

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHAEL AND CHARLOTTE	:	DECISION
LIPPMAN	:	DTA NO. 823374
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income	:	
Tax under Article 22 of the Tax Law for the	:	
Year 2004.	:	

Petitioners, Michael and Charlotte Lippman, filed an exception to the determination of the Administrative Law Judge issued on August 4, 2010. Petitioners appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioners did not file a brief in support. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

FINDINGS OF FACT

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

Petitioners, Michael and Charlotte Lippman, were issued Notice of Deficiency L-029673672 dated May 27, 2008.

In protest of the notice of deficiency, petitioners requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request, dated September 23, 2009, was mailed on September 24, 2009 and stamped received by BCMS on September 28, 2009.

Following this request, BCMS issued Conciliation Order Dismissing Request (CMS No. 235311) on October 16, 2009, denying petitioners' request for a conciliation conference, stating that because the "notice was issued on May 27, 2008, but the request was not received until September 28, 2009, or in excess of 90 days, the request is late filed."

On November 24, 2009, petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the notice of deficiency at issue.

On March 10, 2010, the Division of Taxation (Division) filed an answer alleging that the petition at issue should be denied based upon untimeliness. Subsequently, the Division filed a motion, received on May 7, 2010, requesting an order dismissing the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b).

To support its motion for summary determination, the Division submitted, among other documents, the affidavit of John E. Matthews, Esq.

Petitioners' last known address was 9 Inwood Lane East, Cortland Manor, NY 10567, for the purposes of issuing the notice of deficiency at issue on May 27, 2008, as obtained from a copy of petitioners' last tax return, for 2006, filed on December 31, 2007.

The Division also submitted the affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of

delivering outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of deficiency is placed in the “Outgoing Certified Mail” area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A certified mail record (CMR) is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random check of up to 30 pieces of the certified mail listed.

Once review takes place, a member of the MPC staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and his or her initials or signature to the certified mail record indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS will also either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.

A review of the CMR confirms that a USPS employee initialed page 26 of the CMR, affixed a postmark to each page of the CMR and wrote the total number of pieces of certified mail received. Page 26 of the CMR listed 279 pieces of mail, and the handwritten number by the USPS employee reflects that amount.

On May 27, 2008, an employee of the MPC delivered one piece of certified mail addressed to petitioner, at 9 Inwood Lane East, Cortland Manor, NY 10567, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail. Additionally, the certified mail record lists only the name of Michael Lippman due to the fact that it is standard procedure for the CMR to contain the name of only one taxpayer associated with the statutory notice in instances where a joint return was filed.

The Division also provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the New York State Department of Taxation and Finance (Department). CARTS refers to the Department's computer system for generating documents that include notices of deficiency issued to taxpayers. The computer generated statutory notices are predated with the anticipated date of mailing and each is assigned a certified control number.

Each batch of statutory notices is accompanied by a computer printout entitled "Certified Record for Presort Mail-Assessments Receivable." It lists each notice in the order the notice was generated and each notice's certified control number appears under the first heading, "Certified No." The assessment numbers are listed under the second heading, "Reference No." and the names and addresses of the taxpayers are listed under the third heading, "Name of Addressee, Street and PO Address," while the remaining heading lists postage and fees.

The CMR for the notice issued on May 27, 2008 to the petitioner consisted of 26 pages. Furthermore, the postal service representative affixed a postmark to each page of the CMR and stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" on page 26. Specifically, the representative wrote 279 on page 26 and initialed each page of the CMR.

On page 7 of the CMR, notice of deficiency L-029673672 is indicated as being sent to Michael Lippman, 9 Inwood Lane East, Cortland Manor, NY 10567 by certified mail using control number 7104 1002 9730 0738 7209, and a postmark of May 27, 2008 is present.

On June 8, 2010, petitioners responded to the motion asserting that they had not received the notice of deficiency because they had changed their residence and the notice was never

forwarded to the new address. Petitioners assert that their address at that time was 135 Southside Avenue, Hastings-On-Hudson, NY 10706, as a result of their former residence being foreclosed upon.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that a notice of deficiency is “issued” at the time of its mailing to the taxpayer and that such notice of deficiency is binding on both the Division and the taxpayer unless the taxpayer either requests a conciliation conference or files a petition for a hearing within 90 days. The Administrative Law Judge concluded that petitioners failed to do so within the required time period.

The Administrative Law Judge found that where the timeliness of a petition is at issue, the Division has the burden of proving proper mailing of the notice of deficiency. The Division must prove a standard procedure used by it for the issuance of a notice of deficiency by one with knowledge of the relevant procedures; and must also prove that the standard procedure was followed in the particular instance in question. Based on the submitted affidavits of two of its employees, the Administrative Law Judge concluded that the Division had established that it mailed the notice of deficiency to petitioners by certified mail on May 27, 2008 at their last known address. Thus, the Administrative Law Judge found that since the notice of deficiency was issued to petitioners on May 27, 2008 and a request for a hearing was not submitted to the Division of Tax Appeals until November 24, 2009, the Division of Tax Appeals lacks jurisdiction to consider the petition.

The Administrative Law Judge determined that petitioners did not dispute that the Cortland Manor, New York address was their last known address (Tax Law § 691[b]) at the time that they filed their request for a conciliation conference. The Administrative Law Judge also

found that petitioners did not offer any proof that they attempted to notify BCMS or the Division of their address change.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that they did not receive the notice, as it was mailed to the incorrect Cortland Manor, New York address.

OPINION

We affirm the determination of the Administrative Law Judge.

The Tax Law provides with regard to personal income tax that:

After 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 under section six hundred eighty-nine (Tax Law § 681[b]).

In the alternative, a taxpayer may also, within that same 90 day period, file a request for a conciliation conference with BCMS (*see* Tax Law §§ 170[3-a], 2006[4]; 20 NYCRR 4000.3[c]).

If a taxpayer first elects to file a request for a conciliation conference with BCMS, the conciliation order is binding upon the Department and the taxpayer unless a petition is filed with the Division of Tax Appeals within 90 days after the conciliation order is issued (*see* Tax Law § 173[3-a][e]; 20 NYCRR 4000.3[c], 4000.6[b]).

When the timeliness of the petition is at issue, the Division must establish proper mailing of the notice (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). Tax Law § 691(b) provides that a taxpayer's "last known address" shall be the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the Division of a change of address. Tax Law § 681 does not require actual receipt by

the taxpayer (*see Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The timely filing of a request for a conference or petition is a jurisdictional prerequisite for review of a notice (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

Petitioners' petition was not filed until November 24, 2009, well in excess of the 90 day time period allowed to file a petition with the Division of Tax Appeals. We find that the Division has met its burden to establish proper mailing of the notice of deficiency to petitioners on May 27, 2008 by submitting affidavits describing its general mailing procedure and the mailing record, which showed that the procedure was followed in this case (*see generally Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). We agree with the Administrative Law Judge that petitioners' affirmation did not dispute that their Cortland Manor, New York address was their proper address i.e., last known address at the time that they filed their request for a conciliation conference. Further, petitioners have not offered any proof that they attempted to notify BCMS or the Division of their claimed change of address.

We find that the Administrative Law Judge correctly addressed the issue presented to him and correctly applied the Tax Law and relevant case law to the facts of this case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Michael and Charlotte Lippman is denied;
2. The determination of the Administrative Law Judge is sustained; and

3. The petition of Michael and Charlotte Lippman is dismissed.

DATED: Troy, New York
March 3, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner