a conciliation conference was untimely because it was not received within 90 days of the Division's mailing of the notice of deficiency. Therefore, the Chief Administrative Law Judge granted the Division's motion to dismiss.

On exception, petitioner asserts that the Division had failed to demonstrate that the notice of deficiency was properly mailed in accordance with Tax Law § 681 and that, therefore, petitioner's petition was timely filed.

In response, the Division relies on the order of the Chief Administrative Law Judge.

We affirm the order of the Chief Administrative Law Judge.

Tax Law § 681(b) provides that a notice of deficiency shall become an assessment 90 days after the date of mailing. This result may be avoided if the taxpayer has filed a petition pursuant to Tax Law § 689 within the 90-day period. When the timeliness of a filed petition is at issue, it becomes necessary for the Division to demonstrate proper mailing (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; see also, Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 USTC ¶ 9533). Proper mailing by the Division requires that the notice of deficiency "be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state" (Tax Law § 681[a]), a showing which is made by demonstrating a general procedure for the issuance of notices and the adherence to this procedure when mailing the notices at issue (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra). The Chief Administrative Law Judge determined that the Division had made this showing. We agree.

As proof of the general mailing practice, the Division offered the affidavit of Michael J. O'Reilly, Manager of the Central Processing Section of the Tax Compliance Division. In the affidavit, Mr. O'Reilly states that his office is responsible for generating notices and statements of deficiency. Once prepared, they are placed in envelopes and the proper certified mail documentation is attached. The name and address of the addressee, the date of mailing, and the certified mailing number are then recorded on form 3877. A copy of form 3877 is delivered to the Division's mail room where proper postage is affixed to the envelopes and recorded on form 3877. The mail room staff then delivers the envelopes to the United States Postal Service and

obtains a postmark on form 3877. A postmarked copy of form 3877 is then returned to Mr. O'Reilly's office from the mail room. This affidavit satisfactorily establishes the general mailing procedures of the Division.

As proof that this procedure was followed in this case, the Division has offered a copy of form 3877 bearing petitioner's address. The form bears a postmark dated "Dec 21 1988" but is unsigned. Although the post office branch is illegible on the copy, the date is clearly readable. The form also indicates that nine documents were mailed, and petitioner's address is listed as one of the nine. This address corresponds to the address set forth on petitioner's petition and is identified as corresponding with the envelope which bears the certified mailing number 539074.

Further, petitioner acknowledges receipt of the statement of deficiency. Petitioner's petition for hearing states:

"[t]he petitioner received a statement of deficiency for penalties under Section 685(g) dated December 21, 1988. This Statement of Deficiency was not received by the petitioner until December 24, 1988. Attached hereto and made a part hereof as Exhibit D is a copy of the certified mail receipt which petitioner received from the State of New York, Department of Taxation dated December 24, 1988 under certified mail number 539074" (Petitioner's petition, p. 4, emphasis added).⁴

It has already been established, through the affidavit of Michael O'Reilly, that the statement of deficiency and notice of deficiency were mailed in one envelope. Therefore, acknowledging receipt of the statement implies receipt of the notice.

Petitioner asserts that the Division has failed to prove proper mailing. Petitioner bases this contention on the failure of the Division to produce a properly completed Form 3877 and a return receipt postcard (Postal Service Form 3811). However, petitioner's assertion is undermined by

⁴Exhibit "D" of petitioner's petition is a photocopy of the envelope mailed to petitioner. Attached to the front of the envelope is the detached portion of Postal Service Form 3849-A. This form indicates that delivery of the envelope was made on December 24, 1988. Also on the front of the envelope appears the words "Certified No. 539074." From the photocopy, it appears that a stamp was used to create "Certified No. _____" and that the number "539074" was written on the line provided. We point this out to avoid any confusion between what petitioner terms a "certified mail record" and the Postal Service Form 3877 used by the Division as a certified mail record.

the above-quoted statement from its petition where petitioner acknowledges receipt on December 24, 1988 of the statement of deficiency for penalties under section 685(g) dated December 21, 1988 (Petitioner's petition, p. 4) and offers a copy of the envelope in which the notice and statement were mailed along with a copy of Postal Form 3849-A. Since this evidence corroborates the evidence offered by the Division to establish the mailing of the notice on December 21, 1988 (see, Matter of Kropf, Tax Appeals Tribunal, March 21, 1991), petitioner's assertions need not be addressed in further detail. We conclude that the Division established the mailing of the notice on December 21, 1988.

As stated in Tax Law § 681(b), the time period for filing a petition begins to run from the date of mailing, not the date of receipt as alleged by petitioner (see, Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017; see also, Keado v. United States, 86-1 USTC ¶ 9321, affd 853 F2d 1209, 88-2 USTC ¶ 9489). Since the date of mailing has been established, the date of receipt is irrelevant.

Since the Division has shown December 21, 1988 to be the date of issuance of the notice of deficiency, the 90-day period provided by Tax Law § 681 would have ended on March 21, 1989. Petitioner sent a request for a conciliation conference to the Tax Compliance Division and a petition for hearing to the Division of Tax Appeals, both of which were received on March 24, 1989. Both of these requests were sent by a private carrier, Federal Express. When documents are mailed via the United States Postal Service ("USPS"), the date of the USPS postmark stamped on the envelope will be deemed the date of delivery (Tax Law § 691[a]; 20 NYCRR 3000.16). However, where a private carrier is used, the date that the document is physically received is deemed to be the date of delivery (see, Matter of Stage Delicatessen East, Tax Appeals Tribunal, March 9, 1989). Therefore, both documents were untimely.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Christian J. Milach is denied;
2. The order of the Chief Administrative Law Judge is affirmed; and

3. The petition of Christian J. Milach is dismissed.

DATED: Troy, New York
June 11, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner