

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OMAR RIVAS	:	ORDER
	:	DTA NO. 822625
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax Under Article 22 of the Tax Law for the Year 2001.	:	

Petitioner, Omar Rivas, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2001.

On January 13, 2009, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the petition did not appear to have been filed in a timely manner. Following an extension of time granted by the Division of Tax Appeals, petitioner's representative, Akshay K. Dudani, and the Division of Taxation submitted responses to the Notice of Intent of Dismiss Petition by March 16, 2009, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3009.9[a][4]). The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) submitted affidavits and other documents in support of dismissal. After due consideration of the documents and arguments submitted by the parties, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the issues raised in the petition.

FINDINGS OF FACT

1. The notice in issue, notice number L-028101133-8, dated March 12, 2007, was issued to petitioner, Omar Rivas, by the Division of Taxation (Division) which assessed additional personal income tax plus interest for the year 2001.

2. Petitioner filed a petition with the Division of Tax Appeals on November 7, 2008.

3. On January 13, 2009, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the aforementioned petition. The notice stated as follows:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to § 2006.4 of the Tax Law, a petition must be filed within ninety days from the date a statutory notice is issued.

The Notice of Deficiency appears to have been issued on March 12, 2007, and it appears the petition was not filed until November 7, 2008 or six hundred and six days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty (30) days from the date of this Notice to submit written comments on the proposed dismissal.

4. In response to the issuance of the notice of intent to dismiss petition, the Division submitted the following affidavits of Division employees: John E. Matthews, Esq., an attorney in the Office of Counsel; James Steven VanDerZee, the Mail and Supply Supervisor in the Division's Registry Unit; Patricia Finn Sears, Tax Processing Specialist 2; Heidi Corina, Legal Assistant 2; and Patricia Alund, Keyboard Specialist 1. In addition, the Division submitted copies of the petition filed with the Division of Tax Appeals on November 7, 2008; a copy of the Notice of Deficiency, dated March 12, 2007; copies of the certified mail record (CMR)

containing a list of the statutory notices mailed by the Division on March 12, 2007 and July 11, 2007; and the 2004 and 2005 resident income tax returns filed by petitioner.

5. In response to the issuance of the Notice of Intent to Dismiss Petition, petitioner's representative, Akshay Kumar Dudani, CPA, submitted a letter, dated March 16, 2009, which stated that petitioner never received the Notice of Deficiency and that the underlying issue had been dealt with in a federal audit and resolved in petitioner's favor.

6. The affidavit of Patricia Finn Sears, sworn to March 11, 2009, sets forth the Division's general practice and procedure for processing statutory notices. Ms. Sears receives from CARTS the computer-generated CMR and the corresponding notices. The notices are predated with the anticipated date of mailing. Here, page 58 of the 86-page CMR contains information on the notice in issue and lists an initial date of March 2, 2007.¹ Following general practices, this date was manually changed to the actual mailing date of "3/12/07," or March 12, 2007. Taxpayer addresses, certified control numbers, and reference numbers assigned to each notice may be found under their respective columns on the CMR. The reference number and control number appear on the corresponding notice and accompanying cover sheet, respectively, while the address appears on both. Page 58 of the CMR establishes that a notice with the control number 7104 1002 9730 1773 7933² and reference number L 028101133 was sent to petitioner at the address the Division found on his 2004 NYS Resident Income Tax Return: "144 05 88 Avenue A3, Jamaica, NY 11435-3410."

¹The CMR specifically states "20070611700" or year 2007, day 61 at 5:00 P.M.

² Ms. Sears stated that there was a second certified control number listed on the CMR next to the entry for "Omar Rivas" which was 7104 1002 9730 0723 0673. However, that number did not appear on the CMR.

Ms. Sears specifically states that the procedures described and followed were the normal and regular procedures in effect as of March 12, 2007.

7. The affidavit of James Steven VanDerZee, sworn to March 12, 2009, describes the mail center's general operations and procedures. The center receives the notices and places them in an "Outgoing Certified Mail" area. A mailing cover sheet precedes each notice. A staff member retrieves the notices and operates a machine that puts each notice into a windowed envelope. Staff members then weigh, seal and place postage on each envelope. The envelopes are counted and the names and certified control numbers verified against the CMR. A staff member then delivers the envelopes and the CMR to one of the various U.S. Postal Service (USPS) branches located in the Albany, New York, area. A USPS employee affixes a postmark and also places his or her signature on the CMR, indicating receipt by the post office. The center further requests that the USPS either circle the number of pieces received or indicate the total number of pieces received by writing the number on the CMR. A review of pages 1, 58 and 86 of the CMR submitted by the Division confirmed that a USPS employee marked said pages of the CMR with his initials and the USPS postmark. Page 58 contained the mailing to petitioner at 144 05 88 Ave, A3, Jamaica, NY 11435-3410 with an assigned certified number of 7104 1002 9730 1773 7933 and the notice number L 028101133. On the final page, corresponding to "Total Pieces and Amounts," is the number 940, which has been circled, and a short distance to the right of this number are the handwritten initials of the USPS employee, confirming that all notices were received by the USPS. The USPS postmark is from the Colonie Center branch and bears the date March 12, 2007, confirming that the notices were mailed on that date.

Although the VanDerZee affidavit was submitted to prove that the properly prepared notice of deficiency had been mailed in accordance with established mailing procedures on

March 12, 2007, it was inexplicably altered. In the four instances where the date of mailing is referenced in the affidavit, Mr. VanDerZee refers to the mailing date as May 12, 2008. At some unknown time and by some unknown author, the date has been changed in a handwritten modification to read March 12, 2007.

8. Prior and subsequent to the issuance of the Notice of Deficiency on March 12, 2007, the Division sent other mailings to petitioner at 144 05 88 Avenue, A3, Jamaica, NY 11435-3410. After the Division received his 2002 New York State Resident Tax Return on September 16, 2006, it sent him a letter requesting additional information on November 10, 2006. After receiving no response, the Division mailed petitioner a Statement of Proposed Audit Changes, an explanation of proposed additional tax due, on January 16, 2007. As mentioned above, the Notice of Deficiency was mailed to petitioner on March 12, 2007. Receiving no response to the statutory notice, the Division issued a Notice and Demand for Payment of Tax Due, a bill, on July 5, 2007.

9. The Notice of Deficiency, mailed on March 12, 2007, was returned to the Division on April 4, 2007 as shown by a confirmation of delivery at the Tax Department provided by the United States Postal Service. A new address was located on petitioner's 2005 New York State Personal Income Tax Return filed in April 2006. Inexplicably, the address was not used in mailing the original audit letter requesting documentation, the statement of proposed audit changes or the March 12, 2007 Notice of Deficiency.

10. According to the affidavit of Patricia Alund, keyboard specialist I in the Central Office Support Unit, sworn to March 4, 2009, when a Notice of Deficiency is returned to an auditor for delivery failure, the auditor attempts to find an alternate address. When such an

address is located, the original mailing is brought to Ms. Alund's unit for remailing by certified mail to that address.

11. Ms. Alund averred that the CMR for the notice at issue consisted of one page with 15 entries and was dated July 11, 2007. The CMR indicated that the item was mailed to petitioner at 88 07 145 Street, Jamaica, NY 11435-3632 with an assigned control number of 7104 1002 9730 1773 7933. The item was left in a basket picked up by the mail room personnel, a fact corroborated by James Steven VanDerZee in his affidavit, dated March 12, 2009. Said CMR was then returned to the Central Office Support Unit after mailing with the postal stamp affixed showing the date mailed. In this case, the returned CMR bore the USPS date stamp of July 11, 2007. Ms. Alund also averred that based on her knowledge of the procedures and the returned CMR, she determined that the procedures were followed in this instance.

12. In his affidavit of March 12, 2009, James Steven VanDerZee indicated, as he did for the mailing on March 12, 2007, that the properly prepared Notice of Deficiency had been mailed in accordance with established mailing procedures on July 11, 2007. He determined this based upon his knowledge of the procedures for mailing such notices, his determination that such procedures had been followed in this matter, the affidavit of Patricia Alund and the remailing CMR.

With regard to the remailed notice, Mr. VanDerZee reviewed the pertinent documents. A review of the single-page CMR submitted by the Division confirmed that a USPS employee marked the CMR with his initials and the USPS postmark. The CMR contained the mailing to petitioner at 88 07 145 St., Jamaica, NY 11435-3632, with an assigned certified number of 7104 1002 9730 1773 7933 and the notice number L 028101133. On the bottom of the page, corresponding to "Total Pieces and Amounts," is the number 15, which has been circled, and a

short distance to the left of this number are the handwritten initials of the USPS employee, confirming that all notices were received by the USPS. The USPS postmark is from the Colonie Center branch and bears the date July 11, 2007, confirming that the notices were mailed on that date.

13. The USPS provided a confirmation of delivery of the certified mail item number 7104 1002 9730 1773 7933 to 88 07 145 Street, Jamaica, NY 11435-3632 on July 13, 2007.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals following the issuance of a notice of deficiency. (Tax Law § 689[b].) Pursuant to Tax Law § 689(b), the underlying notice of deficiency would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

B. Where the timeliness of a taxpayer's petition is in question, the initial inquiry focuses on the mailing of the notice because a properly mailed notice creates a presumption that such document was delivered 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 (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

C. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and, second, there must be proof that the

standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioning Sales & Serv.*). In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. VanDerZee and Ms. Alund, Division employees involved in and possessing knowledge of the process.

The Division has also presented sufficient documentary proof, i.e., the CMR, to establish that the subject notice of deficiency was mailed as addressed to petitioner on July 11, 2007. Specifically, this document lists certified control numbers with corresponding names and addresses and bears a U.S. Postal Service postmark dated July 11, 2007. Additionally, a postal employee wrote “15” next to the total pieces received heading and initialed the CMR to indicate receipt by the post office of all pieces of mail listed thereon. The CMR has thus been properly completed and therefore constitutes documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

Finally, the USPS confirmation of delivery of the item with the identifying number 7104 1002 9730 1773 7933 on July 13, 2007 to petitioner’s address at 88 07 145 Street, Jamaica, NY 11435-3632 further establishes that the notice was properly mailed to petitioner.

D. Although not determinative of this Notice of Intent to Dismiss Petition, it is worthwhile to highlight certain facts. In this matter the auditor ignored a more current last known address set forth in petitioner’s 2005 personal income tax return in the Division’s possession for a year and a quarter (actually filed on April 1, 2006) and sent a letter requesting additional information about the year 2001 on November 10, 2006 to the wrong address; sent a Statement of Proposed Audit Changes on January 16, 2007 to the wrong address ; and sent a Notice of Deficiency on March 12, 2007 to the wrong address. Not until July 2007 did the Division of Taxation begin mailing documents to petitioner at his correct address, sending him a

Notice and Demand for Payment of Tax Due on July 5, 2007 and the remailed Notice of Deficiency on or about July 11, 2007.

With knowledge that petitioner may not have received any of the mail generated prior to July 2007, the Division chose to mail the bill (for tax due based upon the returned notice of March 12, 2007) and the statutory notice on July 11, 2007, with the possibility petitioner would have no knowledge of the underlying liability. Further, since the return for 2001 was not filed until September 16, 2006, as documented in the statement of proposed audit changes, the Division had ample time to assess additional tax due for the period without running afoul of the statute of limitations.

In addition, as noted in the facts, neither Mr. VanDerZee's affidavit nor Ms. Sears's affidavit pertaining to the March 12, 2007 mailing were accurate and contained errors which would have nullified any probative value they may have held, if the prior mailing had been in issue.

However, the Division has also offered proof of actual delivery to petitioner on July 13, 2007, and even using this date as the start of the 90-day period for filing a petition, the petition is still over a year late.

E. It is noted, however, that petitioner is not without recourse here, for he may pay the tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If the request 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).

F. The Petition of Omar Rivas is dismissed.

DATED: Troy, New York
May 7, 2009

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE