

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ARNOLD SIEGELAUB : DECISION
for Redetermination of a Deficiency or for Refund of : DTA No. 807997
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 Year 1983 :

Petitioner Arnold Siegelaub, 83-24 258th Street, Floral Park, New York 11004 filed an exception to the determination of the Administrative Law Judge issued on October 10, 1991 with respect to his petition for redetermination of a deficiency 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 year 1983. Petitioner appeared by Steven R. Goldberg, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief.

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

ISSUE

Whether the Division of Taxation timely assessed petitioner for income taxes determined to be due for the year 1983.

FINDINGS OF FACT

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

Following an audit of petitioner's New York State and City of New York Resident Income Tax Return for the year 1983, the Division of Taxation issued a Notice of Deficiency to petitioner, Arnold Siegelau, which set forth additional tax due of \$6,694.46 and interest of \$2,109.86, for a total amount due of \$8,804.32 for the tax year 1983. Said Notice of Deficiency was dated April 14, 1987.

On April 22, 1991, both parties, by their representatives, stipulated to the following facts:

(a) On April 17, 1987, petitioner received, via regular mail, an envelope containing a Statement of Proposed Audit Changes with respect to the assessment which is the subject of this proceeding. The envelope bore a machine-metered postmark dated April 11, 1987.

(b) On April 16, 1987, the United States Postal Service attempted to deliver to petitioner, via certified mail, an envelope containing the Notice of Deficiency which is the subject of this proceeding. The envelope bore a machine-metered postmark dated April 14, 1987. On April 17, 1987, petitioner received the envelope containing the Notice of Deficiency from the United States Postal Service.

(c) The parties agree that the sole issue to be determined is whether the Notice of Deficiency was issued prior to the expiration of the period of limitations on assessment set forth in Tax Law § 683. Aside from the statute of limitations issue, the merits of the assessment are not in issue.

As part of its submission, the Division of Taxation submitted the affidavit of one Stanley K. Devoe, principal clerk in the Manual Assessment Unit, who, as part of his regular duties, supervised the issuance of notices of deficiency. Attached to said affidavit was an alleged "certified mail record" which contained certified control numbers and the names of each taxpayer receiving a Notice of Deficiency thereunder. Mr. Devoe further testified in his affidavit that the alleged "certified mail record" indicated that a Notice of Deficiency was sent to Mr. Siegelau at his address in Floral Park, New York by certified mail on April 14, 1987.

The alleged "certified mail record" did not bear any notation or official stamp of the United States Postal Service or the initials or signature of a United States Postal Service employee. Also, said form, three pages in length, contained a typewritten date of April 6, 1987 and two handwritten notations of "4/14/87."

Petitioner filed his New York State and City of New York Resident Income Tax Return for the year 1983 in a timely manner.

It is noted that April 15, 1984 was a Sunday.

OPINION

In the determination below, the Administrative Law Judge held that the the Notice of Deficiency sent to petitioner by the Division of Taxation (hereinafter the "Division") was mailed in a timely manner. Specifically, the Administrative Law Judge found that the Notice of Deficiency and the metered postmark on the envelope in which it was mailed, both dated April 14, 1987, accurately reflect the date that the Notice of Deficiency was delivered into the custody of the United States Postal Service (hereinafter the "Postal Service") for mailing. Because it was found that this mailing occurred within the three-year statutory period in which the Division was required to issue an assessment, the Administrative Law Judge held that the Notice of Deficiency was properly issued in accordance with Tax Law §§ 681(a) and 683.

On exception, petitioner asserts that the Administrative Law Judge erred in allowing the Division to submit written documentation at hearing that was not made a part of the stipulation entered into by the parties. In addition, he asserts that the Administrative Law Judge erroneously and unnecessarily looked to Federal statutes and case law in his interpretation of Tax Law §§ 681 and 683.

In response, the Division states that the stipulation submitted by the parties did not foreclose the Division from submitting evidence to prove facts not addressed in the stipulation. As to the remaining issue, the Division relies upon the determination of the Administrative Law Judge.

We affirm in all respects the determination of the Administrative Law Judge.

We will first address petitioner's contention that the Administrative Law Judge erroneously applied Tax Law §§ 681 and 683. Tax Law § 683(a) states that income tax must be assessed against a taxpayer within three years from the time the return is filed. If a return is filed before the last day prescribed by law, for purposes of section 683, it is deemed to be filed on the last day (Tax Law § 683[b]). In this case, the last day for filing a return for the tax year 1983 was April 16, 1984.¹ Therefore, the last day for the Division to assess tax for the year 1983 would be April 16, 1987, which is three years from the 1983 filing deadline.

The mailing of a Notice of Deficiency suspends the running of the three-year period in which an assessment must be made (Tax Law § 683[e]). The Division is required to mail the Notice of Deficiency by certified or registered mail to the taxpayer's last known address (Tax Law § 681[a]). Because petitioner received the Notice of Deficiency via certified mail on April 17, 1987, one day beyond the three year statutory deadline established in section 683(a), the issue before us is whether the mailing of the notice by the Division acted to toll this statutory period.

The facts critical to deciding this question have been stipulated to by the parties. On April 16, 1987, the Postal Service attempted unsuccessfully to deliver to petitioner, via certified mail, an envelope containing the Notice of Deficiency which is the subject of this proceeding. This envelope was eventually delivered to petitioner the following day. In light of the unsuccessful attempt by the Postal Service to deliver the Notice of Deficiency on April 16, 1987, the only logical inference which may be drawn from these facts is that the Division delivered the notice into the custody of the Postal Service for mailing on or before this date. Because we find that the notice was mailed at the latest on April 16, 1987, this act of mailing suspended the running of the statute of limitations. Thus, we conclude that the Notice of Deficiency was timely issued by the Division.

¹The last day for a taxpayer to file a calendar year return would normally be April 15 of the following year (Tax Law § 651[a]). However, because April 15, 1984 fell on a Sunday, the three-year period within which an assessment must be mailed begins to run from the next succeeding day which is not a Saturday, Sunday or legal holiday (Tax Law § 691[c]; 20 NYCRR former 146.4).

Petitioner relies on Matter of MacLean v. Procaccino (53 AD2d 965, 386 NYS2d 111) to support his position that the Division failed to prove proper mailing. In MacLean, the Appellate Division, Third Department held that although delivery to the taxpayer's last known address is presumed, this presumption does not arise until adequate proof of mailing has been established by the Division (Matter of MacLean v. Procaccino, supra, 386 NYS2d 111, 112). However, in this case, unlike MacLean, there is no question that petitioner received the Notice of Deficiency. Moreover, the fact stipulated to by the parties that the Division mailed the notice using certified mail,² an authorized method of mailing under section 681(a), negates any duty to establish this fact a second time through its mailing records.³ Thus, we find petitioner's reliance on Matter of MacLean v. Procaccino (supra) to be misplaced.

Petitioner further reads MacLean to hold that a taxpayer's claim of actual receipt of an assessment is not material in determining if the presumption of receipt exists. We disagree with this interpretation. In MacLean, it was not known whether the taxpayer received the Notice of Deficiency. The Appellate Division stated that under this circumstance, a taxpayer's claim that he failed to receive an assessment is not material in determining whether receipt may be presumed (Matter of MacLean v. Procaccino, supra, 386 NYS2d 111, 112). Petitioner would extend this holding to also render immaterial a taxpayer claim that he did receive the assessment. We first note that, because it is stated in the stipulation that petitioner received the Notice of Deficiency, this is not a mere assertion, but an established fact. However, even if petitioner were unilaterally to assert in the record that he received the Notice of Deficiency, such an assertion

²Petitioner contends that because the Notice of Deficiency was mailed by the Division in an envelope bearing a metered mail marking, and metered mail is not a qualified method under Tax Law § 681(a), the mailing was improper, thus, invalidating the assessment. In asserting this position, petitioner inexplicably overlooks stipulated fact number 2, which states that the notice was delivered via certified mail, which is a qualified method under section 681(a) (see, Stipulation [petitioner's brief, exhibit 1]). Thus, we find the fact that the envelope bore a metered postmark to be irrelevant.

³The parties did not stipulate that the requirement in Tax Law § 681(a), that the Notice of Deficiency was mailed to the petitioner's last known address," was met by the Division. However, even assuming that the Division mailed the notice to an address which was not petitioner's last known address, this would not invalidate the assessment. An incorrectly addressed Notice of Deficiency which is actually received by the taxpayer does not invalidate the assessment (Matter of Agosto v. Tax Commn., 68 NY2d 891, 508 NYS2d 934, revg 118 AD2d 894, 499 NYS2d 457) and is effective to suspend the statute of limitations at the time of mailing (Matter of Riehm, Tax Appeals Tribunal, April 4, 1991, annulled and remitted on other grounds ___ AD2d ___, 579 NYS2d 228).

would carry significantly more weight than a denial, as such an admission would constitute a statement against his interest. Therefore, we find this argument to be without merit.

We will next address petitioner's contention that the Administrative Law Judge erred in admitting the affidavit of Stanley K. Devoe, principal clerk in the Division's Manual Assessment Unit. Petitioner argues that the admission of the affidavit violated the stipulation submitted by the parties. Further, he contends that the agreement to waive a formal hearing and the right to examine and cross-examine each party's witnesses and their documentation was based upon this agreement and the facts contained therein.

In Matter of J & L Home Improvement Corp. (Tax Appeals Tribunal, August 1, 1991), we addressed the impact of stipulations as a means of defining or limiting the legal issues to be decided in a taxpayer action. In that case, we adopted the approach taken by the United States Tax Court, which applied principles of contract law. We held that stipulations, like contracts, bind parties only to the extent of their clearly manifested intentions set forth in the terms of the agreement (Matter of J & L Home Improvement Corp., *supra*, citing Stamos v. Commissioner, 87 TC 1451). We note that in J & L Home Improvement, the issue was whether the submitted stipulation precluded the parties from raising any additional legal issues in the case other than that contained in the stipulation. Here, petitioner contends that the purpose of the stipulation was to provide the Administrative Law Judge with all the facts necessary to render a decision in this action as a matter of law. The use of stipulations is addressed in 20 NYCRR 3000.7, which states:

"[w]ith the exception of those instances where the petitioner does not desire to stipulate any facts, the parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all facts not privileged which are relevant to the pending controversy" (20 NYCRR 3000.7[a][1][i], emphasis added).

From this passage it is clear that, in the absence of an expressed intention to the contrary, stipulating to specific facts does not foreclose the submission of evidence to prove other facts.

Therefore, to determine if the facts of this case must be limited to those set forth in the stipulation, we must examine the stipulation to determine if the parties intended such a result.

The stipulation contains three points of agreement. First, the parties agree that the post office attempted to deliver the statement of proposed audit changes as well as the Notice of Deficiency, via certified mail, to petitioner on April 16, 1987. Second, it was established that these notices were delivered by certified mail to petitioner on April 17, 1987. Finally, the parties agreed that the sole issue to be determined in this action is whether the Notice of Deficiency was issued by the Division prior to the expiration of the statute of limitations. As to this final term, the parties clearly stated their intention to preclude the ability of either party to raise any other issues in the case. However, we find no similar intention to limit the facts of the case to those stated in the stipulation. Therefore, we find that the affidavit of Stanley K. Devoe was properly admitted into the record.

Petitioner further contends that the parties' agreement to waive a formal hearing was based on the facts contained in the stipulation. Petitioner concedes that 20 NYCRR 3000.8, which addresses submission of evidence without hearing, permits the submission of "documentary evidence relevant to the issues." However, he fails to point out that the quoted passage continues with the words, "including any stipulation entered into by the parties" (20 NYCRR 3000.8[b]). From this language it is clear that the regulation contemplates the submission of documentary evidence in addition to a stipulation made by the parties.

Despite the language in 20 NYCRR 3000.8, petitioner states that allowing the submission of evidence where the facts have been stipulated enables a party to circumvent the stipulation, rendering it meaningless. However, petitioner's argument is based on the incorrect premise that the agreement to certain facts in a stipulation is a preclusion of all others. Such a result may not be gained simply by the existence of a stipulation; rather, it must be an intended result of the parties' agreement as evidenced by the language of the stipulation (see, Matter of J & L Home Improvement Corp., supra). Because no such intention can be found in the stipulation or the

waiver of hearing, we agree with the Administrative Law Judge that the admission of the affidavit of Stanley K. Devoe was consistent with regulation 20 NYCRR 3000.8.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Arnold Siegelau is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Arnold Siegelau is denied; and
4. The Notice of Deficiency dated April 14, 1987 is sustained.

DATED: Troy, New York
June 4, 1992

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

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

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