

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ROBERT E. AND GLORIA J. McKEE : DETERMINATION
 : DTA NO. 817780
 :
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 1995. :

Petitioners, Robert E. and Gloria J. McKee, 200 East 62nd Street, New York, New York 10021, 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 1995.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 16, 2001 at 10:30 A.M., with all briefs to be submitted by April 27, 2001, which date began the six-month period for the issuance of this determination. Petitioners appeared by Robert E. McKee. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether petitioners remitted the tax due with their 1995 New York State Resident Income Tax Return.

FINDINGS OF FACT

1. Petitioners, Robert E. and Gloria J. McKee, timely filed a New York State Resident Income Tax Return (Form IT-201) for the year 1995 indicating tax due of \$4,436.09. The return is dated August 15, 1996 and was accompanied by an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (Form 4868), dated April 15, 1996.

2. On October 10, 1996, the Division of Taxation (“Division”) issued to petitioners a Notice and Demand for Payment of Tax Due (Assessment ID No. L-012734375) in the amount of \$4,281.80,¹ plus penalty and interest. The notice and demand claimed that no payment had been remitted with petitioners’ 1995 resident income tax return.

3. On January 14, 1998, Mr. McKee advised the Division that he was still unable to locate the canceled check (#6966) which he claimed had been used to pay the tax liability in question. Mr. McKee did provide to the Division a copy of the front and back of a check which he claimed had been made when the check was initially returned to him. The check is dated August 15, 1996 in the amount of \$4,436.09 and is written against an account with The Bank of New York. In response, the Division advised Mr. McKee that the front of check #6966 did not contain a deposit number and without such number, payment could not be traced.

4. In response to Mr. McKee’s request for a copy of check #6966, The Bank of New York advised him that “[t]he photo copy of the front and back of check #6966 that you sent us reflects that the back of the check is actually for check #6964. Please look at photocopy enclosed with this letter. Check #6966 was never received by the bank for encashment.”²

¹The difference in the amount claimed to be due on the return and the amount on the notice and demand is the result of the Division’s recomputation of the City of New York resident tax.

²The front and back of the checks referred to by the Bank of New York are the same copies provided to the Division by Mr. McKee with his letter of January 14, 1998.

5. Attached to the petition in this matter is a copy of the same front of check #6966 but a copy of the back of a different check. In response, the Division stated that the back of the copy of the check was illegible, and requested that Mr. McKee provide the original check #6966 and a copy of the bank statement which would reflect the transaction involving the payment of \$4,436.09 to the Division. Mr. McKee stated in a letter dated December 4, 2000 that he could not find the original check and had requested a copy of it from The Bank of New York. In its reply to Mr. McKee's request, The Bank of New York indicated that there is "no listing for check #6966 on our records."

6. In a letter dated February 23, 2001, Mr. McKee requested that The Bank of New York send him a copy of the monthly statement that shows receipt of check #6966. Mr. McKee advised the bank not to search after December 1996. The Bank of New York replied that it had ordered statements from July 1996 through December 1996 and was "unable to locate the item check #6966 in the amount of \$4,436.09."

7. Mr. Alan Tamaroff is a tax technician with the Division whose responsibilities include the examination of cases in the audit process in those situations where a taxpayer has requested a conciliation conference before the Bureau of Conciliation and Mediation Services ("BCMS"). In the course of his duties, he typically reviews the entire audit file, searches for returns and prior tax payments and reviews any other information which may affect the results of the audit. Mr. Tamaroff was the advocate at the BCMS conference in the present matter. He has reviewed the file of the petitioners and their claim of payment in the amount of \$4,436.09 in relation to their 1995 personal income tax. He also discussed this matter with the Tax Compliance and Processing Bureaus of the Department of Taxation and Finance ("Department").

Mr. Tamaroff's review of the Department's files and computer records indicate that the Department has not received payment for the 1995 personal income taxes due as shown on petitioners' return filed on August 15, 1996. The review also revealed that petitioners have not remitted any payment to be associated with the balance due on their 1995 personal income tax return as assessed in the notice of demand (L-012734375) issued October 10, 1999.

8. Yvonne Urkevich is an assistant vice-president for Fleet Bank³ whose responsibilities include customer service and reconciliation. During the course of her duties she typically assigns and monitors all customer inquiries and requests for research. Ms. Urkevich is familiar with the various types of research requests and has experience handling check analysis through the use of deposit and tracking number stamps.

On July 1, 1999, Mr. Tamaroff sent Brenda Coleman, Supervisor II for Fleet Bank, a copy of the front of check #6966 and the back of a check showing a cancellation stamp⁴ in order to determine if the front and back were from the same check. Ms. Urkevich's analysis of the front and back of the check, including the tracking number listed on the back and review of Fleet Bank files of the check revealed that the copies were from two separate checks. Specifically, Ms. Urkevich's review of Fleet Bank files determined that the cancellation stamp indicated that it was for Mr. McKee's check #6964 in the amount of \$535.00 received on August 16, 1996 and applied to assessment L-0109592269.

³ Fleet Bank is responsible for processing the New York State tax returns and payments received from taxpayers.

⁴ This is the same check front and back which were submitted to the Division by Mr. McKee in his letter of January 14, 1998 and previously analyzed by The Bank of New York.

On November 7, 2000, the Division sent to Brenda Coleman a copy of the front of check #6966 and the back of a check showing a cancellation stamp⁵ to determine if the front and back were from the same check. Ms. Urkevich's analysis of the front and back of the check, including the tracking numbers listed on the back, resulted in the conclusion that she was unable to determine if the copies were from one or two checks as the numbers on the back were not legible.

CONCLUSIONS OF LAW

A. It is well established that a presumption of correctness attaches to a notice of demand properly issued by the Division and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398; *Matter of Kourakos v. Tully* , 92 AD2d 1051, 461 NYS2d 540, *appeal dismissed* 59 NY2d 967, 466 NYS2d 1030, *lv denied* 60 NY2d 556, 468 NYS2d 467, *cert denied* 464 US 1070, 79 L Ed 2d 215; *Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174).

B. Throughout these proceedings petitioners have maintained that a check (#6966) in the amount of \$4,436.09 accompanied their 1995 New York personal income tax return which was filed on August 16, 1996. However, petitioners have produced no evidence which establishes that such a check was received by the Division or processed by their bank, and certain evidence produced contradicts such claims. Petitioners' direct evidence on the issue of the payment of the tax due consists entirely of statements made by Mr. McKee in his testimony at the hearing. The production of the copies of the front and back of two different checks claimed to be one check,

⁵This is the same front and back of checks which were attached to the Petition.

also weakens petitioners' contention that check #6966 accompanied the return in full payment of the tax due.

The testimony of Mr. McKee is legally insufficient, without proof of the existence of payment, to prove that petitioners' 1995 New York State personal income tax liability was paid (*Matter of Schumacher*, Tax Appeals Tribunal, February 9, 1995; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990).

C. The evidence produced by both parties indicates that payment was not made with petitioners' 1995 personal income tax return. The front of check #6966 does not contain a deposit number, which would indicate that the check had been processed and payment was made to the Division. The Bank of New York advised Mr. McKee in a letter dated February 2, 1998 that the copy of the back of a check claimed to be check #6966 was in fact check #6964. That the front and back of the check were from two different checks was confirmed by Fleet Bank personnel following their analysis of the tracking number on the back of the check and review of Fleet Bank's files. The Bank of New York also indicated in its letter that check #6966 had never been received by the bank for processing. A search by The Bank of New York of petitioners' monthly bank statements for the period July 1996 through December 1996 failed to locate check #6966.

The Division reviewed its files and computer records and determined that it had not received payment for the 1995 personal income taxes due from petitioners as shown on their return. The review also revealed that petitioners had not remitted any payments to be associated with the balance due on their 1995 income tax return as assessed in the notice of demand dated October 10, 1999.

D. In *Matter of Mutual Life Ins. Co. v. New York State Tax Commn.* (142 AD2d 41, 534 NYS2d 565), the Appellate Division, Third Department, found that where a petitioner presented compelling evidence that a check for payment of taxes had been prepared and mailed, the Division was required to submit some evidence of the procedures employed by the office that received and processed such checks, or that a search of the files had been made for the check to no avail. The petitioner in *Mutual Life* presented detailed evidence concerning the office processing of such checks, a carbon copy of the check itself and affidavits of office personnel involved in the processing of such checks. The Court also pointed out that petitioner's office procedures had produced an excellent withholding tax compliance record. The facts in the present case clearly do not exhibit such compelling evidence. Petitioners presented no evidence of their general practice of mailing returns and checks other than testimony that they paid the tax due. Petitioners produced a copy of the front of check #6966, but were unable to produce a copy of the back of the check, were unable to produce a copy of the monthly bank statement which showed that check #6966 had been processed and presented to the Division a copy of the back of a check which was not check #6966. The documentary evidence that was presented by petitioners supported the Division's case that no payment was ever made by check #6966. Finally, the Division in this case, unlike *Mutual Life*, submitted documents stating that a search of the Division's records had been made and there was no indication that payment of the tax due had ever occurred.

The Tax Appeals Tribunal ("Tribunal") has also dealt with similar arguments on several occasions. In *Matter of Savadjian (supra)*, the petitioner testified as to when his return had been prepared, when his return had been mailed and that the return had been sent by regular mail. The return had shown a refund due and petitioner testified about numerous telephone calls he had

made to the Division requesting his refund. It was not until after more than five years had passed that the Division informed the petitioner in writing that his refund was being denied because it had no record of his return being filed and it was too late to file a request for refund. The Division submitted a Certificate of Non-filing indicating that a search had been made of the Division's records and no return for the year in question had been filed. The Tribunal discussed *Mutual Life* and held that petitioner's evidence, consisting almost entirely of his own testimony, did not rise to the level of proof presented by the petitioner in *Mutual Life*. The Tribunal stated that there was no evidence of office procedure or documentary evidence to support the mailing of the return. The Tribunal concluded:

Given the evidence of mailing offered by the petitioner, we find that the burden of producing evidence did not pass to the Division of Taxation. In other words, it was not necessary for the Division of Taxation to prove non-receipt since petitioner had not met his burden of proving timely mailing of his 1981 income tax return. (*Matter of Savadjian, supra.*)

The Tribunal went on to say that, although there were some apparent inconsistencies between the information in the Certificate of Non-filing and the proof, it did not matter because it had already been concluded that the Division had no burden to prove nonreceipt because the petitioner had not established mailing first. The facts in *Savadjian* are very similar to the facts in the present case. The present petitioners' mailing evidence consists mostly of testimony, the documentary evidence supporting nonpayment. I see nothing in petitioners' evidence that distinguishes this case from *Savadjian*. The fact that in this case the Division did not submit a Certificate of Non-filing is immaterial because the Tribunal has held that if petitioners cannot prove mailing, the burden never shifts to the Division to establish nonreceipt. In addition, in an affidavit from Mr. Tamaroff, it is stated that the Division had undertaken a search of its files for the check or other

evidence of payment, without finding such evidence. (*See also, Matter of Reeves*, Tax Appeals Tribunal, August 22, 1991; *Matter of Schumacher, supra.*)

Petitioners had the burden to prove that payment was made. As explained above, having not proven that they mailed such payment, the issue of whether the Division received the payment does not arise. It is possible that the Division may have misplaced the check. However, even if that were assumed to be the case, petitioners first have to prove that they mailed it. The inference that the Division misplaced petitioners' payment relates to the issue of whether the Division received payment, not whether petitioners have proven they mailed it.

E. The petition of Robert E. and Gloria J. McKee is denied, and the notice of demand dated October 10, 1996 is sustained.

DATED: Troy, New York
September 20, 2001

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE