

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ROBERT E. AND GLORIA J. McKEE : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 817780
Personal Income Tax under Article 22 of the Tax Law :
and the New York City Administrative Code for the :
Year 1995. :

Petitioners Robert E. and Gloria J. McKee, 200 East 62nd Street, New York, New York 10021, filed an exception to the determination of the Administrative Law Judge issued on September 20, 2001. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception, the Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Petitioners' request for oral argument was withdrawn.

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

ISSUE

Whether petitioners remitted the tax due with their 1995 New York State Resident Income Tax Return.

FINDINGS OF FACT

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

Petitioners, Robert E. and Gloria J. McKee, timely filed a New York State Resident Income Tax Return (Form IT-201) for the year 1995 indicating tax due of \$4,436.09. The return is dated August 15, 1996 and was accompanied by an Application for Automatic Extension of Time to File U.S. Individual Income Tax Return (Form 4868), dated April 15, 1996.

On October 10, 1996, the Division of Taxation (“Division”) issued to petitioners a Notice and Demand for Payment of Tax Due (Assessment ID No. L-012734375) in the amount of \$4,281.80,¹ plus penalty and interest. The notice and demand claimed that no payment had been remitted with petitioners’ 1995 resident income tax return.

On January 14, 1998, Mr. McKee advised the Division that he was still unable to locate the canceled check (#6966) which he claimed had been used to pay the tax liability in question. Mr. McKee did provide to the Division a copy of the front and back of a check which he claimed had been made when the check was initially returned to him. The check is dated August 15, 1996 in the amount of \$4,436.09 and is written against an account with The Bank of New York. In response, the Division advised Mr. McKee that the front of check #6966 did not contain a deposit number and without such number, payment could not be traced.

In response to Mr. McKee’s request for a copy of check #6966, The Bank of New York advised him that “[t]he photo copy of the front and back of check #6966 that you sent us reflects

¹The difference in the amount claimed to be due on the return and the amount on the notice and demand is the result of the Division’s recomputation of the City of New York resident tax.

that the back of the check is actually for check #6964. Please look at photocopy enclosed with this letter. Check #6966 was never received by the bank for encashment.”²

Attached to the petition in this matter is a copy of the same front of check #6966 but a copy of the back of a different check. In response, the Division stated that the back of the copy of the check was illegible, and requested that Mr. McKee provide the original check #6966 and a copy of the bank statement which would reflect the transaction involving the payment of \$4,436.09 to the Division. Mr. McKee stated in a letter dated December 4, 2000 that he could not find the original check and had requested a copy of it from The Bank of New York. In its reply to Mr. McKee’s request, The Bank of New York indicated that there is “no listing for check #6966 on our records.”

In a letter dated February 23, 2001, Mr. McKee requested that The Bank of New York send him a copy of the monthly statement that shows receipt of check #6966. Mr. McKee advised the bank not to search after December 1996. The Bank of New York replied that it had ordered statements from July 1996 through December 1996 and was “unable to locate the item check #6966 in the amount of \$4,436.09.”

Mr. Alan Tamaroff is a tax technician with the Division whose responsibilities include the examination of cases in the audit process in those situations where a taxpayer has requested a conciliation conference before the Bureau of Conciliation and Mediation Services (“BCMS”). In the course of his duties, he typically reviews the entire audit file, searches for returns and prior tax payments and reviews any other information which may affect the results of the audit. Mr. Tamaroff was the advocate at the BCMS conference in the present matter. He has reviewed the

²The front and back of the checks referred to by the Bank of New York are the same copies provided to the Division by Mr. McKee with his letter of January 14, 1998.

file of petitioners and their claim of payment in the amount of \$4,436.09 in relation to their 1995 personal income tax. He also discussed this matter with the Tax Compliance and Processing Bureaus of the Department of Taxation and Finance (“Department”).

Mr. Tamaroff’s review of the Department’s files and computer records indicate that the Department has not received payment for the 1995 personal income taxes due as shown on petitioners’ return filed on August 15, 1996. The review also revealed that petitioners have not remitted any payment to be associated with the balance due on their 1995 personal income tax return as assessed in the notice of demand (L-012734375) issued October 10, 1996.

Yvonne Urkevich is an assistant vice-president for Fleet Bank³ whose responsibilities include customer service and reconciliation. During the course of her duties she typically assigns and monitors all customer inquiries and requests for research. Ms. Urkevich is familiar with the various types of research requests and has experience handling check analysis through the use of deposit and tracking number stamps.

On July 1, 1999, Mr. Tamaroff sent Brenda Coleman, Supervisor II for Fleet Bank, a copy of the front of check #6966 and the back of a check showing a cancellation stamp⁴ in order to determine if the front and back were from the same check. Ms. Urkevich’s analysis of the front and back of the check, including the tracking number listed on the back and review of Fleet Bank files of the check revealed that the copies were from two separate checks. Specifically, Ms. Urkevich’s review of Fleet Bank files determined that the cancellation stamp indicated that it

³ Fleet Bank is responsible for processing the New York State tax returns and payments received from taxpayers.

⁴ This is the same check front and back which were submitted to the Division by Mr. McKee in his letter of January 14, 1998 and previously analyzed by The Bank of New York.

was for Mr. McKee's check #6964 in the amount of \$535.00 received on August 16, 1996 and applied to assessment L-009592269.

On November 7, 2000, the Division sent to Brenda Coleman a copy of the front of check #6966 and the back of a check showing a cancellation stamp⁵ to determine if the front and back were from the same check. Ms. Urkevich's analysis of the front and back of the check, including the tracking numbers listed on the back, resulted in the conclusion that she was unable to determine if the copies were from one or two checks as the numbers on the back were not legible.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that a presumption of correctness attaches to a Notice and Demand properly issued by the Division and the taxpayer has the burden of demonstrating the incorrectness of such a notice. Although petitioners maintain that check #6966 in the amount of \$4,436.09 accompanied their 1995 New York personal income tax return filed on August 16, 1996, the Administrative Law Judge found no evidence which established that such a check was received by the Division or processed by petitioners' bank. Further, the Administrative Law Judge held that the initial production of the copies of the front and back of two different checks, claiming that they were from a single check, weakened petitioners' contention that check #6966 accompanied the return in full payment of the tax due.

⁵This is the same front and back of checks which were attached to the Petition.

The Administrative Law Judge found that the testimony of Mr. McKee was legally insufficient, without proof of the existence of payment, to prove that petitioners' 1995 New York State personal income tax liability was paid.

The Administrative Law Judge distinguished this case from the situation of the taxpayer in *Matter of Mutual Life Ins. Co. v. New York State Tax Commn.* (142 AD2d 41, 534 NYS2d 565). In that case, the Court held that where the taxpayer presented compelling evidence that a check for payment of taxes had been prepared and mailed, the Division was required to submit some evidence of the procedures employed by the office that received and processed such checks, or that a search of the files had been made for the check to no avail. Here, the Administrative Law Judge found no evidence of petitioners' general practice of mailing returns and checks other than their testimony that they paid the tax due. Petitioners produced a copy of the front of check #6966, but were unable to produce a copy of the back of the check. They were also unable to produce a copy of the monthly bank statement which showed that check #6966 had been processed and presented to the Division. Thus, the Administrative Law Judge concluded that the documentary evidence that was presented by petitioners supported the Division's case that no payment was ever made by check #6966. Further, unlike *Mutual Life*, the Division in this case submitted documents stating that a search of the Division's records had been made and there was no indication that payment of the tax due had ever occurred.

The Administrative Law Judge also noted that in *Matter of Savadjian* (Tax Appeals Tribunal, December 28, 1990), the Tax Appeals Tribunal ("Tribunal") held that where there was no evidence of office procedure or documentary evidence to support the mailing of the return, the burden of producing evidence did not pass to the Division and it was not necessary for the

Division to prove nonreceipt. The Administrative Law Judge found the facts in *Savadjian* to be very similar to the facts in the present case. Petitioners' mailing evidence in this case consisted mostly of testimony, with the documentary evidence supporting nonpayment. The Administrative Law Judge found that even though the Division did not submit a Certificate of Non-filing, that was immaterial because the burden never shifted to the Division to establish nonreceipt.

Thus, the Administrative Law Judge sustained the Notice and Demand dated October 10, 1996.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that they timely filed their 1995 income tax return and enclosed check #6966 in payment of the amount of tax due. Petitioners allege that they have met their burden to show payment by their submission to the Division of a photocopy of the front and back of check #6966, as they were requested to do in the Notice and Demand issued to them. Petitioners assert that an examination of the back of the check shows that the check was processed by Fleet Bank, the agent for the Division, and was paid by the Bank of New York. Petitioners maintain that the Administrative Law Judge erroneously concluded that the affidavit of Ms. Urkevich demonstrated that the back of the check could not be identified and he erroneously overlooked the cancellation stamp on the back of the check. Petitioners argue that the Administrative Law Judge uncritically accepted the affidavits offered by the Division concerning the inability to track check #6966 due to missing numbers on the front of the check and on the back. Petitioners believe that the statements relied on by the Administrative Law Judge are contradictory and should have been rejected. Petitioners assert that there is no issue as

to whether the Division received the check since the cancellation stamps indicate that the check was processed by both Fleet Bank and the Bank of New York.

The Division, in opposition, argues that although petitioners filed their 1995 income tax return in a timely manner, they failed to remit payment with the return. Petitioners first submitted as proof of payment a copy of the front of check #6966 with a copy of the back of a different check. Then, with their petition, they submitted a copy of the front of check #6966 with a copy of the back of another check. The Division argues that this undermined the veracity of their attempt to substantiate their payment. Further, the Bank of New York was unable to provide petitioners with a copy of check #6966 or a monthly statement showing that it processed said check for payment. Thus, neither petitioners nor their processing bank can verify with definitive documentary evidence that payment of the tax was made.

OPINION

Despite petitioners' arguments to the contrary, they have not met their burden to prove that payment of their 1995 income tax was remitted with their filed return. Inasmuch as the submission by petitioners to the Division on January 14, 1998 contained a copy of the front of check #6966 and the back of check #6964, it was incumbent on petitioners to demonstrate that the copy of the check they presented with their petition as check #6966 was, in fact, a copy of both sides of that check. This they have not done. Given the fact that the Division has no record of ever receiving the check or of processing it, and petitioner's bank has no record of having cashed said check, petitioners have failed to meet their burden of proof that they paid their 1995 tax liability with check number #6966 at the time they filed their 1995 return on or about August 15, 1996.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert E. and Gloria J. McKee is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Robert E. and Gloria J. McKee is denied; and
4. The Notice of Demand dated October 10, 1996 is sustained.

DATED: Troy, New York
June 27, 2002

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner