STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM AND GLORIA KATZ	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1984.	:	

Petitioners, William and Gloria Katz, 217 Harborview North, Lawrence, New York 11559, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1984 (File No. 805768).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 22, 1990 at 1:15 P.M., with all briefs to be submitted by June 22, 1990.[1] Petitioners appeared by Eugene B. Fischer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation complied with the mailing requirements of Tax Law § 681(a) so that petitioners are precluded from contesting a Notice of Deficiency which they allegedly did not receive.

II. Whether petitioners' due process rights under the United States and New York State Constitutions would be violated if they are precluded from contesting a Notice of Deficiency which they allegedly did not receive.

[1]Petitioners' representative requested a delay in the issuance of this determination in order to conduct further negotiations with the Division of Taxation. Pursuant to Tax Law § 2010(3), the due date for this determination was extended "to no more than three additional months."

FINDINGS OF FACT

In 1984, petitioners had net gambling winnings in Atlantic City, New Jersey of $2,202,482.00. On their 1984 New York State Resident Income Tax Return, they claimed a resident tax credit of $76,318.00, the amount of tax paid by them to New Jersey on their gambling winnings.

The Division of Taxation issued a Statement of Audit Changes dated May 20, 1987 which disallowed:

> "the resident credit claimed...as New York State does not allow a resident credit based on gambling winnings earned in another state as the income is not connected with personal service income or a trade or business carried on in the other jurisdiction."

The statement asserted additional income tax due of $58,372.00, plus interest. (No penalty has been asserted by the Division of Taxation.) It was addressed to petitioners at their then current residence, 1420 57th Street, Brooklyn, New York 11219.

The Division of Taxation then issued a notice of additional tax dated July 10, 1987 to petitioners at their Brooklyn residence showing tax due of $58,372.00, plus interest. This notice further provided, in part, as follows:

> "If you do not agree with this adjustment, you may submit additional information pertinent to your case by writing to this office [Tax Compliance Division], referring to the above assessment number.
>
> Your failure to respond to this letter within 15 days will result in the issuance of a statutory Notice of Deficiency for the amount of the additional tax plus accrued interest. The issuance of this Notice represents the Division's first formal step towards taking legal action to compel payment."

The notice of additional tax described, supra, was soon followed by the Division of Taxation's issuance of a Notice of Deficiency dated August 20, 1987, which also asserted additional tax due of $58,372.00, plus interest. It too was addressed to petitioners at their then current Brooklyn residence. The notice provided, in part, as follows:

> "A deficiency has been determined as shown. The Statement previously sent to you shows the computation of the deficiency.
>
> * * *
>
> If you do not return the signed consent, the deficiency will become an

> assessment subject to collection, with interest to date of payment, unless you file a petition within 90 days after the date of this notice...."

Approximately four months later, the Division of Taxation issued a Notice and Demand for Payment of Income Tax Due dated December 28, 1987 which demanded payment of 1984 income tax of $58,372.00, plus interest. The notice and demand was also addressed to petitioners at their then current Brooklyn residence.

On May 9, 1988, petitioners by their attorney, Eugene B. Fischer, filed a Request for Conciliation Conference protesting the assessment of additional tax for 1984 of $58,372.00, plus interest. Approximately two weeks earlier, on or about April 21, 1988, Mr. Fischer had written to the Tax Compliance Division challenging the disallowance of the resident credit claimed by petitioners for taxes paid to New Jersey on their gambling winnings. Mr. Fischer noted in his letter that the only notice received by petitioners was the notice of additional tax dated July 10, 1987 (described in Finding of Fact "3", supra).

The Bureau of Conciliation and Mediation Services issued a conciliation order dated May 27, 1988 which dismissed petitioners' Request for Conciliation Conference for the following reason:

> "The Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on August 20, 1987, but the request was not received until May 11, 1988, or in excess of 90 days, the request is late filed."

The Division of Taxation introduced into evidence an affidavit dated November 8, 1989 of Stanley K. DeVoe, the principal clerk of the manual assessments unit for the past 18 years, whose regular duties include the supervision of the issuance of notices of deficiency. Attached to Mr. DeVoe's affidavit was a copy of the certified mail record dated August 7, 1987 of the notices of deficiency to be mailed on August 20, 1987. In his affidavit, Mr. DeVoe described his general practice for the issuance of notices of deficiency: He compares the notices of deficiency listed on a certified mail record with the copies of the notices of deficiency which "are then stuffed in envelopes and brought to the United States Postal Service." After verification by a postal service employee, a Post Office stamp is affixed to the last page of the

certified mail record.

A review of the certified mail record attached to the affidavit bears out Mr. DeVoe's general practice. The Notice of Deficiency issued to petitioners at their then current Brooklyn residence[2] was assigned certified number 542080. The last page of the certified mail record shows the August 20, 1987 stamp of the Albany, New York, Roessleville Branch of the Unites States Postal Service. Mr. DeVoe noted that the general practice was not to request or retain return receipts.

Petitioners testified that they never received the Statement of Audit Changes dated May 20, 1987 (described in Finding of Fact "2", supra),

the Notice of Deficiency dated August 20, 1987 (described in Finding of Fact "4", supra), or the notice and demand dated December 28, 1987 (described in Finding of Fact "5", supra). As noted in Finding of Fact "6", supra, petitioners' attorney conceded that petitioners received the notice of additional tax dated July 10, 1987.[3]

Gloria Katz testified that she first became aware of the asserted tax deficiency in early

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[2]This Brooklyn address was also the Division of Taxation's last known address for petitioners at the time the Notice of Deficiency was issued.

[3]However, Gloria Katz testified on cross-examination that she did not recall ever receiving this notice dated July 10, 1987. The testimony of Mr. Katz on this point was confused:

> "Q. [Mr. Zalewski]: Could you tell me if you have ever seen that letter [dated July 10, 1987] before today?
>
> A. [Mr. Katz]: This is June, 1988. Let me just tell you that until my wife called me in a panic, we got in touch with the accountants. I remember some mail coming through and when I got the mail I ran to Manhattan and gave it to the accountant.
>
> Q. [Mr. Zalewski]: Do you believe you saw this prior to today?
>
> A. [Mr. Katz]: To be honest with you, the minute I saw New York State I ran to Manhattan, I parked illegally, I went up to the accountant and brought him the papers. You have to understand that it is all Chinese to me."

1988 when she was contacted by a collections agent from the State by telephone. William Katz's testimony concerning when he first became aware of the asserted tax deficiency was confused, although on recross-examination he ultimately testified that the deficiency first came to his attention when "my wife told me that she got a phone call and she was all panicky."

It is observed that the Notice of Deficiency dated August 20, 1987 was issued at a time of family travail for petitioners. Rose Katz, Mr. Katz's mother, died on August 31, 1987. Morris Katz, Mr. Katz's father,

was hospitalized with pneumonia from August 8, 1987 through August 25, 1987 and from August 30, 1987 through September 9, 1987. In April 1987, Mr. Katz's parents had come from France to live with petitioners because Morris Katz had become "totally bedridden due to Parkinson's and Alzheimer's", and Rose Katz could no longer care for him by herself.

During the summer of 1987, Mrs. Katz lived in a bungalow community in the Catskills. Mr. Katz was in charge of receiving and reviewing mail at the Brooklyn residence. He testified that he checked the mail at night when he returned home anywhere from 8:00 P.M. to 10:00 P.M. According to Mr. Katz, many times it was left on the floor[4] because the letter carrier could not get in during the summer when his family was away. There were two other families in the building, but they apparently spent the summer in the country as well. Consequently, Mr. Katz knew of no one in the building who could have received a certified mail document. Mr. Katz also testified that he did not receive a notice from the Post Office to pick up certified mail.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the Division of Taxation is required to prove their receipt of the Notice of Deficiency, and since delivery did not take place, they should be given the opportunity to be heard on the merits of this matter. Petitioners assert that the affidavit of the Division of

[4]Mr. Katz testified that he "used to get it [the mail] all over."

Taxation's mail clerk was inadequate to prove that petitioners received the Notice of Deficiency. Furthermore, petitioners argue that their due process rights under the United States and New York Constitutions would be violated

if the Division of Taxation is permitted to prove its mailing of a Notice of Deficiency when it fails to maintain adequate records concerning the mailing and/or receipt of the Notice of Deficiency.

In contrast, the Division of Taxation argues that Tax Law § 681(a) has been met since the Notice of Deficiency was sent by certified mail to petitioners' last known address.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) provides, in part, as follows:

> "If upon examination of a taxpayer's return...the [Division of Taxation] determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer.... 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."

Pursuant to Tax Law § 681(b):

> "After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment...except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition...."

B. Tax Law § 681(a) "does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received [citations omitted]" (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). The risk of nondelivery is placed on the taxpayer if the Notice of Deficiency is properly mailed.

C. In Matter of Malpica (supra), the Tax Appeals Tribunal offered some guidance concerning what would constitute adequate proof by the Division of Taxation of the mailing of the Notice of Deficiency. In Malpica, the Division:

> "failed to introduce any evidence relevant to the issue of mailing, such as an authenticated mailing log, a return receipt, evidence as to its course of business or office practice or other probative evidence to establish both the fact and the date of mailing...."

In the matter at hand, the Division has introduced the affidavit of Stanley K. DeVoe, the principal clerk who has supervised the issuance of notices of deficiency for the past 18 years including the time at issue herein, August 20, 1987. As noted in Finding of Fact "8", supra, Mr. DeVoe, in his affidavit, described the general office practice for the issuance of notices of deficiency and authenticated the copy of the certified mail record attached to his affidavit. In sum, the proof offered by the Division of Taxation is minimally adequate (see MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Matter of Davidson, Tax Appeals Tribunal, March 23, 1989).

D. Petitioners contend that they have been deprived of their right to cross-examine Mr. DeVoe concerning alleged factual variances between his description of general office practice in his affidavit and findings of fact in decisions of other administrative law judges. It is noted that the findings of fact contained in decisions of other administrative law judges can have no bearing on the matter at hand. Tax Law § 2010(5) expressly provides that:

> "Determinations issued by administrative law judges shall not be cited, shall not be considered as precedent nor be given any force or effect in any other proceedings conducted pursuant to the authority of the division...." (Emphasis added.)

Furthermore, although the Division of Taxation did not produce Mr. DeVoe for petitioners to cross-examine, petitioners did not request leave to subpoena him (see, Matter of Hugo and Joan Matson, Tax Appeals Tribunal, March 10, 1988).

E. Petitioners have not offered any evidence concerning the mailing of the Notice of Deficiency. Rather, their evidence is limited to their own testimony concerning their failure to receive the Notice of Deficiency. They argue that under the precedent of Ruggerite, Inc. v. State Tax Commn. (97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517), they may rebut the presumption of receipt arising from the mailing of the Notice of Deficiency. However, there is an important, although subtle, distinction between the statutory provisions concerning the mailing of a notice of determination (sales tax assessment) and those concerning the mailing of a Notice of Deficiency (income tax assessment).

Tax Law § 1138(a)(1) provides that a notice of determination of additional sales tax due:

> "shall finally and irrevocably fix the [sales] tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing...."

Tax Law § 1147(a)(1) prescribes how the notice of determination for additional sales tax is to be given as follows:

> "A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed" (emphasis added).

Tax Law § 681(a), supra, concerning the mailing of a Notice of Deficiency for additional income tax, does not include a similar provision which shifts the focus of an analysis onto whether the taxpayer is in "receipt of the same". Rather, the focus is on the mailing of the Notice of Deficiency. What explains this refined distinction? A review of the statutory provisions concerning claims for refund of sales tax as compared to those for refund of income tax would seem to provide an explanation for the less generous standard of review of the timeliness of petitions in income tax matters. Under Tax Law § 687, petitioners herein, for example, may pay the assessment and then apply for a refund. Under Tax Law § 689, if their refund claim is disallowed or "six months have expired since the claim was filed", petitioners may file a petition and have the merits of their claim reviewed in the Division of Tax Appeals. The Tax Law, with regard to the filing of refund claims for sales tax paid, would seem to be much harsher. Tax Law § 1139(c), as in effect prior to 1987 amendments[5] (which became effective September 1, 1987), provided, in part, as follows:

> "A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the

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[5]The current statutory language reads as follows:

> "A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where all opportunities for administrative and judicial review as provided in article forty of this chapter have been exhausted with respect to such determination" (emphasis added).

Whether this current statutory language might represent a relaxation of the limitation on the filing of a sales tax refund claim is unclear.

> provisions of section eleven hundred thirty-eight where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided" (emphasis added).

Further, under Tax Law § 1138(a)(1), supra, sales tax is finally and irrevocably fixed unless a timely petition for a hearing (or request for conciliation conference) is filed.

F. Petitioners' contention that their right to due process under the United States and State Constitutions will be violated if they are not allowed to contest a Notice of Deficiency which they did not receive cannot be addressed herein. Although I have authority to determine whether tax statutes and regulations were constitutionally applied, petitioners' contention requires a determination whether Tax Law § 681(a) on its face is unconstitutional (see Matter of Gasit, Inc., Tax Appeals Tribunal, July 19, 1990; Matter of J.C. Penney Co., Inc., Tax Appeals Tribunal,

April 27, 1989). The statutory language, as noted in Conclusion of Law "A", supra, merely requires the mailing of the Notice of Deficiency and not its receipt by a taxpayer. Moreover, the facts at hand are not good ones to base a constitutional challenge. As noted in Finding of Fact "12", supra, petitioners were lackadaisical, if not careless, with respect to the receipt of their mail at their Brooklyn residence.

G. Finally, petitioners' representative in his reply brief raised for the first time the contention that the Division of Taxation should be defaulted because its answer was filed approximately three months late. Although the amendment of pleadings is freely allowed, it would not be fair to allow petitioners to raise this additional issue at such a late stage (see Matter of Gasit, Inc., Tax Appeals Tribunal, July 19, 1990; 20 NYCRR 3000.4[c]). Moreover, the late filing of an answer does not justify defaulting the Division of Taxation unless substantial prejudice to the taxpayer is established (Matter of Maggin, Tax Appeals Tribunal, March 8, 1990).

H. The petition of William and Gloria Katz is denied, and the Notice of Deficiency dated August 20, 1987 is sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE