

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
B. S. AND BETSY CLARK : DETERMINATION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 824490
York State Personal Income Tax under Article 22 of the :
Tax Law for the Years 2007 and 2008. :

Petitioners, B. S. and Betsy Clark,¹ filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2007 and 2008.

On December 21, 2011, the Division of Taxation, by its representative, Mark F. Volk, 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 (b). Accompanying the motion was the affidavit of John E. Matthews, dated December 19, 2011, and annexed exhibits supporting the motion. Petitioners, appearing by Chris Chudyk, CPA, did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for issuance of this determination began on January 19, 2012, the due date for petitioners' response. After due consideration of the affidavits and documents presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

¹ Petitioner B. S. Clark's name also appears as B. Scott Clark in documents in the record.

ISSUE

Whether petitioners filed timely requests for a conciliation conference following the issuance of notices of deficiency.

FINDINGS OF FACT

1. The subject of the motion of the Division of Taxation (Division) is the timeliness of petitioners' protests of two notices of deficiency dated March 10, 2011 and addressed to petitioners, B. S. and Betsy Clark, at a Delhi, New York, address. The first Notice of Deficiency, notice number L-035507036-5, asserted additional New York State personal income tax due for the year 2008 in the amount of \$16,839.33, plus interest, for a balance due of \$18,259.18. The second Notice of Deficiency, notice number L-035507037-4, asserted additional New York State personal income tax for the year 2007 in the amount of \$19,567.69, plus interest and penalty, for a balance due of \$23,873.89.

2. Copies of each of the foregoing notices were also sent to petitioners' representatives, James A. Lawrence and Chris Chudyk, at an Oradell, New Jersey, address.

3. Petitioners protested the two notices of deficiency by filing with the Division's Bureau of Conciliation and Mediation Services (BCMS) requests for conciliation conference. Both requests were signed and dated by Chris Chudyk, CPA, as petitioners' representative, on June 6, 2011. The envelope in which the requests were sent by certified mail bears a machine metered (Pitney Bowes) postmark dated June 20, 2011. BCMS received the requests on June 22, 2011. Both requests list petitioners' address as the Delhi, New York, address, and Mr. Chudyk's address as the Oradell, New Jersey, address.

4. On July 8, 2011, BCMS issued a Conciliation Order Dismissing Request to petitioners.

The order determined that petitioners' protest of Notice of Deficiency, notice number L-035507036, was untimely and stated:

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 March 10, 2011, but the request was not received until June 22, 2011, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

5. On the same day that the foregoing order was issued, BCMS also issued a Conciliation Order Dismissing Request that dismissed the request and denied a conciliation conference with respect to Notice of Deficiency, notice number L-035507037. The language employed in the second order was identical to the language used in the first order.

6. In response to the dismissal orders, petitioners filed a petition with the Division of Tax Appeals. The petition lists petitioners' address as the Delhi, New York, address, and Mr. Chudyk's address as the Oradell, New Jersey, address. The Division subsequently brought this motion, dated December 19, 2011, seeking dismissal of the petition or, in the alternative, summary determination in favor of the Division on the basis that the Division of Tax Appeals lacks jurisdiction of the matter because petitioners' protests of the statutory notices were filed more than 90 days from their date of issuance.

7. In support of its motion for summary determination, the Division submitted, among other things, the following: (i) an affidavit, dated December 13, 2012, of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center; (ii) an affidavit, dated December 8, 2011, of Daniel B. Maney, a Tax Services Specialist 4 and Manager of the Refunds, Deposits, Overpayments and Control Units, which includes the Division's Case and Resource Tracking

System (CARTS); (iii) the “Certified Record for Non-Presort Manual Mail - Assessments Receivable” (CMR) postmarked March 10, 2011; and (iv) a copy of petitioners’ joint New York State personal income tax return (form IT-201) for the year 2009 dated April 14, 2010, which was the last filing from petitioners prior to the issuance of the notices of deficiency.

8. The affidavit of Daniel A. Maney sets forth the Division’s general practice and procedure for processing statutory notices. More specifically, Mr. Maney’s affidavit describes the computer preparation of notices of deficiency to include the simultaneous preparation of a mailing cover sheet with mailing and return addresses and a bar code for each notice, as well as the preparation of a certified mailing record (CMR). The CMR is a computer-generated document, entitled “CERTIFIED RECORD FOR NON-PRESORT MANUAL MAIL - ASSESSMENTS RECEIVABLE” consisting, in this case, of one page. The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes for each such notice, a separate certified control number.

9. Each computer-generated notice of deficiency is predated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading “Certified No.” The CMR lists each notice in the order the notices are generated in the batch. The assessment numbers are listed under the heading “Reference No.” The names and addresses of the recipients are listed under “Name of Addressee, Street, and P.O. Address.” Mr. Maney’s affidavit describes the CMR as carrying an initial date (the date of its printing) in its upper left corner that is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing the notices, including affixation of postage, and mailing. The initial date on the certified mailing record is manually changed at the time of mailing by Division personnel to

conform to the actual date of mailing of the notices. All notices selected for manual review are printed in one printing run, and each unit that has notices selected for manual review receives a separate and complete CMR for their notices. The notices at issue were selected for manual review by the Audit Division - Income / Franchise Desk - AG14 so that the certified mail could be pulled for manual review prior to mailing.

10. Attached as an exhibit to Mr. Maney's affidavit is the one-page CMR that was printed on page 1 of the run, as indicated by the listing "PAGE: 1" in the upper right corner of the CMR. The CMR lists eight certified control numbers, which were assigned to the items of mail listed on the CMR. Specifically, corresponding to each of the listed certified control numbers is a notice number and the name and address of the addressee. The CMR is manually dated March 10, 2011.

11. Page 1 of the CMR shows that two notices of deficiency with certified control numbers 7104 1002 9730 0531 4771 and 7104 1002 9730 0531 4778 and assessment ID numbers L-03550736 and L-035507037 were mailed to "Clark-Betsy" at the Delhi, New York, address listed on the subject notices of deficiency.² The corresponding mailing cover sheets bear these certified control numbers and the names, "Clark-Betsy" and "Clark-B S," and the Delhi, New York, address.

12. Page 1 of the CMR also indicates that two notices of deficiency bearing the March 10, 2011 date (assessment ID numbers L-035507036 and L-035507037), were sent to petitioners' representatives, "James A. Lawrence, Chris Chudyk," 234 Kinderkamack Road, Oradell, New

² The certified mail record lists only the name Betsy Clark because it is standard procedure for the certified mail record to set forth the name of the primary taxpayer associated with the statutory notice. Thus, when as here, a husband and wife file a joint personal income tax return wherein the wife's social security number is listed in the place designated for the primary taxpayer, only the wife's name will appear on the certified mail record.

Jersey 07649, by certified mail. The certified control numbers, assessment identification numbers and address listed on the CMR all correspond to the information on the mailing cover sheets and the March 10, 2011 notices of deficiency.

13. The affidavit of Bruce Peltier, a mail and supply supervisor in the Division's Mail Processing Center (Center), describes the Center's general operations and procedures. The 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 mailing cover sheets and operates a machine that puts each notice and mailing cover sheet into a windowed envelope. The staff member then weighs, seals and places postage on each envelope. The first and last pieces of mail listed on the CMR are checked against the information listed on the CMR. A clerk then performs a random review of pieces of certified mail listed on the CMR by checking the envelopes against the information contained on the CMR. A member of the Center 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 initials or 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 last page of the CMR.

14. A review of the CMR submitted by the Division confirms that a USPS employee affixed a dated postmark and initials on the one-page CMR. On the bottom of the page of the CMR, corresponding to "TOTAL PIECES AND AMOUNTS," is the preprinted number 8, which was circled. The CMR also bears the postmark of the Colonie Center Branch of the USPS, dated March 10, 2011, and the initials of the USPS employee accepting receipt of the items. The affixation of the Postal Service postmark, the initials of the USPS employee, and the circling of

the preprinted number 8 indicating that all such pieces were received, confirm that the notices of deficiency dated March 10, 2011 were received by the USPS on that date.

15. Petitioners' 2009 New York resident income tax return, dated April 14, 2010, reported petitioners' address as Delhi, New York 13753. This was the last return filed by petitioners prior to the issuance of the subject notices. This address corresponds with the address on the CMR and on the notices that were sent to petitioners.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all 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]; *John William Costello Assocs. 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 Peltier and Maney 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 notices on the same date listed on the notices, i.e., March 10, 2011, 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 sheets and CMR conforms with the address listed on petitioners' personal income tax return for 2009, which satisfies the "last known address" requirement in Tax Law § 681(a). It is concluded that the notices were properly mailed and thus, the statutory 90-day time limit to file either requests for conciliation conference with BCMS or petitions with the Division of Tax Appeals commenced on March 10, 2011 (Tax Law § 170[3-a][a]; § 681[b]).

E. The documents show that the notices were mailed on March 10, 2011, but petitioners' requests for conciliation conference were not mailed until June 20, 2011, a date beyond the 90-day period for protesting the notices. 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 B. S. and Betsy Clark is dismissed.

DATED: Albany, New York
April 12, 2012

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE