

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GERALD SCHMIDT	:	DETERMINATION
	:	DTA NO. 817064
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1995.	:	

Petitioner, Gerald Schmidt, 2268 Brevoort Place, Bellmore, New York 11710-3939, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1995.

On December 13, 1999 and December 23, 1999, respectively, petitioner, by John T. Roesch, Esq., and the Division of Taxation, by Barbara G. Billet, Esq. (Kathleen D. Chase, Esq., of counsel), waived a hearing and agreed to submit this matter for a determination based on documents and briefs submitted by April 15, 2000, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner's request for a conciliation conference was properly denied as untimely filed.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, Gerald Schmidt, a Notice of Deficiency dated September 14, 1998 and addressed to petitioner at "2268 Brevoort Pl, Bellmore,

NY 11710-3939.” The notice bears assessment identification number L-015543772-8 and asserts a total amount due of \$1,355.89. As indicated by the computation summary section of the notice, this amount consisted of 1995 New York State income tax asserted of \$1,325.00, plus interest and penalty, less payment or credit of \$440.00. A cover letter bearing certified mail control number P 911 206 738 accompanied the notice. The cover letter advised petitioner that a power of attorney was on file with the Division in connection with this matter and that a copy of the Notice of Deficiency had been forwarded to petitioner’s representative, Annemarie Salowski, CPA, Meadow Tax Associates, 611 Newbridge Road, East Meadow, New York.

2. The Division issued a copy of the Notice of Deficiency dated September 14, 1998 to Annemarie Salowski, CPA. The cover letter which accompanied the notice bears certified mail control number P 911 206 714.

3. The subject Notice of Deficiency was issued following an audit. The Division received a power of attorney appointing Annemarie Salowski as petitioner’s representative on April 27, 1998. This power of attorney is dated April 1, 1998 and appoints Ms. Salowski as petitioner’s representative before the Division in connection with a proceeding involving petitioner’s 1995 and 1996 income tax.

4. The Division has no record of receiving any other powers of attorney in connection with its audit of petitioner and there are no other powers of attorney in the file maintained by the auditor.

5. Petitioner filed a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) in protest of the 1995 income tax deficiency. Petitioner’s request was mailed to BCMS on January 5, 1999.

6. BCMS issued a Conciliation Order Dismissing Request to petitioner dated January 29, 1999. It states, in part:

The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on September 14, 1998, but the request was not mailed until January 5, 1999, or in excess of 90 days, the request is late filed.

7. Notices of deficiency, such as the one at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record ("CMR"). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the United States Postal Service through return of the CMR to the CARTS Control Unit.

8. Each computer-generated notice of deficiency is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR lists an initial date (the date of its printing) in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The initial (printing) date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices. In this case page one of the CMR lists an initial date of September 2, 1998, which has been manually changed to September 14, 1998.

9. After a notice of deficiency is placed in an area designated by the Division's Mail Processing Center for "Outgoing Certified Mail," a staffer weighs and seals each envelope and

affixes postage and fee amounts thereon. A Mail Processing Center clerk then counts the envelopes and verifies by a random review the names and certified mail numbers of 30 or fewer pieces of mail against the information contained on the CMR. Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to the Colonie Center branch of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or his signature or both to the CMR.

10. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

11. The CMR relevant to this case is an 18-page, fan-folded (connected) computer-generated document entitled "Assessments Receivable Certified Record for Non-Presort Mail." This CMR lists consecutive certified control numbers P 911 206 625 through P 911 206 815, inclusive. There are no deletions from the list. Each such certified control number is assigned to an item of mail listed on the 18 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts.

12. Information regarding the Notice of Deficiency issued to petitioner is contained on page 11 of the CMR. Specifically, corresponding to certified control number P 911 206 738 is notice number L 015543772, along with petitioner's name and an address, which is identical to that listed on the subject Notice of Deficiency.

13. Information regarding the copy of the subject Notice of Deficiency issued to petitioner's representative, Annemarie Salowski, CPA, is contained on page nine of the CMR.

Specifically, corresponding to certified control number P 911 206 714 is notice number L 015543772, along with the name and address of petitioner's representative.

14. The notice numbers, names and addresses of addressees other than petitioner and his representative have been redacted from the CMR in order to comply with statutory privacy requirements.

15. Each page of the CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service, dated September 14, 1998.

16. The last page of the CMR, page 18, contains a pre-printed entry of 191 under the heading "Total Pieces and Amounts Listed." Appearing immediately below the "total pieces" listing on page 18 is the listing "Total Pieces Received at Post Office." The number 191 has been handwritten to the right of this "total pieces received" listing. The initials of a Postal Service employee appear to the right of the handwritten "191." It appears that both the initials and the number were written by the same hand.

17. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and handwritten "191" indicate that all 191 pieces listed on the CMR were received at the post office.

18. The Division generally does not request, demand or retain return receipts from certified or registered mail.

19. Finding of Fact "4" was established through the affidavit of Fred Havenbrook. Mr. Havenbrook is employed by the Division as a Tax Technician II. In that capacity, Mr. Havenbrook conducted the audit of petitioner's 1995 New York State income tax return. Pursuant to his duties as a Tax Technician II, Mr. Havenbrook maintains a file containing all correspondence received from the taxpayer under audit. Mr. Havenbrook maintained such a file

in connection with his audit of petitioner for 1995 and Finding of Fact “4” is based on statements made in Mr. Havenbrook’s affidavit following a review of that file.

20. The facts set forth above in Findings of Fact “7” through “18” were established through the affidavits of Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division’s CARTS Control Unit. Ms. Mahon’s duties include supervising the processing of notices of deficiency. Mr. Baisley is employed as a Chief Mail Processing Clerk in the Division’s Mail Processing Center. Mr. Baisley’s duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

21. The address on the subject Notice of Deficiency is the same as the address given on petitioner’s filed 1997 Resident Income Tax Return (Form IT-201), which was signed by petitioner and dated February 6, 1998.

22. Petitioner submitted a copy of a power of attorney dated April 1, 1998 appointing John T. Roesch, Esq., as petitioner’s representative before the Division in connection with a proceeding involving petitioner’s 1995 and 1996 income tax.

23. Both the power of attorney appointing Ms. Salowski and the power of attorney appointing Mr. Roesch were standard form documents (Form DTF-14) and both contained the following language: “All Powers of Attorney heretofore filed or granted for this purpose are hereby revoked.”

24. Petitioner also submitted photocopies of two pairs of certified mail receipts and return receipt postcards. All four documents list BCMS as the addressee. One set bears article number Z 031 429 964. The postmark on the certified mail receipt for this article number is illegible, but the return receipt postcard contains a Division stamp indicating delivery on December 14, 1998.

“G. Schmidt” is handwritten on the certified mail receipt for this article number. The other pair bear article number Z 031 430 049. The postmark on the certified mail receipt for this article number is December 3, 1998. The date of delivery on the return receipt postcard is December 7, 1998. “Schmidt Gerald” is handwritten on the certified mail receipt.

SUMMARY OF PETITIONER’S POSITION

25. Petitioner made several factual assertions in the affirmation of John T. Roesch, Esq. filed in support of petitioner’s position in this matter:

a) Petitioner contended that, in addition to executing a power of attorney in favor of Annemarie Salowski, CPA, he executed a power of attorney in favor of John T. Roesch, Esq. Mr. Roesch’s affirmation asserts: “*The* power of attorney was filed with the audit department.” (Emphasis added.)

b) Mr. Roesch stated in his affirmation that “the only notice we ever received” after petitioner’s submission of documentation during the audit was a Notice and Demand dated January 7, 1999, and that upon receipt of such notice and demand, “we promptly filed a request for Conciliation Conference.”

c) The affirmation also contended that the certified mail receipts and the return receipt postcards (*see*, Finding of Fact “24”) evidenced timely filings of the request for conciliation conference.

d) Finally, petitioner requested that the Division of Tax Appeals grant him leave to file a late request for conciliation conference with respect to 1995, or in the alternative, to require the Division to issue a revised Notice of Deficiency for 1995.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” In this case, the record is clear that the address listed on the subject Notice of Deficiency was petitioner’s last known address (*see*, Finding of Fact “21”). A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]).

B. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, “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 14, 1991). However, the “presumption of delivery” does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see, Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

C. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of deficiency (*see*, Finding of Fact “20”).

D. The Division also presented sufficient documentary proof to establish that the Notice of Deficiency at issue was mailed to petitioner on September 14, 1998. A properly completed CMR is highly probative evidence of the date and fact of mailing (*see, Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994) and the CMR relevant to this case has been properly completed. Specifically, this 18-page document lists sequentially numbered certified control numbers with corresponding names and addresses. All 18 pages of the CMR bear a U.S. Postal Service postmark dated September 14, 1998. Additionally, a postal employee initialed page 18 of the CMR and wrote “191” on that page next to the listing “Total Pieces Received at Post Office” to indicate receipt by the post office of all 191 pieces of mail listed thereon. This evidence establishes that the Division mailed the subject Notice of Deficiency on September 14, 1998. Petitioner’s request for a conciliation conference, mailed on January 5, 1999, was therefore untimely filed (*see*, Tax Law § 170[3- a][a]).

E. The failure to serve a statutory notice on a petitioner’s representative requires the tolling of the 90-day period for the filing of petition or request for a conciliation conference (*see, Matter of Brager*, Tax Appeals Tribunal, May 23, 1996). Such a tolling is, of course, necessarily contingent upon notice to the Division of the representative’s appointment. In this case, petitioner has failed to show that the power of attorney appointing Mr. Roesch was filed with the Division. The only evidence in support of petitioner’s allegation is Mr. Roesch’s bare and somewhat ambiguous contention that “the power of attorney was filed.”¹ Petitioner offered no evidence regarding the manner in which this power was filed, when it was filed or if it was filed along with the power appointing Ms. Salowski. Additionally, it is curious that petitioner would

¹ The ambiguity arises from the allegation in the affirmation that “*the* power of attorney” (emphasis added) was filed with the Division. It is unclear whether this is a reference to the power appointing Ms. Salowski or to the power appointing Mr. Roesch.

execute two powers of attorney in connection with the same tax matter, ostensibly on the same date, where both powers contain clauses revoking all prior powers. The existence of two such powers could easily cause confusion. For its part, the Division offered the affidavit of the auditor. Upon review of the record, it is concluded that the factual assertions made in the auditor's affidavit are more reliable than the assertions made in Mr. Roesch's affirmation. Accordingly, such assertions have been accepted as fact in this matter (*see*, Findings of Fact "4" and "19"). Petitioner has thus failed to show that the Division had notice of Mr. Roesch's appointment at the time of the issuance of the Notice of Deficiency on September 14, 1998. Absent such notice the Division was prohibited from serving a copy of the Notice of Deficiency on Mr. Roesch (*see*, Tax Law § 697[e]) and the period of limitations for filing a petition or a request for conciliation conference was not tolled.

F. Mr. Roesch's affirmation also alleged that the two certified mail receipts and two receipt postcards submitted in support of his position, which bear December 1998 date stamps, documented the mailings of the requests for conciliation conference in petitioner's audit (*see*, Finding of Fact "24"). Mr. Roesch's affirmation, however, contradicts this allegation in the two preceding paragraphs, which allege that the request was filed following receipt of the notice and demand dated January 7, 1999. Additionally, petitioner offered no documentation to tie the receipts to the subject request. Accordingly, this allegation is rejected.

G. Regarding petitioner's request that the Division of Tax Appeals grant him leave to file a late request for conciliation conference with respect to 1995, or in the alternative, to require the Division to issue a revised Notice of Deficiency for 1995, the Division of Tax Appeals has no jurisdiction over this matter absent a timely filed protest (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989). The Division of Tax Appeals thus has no authority to grant

either of these forms of relief. It should be noted, however, 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 Gerald Schmidt is dismissed.

DATED: Troy, New York
June 01, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE