

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JAMES S. CLARK, JR., AND JOICE M. CLARK	:	DETERMINATION DTA NO. 807085
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code of the City of New York for the Year 1982.	:	

Petitioners, James S. Clark, Jr., and Joice M. Clark, 3002 Merrywood Drive, Edison, New Jersey 08817, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1982.

On June 3, 1991 and June 17, 1991, respectively, petitioner James S. Clark, Jr., appearing pro se,¹ and the Division of Taxation by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel) agreed to waive a hearing and have the matter determined on submission of documents. After due consideration of the record, Marilyn Mann Faulkner, Administrative Law Judge, renders the following determination.

¹Although all notices and correspondence have been addressed to both James S. Clark, Jr. and Joice M. Clark, it appears that Mrs. Clark's name appears on the Notice of Deficiency because she filed a joint income tax return. All references to petitioner, therefore, will be to James S. Clark, Jr., only.

ISSUE

Whether petitioner James S. Clark, Jr. filed a petition within 90 days of the issuance of the Notice of Deficiency.

FINDINGS OF FACT

The Division of Taxation ("Division") issued a Statement of Audit Changes, dated April 28, 1986, to petitioners, James S. Clark, Jr., and Joice M. Clark, indicating income tax due for 1982 based on their Federal tax return. The Division informed Mr. and Mrs. Clark that it was unable to locate a New York State tax return for them, but noted that their Federal tax return showed a New York address.

By letter dated May 29, 1987, the Division informed Mr. and Mrs. Clark that it would credit them for any New York taxes withheld on their wages of \$48,733.00 if they could verify the amount withheld by submitting a wage and tax statement.

By letter dated August 4, 1987, the Division informed Mr. and Mrs. Clark that it did not receive a reply to its letter dated May 29, 1987 and that if they failed to provide further information, an assessment of the tax owed would be based on the information available.

The Division issued to Mr. and Mrs. Clark a Notice of Deficiency, dated May 27, 1988, indicating additional tax due in the amount of \$5,792.41, plus penalty and interest, for a total amount of \$11,991.38. The Notice of Deficiency contained the following statement:

"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....

1. Request a conciliation conference according to Section 170.3-a of the Tax Law, or
2. File a petition for hearing according to Sections 1089 and 2008 of the Tax Law and the Rules of Practice and Procedure of the Tax Appeals Tribunal."

The Division submitted an affidavit of Stanley K. Devoe, the Division's Principal Clerk who supervises the issuance of notices of deficiency to taxpayers with income tax delinquencies. In that affidavit, Mr. Devoe established by reference to attached exhibits that the notice was sent by certified mail on May 27, 1988. Specifically, he affirmed the office practice

regarding the mailing of notices of deficiency and noted that the certified control number assigned to Mr. and Mrs. Clark's Notice of Deficiency corresponded with that listed on the certified mailing record which was stamped by the U.S. Postal Service with the date of May 27, 1988.

Petitioner James S. Clark, Jr. requested a conciliation conference by mail on Form TA-9.1 that was dated August 28, 1988. The envelope containing the request was postmarked August 30, 1988 and was stamped received by the Bureau of Conciliation and Mediation Services on September 1, 1988.

By order dated September 30, 1988, the conciliation conferee dismissed the request as untimely because the request was mailed on August 30, 1988, in excess of 90 days from the issuance of the Notice of Deficiency on May 27, 1988.

By petition dated December 23, 1988, petitioner James S. Clark, Jr. challenged the Notice of Deficiency on the ground that there was an overstatement of adjusted gross income by \$3,851.00.

In its answer dated October 18, 1990, the Division requested that the petition be dismissed as untimely.

By letter dated April 1, 1991, the Calendar Clerk of the Division of Tax Appeals advised petitioner that the timeliness of the petition was a threshold matter to be resolved before a hearing would be held on the merits of the case.

CONCLUSIONS OF LAW

A. A Notice of Deficiency finally and irrevocably fixes the tax liability unless the taxpayer files a petition for a hearing with the Division of Tax Appeals within 90 days of the notice (Tax Law §§ 681[b]; 2006.4). A request for a conciliation conference will suspend the running of the 90-day limitations period for requesting a hearing (Tax Law § 170.3-a[b]); however, requests for a conciliation conference must still be filed within the 90-day period prescribed for hearing requests (Tax Law § 170.3-a[a]; 20 NYCRR 4000.3[c]). A Notice of Deficiency shall be mailed to the taxpayer by certified or registered mail (Tax Law § 681[a])

and the 90-day limitations period commences when the notice is mailed (Tax Law § 689[b]).

When the Division denies a taxpayer a conciliation conference on the ground that a timely request was not filed, the Division is required to establish when it mailed the Notice of Deficiency (see, Matter of Novar TV & Air Conditioner Sales & Service, Inc., Tax Appeals Tribunal, May 23, 1991, citing Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). "The Division may prove the act of mailing by establishing its customary procedure for the mailing of such notices and by introducing evidence that such procedure was followed in this case" (id. [and cases cited therein]; see also, Matter of T. J. Gulf v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97, 98). Here, there was adequate evidence to prove that the Notice of Deficiency was mailed on May 27, 1988 (see, Finding of Fact "5"). The affidavit by Stanley K. Devoe established the customary office procedures for mailing and that such procedures were followed in this case. Attached to the affidavit was evidence in the form of a certified mailing record of the Notices of Deficiency that listed Mr. and Mrs. Clark's name and address and was stamped by the U.S. Postal Service with the date of May 27, 1988. The certified control number next to Mr. and Mrs. Clark's address on the certified mailing record corresponded to the certified control number typed on the top of the Notice of Deficiency that was issued to them. Thus, the 90-day limitation period commenced on May 27, 1988.

B. When a petition or any other document is required to be filed within a prescribed period, the date of the United States postmark stamped on the envelope of such document "shall be deemed to be the date of delivery" (Tax Law § 691[a]). Here, the postmark on the envelope containing the request for a conciliation conference was dated August 30, 1988 (see, Finding of Fact "6"). Thus, inasmuch as the petition was not filed within the 90-day period prescribed by statute, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's tax liability (see, Matter of Albert and Florence Dreisinger, Tax Appeals Tribunal, July 20, 1989; Tax Law § 2000.6).

C. The petition of James S. Clark, Jr., and Joice M. Clark is dismissed.

DATED: Troy, New York
9/5/91

ADMINISTRATIVE LAW JUDGE