

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM ROLAND	:	DETERMINATION
for Redetermination of a Deficiency or for	:	DTA NO. 813257
Refund of 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, filed a petition for redetermination of a deficiency or for refund of 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.

The Division of Taxation, by its representative, William F. Collins, Esq. (Christina L. Seifert, Esq. of counsel), brought a motion dated February 27, 1995 and returnable March 30, 1995 for an order of summary determination 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. The Division of Taxation's motion is supported by the affidavit of Christina L. Seifert, Esq., sworn to the 27th Day of February 1995, with attachments thereto; the affidavit of Geraldine Mahon, sworn to the 10th day of January 1995, with attachments thereto; and the affidavit of Daniel B. LaFar, sworn to the 18th day of January 1995. Petitioner filed the affidavit of his representative Larry J. Silverman, Esq., sworn to the 15th day of March 1995, in opposition to the Division of Taxation's motion for summary determination. Now, upon the motion papers, affidavits, and all pleadings and documents submitted, Winifred M. Maloney, Administrative Law Judge, issues the following determination.

ISSUE

Whether petitioner timely protested a Notice of Deficiency.

FINDINGS OF FACT

The Division of Taxation ("Division") mailed 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	<u>9,500.41</u>
						Total	<u>\$9,500.41"</u>

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."

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

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

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

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 to 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

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

answer also states 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

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".

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.

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.

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 Roessleville 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. 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).

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 Roessleville 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."

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1)

after issue has been joined. The regulation provides, in pertinent part, that:

"Such motion shall be supported by an affidavit, by a copy of the pleadings, and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact." (Emphasis added.)

A party moving for summary determination must show that there is no material issue of fact (20 NYCRR 3000.5[c][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, citing Zuckerman v. City of New York,

49 NY2d 557, 562, 427 NYS2d 595). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (see, Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

B. Tax Law § 681(a) provides, in pertinent part, that:

"A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state"

Tax Law § 681(b) provides 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 tax commission a petition under section six hundred eighty-nine."

The personal income tax imposed by the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law.

C. Tax Law § 689(b) states that:

"Within ninety days . . . after the mailing of the notice of deficiency authorized by section six hundred eighty-one the taxpayer may file a petition with the tax commission for a redetermination of the deficiency. Such petition may also assert a claim for refund for the same taxable year or years, subject to the limitations of subsection (g) of section six hundred eighty-seven."

D. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

"The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extensions of those time limitations" (20 NYCRR 3000.3[c]).

E. If a taxpayer fails to file a petition protesting the notice of deficiency, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

F. Where the timeliness of a protest is at issue, the Division bears the burden of proof to demonstrate the proper mailing of the documents protested (in this case, the Notice of Deficiency) which begins the running of the 90-day statutory period (see, Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; 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, affd 499 F2d 550, 74-2 US Tax Cas ¶ 9533). The Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994; Matter of Accardo, Tax Appeals Tribunal, August 12, 1993; Matter of Air Flex Custom Furniture, supra; Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, supra).

G. As noted in Conclusion of Law "F", the required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and Mr. LaFar in support of its position that the Notice of Deficiency was issued to petitioner on December 3, 1993.

The Division has established through the affidavits of Ms. Mahon and Mr. LaFar that the Notice of Deficiency was issued and sent by certified mail on December 3, 1993 to petitioner. In addition, the Division has submitted a copy of the 28-page Assessments Receivable certified mail record for December 3, 1993 as proof of mailing.

I find the certified mail record in this case to be adequate. The certified mail record submitted contains all 28 pages of the original 28-page fan-folded certified mail record. All 28 pages of the certified mail record are date stamped December 3, 1993 by the Roessleville branch of the United States Postal Service. The postal representative's illegible signature appears directly below the circled number 297 on page 28 of the certified mail record. This supports the conclusion that all 297 pieces were in fact received at the post office (see, Matter of Katz, supra).

The Division has established December 3, 1993 as the date of mailing of the Notice of Deficiency.

H. Tax Law § 681(a) requires the Division to send notice by certified or registered mail when it determines that there is an income tax deficiency. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990; 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 667, 335 NYS2d 1028; cf., Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places the risk of nondelivery on the taxpayer (see, Matter of Malpica, supra). Once the statutory notice is mailed, the taxpayer has 90 days within which to petition for a redetermination (Tax Law § 689[b]).

The Division has established that it mailed the Notice of Deficiency to petitioner on December 3, 1993 at his last known address. There is no dispute that the address on the Notice of Deficiency was petitioner's address at the time the notice was issued. Petitioner's representative in his affidavit states that petitioner never received the Notice of Deficiency. His representative's mere denial of receipt is insufficient to rebut the presumption of receipt. Furthermore, Mr. Silverman's affidavit does not dispute the date of the notice (see, Engel v. Lichterman, 95 AD2d 536, 467 NYS2d 642, 643).

I. As noted in Conclusion of Law "B", a Notice of Deficiency becomes an assessment unless the taxpayer files a petition with the Division of Tax Appeals within 90 days after the notice is issued. The last day on which petitioner could have timely filed the petition was March 3, 1994. The petition was filed with the Division of Tax Appeals on September 23, 1994. Unfortunately, this date is well past the statutory 90-day period within which a petition may be filed. Accordingly, the petition was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's case.

J. Finally, it is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law

§ 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 689[c]; 170[3-a][a]; Matter of Rosen, Tax Appeals Tribunal, July 19, 1990).

K. The Division's motion for summary determination is granted; and the petition of William Roland is hereby dismissed.

DATED: Troy, New York
May 18, 1995

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE