

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BERNARD F. AND PAMELA W. COMBEMALE	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 810503
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1986 and 1987.	:	

Petitioners Bernard F. and Pamela W. Combemale, Route 135, Box 315, Winthrop, Maine 04364, filed an exception to the determination of the Administrative Law Judge issued on July 1, 1993. Petitioner Pamela W. Combemale appeared by Tenzer, Greenblatt, Fallon & Kaplan, Esqs. (Glenn A. Busch, Esq., of counsel). Petitioner Bernard F. Combemale appeared by Arthur B. Greene & Co., P.C. (Richard Guttenberg, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter stating that it would not file a brief and asking that its brief below be considered on exception. This letter was received by the Tax Appeals Tribunal on October 28, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation mailed the Notice of Deficiency to petitioners' last known address as required by section 681(a) of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

By a Notice of Deficiency dated on its face March 28, 1991, the Division of Taxation ("Division") asserted additional personal income tax due against petitioners, Bernard F. and Pamela W. Combemale, for the years 1986 and 1987 in the aggregate amount of \$151,378.70, including penalty and interest.

At the commencement of the proceedings herein, the parties stipulated and agreed that the portion of the deficiency relating to the year 1986 would be cancelled by the Division in that the Notice of Deficiency was not issued in a timely manner with respect to said year. However, the portion of the asserted deficiency pertaining to the year 1987 remains at issue. Computation sheets attached to and forming a part of the Notice of Deficiency specify that the respective amounts of tax due for 1987 (exclusive of penalty and interest) are \$25,913.20 (New York State liability) and \$12,503.66 (New York City liability).

The above-described Notice of Deficiency carries on its face certified mailing number P-001-060-409, document number 84425635 and identification number L-002407170-2. Petitioners' address on the face of the Notice of Deficiency is listed as follows:

"Combemale - Bernard F.
Combemale - Pamela W.
Greene
101 Park Ave.
New York, NY 10178-0002"

Copies of the first page of petitioners' United States Individual Income Tax Return (Form 1040) and New York State Nonresident Income Tax Return (Form IT-203) for each of the years

1986 and 1987, as well as copies of "amended" returns for each of such years, were offered in evidence. On each of these returns, petitioners consistently list their address as follows:

"Combemale, Bernard F. and Pamela W.
Clearview Farm, ME 04364
C/O Arthur B. Greene
101 Park Avenue
NY, NY 10178"

From the documents provided in evidence, it is clear that the underlying issue in this case is whether petitioners may properly be held taxable as New York State and City residents. However, petitioners claim that neither they nor their accountant, Arthur B. Greene, received the Notice of Deficiency described hereinabove. Petitioners admit, in turn, that they did not file either a petition with the Division of Tax Appeals or a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") within 90 days of the March 28, 1991 date appearing on the face of the Notice of Deficiency, or at any time prior to the petition filed herein (received on February 14, 1992). Thus, the preliminary jurisdictional issues of proper and timely mailing of the Notice of Deficiency, and of timely protest against such notice, are presented.

A Statement of Personal Income Tax Audit Changes dated June 26, 1990 and issued to petitioners by the Division was included among the documents attached to the petition herein. Petitioners' address on the Statement of Audit Changes is listed as follows:

"Combemale Bernard and Pamela
Arthur B. Greene
101 Park Ave
New York NY 10178"

It was admitted that petitioners' representative, Mr. Greene, in fact received the Statement of Personal Income Tax Audit Changes addressed as described.

In support of its position that the Notice of Deficiency was properly mailed to petitioners at their last known address, the Division submitted an affidavit made by one Donna Biondo, Head Clerk in the Division's Case and Resource Tracking System ("CARTS") control unit. Ms. Biondo described a part of her regular duties to include supervising the mailing, by certified mail, of notices of deficiency, as well as the transfer of such notices from CARTS, where such

notices are generated, to the Division's District Office Audit Bureau ("DOAB") for manual review and ultimate mailing. Ms. Biondo's affidavit explains that the CARTS control unit receives two copies of each notice plus three copies of a document entitled "Certified Record for Non-Presort Manual Mail" from the CARTS Information Systems Management section where such documents are printed. After stamping the words "Mailroom: Return listing to CARTS Control Unit" on the certified mail record, two copies of such document and one copy of the notice of deficiency are delivered to a member of the staff of the CARTS control unit for delivery to the DOAB control unit. Ms. Biondo's affidavit goes on to state:

"After the notice of deficiency has been mailed to the taxpayers, one copy of the certified record for non-presort manual mail with a United States Postal Service postmark affixed is returned to the CARTS Control Unit where it is stored in the usual course of business of the CARTS Control Unit."

Attached to Ms. Biondo's affidavit is a one-page copy of a document entitled "Certified Record for Non-Presort Manual Mail", which includes a U.S. Postal Service postmark stamp reflecting the date March 29, 1991. Ms. Biondo's affidavit states that such document "confirms that Notice of Deficiency number L-002407170 was mailed by certified mail to [petitioners herein] under certified mail number P001060409 on March 29, 1991."

The copy of the Certified Record for Non-Presort Manual Mail ("Certified Record") indicates in its upper right hand corner that it is page 6. The total number of pages in such record is not specified, nor are the preceding five pages included in evidence. The Certified Record contains, in its upper left hand corner, the typed date March 18th, 1991. However, the "18" is crossed out, and such date is hand-changed to read "29". The certified mail number, the notice number and the address information match such items as they are reflected on the face of the Notice of Deficiency. In the right hand column of the Certified Record, a postage amount of \$.52 is indicated, as is a "fee" (certified mailing fee) of \$1.00. A second certified number (P-001-060-410) is listed directly below the certified number pertaining to the notice relative to petitioners. However, other than such certified number and the \$1.00 certified mailing fee, the balance of information for such second taxpayer is redacted in order to comply with secrecy provisions under the Tax Law. The base of the Certified Record includes the stamped phrase

"Mailroom: Return Listing to CARTS Control Unit." As noted, the U.S. Postal Service postmark of March 29, 1991 is stamped on the document. Finally, directly below the area where the name and address information appears are two additional lines. The first of these lines reads "Total pieces and amounts listed", to the right of which appears "2" followed by the amount \$2.00 (representing the total certified mailing fees for the documents listed on the page). Directly below this line is a second line, reading "Total pieces received at Post Office." The area immediately to the right of this line is blank.

In addition to the Biondo affidavit, the Division offered an affidavit made by one Jennifer Gable, employed as a Calculation Clerk II in the DOAB's control unit. This affidavit explains that when a Notice of Deficiency is received from the CARTS control unit, it is placed in a window envelope, which in turn is wrapped in the two copies of the Certified Record for Non-Presort Manual Mail. These documents are thereafter delivered by a Division employee to the Division's mailroom where the envelope is sealed, metered and "delivered to a United States Post Office for mailing by certified mail."

The Division also offered an affidavit made by one Daniel D. Lafar, employed as a Principal Mail and Supply Clerk in the Division's Mail and Supply Section ("mailroom"). The Lafar affidavit provides that upon receipt by the Division's mailroom, a mailroom clerk compares the number of envelopes to the number of statutory notices listed on the certified mail record, and also compares the certified control numbers on the envelopes to the certified control numbers listed on the left side of such certified mail record. The affidavit goes on to explain that the clerk seals and affixes metered postage to the envelopes, after which another mailroom employee hand-delivers the envelopes and associated certified record to the United States Postal Service on the date indicated in the upper lefthand corner of the certified mail record, as such is hand-changed to reflect the actual date of delivery to the Post Office (see above). The Lafar affidavit explains that upon delivery to the Post Office, a Postal employee verifies the addresses and certified control numbers on the envelopes against the addresses and certified control numbers on the mailing record, accepts the envelopes into the custody of the Postal Service and

affixes a dated postmark to the certified mail record. The mailroom clerk then returns the certified mail record with its dated postmark to the mailroom where it is transferred to the CARTS control unit for storage (per the instruction "Mailroom: Return Listing to CARTS Control Unit" [see above]).

In addition to the issue of mailing, petitioners also challenge the correctness of the address on the Notice of Deficiency. More specifically, petitioners argue that such address does not mirror their address as set forth on the tax returns, maintaining therefore that the Division failed to mail the notice to petitioners' last known address as required per Tax Law § 681(a). Petitioners go on to argue that this address flaw accounts for and supports their claim that neither they nor their appointed representative received the subject notice.

In addition to the facts found by the Administrative Law Judge, we find the following facts:

Through affidavits, petitioners and Arthur B. Greene each stated that they did not receive the Notice of Deficiency. In addition, Richard Guttenberg, a partner in the firm of Arthur B. Greene & Co., testified at the hearing that he personally worked on petitioners' tax matters, that his office did not receive the Notice of Deficiency and that he became aware of the deficiency only after a bank informed him that there was a lien on petitioners' property. The Division has not disputed that neither petitioners nor their representative received the Notice of Deficiency. Based on these facts, we find that neither petitioners, nor their representative received the Notice of Deficiency.

OPINION

With regard to petitioners' argument that the Division failed to mail the Notice of Deficiency to petitioners' last known address, the Administrative Law Judge concluded that the Division addressed "the notice in a manner sufficiently parallel to the address listed by petitioners on their returns" and that the absence of "Arthur B." from before the name Greene on the address would only be relevant upon a showing that there was more than one "Greene" or more than one Arthur B. Greene at the 101 Park Avenue address. Ultimately, the Administrative Law Judge determined that the Division had substantially complied with the address specified by petitioners and that this was sufficient to satisfy section 681(a) of the Tax Law.

On exception, petitioners argue that the "alleged certified mail record [is] inadequate to establish the second portion of the Division's burden of proof; namely, that the Division's general issuance procedures were, in fact, followed in this case" (Petitioners' brief on exception, p. 11). The flaws noted by petitioners with respect to the certified mail record include that the document is not a United States Postal Service form, it contains no information about the Division employee who delivered the mail and it does not include the signature of the Postal Service employee who received the mail. Petitioners also argue that the Division did not issue the Notice of Deficiency to their last known address because the address on petitioners' tax returns for the year in question bears no resemblance to the address to which the Notice of Deficiency was allegedly sent.

We reverse the determination of the Administrative Law Judge.

Section 681(a) of the Tax Law provides, in part, that: "[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."

The Appellate Division, Third Department, recently ruled on the effect of this provision in Matter of Riehm v. Tax Appeals Tribunal (179 AD2d 970, 579 NYS2d 228, lv denied 79 NY2d 759, 584 NYS2d 447). The taxpayer in Riehm argued that the mailing of an incorrectly addressed notice of deficiency was ineffective to suspend the period of limitations on assessment and, therefore, if such a notice was received by the taxpayer after the period had run the notice would be untimely. The Court rejected this theory and held that "[a]s long as a notice of deficiency is actually received by the taxpayer in sufficient time to file a petition for redetermination, the notice is valid despite an error in the taxpayer's mailing address" (Matter of Riehm v. Tax Appeals Tribunal, supra, 579 NYS2d 228, 229). From this principle, it follows that if the incorrectly addressed notice is not actually received by the petitioner, the notice is invalid (see, Matter of Karolight, Ltd., Tax Appeals Tribunal, February 8, 1990; see also, Shelton v. Commissioner, 63 TC 193). Because we have found that neither petitioners nor their representative received the notice at issue, our conclusion as to whether the notice was

addressed to petitioners' last known address will determine the validity of the notice. To determine whether the Division mailed the Notice of Deficiency to petitioners' last known address, we must decide whether the errors made by the Division in addressing the notice were consequential errors (see, Matter of Karolight, Ltd., Tax Appeals Tribunal, July 30, 1992 [where we held, following Federal precedent, that the zip code was not a required element of an address under the applicable Postal Service rules and, therefore, the use of an incorrect zip code by the Division did not render the notice invalid]).

To deliver certified mail, the Postal Service employee must obtain the signature of the addressee or the addressee's personal representative (Domestic Mail Manual, §§ 912.5 and 911.4). Petitioners were not at 101 Park Avenue, thus, the notice could not actually be delivered to petitioners there.

If the Division had used the "in care of" instruction included by petitioners on their return along with the name Arthur B. Greene, that would have added a person in addition to petitioners at the 101 Park Avenue address who could claim the certified mail (see, Hoffenberg v. Commissioner, 905 F2d 665, 90-2 USTC ¶ 50,346). By deleting the "in care of" instruction, the Division eliminated the direction to the Postal Service to look for another addressee, in addition to petitioners, at the 101 Park Avenue address. Further, by deleting the words "Arthur B.," the Division omitted part of the name of this alternative addressee as identified by petitioners on their return. Under the Postal Service rules, the name or identification of the intended recipient is a required element of the address (Domestic Mail Manual, § 122.13). Considered together, we conclude that these address errors were consequential and, therefore, that the Division failed to mail the notice to petitioners' last known address. Because the notice was not received by petitioners, the notice was not valid to assess taxes (see, Matter of Riehm v. Tax Appeals Tribunal, supra; see also, Shelton v. Commissioner, supra).

Given our disposition of this issue, we need not address the adequacy of the Division's evidence of mailing.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Bernard F. and Pamela W. Combemale is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Bernard F. and Pamela W. Combemale is granted; and
4. The Notice of Deficiency dated March 28, 1991 is cancelled.

DATED: Troy, New York
March 31, 1994

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

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