

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JAMES AND MARY WALSH : DETERMINATION
for Redetermination of a Deficiency or for Refund : DTA NO. 823441
of New York State and New York City Personal :
Income Tax under Article 22 of the Tax Law and :
New York City Administrative Code for the Year :
2002. :

Petitioners, James and Mary Walsh, filed a petition for revision of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2002.

On May 28, 2010, the Division of Taxation filed a motion seeking an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Accompanying the motion to dismiss, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Petitioners, appearing by Timothy P. Noonan, Esq., submitted a response in opposition to the Division's motion on July 12, 2010, and pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced. After due consideration of the documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a Notice of Deficiency.

II. Whether petitioners' claim for refund for the 2002 tax year was filed prematurely.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, James and Mary Walsh, Notice of Deficiency L-031577239-5, dated February 23, 2009.

2. In protest of the notice, petitioners filed a petition with the Division of Tax Appeals on January 13, 2010, seeking an administrative hearing to review the notice at issue.

3. Accompanying this request, petitioners attached a Claim for Credit or Refund of Personal Income Tax, Form IT-113-X, dated January 11, 2010 for the year 2002.

4. The Division provided an executed Consent Extending Period of Limitation for Assessment of Income taxes under Articles 22, 30, 30A and 30B of the Tax Law signed by both petitioners and dated October 17, 2008 and October 20, 2008. This was the last correspondence between the Division and petitioners, and provided petitioners' last known address as 845 United Nations Plaza, Apt 9G, New York, NY 10017 (the 9G address).

5. Petitioners filed their petition and power of attorney forms, dated January 13, 2010, listing the 9G address.

6. Petitioners assert that their address in 2007 was 845 United Nations Plaza, Apt. 54B, New York, NY 10017 (the 54B address) based upon previous correspondence between the Division and petitioners, but they do not deny that their address in 2008 was the 9G address. Neither party provided a copy of petitioners' last tax return filed.

7. The Division provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the Division. CARTS refers to the Division's computer system for generating documents, including notices of deficiency issued to taxpayers. The computer generated statutory notices are predated with the anticipated date of mailing and each is assigned a certified control number.

8. Each batch of statutory notices is accompanied by a computer printout entitled "Certified Record for Presort Mail-Assessments Receivable." It lists each notice in the order the notice was generated, and each notice's certified control number appears under the first heading, "Certified No." The assessment numbers are listed under the second heading, "Reference No." and the names and addresses of the taxpayers are listed under the third heading, "Name of Addressee, Street and PO Address," while the remaining heading lists postage and fees.

9. The certified mail record (CMR) for the notice issued on February 23, 2009 to petitioners consisted of 16 pages, with the words, "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" on page 16.

10. On page 1 of the CMR, Notice of Deficiency L-031577239 is indicated as being sent to "Walsh-James M, 845 United Nations PLZ, Apt 9G, New York, NY 10017" by certified mail using control number 7104 1002 9730 1206 1385 and a postmark of February 23, 2009 is present.

11. The Division also submitted the affidavit of Bruce Peltier, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering

outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of deficiency is placed in the “Outgoing Certified Mail” area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A CMR is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and performs a random check of up to 30 pieces of the certified mail listed.

12. Once review takes place, a member of the MPC staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS will also either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.

13. A review of the CMR confirms that a USPS employee initialed or signed page 16 of the CMR, affixed a postmark to each page of the CMR and wrote the total number of pieces of certified mail received. Page 16 of the CMR lists 172 pieces of mail received at the post office.

14. On February 23, 2009, an employee of the MPC delivered one piece of certified mail addressed to petitioners, at their 9G address, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail.

15. On January 11, 2010, petitioners filed a Claim for Credit or Refund of Personal Income Tax, Form IT-113-X, and waived the requirement that they be mailed a notice of disallowance in writing. Petitioners were never sent a notice of disallowance from the Division.

Subsequently, they filed a petition for a claim of refund with the Division of Tax Appeals on January 13, 2010, which was two days after the filing of the claim with the Division.

CONCLUSIONS OF LAW

A. In reviewing a motion for summary determination, an administrative law judge is constrained by the following guidelines:

The motion 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. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. Where it appears that a party, other than the moving party, is entitled to a summary determination, the administrative law judge may grant such determination without the necessity of a cross-motion (20 NYCRR 3000.9[b][1]; *see also* Tax Law § 2006[6]).

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also Matter of Service Merchandise Co.*, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004 [1965]; *see Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990 [1989]). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179 [1989]), undermining the notion of a “day in court,” summary determination must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229 [1965], *affd* 26 AD2d 729 [1966]). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such facts exist” (*Daliendo v.*

Johnson, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94 [1968]; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881 [1960]).

B. Tax Law § 689(b) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of deficiency of tax due. 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, Inc.*, Tax Appeals Tribunal, January 6, 1989).

Pursuant to these provisions, petitioners had 90 days from the date the notice was issued (February 23, 2009) to either request a conciliation conference or file a petition for a hearing.

C. Where the timeliness of a taxpayer’s protest against a notice is in question, the initial inquiry is 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 Katz*). 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).

D. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of statutory 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 Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

E. In this case, the Division has introduced adequate evidence of its standard mailing procedures through the affidavits of Patricia Finn Sears and Bruce Peltier, Division employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

F. The production of the CMR by the Division constitutes sufficient documentary evidence to establish the subject notice was mailed as addressed to petitioners on February 23, 2009. The CMR listed: (1) name and address, (2) a corresponding certified control number, (3) U.S. Postal Service postmarks dated February 23, 2009, and (4) a postal employee's handwritten initials and documentation of the total number of pieces. The CMR has been properly completed, therefore, constituting appropriate documentary evidence of both the date and fact of mailing (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

G. Here, as in *Matter of T.J. Gulf Inc. v. New York State Tax Commn.*, petitioner merely denies receipt of the notice, yet does not provide any evidence that the routine office practices were not followed by the Division (*Matter of T.J. Gulf Inc. v. New York State Tax Commn.*, 124 AD2d 314 [3d Dept 1986]).

H. Tax Law § 681(a) provides a notice of deficiency shall be mailed by certified or registered mail to the taxpayers at their last known address in or out of this state. Tax Law § 691(b) provides the taxpayers' last known address shall be the address given in the last return filed by them, unless subsequently to the filing of such return the taxpayers shall have notified the tax commission of a change of address.

I. The Consent Extending Period of Limitation for Assessment of Income taxes under Articles 22, 30, 30A and 30B of the Tax Law executed between the parties and signed by both petitioners on October 17, 2008 and October 20, 2008 is sufficient to fulfill the requirement of Tax Law § 691(b). The executed tax form properly notified the Division of petitioners' change of address. In addition, petitioners filed their petition and power of attorney forms from the 9G address at issue.

J. Petitioners do not provide any evidence that the 9G address was not their last known address at the time the notice was issued.

K. Tax Law 689(c) provides that taxpayers may file a petition for refund either if the tax commission has mailed to the taxpayers, by registered or certified mail, a notice of disallowance of such claim or six months from the time the claim was filed . However, if taxpayers file a written waiver of the requirement that they be mailed a notice of disallowance, the two-year period during which to file a petition shall begin on the date such waiver is filed (Tax Law § 689[c][4]).

L. Petitioners filed a waiver on January 11, 2010, thereby beginning the two year period by which they could file their petition for a claim of refund. Here, petitioners have properly followed the statutory requirements to file a petition for a claim of refund.

M. The Division's motion for summary determination pertaining to the notice of deficiency at issue is hereby granted. However, the Division's motion regarding the refund claim is hereby denied. A hearing on the merits of the refund claim will be scheduled in due course, and the petition is otherwise dismissed.

DATED: Troy, New York
September 2, 2010

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE