

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WILLIAM F. REGAN : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 816217
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Year 1988. :
:

Petitioner, William F. Regan, 11½ West 26th Street, 3F, New York, New York 10010, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1988.

On May 8, 1998 and May 21, 1998, respectively, petitioner appearing by Spitz, Friedman, Libien & Gottfried (Ashoka Daibee, CPA) and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), consented to have the controversy determined on submission without a hearing with all briefs to be submitted by September 25, 1998, which date began the six-month period for the issuance of this determination.

Upon review of the documents and pleadings submitted in connection with the matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely request for conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued to petitioner, William F. Regan, a Notice of Deficiency, dated October 23, 1995, asserting additional personal income tax due in the amount of \$18,387.31 plus interest of \$12,320.21 and penalty of \$11,676.25, for a total amount due of \$42,383.77 for tax year 1988. The Notice of Deficiency is addressed to “Regan-Will, 11 ½ W 26 St, New York, NY 10010-1007.”

The Notice of Deficiency states that “[a]ny disagreement previously submitted for the Statement of Proposed Audit Changes cannot be considered a disagreement with this notice. You must file a Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 01/21/96.” The notice then states, in part, “[i]f we do not receive a response to this notice by 01/21/96: This notice will become an assessment subject to collection action.”

2. The Division submitted a copy of petitioner’s Request for Conciliation Conference, in the form of correspondence dated October 21, 1997, prepared on the letterhead of petitioner’s representative. The letter is date stamped October 27, 1997 by the Bureau of Conciliation and Mediation Services (“BCMS”). The Division also submitted a copy of an envelope which the Division claims contained such correspondence; however, the envelope bears petitioner’s return address, rather than the return address of the representative’s CPA firm. No explanation regarding this discrepancy was provided by either party. The envelope bears a legible postmark of October 24, 1997 and is date stamped as received by BCMS on October 27, 1997.

3. The Division submitted the affidavits of Geraldine Mahon, Principal Clerk of the Case and Resource Tracking System (hereinafter “CARTS”) Control Unit of the Division since 1989, whose duties include supervising the processing of notices of deficiency and determination prior to sending the notices to the Division's mechanical section for mailing, and James Baisley, Chief

Mail Processing Clerk, Mail Processing Center of the Division since 1994, whose duties include supervising the staff responsible for the delivery of outgoing mail to the post office.

These affidavits describe the general procedures for the preparation and mailing of notices of deficiency. The affidavits also describe how such procedures were followed in this case.

4. The general process for issuing and mailing notices of deficiency begins with the CARTS Control Unit's receiving a computer printout entitled "Assessments Receivable, Certified Record for Zip +4 Minimum Discount Mail," referred to as a Certified Mail Record ("CMR"), and the corresponding notices of deficiency. The CMR is printed approximately ten days prior to mailing to allow time for processing and, therefore, the date on the CMR usually has to be changed to coincide with the date the notices are mailed. The notices themselves, on the other hand, are printed with the anticipated date of mailing. A certified control number is assigned to each notice, recorded on the notice itself and listed on the CMR under the heading "CERTIFIED NO."

A Division employee places each notice in an envelope. Once the notices are placed in the "Outgoing Certified Mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Then a mail processing clerk compares the information on the envelopes with that on the CMR and counts the envelopes. At some point in this process an employee of the Mail Processing Center manually changes the date on the CMR (which reflects the date it was printed) to the date of delivery to the post office. An employee of the Mail Processing Center then delivers the envelopes and the CMR to one of the various branch offices of the United States Postal Service ("USPS") located in the Albany, New York area. A postal employee signs and affixes

a postmark to the CMR indicating receipt of the mail listed on the certified mail record and of the CMR itself. The employee of the Mail Processing Center also requests the postal employee to either write in the number of pieces received at the post office in the space provided or, alternatively, to circle the number for the pieces listed to indicate that was the number of pieces received.

The Division does not in the normal course of business request return receipts. Therefore, the CMR is the Division's receipt for certified mail delivered to the post office. It is usually picked up from the post office the following day by an employee of the Mail Processing Center and returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the USPS and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

5. In support of its position that the procedures outlined in Finding of Fact "4", were followed in this case, the Division has also submitted a copy of the CMR listing notice number L-010958639, the notice at issue in this matter. The CMR consists of 40 pages with 11 entries on each page. It shows a printed date of "10/13/95" on each of the 40 pages. On page one the printed date has a line through it and above it is handwritten the date of "10-23-95." There is a consecutive listing of 440 certified control numbers beginning with P 911 008 483 and ending with P 911 008 922. There is a Postal Service postmark of October 23, 1995 on each page of the CMR. On the last page next to "TOTAL PIECES AND AMOUNTS LISTED" appears the printed number 440, and the handwritten number 440 appearing after the words "TOTAL PIECES RECEIVED AT POST OFFICE." There is a USPS postmark of October 23, 1995 on the last page and initials under the handwritten number 440.

Petitioner Will Regan's name is listed on page two of the CMR. The certified number listed for the notice sent to petitioner is P 911 008 503 which matches the certified number shown at the top of petitioner's notice. The notice number listed on the CMR for petitioner's notice is L 010958639 which matches the number appearing on the notice. The name and address of petitioner are listed next and also correspond to the information set forth on petitioner's notice. There is a USPS postmark of October 23, 1995 on page two of the CMR.

6. Petitioner's only statement of position was made in his petition, and pertained only to the merits of petitioner's case with regard to withholding taxes. Although petitioner's representative, in correspondence dated August 5, 1998, indicated that petitioner had "decided to concede the issue of timeliness," the Division of Tax Appeals did not receive a signed notice of withdrawal of petition to close the matter.

The Division simply argues that petitioner did not meet his burden of proof to show that petitioner's protest of the notice of deficiency was timely.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 681(a):

[i]f upon examination of a taxpayer's return . . . the [Division of Taxation] determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer 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, in relevant part, 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

B. Upon receipt of the notice of deficiency, a taxpayer has the option of requesting a conciliation conference with BCMS, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a timely petition or a request for a conciliation conference protesting the statutory notice, 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).

C. 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*).

D. As noted in Conclusion of Law “C”, 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, there must be proof that the standard procedure was followed in the particular instance in question.

The Division submitted the affidavits of Ms. Mahon and Mr. Baisley in support of its position that the Notice of Deficiency was issued to petitioner on October 23, 1995. The affidavits of Ms. Mahon and Mr. Baisley contain sufficient proof to establish the standard procedure of the Division for issuing notices of deficiency (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, 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 the notice.

Second, the Division established that the general issuance procedure was followed on October 23, 1995 in the generation and mailing of petitioner's notice. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as October 23, 1995 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purpose of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient.

E. 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]).

Petitioner does not challenge the date or method of mailing of the Notice of Deficiency. Furthermore, review of the petition filed in this matter indicates that petitioner does not dispute that the Notice of Deficiency was issued to him at his last known address. The Division has established that it mailed the Notice of Deficiency to petitioner on October 23, 1995 at his last known address.

F. As noted in Conclusions of Law “A” and “B”, a Notice of Deficiency becomes an assessment unless the taxpayer requests a conciliation conference with BCMS or 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 requested a conciliation conference with BCMS or filed a petition with the Division of Tax Appeals was January 21, 1996. Since petitioner filed no response to the position of the Division that the copy of the envelope submitted contained the request for conference, the allegation is deemed conceded. Thus, the request is deemed filed with the BCMS on October 24, 1997, well past the statutory 90-day period within which such a request may be made. Accordingly, the request was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner’s case.

G. 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).

H. The petition of William F. Regan is hereby dismissed.

DATED: Troy, New York
March 11, 1999

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE