

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EDWARD J. NALBANDIAN	:	DETERMINATION DTA NO. 808723
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1988.	:	

Petitioner, Edward J. Nalbandian, 137 Putman Road, New Canaan, Connecticut 06840, 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 for the year 1988.

A small claims hearing was held before James Hoefler, Presiding Officer, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 22, 1991 at 9:15 A.M., with additional evidence and/or briefs to be submitted by May 22, 1991. Petitioner appeared by William O. Lenihan, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Melvin Rubenstein).

ISSUES

I. Whether the Division of Taxation has established that it properly mailed a Notice of Deficiency to petitioner on January 18, 1990 and, if so, whether petitioner timely filed a request for conciliation conference within 90 days of the mailing of the Notice of Deficiency.

II. Whether a letter dated January 8, 1990 from William O. Lenihan, Attorney and Counsellor at Law, is sufficient to constitute a notice of appearance and, if so, whether the Division of Taxation was thus required to serve a copy of the Notice of Deficiency on Mr. Lenihan.

III. Whether it was proper for the Division of Taxation to recognize an accounting firm located in the State of Connecticut as petitioner's representative during the course of the audit.

FINDINGS OF FACT

Petitioner herein, Edward J. Nalbandian, timely filed a 1988 New York State Nonresident and Part-Year Resident Income Tax Return indicating that he had moved out of New York State during said year. The address shown on petitioner's 1988 return was "Nalbandian, Edward J., c/o Berkow, Schechter & Company, 111 Prospect Street, Stamford, Ct. 06901".

On September 19, 1989, the Division of Taxation ("Division") sent a letter to petitioner requesting information concerning the apportionment of income between his resident and nonresident period and also information with respect to his change of residence from New York State. On October 31, 1989, the accounting firm of Berkow, Schechter & Company replied to the Division's letter of September 19, 1989. Included with this reply was a power of attorney dated August 24, 1989 whereby petitioner appointed Neil H. Berkow of the firm of Berkow, Schechter & Company as his representative. In the Notice of Appearance section of the power of attorney, Mr. Berkow indicated that he was a certified public accountant duly qualified to practice in New York State. Mr. Nalbandian's address, as shown on the power of attorney dated August 24, 1989, was "c/o Berkow, Schechter & Company, 111 Prospect Street, Stamford, Connecticut 06901".

On January 8, 1990, William O. Lenihan, Attorney and Counsellor at Law, forwarded the following letter to the Division:

"Reference is to your notice of 12/7/89 on subject taxpayer.

Please be advised that the second sentence of the attachment page is incorrect.

Taxpayer physically moved from his residence in N.Y. on April 1, 1988 to a new residence in Ridgefield, Connecticut. He paid rent in Connecticut effective 4/1/88 and sold his house in New York State on that date.

He further showed evidence of intent to change his domicile by registering to vote [sic] in Connecticut and executing a Will in Connecticut [sic] as the state of his domicile.

He also filed a Connecticut Tax return for the period of his residence.

In summary, Mr. Nalbandian did everything physically possible to change his residence and exhibited every intention to change his domicile.

Would you please review your assessment with regard to the above facts.

If your decision is unfavorable or you need further information, please call me collect at 212-503-0826."

A power of attorney appointing Mr. Lenihan to represent petitioner was not submitted with Mr. Lenihan's letter of January 8, 1990. In fact, a power of attorney appointing Mr. Lenihan as Mr. Nalbandian's attorney was not submitted until November 20, 1990.

On January 18, 1990, the Division issued a Notice of Deficiency to petitioner for the year 1988 asserting a total amount due of \$9,402.47. The total amount due was premised upon the Division's belief that Mr. Nalbandian had not changed his residence from New York State in 1988 and therefore it recomputed petitioner's 1988 personal income tax liability as if he were a resident individual for the entire tax year. The Notice of Deficiency was sent by certified mail to Mr. Nalbandian at his last known address, to wit, c/o Berkow, Schechter & Company, 111 Prospect Street, Stamford, Connecticut 06901-1208.

To support its position that a Notice of Deficiency was mailed to petitioner on January 18, 1990, the Division submitted in evidence an affidavit of Mary K. Randolph, the head clerk who supervises the mailing of notices of deficiency. Ms. Randolph's affidavit sets forth the Division's general office practice concerning the mailing of notices of deficiency and also provides specific details concerning the mailing of the January 18, 1990 Notice of Deficiency to Mr. Nalbandian. Attached to Ms. Randolph's affidavit as Exhibit "A" was a copy of the Division's "certified mail record", which document contained the following entry:

<u>"Certified No.</u>	<u>Notice Number</u>	<u>Name of Addressee, Street...</u>
P 001 061 046	L001349920	Nalbandian - Edward J. c/o Berkow, Schechter & Company 111 Prospect Street Stamford, CT 06901-1208"

At the small claims hearing held on March 22, 1991, the Division was unable to produce a copy of the Notice of Deficiency dated January 18, 1990 and, therefore, its representative requested, and was granted, a 30-day period within which to produce the Notice of Deficiency. Pursuant to a letter dated April 17, 1991 from Associate Attorney Mark F. Volk, the Division submitted the January 18, 1990 Notice of Deficiency which had been attached to the formal

request for conciliation conference received by the Division on May 14, 1990 (see Finding of Fact "8", infra).

On February 15, 1990, some 28 days after the issuance of the Notice of Deficiency, Mr. Lenihan corresponded with the Division, specifically "Central Office Income Tax AG2", stating that:

"Reference is to your notice on subject taxpayer dated 1/18/90.

Please review my letter of 1/8/90 to your office discussing the issues in the case.

If you do not agree with subject matter of my letter, request is hereby made for a Conciliation Conference at your Ryebrook, New York office on any Monday, Wednesday or Friday, as soon as convenient.

Under separate cover the Disagreement with Findings Section has been returned" (emphasis added).

On May 14, 1990, petitioner filed a Request for Conciliation Conference (Form CMS-1) with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). As noted earlier, attached to said request was the Notice of Deficiency dated January 18, 1990. On July 6, 1990, BCMS, apparently unaware of the existence of Mr. Lenihan's letter dated February 15, 1990, issued a Conciliation Order Dismissing Request which contained the following:

"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 January 18, 1990, but the request was not mailed until May 14, 1990, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied."

A timely petition was filed with the Division of Tax Appeals contesting the Conciliation Order Dismissing Request dated July 6, 1990.

On July 16, 1990, the Central Income Tax Section of the Division corresponded with petitioner stating, inter alia, that:

"We have received correspondence from William O. Lenihan concerning the above assessment.

I am writing directly to you since there is no Power of Attorney on file for Mr. Lenihan."

CONCLUSIONS OF LAW

A. When it determines that there is a deficiency in income tax, the Division of Taxation may, pursuant to Tax Law § 681(a), issue a Notice of Deficiency. Said section provides that the notice "shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state." Tax Law § 691(b) defines "last known address" as:

"For purposes of this article, a taxpayer's last known address shall be the address given in the last return filed by him, unless subsequently to the filing of such return the taxpayer shall have notified the [commissioner] of a change of address."

B. In the instant matter, the evidence clearly shows that the Division complied with Tax Law § 681(a) by mailing the January 18, 1990 Notice of Deficiency by certified mail to Mr. Nalbandian's last known address. Furthermore, it is evident from Mr. Lenihan's letter of February 15, 1990 that petitioner, or his representative, received the January 18, 1990 Notice of Deficiency in a timely fashion. Accordingly, since the January 18, 1990 Notice of Deficiency was properly issued in accordance with Tax Law § 681(a), Mr. Nalbandian had 90 days from said date within which to either request a conciliation conference (Tax Law § 170.3-a[a]) or file a petition for redetermination (Tax Law § 689[b]).

C. Since the Conciliation Order Dismissing Request issued by BCMS on July 6, 1990 makes no reference to Mr. Lenihan's letter dated February 15, 1990, it would appear that said order was issued without knowledge of the existence of said letter. Although petitioner's formal request for conciliation conference received by BCMS on May 14, 1990 was filed beyond the statutory 90-day period for filing such a request, it is clear that Mr. Lenihan's letter of February 15, 1990 constitutes an adequate and sufficient request for conciliation conference. Since the February 15, 1990 letter was filed within 90 days of the January 18, 1990 Notice of Deficiency, it is determined that petitioner made a timely request for conciliation conference. Although the record herein contains only Mr. Lenihan's copy of his letter dated February 15, 1990, it is concluded that the Division did, in fact, receive said letter for the following reasons:

- (1) the Division's letter of July 16, 1990 addressed to petitioner admits to having "received correspondence from William O. Lenihan";
- (2) at hearing the Division did not object to the submission of the February 15, 1990

letter in evidence; and

(3) the Division made no allegation to the effect that it did not receive the February 15, 1990 letter.

D. Although the remaining issues raised by petitioner are essentially rendered moot in light of Conclusion of Law "C", supra, I nonetheless note that such arguments are without merit. The Commissioner's regulation 20 NYCRR 600.1(a) provides that:

"No attorney or agent shall appear on behalf of any person before, or be recognized by, any officer or employee of the Department of Taxation and Finance in any proceeding, as hereinafter defined, unless such attorney or agent appears with the taxpayer or files a power of attorney, in proper form, or a certified copy thereof, from the taxpayer involved therein authorizing the attorney or agent to represent him."

With respect to the effect of filing a notice of appearance, 20 NYCRR 600.3 provides, inter alia, as follows:

"any attorney or agent appearing in a proceeding before the Department of Taxation and Finance may file a notice of appearance" (emphasis added).

In order to file a notice of appearance, an attorney or agent must be appearing in a proceeding before the Division. In accordance with 20 NYCRR 600.1(a), in order to appear an attorney or agent must file a power of attorney in proper form signed by the taxpayer. These provisions are vigorously enforced so as to comply with the secrecy provision contained in Tax Law § 697(e). Since a power of attorney appointing Mr. Lenihan was not submitted until November 20, 1990, the Division was not required to send a copy of the January 18, 1990 Notice of Deficiency to Mr. Lenihan.

Petitioner's remaining argument that it was improper for the Division to recognize a Connecticut accounting firm as his representative is also without merit. It must be noted that the power of attorney dated August 24, 1989 ran from Mr. Nalbandian to Mr. Berkow, a certified public accountant duly qualified to practice in New York State. I see no statutory or regulatory provision which would prohibit a taxpayer from appointing a certified public accountant duly qualified to practice in New York State as his or her representative.

E. The petition of Edward J. Nalbandian is granted and the matter is remanded back to

the Bureau of Conciliation and Mediation Services for the scheduling of a conciliation conference on all substantive issues raised by petitioner.

DATED: Troy, New York

PRESIDING OFFICER