

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARIA RODRIGUEZ : SMALL CLAIMS
 : DETERMINATION
 : DTA NO. 820187
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 2002. :
:

Petitioner, Maria Rodriguez, 1928 University Avenue, Apt. 12, Bronx, New York 10453, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2002.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on August 3, 2005 at 9:15 A.M. Petitioner Maria Rodriguez appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Mac Wyszomirski).

Since neither party herein elected to reserve time to file a post hearing brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a Conciliation Order.

FINDINGS OF FACT

1. Petitioner, Maria Rodriguez, filed a New York State Resident Income Tax Return for the year 2002 which reported income from wages, salaries and tips and claimed a refund in the amount of \$2,657.00. A portion of the refund was based on a child and dependent care credit in the amount of \$1,320.00. Petitioner's return, which was dated February 25, 2003, listed her address as 1928 University Avenue, Apartment 12, Bronx, New York 10453.

2. On March 28, 2003, the Division of Taxation ("Division") asked petitioner to provide verifiable documentation to support the claimed child and dependent care expenses. In response, petitioner sent 48 handwritten receipts for \$100.00 each as proof of the child care expenses.

3. The Division concluded that the proof provided was inadequate because the receipts were not verifiable. The Division took this position because it had no record of any returns being filed by the child care provider. Accordingly, the Division issued a Notice of Disallowance, dated August 8, 2003, which denied the portion of the refund which was premised upon the child and dependent care credit. The notice stated, in pertinent part:

You did not provide acceptable documentation to support your request for dependant care credit. We have reviewed your response to our inquiry and find it to be insufficient for the following reasons: We could not validate the payments you claim you made to your child care provider.

The notice further stated:

If you **disagree** and would like further review of this matter, you **must** file either a *Request for a Conciliation Conference* with the Bureau of Conciliation and Mediation Services or a *Petition for a Tax Appeals Hearing* with the Division of Tax Appeals within two years from the date of this notice. (Emphasis in original.)

4. Petitioner filed a Request for a Conciliation Conference which was scheduled on January 13, 2004 in New York City. She did not appear at the conciliation conference and a

default was noted. Thereafter, the Division mailed a Conciliation Default Order, dated January 30, 2004, to petitioner.

5. On October 1, 2004, the Division of Tax Appeals received a petition challenging the denial of the refund. The petition, which was dated September 21, 2004, listed petitioner's address as 1928 University Avenue, Apartment 12, Bronx, New York 10453.

6. At the hearing, the Division offered the affidavits of Bruce Peltier, Robert Farrelly and Heidi Corina, employees of the Division. The Division also offered a copy of petitioner's Request for Conciliation Conference, a copy of the certified mail record ("CMR") containing a list of the conciliation orders allegedly issued by the Division on January 30, 2004, including petitioner's, and a copy of the Conciliation Default Order dated January 30, 2004.

7. The Division also submitted the affidavit of Heidi Corina, a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. The Postal Form 3811-A is a form used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

8. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A which was requested for petitioner herein. This form requests information from Gary Chiboucas, Claims Inquiry Clerk of the U.S. Postal Service - Albany District, regarding a piece of mail bearing article number 7104 10029730 0383 3557 and addressed to petitioner at 1928 University Avenue, Apt.12, Bronx, NY 104533. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request, a letter on USPS letterhead dated June 17, 2005. The letter states in part: "The delivery record shows that this item was delivered on 02/02/2004 at

02:12 PM in Bronx, NY 10453.” The letter also contains a scanned image of the recipient as “Alexis Rodriguez” above the handwritten name “Alexis Rodriguez.” The address of the recipient was written in but it is shown as “8 University Ave. 12.”

CONCLUSIONS OF LAW

A. The Division contends that the petition to the Division of Tax Appeals was untimely since it was not filed within 90 days of the issuance of the Conciliation Default Order. This argument is rejected. Generally, there is a 90-day statutory time limit for filing a petition following the issuance of a conciliation order (Tax Law § 170[3-a][e]; 20 NYCRR 4000.5[c][4]). The conciliation order would be binding upon petitioner unless she filed a timely petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]). However, an additional provision of the Tax Law is also operative in this situation. Tax Law § 689(c)(3) provides that a petition for a refund may be filed within two years of the date of the mailing of the notice of disallowance. Here, the Division denied petitioner’s claim by a notice dated August 8, 2003 and in accordance with Tax Law § 689(c)(3) petitioner had two years or until August 8, 2005 to file a petition for a refund. Since petitioner filed a petition in this matter no later than October 1, 2004, it is concluded that the petition was timely and that the Division of Tax Appeals has jurisdiction to consider the merits of this matter.

B. The petition of Maria Rodriguez is granted with respect to the issue of timeliness and a small claims hearing will be scheduled in due course on the merits of petitioner’s case.

DATED: Troy, New York
October 6, 2005

/s/ Arthur S. Bray
PRESIDING OFFICER