

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM ROLAND	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA No. 813257
Personal Income Tax under Article 22 of the Tax Law	:	
and the Administrative Code of the City of New York	:	
for the Period January 1,1992 through September 30, 1992.	:	

Petitioner William Roland, 808 Broadway, New York, New York 10003-4806, filed an exception to the determination of the Administrative Law Judge issued on May 18, 1995. Petitioner appeared by Larry J. Silverman, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter on September 8, 1995 stating it would not be filing a brief in opposition, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam. Commissioner Donald C. DeWitt took no part in the consideration of this decision.

ISSUE

Whether the Administrative Law Judge properly granted the Division of Taxation's motion for summary determination on the basis that petitioner did not timely file a petition.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1" and "14" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

The Division of Taxation ("Division") issued to petitioner, William Roland, a Notice of Deficiency (Notice No. L-008298590-3) dated December 3, 1993 asserting withholding tax penalties in the amount of \$9,269.04 for the period January 1, 1992 through September 30, 1992.¹

The Division issued a Notice of Impending Tax Warrant ("notice of warrant") dated July 18, 1994 to petitioner in the amount of \$9,500.41.²

The notice of warrant included a Consolidated Statement of Tax Liabilities ("consolidated statement"). The following explanation appeared in Section A of the consolidated statement:

"The following liabilities are subject to collection action and the accrual of additional penalty and/or interest. To avoid such collection action and additional accruals, they must be paid immediately."

<u>"Tax Type</u>	<u>Assessment ID</u>	<u>Tax Period Ended</u>	<u>Tax Amount Assessed</u>	<u>Interest Amount Assessed</u>	<u>Penalty Amount Assessed</u>	<u>Assessment Payments/ Credits</u>	<u>Current Balance Due</u>
Withld	L-008298590-3	09/30/92	0.00	231.37	9,269.04	0.00 Total	<u>9,500.41</u> \$9,500.41"

On September 23, 1994, petitioner filed a petition with the Division of Tax Appeals for redetermination of a deficiency or for refund of withholding tax under Articles 22 and 30 of the Tax Law. The petition states:

"1. Petitioner was not a responsible person.

"2. Great Gatsby's of New York City, Inc. is a Georgia corporation.

"3. Petitioner had/had no knowledge regarding the amount of tax that should or should not have been paid by Great Gatsby's of New York City, Inc."

The amount of tax being contested was \$9,500.41.

¹The Notice of Deficiency was addressed to "Roland-William, 808 Broadway, New York, New York 10003-4806.

We modified finding of fact "1" by substituting the word "issued" for "mailed" in order to accurately reflect the record.

²The notice of warrant was addressed to: "Roland-William, 808 Broadway, New York, New York 10003-4806."

The Division of Tax Appeals by Frank Landers, Petition Intake, Review and Exception Unit, sent a letter dated October 18, 1994 to petitioner's representative.³ Mr. Landers wrote in pertinent part:

"As you know, the administrative hearing process begins with the filing of a petition within ninety days from the date of issuance of a statutory assessment/notice (Notice of Deficiency or Notice of Determination).

"Therefore, in order that I may determine if the Division of Tax Appeals has jurisdiction over this matter, please submit a copy of the statutory notice. If it is found that the petition was not filed within the 90-day protest period, the petition will be dismissed.

"Please forward the required document to my attention."

On October 27, 1994, Michelle D. Mogal, Esq., sent a letter to Mr. Landers in which she stated:

"Pursuant to our telephone conversation today, I write to advise you that Mr. Roland did not receive a statutory assessment/notice in connection with the Petition filed on September 22, 1994. Mr. Roland received only the Notice of Impending Tax Warrant in connection with this matter."

On November 3, 1994, the Division of Tax Appeals notified petitioner's representative that the petition was deemed in proper form and had been forwarded to the law bureau for preparation of the answer.

An answer, dated December 29, 1994, was served on petitioner by a transmittal letter also dated December 29, 1994. The Division, in its answer, denied petitioner's allegations and stated that: (1) a Notice of Deficiency was issued to petitioner, pursuant to Article 22 of the Tax Law, asserting penalty only in the amount of \$9,269.04 plus interest; (2) the petition for a hearing was not received until September 26, 1994, in excess of 90 days from the issuance of the notice; (3) pursuant to Tax Law § 689(b), a petition must be filed within 90 days of the date of the statutory notice; and (4) therefore, petitioner is not entitled to a hearing on the merits, but rather only one which is confined to the issue of the timeliness of petitioner's petition. The answer also states

³The letter was in reference to: William Roland; Assessment ID: L-008298590-3.

that petitioner has the burden to prove that "the assessment at issue is erroneous or otherwise improper," and to show that petitioner's petition was timely.

By letter dated January 17, 1995, petitioner's representative requested a 30-day extension of time in which to file a reply to the Division's answer. The Division of Tax Appeals granted an extension until February 17, 1995.

On January 30, 1995, the Division of Tax Appeals received petitioner's reply to the Division's answer to the petition. Mr. Silverman, in the reply, states the following:

"1. I am advised that William Roland did not receive the Notice of Deficiency referred to in Paragraph 2 the Division of Taxation's Answer to the Petition in connection with the above-entitled matter. The only documentation Mr. Roland did receive in connection with this matter is a Notice of Impending Tax Warrant dated July 18, 1994.

"2. On July 19, 1994, Mr. Roland sent the Notice of the Impending Tax Warrant via telecopier to my office.

"3. On Mr. Roland's behalf, I filed a Petition in connection with this matter on or about September 26, 1994. As I filed a petition on Mr. Roland's behalf on or about March 23, 1994 (DTA #812707) concerning issues identical to those in the instant Petition, I advised Kathleen Church, Esq. that Mr. Roland received the instant Notice of Impending Tax Warrant. At her suggestion I requested that the above-referenced Petition be associated with DTA #812707.

"4. In furtherance of a telephone conversation between Michelle Mogal, Esq. of my office and Frank A. Landers, on October 27, 1994 Ms. Mogal advised Mr. Landers in writing that Mr. Roland did not receive any statutory assessment/notice in connection with this matter.

"5. We received the New York State Division of Taxation's Answer to our Petition in early January. Neither the cover letter dated December 29, 1994 nor the Answer addressed the fact that we did not receive the statutory notice.

"6. We are scheduled to proceed with a hearing in connection with DTA #812707 on April 17, 1995 at 1:15 P.M. In the interest of judicial economy, we believe these two matters should be associated and that the merits of both Petitions may be resolved at the same hearing."

On February 27, 1995, the Division filed a motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency, as required by Tax Law § 689(b).

In support of its motion for summary determination, the Division submitted: the affidavit of its representative; affidavits of Geraldine Mahon and Daniel LaFar, employees of the Division; a copy of the New York State Department of Taxation and Finance Assessments Receivable certified mail record dated December 3, 1993; a copy of the Notice of Deficiency dated December 3, 1993; and a copy of the first page of the 1992 Form IT-201 Resident Income Tax Return for William and Beth Roland.

Geraldine Mahon is the principal clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division which relates to the Division's computer system for generating notices of deficiency and notices of determination to taxpayers under Article 22 of the Tax Law and the Administrative Code of the City of New York.

In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency/determination prior to their shipment to the Division's mechanical section for mailing. As part of her duties, she receives a computer printout referred to as a "certified mail record", and the corresponding notices of deficiency generated by CARTS. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a "certified control number", which is recorded on the certified mail record. She further explained that each notice is placed in an envelope by Division personnel and then delivered into the possession of a U.S. Postal Service representative, who then affixes his or her initials/signature and/or a U.S. Postal Service postmark to a page or pages of the certified mail record. In addition, Ms. Mahon stated that in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

Attached to Ms. Mahon's affidavit as Exhibit "A" are the 28 pages of the certified mail record containing a list of the notices allegedly issued by the Division on December 3, 1993, which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of such record.⁴ Attached to Ms. Mahon's affidavit as Exhibit "B" is a copy of a Notice of Deficiency, addressed to petitioner, which bears assessment identification number L008298590 and certified control number P911 005 698. Page 2 of the certified mail record contains certified mail control number P911 005 698, Notice of Deficiency number L008298590, addressed to petitioner, Roland-William, 808 Broadway, New York, New York 10003-4806. The certification and notice numbers listed match those on the notice issued to petitioner.

On this copy of the certified mail record, the certified control numbers run consecutively from P911 005 678 on page 1 to P911 005 974 on page 27, with 11 entries per page except page 28, which contains the total figures for the certified mail record. All 28 pages of the certified mail record bear the print date of November 23, 1993, changed manually on the first page only to December 3, 1993 and the record print time of 23:31:39. Each of the 28 pages submitted is date stamped December 3, 1993 by the Albany, New York Roessleville Branch of the United States Postal Service. Ms. Mahon explained in her affidavit that the print date for certified mail records is approximately ten days prior to the mail date in order to give sufficient time to review the notices by hand and to process the postage. She notes that the print date here was changed to conform to the actual date of delivery of the notices to the United States Postal Service. She also identified that the original document consisted of 28 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the United States Postal Service; and that the pages remain connected when the postmarked document is returned by the United States Postal Service after mailing.

⁴Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding. The Notice of Deficiency was sent to "Roland-William."

It is noted that while the certified mail record submitted contains, on page 28, the total number of pieces listed, 297, it does not contain a total for the number of pieces received at the post office. On page 28, the number 297 is circled on the line entitled "TOTAL PIECES AND AMOUNTS LISTED," and directly beneath the circled number 297 is the illegible signature of the postal representative.

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

Daniel B. LaFar is employed as a principal mail and supply clerk in the Division's mail and supply room. Mr. LaFar's duties include the supervision of mail and supply room staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on December 3, 1993.

Mr. LaFar stated that after a notice is placed in the "Outgoing Certified Mail" basket in the mail and supply room, a member of the staff weighs and seals each envelope, postage and fees are affixed and the postage and fee amounts are recorded on the certified mail record. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the mailroom staff delivers the stamped envelopes to the Roesseville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service. The LaFar affidavit stated that in this instance the postal service representative signed the certified mailing record and circled the number listed to indicate that this was the number received. After the certified mail record has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here CARTS Control Unit).⁵

⁵We modified finding of fact "14" by adding the following sentence before the last sentence of the fact in order to reflect the record in more detail:

The LaFar affidavit stated that in this instance the postal service representative signed the certified mailing record and circled the number listed to indicate that this was the number received.

The LaFar affidavit affirms that on December 3, 1993, an employee of the mailroom delivered a sealed, post-paid envelope for delivery by certified mail addressed to William Roland, 808 Broadway, New York, New York 10003-4806 to the Roesseville Branch of the U.S. Postal Service in Albany, New York.

Attached to Ms. Seifert's affidavit as Exhibit "3" is a copy of the first page of the 1992 New York State Resident Income Tax Return (Form IT-201) for William and Beth Roland. The address listed on Exhibit "3" is "Roland, William & Beth, 808 Broadway, New York, New York 10003". Ms. Seifert, in her affidavit, states that:

"the address used on the 1992 return is the same address used by the Department to mail the Notice of Deficiency to William Roland."

In opposition to the Division's motion for summary determination, petitioner submitted the affidavit of his representative, Larry J. Silverman, Esq. Mr. Silverman, in his affidavit, stated, in pertinent part, that:

"2. On March 22, 1994 I filed a timely petition on behalf of William Roland for redetermination of a deficiency or for refund of New York State and New York City income and sales taxes with regard to the following notice assessment numbers:

"a. Articles 22 & 30: L007032038, L007032039, L007032040

"b. Articles 28 & 29: L007032152, L007032153, L007032154, L007032155, L0070321564 & L007032157.

"3. The statutory notices charge that Great Gatsby's of New York City, Inc. (which is incorporated under the laws of the state of Georgia) failed to pay various income and sales taxes. The basis of our petition is that Petitioner William Roland was not a responsible person of Great Gatsby's of New York City, Inc. While Mr. Roland was an employee of Great Gatsby's of New York City, Inc., he was not an officer and therefore has no knowledge regarding and is not liable for taxes that should or should not have been paid by the Corporation.

"4. A hearing regarding the above-referenced Notices is scheduled to proceed on April 17, 1995.

"5. With regard to the instant matter, the only Notice we received is the Notice of Impending Tax Warrant. We filed our Petition within 90 days of the issuance thereof.

"6. The issues presented in the instant Petition are identical to those in the March 22, 1994 Petition. Therefore, in the interests of justice, the two Petitions should be associated together and decided on their merits for a factual determination as to whether or not Mr. Roland was an officer of Great Gatsby's of New York City, Inc. and whether or not Mr. Roland is liable for the taxes due from the corporation."

OPINION

In the determination below, the Administrative Law Judge held that the evidence submitted by the Division on its motion for summary determination was sufficient to establish a presumption of mailing which petitioner failed to rebut. Having held that the notice of deficiency was properly mailed on December 3, 1993, the Administrative Law Judge then granted the Division's motion for summary determination because the petition was untimely filed.

On exception, petitioner asserts that the Administrative Law Judge erred in relying on the affidavit of Daniel LaFar to establish proper mailing because Mr. LaFar's affidavit does not establish the standard procedure employed by the postal service for indicating the number of pieces delivered to and received at the post office. Petitioner contends that in the absence of demonstrating knowledge of the postal service's standard procedure for such and whether the procedure was employed on the date the notice of deficiency was allegedly mailed, the Division has not met its burden of proving proper mailing.

In response, the Division relies on the reasoning embodied in the Administrative Law Judge's determination.

We reverse the determination of the Administrative Law Judge for the reasons set forth below.

A petition contesting a notice of deficiency must be filed with the Division of Tax Appeals within 90 days of mailing (Tax Law § 689[b]). The filing of the petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals (Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989). If the timeliness of a petition is in issue, the Division bears the burden of establishing proper mailing of the notice of deficiency (Matter of Katz, Tax

Appeals Tribunal, November 14, 1991). The Division meets this burden by proffering evidence concerning "a standard procedure for the issuance of such notices by one with knowledge of such procedures, and the introduction of evidence to show that this procedure was followed in the particular case at hand" (Matter of Katz, supra; see also, Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). Once this burden is met, a presumption of proper mailing arises (Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112). If, on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed (Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra).

We find that the affidavits of Daniel LaFar and Geraldine Mahon and the certified mailing record sufficiently detail the standard procedure of the Division of Taxation for issuing notices of deficiency.

The affidavits establish that when notices of deficiency are generated a certified control number is assigned to each such notice. In turn, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to that notice. Here, the certified mail record establishes that a notice was indeed issued to petitioner. Further, the certified control number imprinted on the top of the copy of the notice of deficiency submitted by the Division corresponds to the certified mailing record.

However, unlike the Administrative Law Judge, we find the certified mail record submitted by the Division does not prove when mailing was effectuated. Here, although all 28 pages are date stamped December 3, 1993 by the Roessleville branch of the United States Postal Service and the last page of the certified mail record was either signed or initialed by a representative of the postal service, we find that the certified mailing record is flawed in that it does not indicate how many of the 297 pieces listed were actually received at the post office (see, Matter of Huang, Tax Appeals Tribunal, April 27, 1995; Matter of Fuchs, Tax Appeals Tribunal,

April 20, 1995; Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995; Matter of Turek, January 19, 1995).

The Administrative Law Judge stated that the postal representative's signature directly below the circled 297 on the certified mail record "supports the conclusion that all 297 pieces were in fact received at the post office" (Determination, conclusion of law "G"). This conclusion, however, is based upon speculation as to whether the circled "297" means that those listed pieces were actually received at the post office. Although the LaFar affidavit states that the postal service representative circled the total number of pieces listed to indicate this was the number of pieces received, the affidavit does not state the affiant's basis of knowledge for this proposition. Lacking this element, we conclude that the Division has not met its burden of proof and petitioner is entitled to a hearing on the merits to challenge the validity of the notice of deficiency.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William Roland is granted;
2. The determination of the Administrative Law Judge is reversed; and
3. The matter is remanded for a hearing.

DATED: Troy, New York
February 22, 1996

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner