

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JARED AND RISA KABAN	:	DETERMINATION
		DTA NO. 823343
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 for the City of New York for the Year 2004.		

Petitioners, Jared and Risa Kaban, 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 2004.

On March 10, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), filed a motion seeking dismissal of the petition or, in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated March 9, 2010, and annexed exhibits supporting the motion. Petitioners, appearing by James P. Ciliberti, C.P.A., did not respond to the motion of the Division of Taxation. Accordingly, the 90-day period for issuance of this determination commenced on April 9, 2010, the date on which petitioners' time to serve a response to the Division of Taxation's motion expired. After due consideration of the affidavits and documents presented by the Division of Taxation, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely request for conciliation conference following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Jared and Risa Kaban, at their New York, New York, address, a Notice of Deficiency, dated April 24, 2009, which asserted additional New York State and City personal income taxes for the year 2004 in the amount of \$35,232.00, plus penalty and interest for a balance due of \$73,432.72. By their request for conciliation conference dated October 19, 2009, petitioners protested the notice numbered L-031832999-2.

2. On November 6, 2009, the Division's Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order Dismissing Request to petitioners. The order determined that petitioners' protest of the subject notice was untimely and stated, in part:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice(s) was issued on April 24, 2009, but the request was not mailed until October 19, 2009, or in excess of 90 days, the request is late filed.

3. To show proof of proper mailing of the notice dated April 24, 2009, the Division provided the following: (i) an affidavit, dated March 4, 2010, of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center; (ii) an affidavit, dated March 2, 2010, of Patricia Finn Sears, the supervisor of the control unit of the Division's Case and Resource Tracking System (CARTS); (iii) the "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked April 24, 2009; and (iv) a copy of petitioners joint

New York State personal income tax return (form IT-201) for the year 2007 dated November 14, 2008, which was the last filing from petitioners prior to the issuance of the Notice of Deficiency.

4. The affidavit of Patricia Finn Sears 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, each page of the 19-page CMR lists an initial date which is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first page to "4/24/09," to reflect the actual mailing date. Each notice is assigned a certified control number. The certified number of each notice is listed on a separate one-page Mailing Cover Sheet, which also bears a bar code, the mailing address and the Departmental return address on the front and taxpayer assistance information on the back. The certified control number, the assessment numbers and the names and addresses of the recipients are also listed on the CMR. Page 5 of the CMR contains information on the subject notice and establishes that on April 24, 2009 a notice with the control number 7104 1002 9730 1316 6744 was sent to petitioners at their New York, New York, address.

5. The affidavit of James Steven VanDerZee, the mail and supply supervisor of the staff of the Division's Mail Processing Center, describes the Center's general operations and procedures. As the mail and supply supervisor, he supervises the Center's staff. The Mail Processing Center receives the notices and places them in an "Outgoing Certified Mail" area. Each notice is preceded by a Mailing Cover Sheet. A staff member retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of up to 30

pieces of certified mail listed on the CMR by checking the envelopes against information contained on the CMR. A member of the Mail Processing Center further requests that the USPS either circle the number of pieces of mail received or indicate the total number of pieces received by writing the number on the CMR. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on each page of the CMR. On page 19, corresponding to "Total Pieces and Amounts," is the preprinted number 199. The number 199 is handwritten on page 19 and the page is initialed, confirming that all notices were received. The USPS postmark is from the Colonie Center branch and bears the date April 24, 2009, confirming that the notices were mailed on that date.

6. Petitioners' New York, New York, address on the CMR and the Mailing Cover Sheet matches the address listed on their joint New York State personal income tax return for the year 2007. This is the most recent return that petitioners filed with the Division before the issuance of the subject Notice of Deficiency.

7. As noted, the request for conciliation conference was dated October 19, 2009. A stamp shows that the request was received by BCMS on October 20, 2009.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. (20 NYCRR 3000.9[b][1]).

B. In the instant matter, petitioners did not respond to the Division's motion and, therefore, have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99

AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]). In addition, petitioners have submitted no evidence to contest the facts alleged by the VanDerZee and Sears affidavits; consequently, those facts may be deemed admitted. Accordingly, summary determination may be granted in this matter, and the Division's motion will be granted for the reasons set forth below.

C. Where the timeliness of a petition or a request for conciliation conference is at issue, as it is here, the initial inquiry is whether the Division has carried its burden of demonstrating proper mailing to petitioners' last known address (Tax Law § 681[a]; *see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). To prove the fact and date of mailing of the subject notice, the Division must make the following showing:

first, there must be proof of a standard procedure used by the Division for the issuance of the statutory notice by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*Matter of United Water New York, Inc.*, Tax Appeals Tribunal, April 1, 2004; *see Matter of Katz*).

D. Here, the Division has offered proof sufficient to establish the mailing of the statutory notice on the same date that it was dated, i.e., April 24, 2009, to petitioners' last known address. The affidavits submitted by the Division adequately describe the Division's general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002). Further, the address on the Mailing Cover Sheet and CMR conforms with the address listed on petitioners' personal income tax return for 2007 which satisfies the "last known address" requirement in Tax Law § 681(a). It is concluded that the notice was properly mailed and thus, the statutory 90-day time limit to file either a request for conciliation conference with

BCMS or a petition with the Division of Tax Appeals commenced on April 24, 2009 (Tax Law § 170[3-a][a]; § 681[b]).

E. The documents show that the notice was mailed on April 24, 2009, but petitioners' request for conciliation conference was not mailed until October 19, 2009, which is well beyond the 90-day period. Consequently, the Division of Tax Appeals has no jurisdiction over this matter and must grant summary determination in favor of the Division of Taxation. (*See Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003 [a petition was dismissed because it was filed one day late].)

F. Finally, it is observed that petitioners are not entirely without recourse. That is, petitioners may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 687[a]). If the claim for refund is disallowed, petitioners may then request a conciliation conference or file a petition with the Division of Tax Appeals in order to contest such disallowance (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

G. The Division of Taxation's motion for summary determination is granted, and the petition of Jared and Risa Kaban is dismissed.

DATED: Troy, New York
May 13, 2010

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE