

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
KAREN J. KIMMEY :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law for :
the Periods January 16, 1989 through June 30, 1989, :
August 16, 1989 through December 31, 1989 and March 16, :
1990 through July 15, 1990. :

DECISION
DTA Nos. 809958
and 809959

In the Matter of the Petition :
of :
JOHN L. MATRONE :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law for :
the Periods January 16, 1989 through June 30, 1989, :
August 16, 1989 through December 31, 1989 and :
March 16, 1990 through July 15, 1990. :

Petitioners Karen J. Kimmey, 160 Brookside Avenue, Amsterdam, New York 12010, and John L. Matrone, 233 Greenwood Drive, Schenectady, New York 12303, filed exceptions to the determination of the Administrative Law Judge issued on June 10, 1993. Petitioners appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioners did not file a brief. The Division of Taxation filed a letter, received August 10, 1993, which began the six-month period to issue this decision. Oral argument, requested by petitioners, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether the denial of petitioners' request for a conciliation conference was proper because the request was not timely made.

FINDINGS OF FACT

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

On or about January 18, 1991, the Division of Taxation ("Division") issued to Karen J. Kimmey and John L. Matrone, petitioners herein, 28 statements of deficiency each for the following periods and in the following amounts:

<u>Withholding Tax Period</u>	<u>Amount</u>
January 16, 1989 - January 31, 1989	\$2,913.02
February 1, 1989 - February 15, 1989	4,411.24
February 16, 1989 - February 28, 1989	1,494.98
March 1, 1989 - March 15, 1989	4,523.59
March 16, 1989 - March 31, 1989	2,859.29
April 1, 1989 - April 15, 1989	2,822.60
April 16, 1989 - April 30, 1989	2,653.48
May 1, 1989 - May 15, 1989	2,407.82
May 16, 1989 - May 31, 1989	3,627.60
June 1, 1989 - June 15, 1989	1,984.80
June 16, 1989 - June 30, 1989	2,064.63
August 16, 1989 - August 31, 1989	2,764.56
September 1, 1989 - September 15, 1989	1,764.98
September 16, 1989 - September 30, 1989	1,883.15
October 1, 1989 - October 15, 1989	1,886.45
October 16, 1989 - October 31, 1989	1,804.20
November 1, 1989 - November 15, 1989	2,686.14
November 16, 1989 - November 30, 1989	1,784.86
December 1, 1989 - December 15, 1989	1,754.63
December 16, 1989 - December 31, 1989	1,764.51
March 16, 1990 - March 31, 1990	1,923.11
April 1, 1990 - April 15, 1990	1,938.29
April 16, 1990 - April 30, 1990	1,914.16
May 1, 1990 - May 15, 1990	1,928.81
May 16, 1990 - May 31, 1990	2,831.56
June 1, 1990 - June 15, 1990	1,936.00
June 16, 1990 - June 30, 1990	1,941.59
July 1, 1990 - July 15, 1990	1,950.93

Each of the statements of deficiency contained the following language:

"Section 685(g) of the Personal Income Tax Law provides that any person required to collect, truthfully account for, and pay over the tax imposed by this Income Tax Law who willfully fails to do so or attempts in any manner to evade or defeat the tax or its payment shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax."

The term "person" is defined in Tax Law § 685(n) and includes:

"an individual, corporation or partnership, or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect to which the violation occurs."

As stated above, each petitioner received 28 statements of deficiency for the periods listed as an officer or employee of CIMM, Inc.

On or about January 18, 1991, the Division issued 28 notices of deficiency to Karen J. Kimmey and John L. Matrone, each of which set forth the penalty assessed pursuant to Tax Law § 685(g) which corresponded to the same withholding tax periods and amounts set forth on the statements of deficiency. Each Notice of Deficiency set forth the following language:

"If you do not return the signed consent, the deficiency will become an assessment subject to collection (with interest to the date of payment) unless you do one of the following within 90 days from the date of this notice (150 days if the notice is addressed outside the U.S.):

- request a conciliation conference according to section 170.3-a of the Tax Law;

or

- file a petition for hearing according to sections 1089 and 2008 of the Tax Law and the Rules and Practice and Procedure of the Tax Appeals Tribunal."

The Division submitted no evidence of mailing with regard to the notices of deficiency herein. However, both petitioners specifically acknowledge receipt of the notices of deficiency in their petitions. Further, both petitioners sent letters, dated May 23, 1991, to the Bureau of Conciliation and Mediation Services requesting a conference. In the letter sent by petitioner Karen J. Kimmey, she stated that the notices of deficiency were "received only by Mr. Matrone and me near the end of January 1991...." In the May 23, 1991 letter from Mr. Matrone to the Bureau of Conciliation and Mediation Services, he stated that the notices of deficiency were

"received for some reason by only two of seven officers and directors near the end of January 1991...."

Both petitioners also admitted in the May 23, 1991 letter to the Bureau of Conciliation and Mediation Services that they "received the January 18, 1991 penalty notice" and "intended to file a timely request for an Appeals Hearing but did not do so because of the granting of the 30 Month Payment Plan to the Company and our belief that all personal penalty actions were suspended."

For all periods in issue, petitioner John L. Matrone was an employee and chief executive officer of CIMM, Inc., a public company in which Mr. Matrone was a minority stockholder, owning less than 10% of the company's stock.

Petitioner Karen J. Kimmey was an assistant to the corporate secretary and also a minor shareholder and employee of CIMM, Inc.

Both petitioners deny that they were persons required to collect, truthfully account for and pay over the withholding tax due and owing for the periods herein, but neither deny that the taxes were in fact due. In fact, in his January 29, 1991 letter to Commissioner James M. Wetzler, Commissioner of the New York State Department of Taxation and Finance, Mr. Matrone pleaded for more time for the company "to make full payment of past due N.Y.S. Withholding Taxes on its own behalf" and that "[t]he Company recognizes the seriousness of the taxes due and the already considerable patience of the N.Y.S. Department of Taxation and Finance." Mr. Matrone added that it was his "strong conviction that this added time will result in the payment of this obligation...."

In the contact log kept by the Tax Compliance Division in this case, introduced in evidence as the Division's Exhibit "E", the entry for November 23, 1990 stated: "Received info from bank (FNB of Scotia) Only officers named are Karen Kimmey and John Matrone."

After the issuance of the notices of deficiency on or about January 18, 1992, the Division sent a letter to CIMM, Inc., to the attention of John L. Matrone, which enclosed and set forth the

terms of the Deferred Payment Agreement between the Division and CIMM, Inc. The letter contained the following language:

"Non-compliance with any of these conditions will default the Deferred Payment Agreement resulting in the execution of the warrants."

Said Deferred Payment Agreement, attached to the letter, was signed by John Matrone as "responsible office [sic]".

Printed on the back of the Deferred Payment Agreement are the specific terms of the agreement which are meant to inform the taxpayer of the conditions of the agreement. The terms provide, in pertinent part, as follows:

"I, the undersigned, declare that because of my present financial condition, as evidenced by the financial statement submitted, I am currently unable to pay in full New York State taxes. I agree that I am liable for all assessments listed on the reverse side of this agreement.

"I understand, and agree, that if I fail to meet any conditions stated herein, or it is determined that collection of this tax is in jeopardy, the privilege of installment payments **will be withdrawn** and any tax warrants not already filed **will be filed**. The entire amount of my tax liability will be collected by any or all of the following methods:

- . Garnishee of wages.
- . Levy and seizure of any assets.
- . Issuance of assessments and enforcing of collection against responsible officers of a corporation.
- . Other appropriate enforcement techniques." (Emphasis in original.)

On March 4, 1991, petitioner John L. Matrone initiated a telephone conversation with the tax compliance agent, Mr. Victor Cardona, regarding the company's new monthly payment agreement. There was also conversation concerning the personal assessments issued to Mr. Matrone and Ms. Kimmey. Mr. Matrone's notes, recorded contemporaneously, stated as follows:

"Also asked about personal penalty notice re: officer -- he said Div will not go after personal penalty while the Co is on the monthly plan.

"We now understand individual penalty action is set aside but would be renewed if the company does not stay on monthly payments satisfactory to the Tax Div."

This note, stated also that "Karen listened in on phone conversation because she wanted

firsthand understanding about her specific case."

Another telephone conversation between Mr. Matrone and Mr. Cardona occurred on May 23, 1991. After some discussion with regard to the company's financial reports, the conversation turned to personal liability. Mr. Matrone's notes stated as follows:

"While talking to him -- asked again about hold in personal penalty action while the Co. is on the monthly payment plan -- since the original 90 day period just ended -- For assurance specifically told him we were assuming a new 90 day period would start if Company defaulted on monthly payment plan -- He now said the two actions -- personal and Co. -- are separate -- should have asked for penalty hearing to protect us possibly for penalty -- as we have been saying to Tax Division all along -- within original 90 day period." (Emphasis in original.)

The note also stated that Mr. Cardona told petitioners to write to the Bureau of Conciliation and Mediation Services for a hearing and provided the address for doing so.

There was no indication of these telephone conversations in the records or log of the Tax Compliance Division. Mr. Cardona recalled having many conversations with petitioners, but had no recollection of the specific contents of those conversations.

Mr. Cardona explained that the comment recorded in Mr. Matrone's March 4, 1991 memo of their telephone conversation with regard to his statement that the Division would not "go after personal penalty while the company is on the monthly plan" meant that if a corporation has a liability and personal assessments are issued, if the corporation has a Deferred Payment Agreement and/or is current with its payments, there is no collection action taken against the responsible persons. However, Mr. Cardona had no recollection of either petitioner ever telling him that they did not agree with the notices of deficiency and that, had either taxpayer indicated to him that he or she did not agree with said notices, he would have told them to protest the notices. Since this issue of protest did not arise until their May 23, 1991 conversation, Mr. Cardona did not instruct petitioners to file a request for a conference with the Bureau of Conciliation and Mediation Services.

During December of 1990, all area banks were served with levies for monies due from CIMM, Inc. The log in this case revealed that, on January 31, 1991, a package was delivered to

the Commissioner's office, presumably the aforementioned January 29, 1991 letter to Commissioner James W. Wetzler from John L. Matrone, seeking "still more time" to pay their obligation.

It was at this juncture that Mr. Cardona was assigned the task of preparing a Deferred Payment Agreement between the Division and CIMM, Inc. This is the same February 1, 1991 agreement executed by Mr. Matrone and Mr. Cardona, referred to above.

In response to their letters to the Bureau of Conciliation and Mediation Services requesting a conference on the notices issued to them in this matter, both John L. Matrone and Karen J. Kimmey received conciliation orders dated July 26, 1991, dismissing their requests which were received by the Bureau on May 31, 1991.

On September 17, 1991, timely petitions were received by the Division of Tax Appeals requesting a review of said conciliation orders.

OPINION

In the determination below, the Administrative Law Judge held that under Tax Law § 170(3-a)(a) a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services in the Department of Taxation and Finance and, in the case at hand, the time for filing said request for a conciliation conference was 90 days after the issuance of the notices of deficiency.

The Administrative Law Judge also held that the Division is required to establish when it mailed the notices of deficiency; however, in this case both petitioners conceded receipt of said notices numerous times, specifically, "near the end of January 1991."

The Administrative Law Judge, therefore, used February 1, 1991 as the receipt date, and held that petitioners' request for a conciliation conference was not timely since they filed said request on May 23, 1991, 112 days after actual receipt.

With regard to petitioners' argument that they were operating under a misunderstanding as the result of two telephone conversations with a tax compliance agent, the Administrative Law

Judge held that: 1) any misunderstanding was due to a unilateral mistake by petitioners, not misinformation from the Division, and 2) petitioners failed to comply with the 90-day statutory filing requirements; thus, their petitions were dismissed. The Administrative Law Judge noted, however, that petitioners were not without a remedy because they could pay all, or a portion, of the assessments, request a refund of the payment and then file a timely protest of refund denial.

While the major portion of both petitioners' arguments on exception relate to the substantive issue, that being responsible officer liability, petitioner Matrone, on exception, argues that the Administrative Law Judge:

"minimized and rejected [petitioners' telephone conversations with, and responses from, the tax compliance agent] as the critical cause of the misunderstanding about the 'set aside' of any assessment of personal penalty actions while an approved CIMM INC. Deferred Payment Plan was in effect" (Petitioner Matrone's exception, item "3").

Petitioner Matrone argues that:

"there was an ongoing awareness of absolute intent on the Petitioner's part to file for a 'Tax Liability Hearing' which would be possible when and if the Company was no longer on an approved payment plan" (Petitioner Matrone's exception, conclusion of law, p. 2).

On exception, petitioner Kimmey concurs with Mr. Matrone's statements, arguing that:

"[t]here was no possibility that I would not protest liability for the taxes considering my job assignment and lack of responsibility flowing therefrom under the circumstances" and "[h]owever, I feel I have been subjected to special personal injustice and discrimination in this situation -- because of the special circumstances involved" (Petitioner Kimmey's exception, p. 2).

Both petitioners respectfully request a hearing be granted on the matter of tax liability.

The Division, in a letter dated August 5, 1993, advised the Tax Appeals Tribunal that they would not be filing a formal brief, arguing that the Administrative Law Judge properly set forth the facts and correctly concluded that the requests for conciliation were not timely filed. The Division pointed out that petitioners are not without remedy in that they may pay the notices of deficiency, seek a refund and, if denied, either request a conciliation conference or file a petition with the Division of Tax Appeals as to such denial.

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issue before him, we see no reason to analyze this issue further and, therefore, we affirm the Administrative Law Judge based on his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners Karen J. Kimmey and John L. Matrone are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Karen J. Kimmey and John L. Matrone are denied; and
4. The notices of deficiency dated January 18, 1991 are sustained.

DATED: Troy, New York
December 23, 1993

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

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