

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHAEL S. TAYLOR	:	DECISION
	:	DTA No. 813700
for Redetermination of a Deficiency 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 Year 1988.	:	

Petitioner Michael S. Taylor, 444 East 82nd Street, New York, New York 10028, filed an exception to the determination of the Administrative Law Judge issued on December 19, 1996. Petitioner appeared by Richardson Mahon Casey & Rooney, LLP (James J. Mahon, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether the Division of Taxation's failure to properly issue a Notice of Deficiency to petitioner requires the cancellation of that Notice.

II. Whether, if jurisdiction exists to entertain the petition filed herein, petitioner was liable for the penalty provided for in Tax Law § 685(g) as a person required to collect, truthfully account for and pay over withholding taxes on behalf of Mostel & Taylor Securities, Inc., who willfully failed to do so.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

According to the affidavit of David Schaible of the Withholding Tax Unit of the Division of Taxation ("Division"), a Form IT-2103, Year-end Reconciliation, was received on January 17, 1990 for the 1988 tax year from "Mostel & Taylor Investments" indicating that a total of \$74,100.00 had been withheld from its employees for the year (*see*, Division's Exhibit "D"). The IT-2103 contained the ID Number WD113090543. The signature line was blank; however, it was dated January 29, 1989, and the title "President" was filled in on the line provided for the title of the person completing the form (the original IT-2103 is attached to Division's Exhibit "D").

On February 20, 1990, the Division issued a Notice and Demand for Unpaid Withholding Tax Due to Mostel & Taylor Investments, 919 3rd Avenue, New York, NY 10022 which demanded payment of \$74,100.00 in tax withheld, plus penalty and interest, for a total amount due of \$110,480.00 for the year 1988 (*see*, Division's Exhibit "E").

The Division issued a Notice of Deficiency, dated June 7, 1991, to Michael Taylor ("petitioner") at 444 East 82nd Street, New York, NY 10028. The Notice of Deficiency asserted a penalty in the amount of \$74,100.00 for the year 1988. The identification number listed on the notice was 113090543. Petitioner denies having ever received the Notice of Deficiency although he acknowledged that he lived at 444 East 82nd Street in New York City on the date on which the Division contends that it issued the notice and for many years prior thereto.

On March 1, 1993, the Division issued a Notice to Taxpayer as well as a Notice and Demand for Payment of Tax Due to petitioner in the amount of \$74,100.00 which indicated that he was liable as an officer/responsible person for a penalty, imposed pursuant to Tax Law § 685(g), in an amount equal to the unpaid withholding tax of Mostel & Taylor Investments. The notice and demand was sent to petitioner at 444 East 82nd Street, New York, NY 10028-5903. Petitioner acknowledges that he received these notices in March 1993.

Petitioner was the president of Mostel and Taylor Securities, Inc., a company with offices located at 919 Third Avenue, New York, New York 10022. The business was incorporated in the State of New York on October 14, 1981 (*see*, Division's Exhibit "N"). During the year at issue and for years prior thereto, petitioner was an investment banker for Mostel and Taylor Securities, Inc.

Petitioner testified that he initially contributed approximately \$50,000.00 toward the organization of the company and owned 16 2/3 percent of its stock. He stated that Leonard Osser joined the company in the middle of 1987 at which time Mr. Osser became a vice-president. Petitioner and Bennett Mostel were the other officers at that time. Mostel left the company in late 1987. Osser was put in charge of all operational matters including maintaining the books, filing tax returns and supervising the sales department.

In 1988 there were 11 stockholders of the company, and petitioner owned 12 to 13 percent of the stock. The board of directors consisted of petitioner, Leonard Osser, Neil Voorsanger and Richard Hodgson. The board met quarterly and, at its meetings, discussed whether the company was paying its taxes. At one of the board meetings, it was decided that petitioner would no longer be permitted to sign checks alone because Osser wanted to monitor the checkbook more closely.

Petitioner's earnings from Mostel and Taylor Securities, Inc. (approximately \$40,000.00 to \$50,000.00 per year) were his sole source of income during the year at issue. He devoted all of his time to the business of the company. As president, petitioner had the authority to hire and fire employees. However, since Leonard Osser was the operating officer, petitioner stated that he did not exercise this power without Osser's consent.

While Leonard Osser provided financial statements to the board of directors which showed taxes paid or taxes accrued on both balance sheets and income statements, petitioner never saw checks or copies of checks evidencing payment. Petitioner took no specific action to insure that Osser was filing New York State withholding tax returns and remitting payment. It

was petitioner's understanding that this was Osser's responsibility and "I left the delegated responsibilities that were delegated to him to do."

The business began failing in late 1988. In January 1989, \$250,000.00 was raised to recapitalize the company (petitioner raised about \$200,000.00 of this amount). After recapitalization, petitioner stated that he believed the company was current with all of its creditors.

The company ceased doing business in May 1989. At that time, petitioner was aware that the company owed Federal withholding taxes. Leonard Osser told him that they had "a huge Federal tax problem." When petitioner asked whether New York State withholding taxes were owed, he was told that they had been paid. Petitioner did not investigate this statement himself as he was trying to find jobs for the people who worked for the company and was trying to close the business.

In June or July 1990, petitioner filed for personal bankruptcy. He included the Federal government among his creditors because it was alleging that taxes were due and owing and was trying to recover such taxes from petitioner. On the advice of his attorney, he also included New York State as a creditor despite not knowing that any taxes were due to the State.

In his capacity as president of Mostel and Taylor Securities, Inc., petitioner signed the following documents:

- a. Form CT-5, Application for Automatic Six-Month Extension for Filing Tax Report or Return for the period March 1, 1987 through February 29, 1988 (see, Division's Exhibit "H");
- b. Form CT-4, New York State Corporation Franchise Tax Report for the period November 18, 1986 through February 28, 1987 (see, Division's Exhibit "I");
- c. Form CT-3M/4M, New York State Metropolitan Transportation Business Tax Surcharge Report for the period November 18, 1986 through February 28, 1987 (see, Division's Exhibit "J");
- d. Form CT-3S, S Corporation Information Report for the periods March 1, 1984 through February 28, 1985 (see, Division's Exhibit "M"), March 1, 1985 through February 28, 1986 (see, Division's Exhibit "L"), and March 1, 1986 through November 17, 1986 (see, Division's Exhibit "K");

- e. Form CT-6, Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes which was signed on December 28, 1983;
- f. Forms IT-2101, Return of Tax Withheld for various months during tax years 1984, 1985 and 1986 along with a Form IT-2103, Reconciliation for 1985 (*see*, Division's Exhibit "O").

In contrast to petitioner's testimony (*see*, above), the S corporation information reports reveal that for the period ended February 28, 1985 and for the period ended November 17, 1986, petitioner owned 24.56 percent of the company's stock; for the period ended February 28, 1986, he owned 32.55 percent. A schedule K-1 attached to the report filed for the period March 1, 1986 through November 17, 1986 (*see*, Division's Exhibit "K") also indicates that Leonard Osser was a 24.56 percent shareholder during that time.

As proof of its proper and timely issuance of the notice of deficiency, the Division submitted an affidavit of Michael J. O'Reilly of its Tax Compliance Division, an affidavit of Daniel LaFar of the Division's Mail and Supply Room, and copies of the notice of deficiency and the mailing log (Postal Form 3877). The mailing log consists of a one-page document indicating that, on June 7, 1991, 15 articles were allegedly mailed by "New York State Taxation & Finance". One of these articles was addressed to Michael Taylor at 444 E. 82 Street, New York, N.Y. 10028. The article number of this mailing was 539033, the postage was \$.52 and the fee was \$1.00. At the bottom of the form, "Total number of Pieces Listed by Sender", "Total number of Pieces Received at Post Office" and "Postmaster, Per (Name of receiving employee)" are blank.

Mr. O'Reilly's affidavit describes the procedures of the Tax Compliance Division in preparing a mailing log for each set of notices mailed by certified mail each day. It states that the notice as well as a blank power of attorney form and a blank request for conciliation conference form are inserted into the envelope. A certified mail number is then listed on each envelope and entered on the mailing log. The envelopes are compared with the mailing log to verify that all notices are accounted for. The unsealed envelopes and the mailing log are then

transferred by a Tax Compliance Division clerk to the Division's outgoing mail unit for delivery to the United States Postal Service.

The outgoing mail unit delivers the notices to the United States Postal Service which stamps the certified mailing log to show that all pieces of mail listed thereon were received at the U.S. post office. One copy of the certified mailing log is returned to the Tax Compliance Division.

Mr. O'Reilly states that on the mailing log attached to his affidavit, there were 15 pieces of mail listed as having been sent to the U.S Postal Service on June 7, 1991. It is the practice of his office that if any of the notices listed on the Form 3877 are not included in the mailing, the reference to the excluded notice on the form is crossed out and no postage is charged for such notice. Since no names or addresses are crossed out on the form at issue herein and since postage and fees were charged for all notices contained on the form, it is Mr. O'Reilly's contention that all notices listed on the Form 3877 accompanied the form to the post office. Mr. O'Reilly stated that it appears that the certified mailing of the notice of deficiency to petitioner at 444 East 82nd Street, New York, NY 10028 was in compliance with the Tax Compliance Division procedures and that he was unaware of any problems which arose with respect to executing these procedures.

The affidavit of Daniel LaFar of the Division's Mail and Supply Room states that his regular duties include the supervision of staff in delivering outgoing mail to branch offices of the U.S. Postal Service. After a notice is placed in the "Outgoing Certified Mail" basket in the mail room, a member of his staff weighs and seals each envelope, places postage and fee amounts on the letters and records the postage and fee amounts on the mail record. A mail room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. A member of the mail room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. The postal employee affixes a postmark to the certified mail record to indicate receipt by the postal service.

Mr. LaFar's affidavit states that, in the present matter, the postal employee placed a postmark on the certified mail record to indicate that 15 pieces were received at the post office on June 7, 1991. In the ordinary course of business and pursuant to the practices and procedures of the Mail and Supply Room, the certified mail record is picked up at the post office the following day and is delivered to the originating office by a member of Mr. LaFar's staff. From a review of Michael J. O'Reilly's affidavit as well as copies of the notice and the mailing record, Mr. LaFar states that he can determine that on June 7, 1991, an employee of the Mail and Supply Room delivered a piece of certified mail addressed to Michael Taylor, 444 E. 82 Street, New York, NY 10028 to the Roessleville Branch of the United States Post Office in Albany, New York in a sealed postpaid envelope for delivery by certified mail. Mr. LaFar further states that the procedures described in his affidavit are the regular procedures followed by the Mail and Supply Room staff in the ordinary course of business when handling items to be sent by certified mail, and that those procedures were followed in mailing the notice at issue herein.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge first addressed the issue of whether the Notice of Deficiency was properly mailed. The Administrative Law Judge concluded that while the Division presented adequate proof of its standard mailing procedures, the Division did not meet its burden of proving that its standard procedure was followed in this particular instance. Relying on prior decisions by this Tribunal (*Matter of Sabando Auto Parts*, Tax Appeals Tribunal, March 9, 1995; *Matter of Auto Parts Ctr.*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995), the Administrative Law Judge found that the certified mail record offered by the Division did not establish that each of the pieces of mail listed thereon was received by the Postal Service. As a result, the Division failed to meet its burden of proving that the Notice of Deficiency was properly mailed to petitioner.

While the proper issuance of a Notice of Deficiency is a jurisdictional matter and the Administrative Law Judge noted that the remedy for the Division's failure in this instance would ordinarily be to cancel the Notice of Deficiency, the Administrative Law Judge did not do so. Rather, he concluded that because the statute of limitations is not available as a defense in this proceeding, if the Notice of Deficiency in this matter were cancelled, the Division:

"may simply reissue another notice to petitioner which asserts the same penalty for the same period. Petitioner would then be compelled to file another petition for an administrative hearing (or request for a conciliation conference) with the ultimate result being that the parties would again be before this forum litigating the exact same issues. Even if petitioner never received the actual notice of deficiency until the hearing held herein, there was absolutely no prejudice to petitioner since he was clearly apprised of the basis of the Division's assertions that he was being held liable for a penalty equal to the amount of withholding taxes owed by Mostel and Taylor Securities, Inc." (Determination, conclusion of law "E").

Therefore, the Administrative Law Judge deemed the Notice of Deficiency to have been properly served upon petitioner, deemed all pleadings to have been timely and properly filed and served, and considered the substantive issues raised by petitioner.

The Administrative Law Judge noted that the unsigned Form IT-2103 which was the basis for the calculation of petitioner's assessment contained a different taxpayer's name and identifying number than the entity of which petitioner admitted being an officer. The Administrative Law Judge concluded that these discrepancies in the preprinted taxpayer name and identification number were merely errors which went uncorrected by whomever filed the Form IT-2103 on behalf of the taxpayer. The Administrative Law Judge concluded that since petitioner had neither alleged nor proven any harm or prejudice occurring as a result of the errors on the notice and demand, petitioner's contentions with respect to these errors must be dismissed.

The Administrative Law Judge further concluded that petitioner was a person under a duty to collect, truthfully account for and pay over such withholding taxes due from Mostel and Taylor Securities, Inc., the corporation of which he was the president and a member of its board

of directors and that his failure to do so was willful within the meaning and intent of Tax Law § 685(g).

ARGUMENTS ON EXCEPTION

In his exception, petitioner argues that the Administrative Law Judge incorrectly ignored the jurisdictional defect in the mailing of the Notice of Deficiency simply because there was no statute of limitations defense available in this matter. The issue is whether the matter is properly before the Division of Tax Appeals, not whether the defense of statute of limitations has merit. Further, petitioner argues that the Administrative Law Judge incorrectly found petitioner liable for tax due from a taxpayer with a different name and identifying number than the one of which he was an officer. Finally, petitioner argues that he had no knowledge of the failure of the taxpayer to remit withholding taxes and did not willfully fail to collect or pay over such tax.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that petitioner's failure to collect, truthfully account for and pay over withholding taxes on behalf of the corporation was willful within the meaning of Tax Law § 685(g).

OPINION

Tax Law § 685(g) provides that:

"Willful failure to collect and pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(n) provides the following definition of "persons" subject to the section 685(g) penalty:

"the term person includes an individual, corporation, partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs."

Tax Law § 685(l) provides that the penalties imposed pursuant to section 685 shall be assessed, collected and paid in the same manner as taxes.

Tax Law § 681(a) provides that when the Commissioner of Taxation and Finance determines a deficiency of income tax, he may mail a Notice of Deficiency by certified or registered mail to the taxpayer at his last known address.

Tax Law § 681(b) provides that:

"[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition"

Whether or not the notice is actually received, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (*see, Matter of Katz*, Tax Appeals Tribunal, November 3, 1994, *citing Dorff v. Commissioner*, T.C. Memo 1988-117, 55 TCM 412; *Cataldo v. Commissioner*, 60 T.C. 522, *affd* 499 F2d 550, 74-2 USTC ¶ 9533). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced (*see, Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111; *Matter of Katz, supra*).

To prove that the Notice of Deficiency was mailed to a taxpayer on a particular date, the Division was required to prove its standard procedure used for the mailing of such notices by those with knowledge of the relevant procedures; and that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In this proceeding, the Division presented adequate proof of its standard mailing procedures but did not meet its burden of proving that its standard procedure was followed. Lacking sufficient evidence to establish both the fact and date of mailing, the case must be dismissed on the ground that the Notice of Deficiency was improperly issued and cannot serve as the basis for a valid assessment (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

Tax Law § 682(a) provides, in applicable part, that "[i]f a notice of deficiency has been mailed, the amount of the deficiency shall be deemed to be assessed [90 days from the mailing of the notice] if no petition to the tax commission is filed, or if a petition is filed, then upon the date when a decision of the tax commission establishing the amount of the deficiency becomes final." Once a Notice of Deficiency has become an assessment, Tax Law § 692(b) provides that a "notice and demand" for tax shall be given to each person "liable for any amount of tax, addition to tax, penalty or interest, which has been assessed but remains unpaid." However, until a Notice of Deficiency has been mailed, "[n]o assessment of a deficiency in tax and no levy or proceeding in court for its collection shall be made" (Tax Law § 681[c]).

Having determined that the Division failed to properly mail the Notice of Deficiency at issue, the Administrative Law Judge correctly concluded that the Division of Tax Appeals lacked jurisdiction to consider the merits of the petition. However, it was an error for the Administrative Law Judge to then deem the Notice of Deficiency to have been served on petitioner and to have considered the substantive issues raised by petitioner. While the Administrative Law Judge's speculation may be correct that our dismissal may result in the issuance of a new Notice of Deficiency by the Division with hearing rights attendant thereto, this cannot justify our failure to observe the jurisdictional prerequisites of Tax Law § 681(a) in the first instance (*see, Matter of Jaffe*, Tax Appeals Tribunal, September 21, 1995 [dismissal of the case on jurisdictional grounds did not end the matter with regard to the failure to report Federal changes since there is no statute of limitations on the issuance of the notice and demand for such failure; the Division could issue new notices at any time]).

Based on the foregoing, we are without jurisdiction to decide the issue of whether petitioner was subject to the penalty provided for in Tax Law § 685(g) as a person required to collect, truthfully account for and pay over withholding taxes on behalf of Mostel & Taylor Securities, Inc., who willfully failed to do so. Therefore, we reverse the determination of the Administrative Law Judge and cancel the Notice of Deficiency at issue herein.

According, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael S. Taylor is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Michael S. Taylor is granted; and
4. The Notice of Deficiency dated June 7, 1991 is cancelled.

DATED: Troy, New York
October 9, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner