

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition :  
of :  
**IRA N. SMITH** : DECISION  
for Redetermination of Deficiencies or for Refund of :  
New York State and New York City Income Taxes :  
under Article 22 of the Tax Law and the New York City :  
Administrative Code for the Years 1982 through 1985. :

---

Petitioner Ira N. Smith, 919 Third Avenue, New York, New York 10019 filed an exception to the determination of the Administrative Law Judge issued on November 8, 1990 with respect to his petition for redetermination of deficiencies or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1982 through 1985 (File No. 807285). Petitioner appeared by Townsend & Valente (David Schmutde, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael Glannon, Esq., of counsel).

Petitioner submitted a brief in support of his exception. The Division filed a brief in response. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUES***

- I. Whether the notices of deficiency were barred by the statute of limitations.
- II. Whether the notices of deficiency were issued in accordance with the mailing requirements of Tax Law § 681(a).

***FINDINGS OF FACT***

We find the fact as determined by the Administrative Law Judge. These facts are set forth below.

On July 27, 1988, the Division of Taxation issued three notices of deficiency to petitioner, Ira N. Smith, bearing a mailing address of 49 Woodland Drive, Oyster Bay Cove, New York 11771, asserting the following amounts due:

<u>Period</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>
1982	\$ 4,503.66	\$ 225.18	\$ 2,525.31	\$ 7,254.15
1983 & 1984 <sup>1</sup>	\$247,088.24	\$12,354.42	\$92,257.39	\$351,700.05
1985	\$ 30,516.63	\$ 1,525.83	\$ 5,161.97	\$ 37,204.43

Petitioner filed New York State resident income tax returns for the years 1982, 1983, 1984 and 1985 on the following dates: October 19, 1983, October 17, 1984, October 22, 1985 and October 14, 1986, respectively. The tax returns for those years bear the address of petitioner at 49 Woodland Drive, Oyster Bay Cove, New York 11771.

The proposed disallowances resulting in the asserted tax due were not the result of audits, according to petitioner's representative. The Division of Taxation, however, states that it audited petitioner's income tax returns for 1982 through 1985 and requested substantiation for claimed Schedule C expenses. Since petitioner failed to provide the Division with the requested substantiation, petitioner's tax liability was recomputed by reason of having certain Schedule C losses disallowed.

Petitioner signed consents extending the period of limitation during which taxes due could be determined for taxable years 1982 and 1983, ultimately to October 19, 1988.

A request for a conciliation conference with respect to the deficiencies for 1982 through 1985 was made on April 3, 1989. Introduced into evidence was the actual request for conciliation conference, Forms TA-9.1, as well as the envelopes in which those requests for all years were received. The postmark on the envelopes is clearly April 3, 1989, having been received by the Bureau of Conciliation and Mediation Services on April 7, 1989. Subsequently, on May 19, 1989, two Conciliation Orders covering the four tax years were issued with the following explanation:

---

<sup>1</sup>The amounts for these two periods have been combined on one notice.

"The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notices were issued on July 27, 1988 but the request was not mailed until April 3, 1989 or in excess of 90 days, the request is late filed. The request filed for a Conciliation Conference is denied."

On or about August 10, 1989, and received by the Division of Tax Appeals August 14, 1989, two petitions were filed on behalf of petitioner with regard to the notices of deficiency in issue bearing petitioner's address, 49 Woodland Drive, Oyster Bay, New York 11771.

On the record, petitioner's representative indicated that petitioner would concede that the petition was not timely filed if the notices of deficiency are valid as a result of a finding that the mailing requirements have been met.

The Division of Taxation submitted into evidence the envelopes in which each of the three notices of deficiency were mailed. Each bears a U.S. Postal Service date stamp of July 27, 1988, as well as indications that each was sent as certified mail. Also attached to the envelopes are claim check receipts indicating that the U.S. Postal Service attempted two deliveries or notifications to petitioner's address and that the envelopes were returned to the Division of Taxation for the reason that they were "unclaimed".

The Division of Taxation further introduced a record of mailing and fees which is retained by the Tax Compliance Division indicating the dates that notices of deficiency are mailed by the U.S. Post Office. Each of the certified article numbers corresponds to the notices mailed to Ira N. Smith at 49 Woodland Drive, Oyster Bay Cove, New York 11771.

### ***OPINION***

The Administrative Law Judge concluded that the Division of Taxation (hereinafter the "Division") did establish compliance with the mailing requirements of Tax Law § 681(a).

On exception, petitioner argues that the statute of limitations has expired for the years 1982 and 1983 and, therefore, the notices of deficiency for those years are barred. Petitioner also argues that there can be no presumption of delivery when a return receipt is required. Petitioner asserts that requiring a return receipt made delivery impossible in this case.

The Division, in response, argues that the notices were issued within the time to assess as petitioner signed two consents extending the period of limitation to assess for the years 1982 and 1983. Further, the Division argues that the notices were issued in compliance with Tax Law § 681(a) as they were sent by certified mail to the taxpayer's last known address.

We affirm the determination of the Administrative Law Judge.

In his brief on exception, petitioner has again made the statement that the notices of deficiency for the tax years 1982 and 1983 were barred by the statute of limitations. We find petitioner's contention that such notices were time barred without merit. Petitioner has not submitted anything at all to challenge the validity of the consents. In fact, petitioner has not even mentioned the consents. The record before us clearly establishes that petitioner signed consents extending the period to assess for these years until October 19, 1988. The notices were issued on July 27, 1988 well within the time to assess.

The next issue before us is whether the Division complied with the requirements of Tax Law § 681(a) in issuing the notices of deficiency. Tax Law § 681(a) provides as follows:

" . . . [a] notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state . . ." (Tax Law § 681[a]).

We find the Division's evidence of mailing in this matter adequate to prove compliance with Tax Law § 681(a). Here, the Division submitted into evidence the mailing envelopes in which the three notices of deficiency were sent. Each envelope is postmarked July 27, 1988 and indicates that they were sent by certified mail. The envelopes also have claim checks attached to them which indicate the United States Post Office's two attempts at delivery or notification to petitioner's address. The envelopes also indicate that they were returned to the Division because they were unclaimed. Also submitted into evidence was the Tax Compliance Bureau's record of mailing and fees which further establishes that three certified articles were mailed on July 27, 1988. The certified mail numbers on the notices are the same as those listed for the certified articles on the record of mailing and fees.

We find petitioner's argument, that delivery was impossible because a return receipt was requested and that there can be no presumption of delivery when a return receipt is used, totally unfounded. First, the record does not indicate that the notices were mailed with a return receipt request. Second, petitioner offers no proof of his assertion that the United States Postal Service would leave certified mail, without a return receipt request, at a residence and only requires delivery to a person where there is a return receipt request. Since petitioner has not proved any of the facts underlying his position, he cannot prevail. However, even if petitioner had established these facts, we would not accept his ultimate contention that the need to claim the mail at the post office made delivery impossible. In our view, the only effect of a return receipt request is to provide the Division with direct evidence that a notice of deficiency was mailed to a taxpayer (see, Matter of Kropf, Tax Appeals Tribunal, March 21, 1991). Petitioner has not presented any reason why the Division should be precluded from obtaining this important evidence.

Contrary to petitioner's allegation, under section 681(a), the focus is on the proper mailing of a notice of deficiency. If the notice has been properly mailed, the statute places the risk of nondelivery on the taxpayer (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). The statute only requires the Division to mail the notice by registered or certified mail to the petitioner's last known address. When proper mailing has been effected, the petitioner's failure to receive the notice is not material (Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 667, 355 NYS2d 1028).

The Division has also met the requirement of mailing the notices to petitioner's last known address. The income tax returns filed by petitioner for the years 1982, 1983, 1984 and 1985 all list 49 Woodland Drive, Oyster Bay Cove, New York 11771 as his address. There is nothing in the record to indicate that this was not petitioner's address when the notices were issued.

In view of the above, we conclude that the requirements of section 681(a) have been fully met and petitioner's request for a conciliation conference was not timely filed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ira N. Smith is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Ira N. Smith is dismissed.

DATED: Troy, New York  
July 3, 1991

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner