

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
JEFFREY BRAGER	:	DETERMINATION DTA NO. 812523
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1987 through 1990.	:	

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Petitioner, Jeffrey Brager, 107 Foxwood Drive, Jericho, New York 11753, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1987 through 1990.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on December 7, 1994 at 1:00 P.M. Petitioner was granted permission to submit additional evidence post-hearing and did submit such evidence on February 6, 1995. The Division of Taxation filed a letter commenting on petitioner's post-hearing submission on February 27, 1995. This date commenced the six-month period for the issuance of this determination. Petitioner appeared at hearing by William J. Bernstein, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

ISSUE

Whether petitioner's petition was timely filed.

FINDINGS OF FACT

The subject of this matter is a Notice of Deficiency dated March 4, 1993 bearing assessment identification number L-007046270-4. Said notice is addressed to petitioner, Jeffrey Brager, and to Paula Brager, petitioner's former wife, at "110 Great Neck Rd. 5E, Great

Neck, NY 11021-3304" and asserts a total of \$35,321.14 in additional New York State and New York City personal income tax due, plus penalty and interest, for a "total amount due" of \$75,593.56 for the years 1987 through 1990. A copy of this notice was introduced into the record herein. This copy also lists a certified mail control number, "P 911 005 784", in the upper right corner.

On December 24, 1993, petitioner filed a petition in respect of the above-referenced assessment identification number wherein petitioner stated, in pertinent part:

"No Notices of Deficiency are attached nor were the original Notice or Nortices [sic] timely protested because the Notice of Deficiency was allegedly mailed to Mr. Brager at a prior address, said address being 6 Rodeo Circle, Syosset, New York, despite the fact that the audit information contained petitioner's correct address which is 107 Foxwood Drive, Jericho, New York 11753. In fact Petitioner has never received copies of any such Notices despite numerous requests by his accountants who represented Petitioner during audit and were likewise never sent copies of the Notice of Deficiency."

The Division of Taxation ("Division") subsequently filed an answer to petitioner's petition and asserted that since said petition was filed in excess of 90 days from the (alleged) date of issuance of the above-referenced Notice of Deficiency, such petition was untimely filed.

In order to establish the date and proper mailing of the subject Notice of Deficiency, the Division submitted a 30-page document referred to as a "certified mail record" or "CMR".

The first three pages of the CMR are encaptioned "Certified Record of Non-Presort Mail" and are numbered pages "1", "2" and "3", respectively. These three pages list certified control numbers sequentially numbered from P 911 206 805 through P 911 206 836 for a total of 32 pieces. There appear to have been no deletions from the 32 items listed on these three pages. The bottom of page "3" of this "Certified Record for Non-Presort Mail" lists "32" as the total pieces listed therein. This "32" has not been manually circled (see, Finding of Fact "7"). The space corresponding to the heading "Total Pieces Received at Post Office" is blank. Page "3" of the "Certified Record for Non-Presort Mail" contains no signature (see Finding of Fact "8").

The fourth through thirtieth pages of the CMR bear page numbers "1" through "27". These 27 pages are encaptioned "Certified Record for Zip + 4 Minimum Discount Mail". These

27 pages list certified control numbers sequentially numbered from P 911 005 666 through P 911 005 957 for a total of 292 items. There appear to be no deletions from the 292 items listed on these 27 pages.

The page numbered "27" indicates that 292 pieces of mail were listed on this "Certified Record for Zip + 4 Minimum Discount Mail". It is noted that this "292" has been manually circled. Just below this entry, the space next to the heading "Total Pieces Received at Post Office" is blank.

Page "27" also contains a signature.

All 30 pages of the CMR submitted by the Division contain a pre-printed date of February 22, 1993. On the first page of the document, i.e., page "1" of the "Certified Record of Non-Presort Mail", this date has been manually changed to March 4, 1993.

All 30 pages of the CMR bear a United States Postal Service postmark dated March 4, 1993. The stamp further identifies itself as that of the Roessleville Branch of the U.S. Postal Service, located in Albany, New York.

Assigned to each certified control number on all 30 pages of the CMR is a notice number, a listing of the name of the addressee and mailing address, and a listing of postage and fees.

The page numbered "11" of the "Certified Record for Zip + 4 Minimum Discount Mail" lists certified control number P 911 005 784. Corresponding to this number is notice number "L-007046270" and petitioner's name and the address listed in Finding of Fact "1" herein.

The Division also submitted the affidavit of Donna Biondo, head clerk for the Division's Case and Resource Tracking System ("CARTS") Control Unit. As part of her regular duties, Ms. Biondo supervises the processing of notices of deficiency/determination prior to shipment to the Division's Mechanical Section for mailing. In her affidavit, Ms. Biondo stated that she had reviewed the certified mail record previously described herein and, in connection with such review, the Biondo affidavit further stated, in pertinent part:

"3. I have examined the [subject certified mail record]. This document is a true and accurate copy of the certified mail record for

Notice(s) of Deficiency and Notice(s) of Determination issued by the Department of Taxation and Finance on March 4, 1993, including the Notice of Deficiency issued to Jeffrey Brager. The original document consists of 30 fan-folded (connected) pages. All pages are connected when the postmarked document is returned to our office after the mailing. Portions of [the CMR] have been redacted to preserve the confidentiality of information relating to other taxpayers.

- "4. In the upper left hand corner of the certified mail record, page 1, the date 02/22/93 was changed manually to 3-4-93. The original date, 02/22/93, was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular Notice(s) so that there is sufficient lead time for the Notice(s) to be manually reviewed and then processed for postage, etc. by the Department's Mechanical Section. The handwritten change of the date from 02/22/93 to 3-4-93 was made by personnel, in the Department's mail room, who changed the date so that it conformed to the actual date that the Notices and the certified mail record were delivered into the possession of the United States Postal Service.
- "5. The United States Postal Service authorizes the use of certified control numbers in numerically consecutive blocks. This certified mail record uses two blocks of certified control numbers; certified control numbers 911 206 805 through 911 206 836 (assigned to the items of mail listed on the first three pages (numbered 1 through 3)) and certified control numbers P 911 005 666 through 911 005 957 (assigned to items of mail listed on the next 27 pages (numbered 1 through 27)). There are two blocks of certified control numbers in [the CMR] because the certified mail record was not separated into two parts with each part corresponding to blocks of certified control numbers. Therefore, the two parts were treated as a single certified mail record.
- "6. Each statutory Notice is placed in an envelope by Department personnel and the envelopes are then delivered into the possession of a U.S. Postal Service representative. The Postal Service representative then affixes his or her initials/signature and/or a U.S. Postmark to a page or pages of the certified mail record. Here, the Postal Service representative affixed a Postmark to each page of the certified mail record and placed his signature on page 27 of part two of the certified mail record."

The Biondo affidavit concluded that the certified mail record indicated that a Notice of Deficiency bearing notice identification number 007046270 was mailed to petitioner by certified mail on March 4, 1993 at the address listed in the CMR and using the certified control number P 911 005 784.

In further support of the mailing of the notice in issue, the Division offered the affidavit of Daniel LaFar, principal mail and supply clerk. Mr. LaFar worked in the Division's mailroom at the time of the mailing of the notice at issue herein. The LaFar affidavit explained the regular

procedure in the mailroom which was followed when mailing notices of deficiency. The affidavit stated that, upon receipt of the notices, envelopes and certified mail record by the Division's mailroom, a mailroom clerk verified the names and certified mail numbers against the information in the certified mail record. The clerk then weighed and sealed the envelopes containing the notices, affixed postage and fees to the envelopes, and recorded such amounts on the certified mail record. Thereafter, a mailroom employee delivered the envelopes and associated certified mail record to the Roessleville Branch of the U.S. Postal Service in Albany, New York, where a postal employee affixed a dated postmark and/or his or her signature to the certified mail record.

The LaFar affidavit also stated that it was the ordinary course of business pursuant to the practices and procedures of the mail and supply room to pick up the certified mail record the following day and deliver it to the originating office, which was done herein.

The LaFar affidavit further stated that Mr. LaFar had reviewed the certified mail record and the affidavit of Donna Biondo and could determine that an employee of the mailroom had delivered the certified mail addressed to Jeffrey Brager, 110 Great Neck Road East 5E, Great Neck, New York 11021-3304 to the Roessleville Branch of the United States Postal Service in Albany, New York on March 4, 1993, in a postpaid envelope for delivery by certified mail.

Petitioner filed his 1991 New York State personal income tax return (Form IT-201) on October 15, 1992. Petitioner filed said return jointly with his former wife, Paula Brager. Petitioner's address as listed on said return was "110 Great Neck Rd. Apt. 5E, Great Neck, New York 11021."

The address listed on petitioner's 1991 IT-201 was erroneous. At the time said return was filed, petitioner resided at 100 Great Neck Road, Great Neck, New York. Petitioner had resided at that address since about September 1991. Petitioner continued to reside at that location until December 31, 1992 when he purchased a residence at 107 Foxwood Drive, Jericho, New York and moved to that location.

The closing on petitioner's purchase of the Foxwood Drive residence occurred on

December 31, 1992. In connection with this transfer, a Form TP-584 (Combined Real Property Transfer Gains Tax Affidavit/Real Estate Transfer Tax Return/Credit Line Mortgage Certificate) was filed with the Suffolk County Clerk on January 12, 1993. The form indicates the address of the property being conveyed, 107 Foxwood Drive, Jericho, New York, and lists petitioner's address as 100 Great Neck Road, Great Neck, New York.

Prior to his living at the 100 Great Neck Road address, petitioner resided with his former wife at 6 Rodeo Circle, Syosset, New York. A power of attorney form listing this address for petitioner was filed with the Income Tax Section of the Division's Queens District Office on March 29, 1991. This form was apparently filed during the course of the audit which led to the Notice of Deficiency in dispute herein.

The power of attorney referred to above appointed Eugene L. Kass and John R. Bernhardt, Jr., C.P.A.'s, as petitioner's representatives in connection with "New York State Income Tax Returns 1987, 1988, 1989."

By letter dated February 9, 1993, the Division's auditor, Kamal Shah, transmitted copies of statements of proposed audit adjustment to petitioner's former representative, John Bernhardt. Both the transmittal letter and the statements themselves indicated the necessity of a response by February 10, 1993 in order to "discuss the audit findings in detail."

Mr. Bernhardt responded to the statements of audit changes by letter dated April 5, 1993, wherein he expressed his disagreement with the audit findings and requested a "conference meeting".

By letter to Mr. Shah dated June 25, 1993, petitioner's former representative advised that petitioner no longer resided at 100 Great Neck Road, Great Neck, New York and that he currently resided at the Jericho address (see, Finding of Fact "19").

Petitioner received a "Collection Notice" dated August 13, 1993 in respect of assessment number L-007046270-4. This notice was addressed to petitioner at his Jericho address.

In response to the "Collection Notice" dated August 13, 1993, petitioner's former representative transmitted a letter dated August 25, 1993 to the Division's Tax Compliance unit

requesting "a copy of the original assessment notice, which is believed to have occurred on June 14, 1993."

By letter addressed to the Division's Compliance Unit dated October 15, 1992 and received on October 16, 1992, Mr. Bernhardt remitted payment on an income tax assessment against petitioner unrelated to the assessment at issue herein. Said letter referenced petitioner's address as "100 Great Neck Road, Great Neck, New York."

Petitioner did not dispute that the Division issued the subject Notice of Deficiency, addressed to petitioner as indicated in Finding of Fact "1". Petitioner did deny receipt of such notice.

#### CONCLUSIONS OF LAW

A. Tax Law § 681(a) provides that if the Division determines there is an income tax deficiency, it must mail a Notice of Deficiency to the taxpayer at his or her last known address by certified or registered mail. If such notice is properly mailed,<sup>1</sup> it shall constitute a final assessment unless the taxpayer files a petition protesting the notice within 90 days of the mailing of the notice (Tax Law § 681[b]; see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025; cf., Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517). The taxpayer has the option of protesting the notice by requesting a conciliation conference in lieu of filing a petition for hearing if the 90-day period to petition for hearing has not elapsed (Tax Law § 170[3-a][a]; § 689[b]; 20 NYCRR 4000.3[c]).

B. When the timeliness of a filed petition is at issue, the Division must 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). To show that the

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<sup>1</sup>It is noted that where a notice is, in fact, properly mailed, nonreceipt of such notice by the taxpayer is immaterial (see, Matter of Kenning, 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, lv denied 34 NY2d 653, 360 NYS2d 419).

notices were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and evidence that this procedure was adhered to with respect to the notice in question (Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra).

C. In this case, although the Division has established a standard mailing procedure through the Biondo and LaFar affidavits, the certified mail record is flawed because it does not contain a total for the number of pieces received at the post office (see, Findings of Fact "5" and "7"). The certified mail record thus does not establish that all of the pieces listed thereon by the sender were received by the post office (see, Matter of Auto Parts Center, Tax Appeals Tribunal, February 9, 1995).

On this point, it is noted that the "total number of pieces listed by sender", i.e., 292, on page numbered "27" of the certified mail record has been circled (see, Finding of Fact "7"). One could infer that the post office employee circled this number to indicate receipt of 292 pieces at the post office (It is noted that the Division has offered no evidence on this point). Such an inference, however, does not tend to establish that all pieces listed on the CMR submitted herein were, in fact, received by the post office, for the CMR submitted by the Division purports to show not that 292 pieces were mailed but that a total of 324 pieces (i.e.,  $292 + 32$  [see, Finding of Fact "5"]) were mailed.

D. Since the Division has failed to prove the fact and date of mailing herein, it must be concluded that the subject Notice of Deficiency was improperly issued and cannot serve as the basis for a valid assessment (see, Matter of Malpica, supra).

E. Petitioner asserted that the Notice of Deficiency herein was improperly issued because it was not mailed to petitioner's "last known address" as required under Tax Law § 681(a). This contention is rejected. The notice was issued to petitioner at the address listed on the last income tax return filed by him. Clearly, neither the letter dated October 15, 1992, wherein petitioner's address is referenced in a transmittal letter remitting a tax payment (see, Finding of



Fact "28"), nor the real property gains tax affidavit filed with the Suffolk County Clerk (see, Finding of Fact "20") constitute notice to the Division of a change in petitioner's address for personal income tax purposes. Obviously, the notice given by the June 25, 1993 letter to Mr. Shah (see, Finding of Fact "25") came well after the purported issue date of the subject notice of March 4, 1993. In the absence of any other evidence, it must be concluded that the subject notice did bear petitioner's "last known address".

F. The petition of Jeffrey Brager is granted and the Notice of Deficiency, dated March 4, 1993, is cancelled.

DATED: Troy, New York  
August 3, 1995

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE