

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JAMES S. CLARK, JR. AND JOICE M. CLARK : DECISION
for Redetermination of a Deficiency or for : DTA No. 807085
Refund of New York State Personal Income Tax :
under Article 22 of the Tax Law and New York :
City Personal Income Tax under Chapter 46, :
Title T of the Administrative Code of the City :
of New York for the year 1982 :
:

Petitioner James S. Clark, Jr.,¹ 3002 Merrywood Drive, Edison, New Jersey 08817 filed an exception to the determination of the Administrative Law Judge issued on September 5, 1991 with respect to his petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1982. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioner filed a letter in support of his exception. The Division of Taxation filed a letter in response. Oral argument was not requested.

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

¹Although all notices and correspondence have been addressed to both James S. Clark, Jr. and Joice M. Clark, it appears that Mrs. Clark's name appears on the Notice of Deficiency because she filed a joint income tax return. All references to petitioner, therefore, will be to James S. Clark, Jr., only.

ISSUE

Whether petitioner James S. Clark, Jr. filed a petition within ninety days of the issuance of the notice of deficiency.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued a Statement of Audit Changes, dated April 28, 1986, to petitioners, James S. Clark, Jr., and Joice M. Clark, indicating income tax due for 1982 based on their Federal tax return. The Division informed Mr. and Mrs. Clark that it was unable to locate a New York State tax return for them, but noted that their Federal tax return showed a New York address.

By letter dated May 29, 1987, the Division informed Mr. and Mrs. Clark that it would credit them for any New York taxes withheld on their wages of \$48,733.00 if they could verify the amount withheld by submitting a wage and tax statement.

By letter dated August 4, 1987, the Division informed Mr. and Mrs. Clark that it did not receive a reply to its letter dated May 29, 1987 and that if they failed to provide further information, an assessment of the tax owed would be based on the information available.

The Division issued to Mr. and Mrs. Clark a Notice of Deficiency, dated May 27, 1988, indicating additional tax due in the amount of \$5,792.41, plus penalty and interest, for a total amount of \$11,991.38. The Notice of Deficiency contained the following statement:

"If you do not return the signed consent, the deficiency will become an assessment subject to collection (with interest to the date of payment) 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 "5" of the Administrative Law Judge's determination to read as follows:

The Division submitted an affidavit of Stanley K. Devoe, the Division's Principal Clerk who supervises the issuance of notices of deficiency to taxpayers with income tax delinquencies. In that affidavit, Mr. Devoe [established by reference to attached exhibits that the notice was sent by certified mail on May 27, 1988. Specifically, he affirmed the office practice regarding the mailing of notices of deficiency and noted that the certified control number assigned to Mr. and Mrs. Clark's Notice of Deficiency corresponded with that listed on the certified mailing record which was stamped by the U.S. Postal Service with the date of May 27, 1988.] described his general practice for supervising the mailing of notices of deficiency -- he compares the notices of deficiency listed on the certified mail record with the copies of the notices of deficiency, verifying that a properly addressed notice exists for each taxpayer listed. The notices of deficiency "are then stuffed in envelopes and brought to the United States Postal Service." After verification by a postal employee that an addressed envelope exists and corresponds with each name on the certified mailing record, a Post Office stamp is then affixed to a page of the certified mailing record. It is an office practice of the Division not to request return receipts.

Attached to the affidavit was a copy of the alleged mailing record (Exhibit "A"), consisting of three pages:

1) The cover sheet bears the printed label "New York State Dept. of Taxation and Finance." The time and date of the document's creation is printed as 09:33:59 on May 14, 1983. Further, the date 5/27/88 and the word "Mail" have been handwritten in the upper left hand corner, Mr. Devoe's signature appears on the same line in the upper right hand corner, and handwritten below this signature appears "Mailed 5/27/88."

2) The second sheet is labeled "Certified Mail Record," and bears the heading "Tax Compliance Bureau - Notice of Deficiency - Record of Mailing and Fees." In the upper right hand corner, this sheet is designated as being page 1 of some document created on 5/14/88. Certified numbers 546675 through 546688 are listed in a vertical column on the left side of the page and certified number 546676 is listed as assigned to James S. & Joice M. Clark, Jr. of #5 343-4 Street, Jersey City, N.J. This page bears no postmark.

3) The "last page" (so indicated) bears the heading "Tax Compliance Bureau - Notice of Deficiency - Record of Mailing and Fees." In the upper right hand corner, this sheet is designated as being created on 5/14/88; no page number appears. Certified numbers 546915 through 546928 are listed in a vertical column on the left side of the page. At the bottom of the page, next to the words "certified nos = " is the printed number 254. Under that number, someone, in their own hand, has subtracted "37" from the 254 leaving the number at 217. In addition, the postage fees were apparently recalculated, as the typewritten numbers on the form were crossed out and new numbers were handwritten in their place. Finally, a postal stamp of

May 27, 1988 of the Roessleville Branch of the United States Post Office appears in the lower right hand corner of the page, and beside that is an illegible, unidentified signature.

In the affidavit, Mr. Devoe states that Exhibit "A" is a "true and accurate copy of the cover sheet and page 1 and the last page of a certified mail record of Notices of Deficiency mailed on May 27, 1988 by the Department of Taxation and Finance."²

Petitioner James S. Clark, Jr. requested a conciliation conference by mail on Form TA-9.1 that was dated August 28, 1988. The envelope containing the request was postmarked August 30, 1988 and was stamped received by the Bureau of Conciliation and Mediation Services on September 1, 1988.

By order dated September 30, 1988, the conciliation conferee dismissed the request as untimely because the request was mailed on August 30, 1988, in excess of 90 days from the issuance of the Notice of Deficiency on May 27, 1988.

By petition dated December 23, 1988, petitioner James S. Clark, Jr. challenged the Notice of Deficiency on the ground that there was an overstatement of adjusted gross income by \$3,851.00.

In its answer dated October 18, 1990, the Division requested that the petition be dismissed as untimely.

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

"The Division submitted an affidavit of Stanley K. Devoe, the Division's Principal Clerk who supervises the issuance of notices of deficiency to taxpayers with income tax delinquencies. In that affidavit, Mr. Devoe established by reference to attached exhibits that the notice was sent by certified mail on May 27, 1988. Specifically, he affirmed the office practice regarding the mailing of notices of deficiency and noted that the certified control number assigned to Mr. and Mrs. Clark's Notice of Deficiency corresponded with that listed on the certified mailing record which was stamped by the U.S. Postal Service with the date of May 27, 1988."

This fact was modified to more accurately reflect the record.

By letter dated April 1, 1991, the Calendar Clerk of the Division of Tax Appeals advised petitioner that the timeliness of the petition was a threshold matter to be resolved before a hearing would be held on the merits of the case.

OPINION

The Administrative Law Judge determined that the petition of petitioner James S. Clark, Jr. was not filed within 90 days as required by statute. Therefore, the Administrative Law Judge determined that the Division of Tax Appeals was without jurisdiction to address the merits of the case and dismissed petitioner's petition.

On exception, petitioner attributes his failure to timely file a request for a conciliation conference to his unfamiliarity with the procedure of the Tax Appeals Tribunal and his failure to mail the request by registered mail, return receipt requested. Petitioner also reiterates the substantive arguments which were presented before the Administrative Law Judge.

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

We reverse the determination of the Administrative Law Judge.

Tax Law § 681(b) provides that a notice of deficiency shall become an assessment ninety days after the date of mailing. This result may be avoided if the taxpayer has filed a petition with the tax commission pursuant to Tax Law § 689 within the ninety-day period. When the timeliness of a filed petition is at issue, it becomes necessary for the Division to demonstrate proper mailing (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). 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 and the adherence to this procedure when mailing the notices at issue (Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra). The Administrative Law Judge determined, through the affidavit of Stanley Devoe, Principal Clerk for the Division,

that the Division had demonstrated its mailing procedures, generally, and that these procedures had been followed in this case. We do not agree with this conclusion.

The situation at issue is analogous to the scenario dealt with by this Tribunal in Matter of Katz (supra) issued after the Administrative Law Judge's determination in the instant matter. In Katz, nearly identical evidence was presented by the Division in an effort to demonstrate the general practice when mailing notices of deficiency, and that this practice was followed when mailing the notices which were at issue. It was determined that a certified mail record sheet which bore no postmark, without more, was insufficient to demonstrate that the Division had followed its mailing procedure when issuing the petitioners' notices of deficiency. Therefore, the Tribunal held that the Division had failed to demonstrate proper mailing, and that the petition of the petitioners was deemed timely.

The certified mailing sheets in the instant case are deficient in several respects. First, there is no evidence, on the documents themselves, that the third sheet presented -- bearing the postmark -- is related to the sheet bearing petitioner's address and certified number. The third sheet is only relevant, if at all, to notices 546915 through 546928, and cannot be implied to relate back to the sheet bearing petitioner's address and certified number which bears no postmark.

Additionally, based upon the calculation on the third page which appears to indicate a reduction in the number of certified pieces of mail sent, it cannot be determined which pieces of mail were removed if, indeed, that is what the calculation indicates. Assuming the calculation indicates a reduction in the certified mail issued, it is impossible to determine what certified numbers were removed. Although sheets two and three bear designations that may indicate which pieces of mail were removed, these offer no evidence as to whether the designation was applied exclusively and consistently, and fall well short of the 37 indicated in the calculation. In other words, it is impossible to determine exactly which pieces of certified mail, if any, were removed.

Further, while a properly completed postal form 3877 is considered "highly probative evidence," in part because of the space it provides for the postmaster's signature verifying receipt (see, United States v. Ahrens, 530 F2d 781, 76-1 USTC ¶ 9241, at 83,511; Cataldo v. Commissioner, supra), the pages of the certified mail record here do not provide an equivalent identified space indicating receipt. Also, unlike form 3877, the third sheet submitted does not list all the documents received by the post office. Therefore, it is impossible to determine whether the sheet on which petitioner's name appears was included in the pages postmarked 5/27/88.

Finally, the sheet on which petitioner's certified mail number and address appear lacks any postmark. Although the date 5/27/88 appears on the notice of deficiency addressed to petitioner, this is in no way related to the date upon which the notice is alleged to have been mailed (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990) and is, therefore, irrelevant to the present inquiry.

We conclude, as we did in Matter of Katz (Tax Appeals Tribunal, November 14, 1991), that the direct evidence of mailing offered here is not sufficient, in itself, to establish that the Division mailed the notice on the date claimed. What is missing here, as it was in Katz, is any evidence allowing us to determine that the relevant page of the purported certified mailing record was in fact attached to the page bearing the postmark at the time the document was delivered to the postal service. Although the Devoe affidavit describes, in part, the process by which the Division generates the certified mail record, it offers no description of the process by which the Division ensures that the multi-page document generated is the same one ultimately delivered to the postal service and then returned to the Division. In our view, if the Division has elected to abandon the use of a document complete on one page bearing a postmark and the signature of a postal service employee (i.e, Postal Form 3877) as its direct evidence of mailing, then it must provide us with additional information that allows us to determine that the relevant page of the computer-generated, multi-page certified mailing record was in fact delivered to the postal service with the postmarked page. One form that this additional information could take

would be a description of office practice suited to the new form of direct evidence -- an articulated procedure employed by the Division to ensure that the integrity of the certified mail record is maintained from the time that the document is generated, delivered to the postal service and returned to the custody of the Division.

The absence of such an articulated procedure renders meaningless, for our purposes, the statement in the Devoe affidavit that the pages entered into evidence are a true and accurate copy of pages from the certified mail record of notices of deficiency mailed on May 27, 1988. Without any information in the record for us to determine the basis of Mr. Devoe's statement, we conclude that the statement does not provide direct evidence that the Division physically deposited the notice with the postal service on the date claimed (Matter of Novar TV & Air Conditioner Sales & Serv., supra).

In sum, the three pages of certified mail records offered by the Division are insufficient to demonstrate when the Division delivered petitioner's notice of deficiency to the United States Postal Service. Therefore, petitioner's request for a conciliation conference dated August 28, 1988 is deemed to be timely filed (see, Matter of Novar TV & Air Conditioner Sales and Serv., supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner James S. Clark is granted; and
2. The determination of the Administrative Law Judge is reversed and the matter is remanded for a conciliation conference.

DATED: Troy, New York
June 18, 1992

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

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