STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of KAREN J. KIMMEY for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Periods January 16, 1989 through June 30, 1989, August 16, 1989 through December 31, 1989 and March 16, 1990 through July 15, 1990.	:	DETERMINATION DTA NOS. 809958 AND 809959
In the Matter of the Petition of JOHN L. MATRONE for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Periods January 16, 1989 through June 30, 1989, August 16, 1989 through December 31, 1989 and March 16, 1990 through July 15, 1990.	:	

Petitioners, Karen J. Kimmey, 160 Brookside Avenue, Amsterdam, New York 12010, and John L. Matrone, 233 Greenwood Drive, Schenectady, New York 12303, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the periods January 16, 1989 through June 30, 1989, August 16, 1989 through December 31, 1989 and March 16, 1990 through July 15, 1990.

A consolidated hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 25, 1992 at 10:45 A.M., with all briefs to be filed by December 30, 1992. Petitioners appeared prose. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUE

Whether the denial of petitioners' request for a conciliation conference was proper because the request was not timely made.

FINDINGS OF FACT

On or about January 18, 1991, the Division of Taxation ("Division") issued to Karen J. Kimmey and John L. Matrone, petitioners herein, 28 statements of deficiency each for the following periods and in the following amounts:

Withholding Tax Period	Amount
January 16, 1989 - January 31, 1989	$2,913.02
February 1, 1989 - February 15, 1989	4,411.24
February 16, 1989 - February 28, 1989	1,494.98
March 1, 1989 - March 15, 1989	4,523.59
March 16, 1989 - March 31, 1989	2,859.29
April 1, 1989 - April 15, 1989	2,822.60
April 16, 1989 - April 30, 1989	2,653.48
May 1, 1989 - May 15, 1989	2,407.82
May 16, 1989 - May 31, 1989	3,627.60
June 1, 1989 - June 15, 1989	1,984.80
June 16, 1989 - June 30, 1989	2,064.63
August 16, 1989 - August 31, 1989	2,764.56
September 1, 1989 - September 15, 1989	1,764.98
September 16, 1989 - September 30, 1989	1,883.15
October 1, 1989 - October 15, 1989	1,886.45
October 16, 1989 - October 31, 1989	1,804.20
November 1, 1989 - November 15, 1989	2,686.14
November 16, 1989 - November 30, 1989	1,784.86
December 1, 1989 - December 15, 1989	1,754.63
December 16, 1989 - December 31, 1989	1,764.51
March 16, 1990 - March 31, 1990	1,923.11
April 1, 1990 - April 15, 1990	1,938.29
April 16, 1990 - April 30, 1990	1,914.16
May 1, 1990 - May 15, 1990	1,928.81
May 16, 1990 - May 31, 1990	2,831.56
June 1, 1990 - June 15, 1990	1,936.00
June 16, 1990 - June 30, 1990	1,941.59
July 1, 1990 - July 15, 1990	1,950.93

Each of the statements of deficiency contained the following language:

> "Section 685(g) of the Personal Income Tax Law provides that any person required to collect, truthfully account for, and pay over the tax imposed by this Income Tax Law who willfully fails to do so or attempts in any manner to evade or defeat the tax or its payment shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax."

The term "person" is defined in Tax Law § 685(n) and includes:

> "an individual, corporation or partnership, or an officer or employee of any

> corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect to which the violation occurs."

As stated above, each petitioner received 28 statements of deficiency for the periods listed as an officer or employee of CIMM, Inc.

On or about January 18, 1991, the Division issued 28 notices of deficiency to Karen J. Kimmey and John L. Matrone, each of which set forth the penalty assessed pursuant to Tax Law § 685(g) which corresponded to the same withholding tax periods and amounts set forth on the statements of deficiency. Each Notice of Deficiency set forth the following language:

> "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 (150 days if the notice is addressed outside the U.S.):
>
> - request a conciliation conference according to section 170.3-a of the Tax Law;
>
> or
>
> - file a petition for hearing according to sections 1089 and 2008 of the Tax Law and the Rules and Practice and Procedure of the Tax Appeals Tribunal."

The Division submitted no evidence of mailing with regard to the notices of deficiency herein. However, both petitioners specifically acknowledge receipt of the notices of deficiency in their petitions. Further, both petitioners sent letters, dated May 23, 1991, to the Bureau of Conciliation and Mediation Services requesting a conference. In the letter sent by petitioner Karen J. Kimmey, she stated that the notices of deficiency were "received only by Mr. Matrone and me near the end of January 1991...." In the May 23, 1991 letter from Mr. Matrone to the Bureau of Conciliation and Mediation Services, he stated that the notices of deficiency were "received for some reason by only two of seven officers and directors near the end of January 1991...."

Both petitioners also admitted in the May 23, 1991 letter to the Bureau of Conciliation and Mediation Services that they "received the January 18, 1991 penalty notice" and "intended to file a timely request for an Appeals Hearing but did not do so because of the granting of the

30 Month Payment Plan to the Company and our belief that all personal penalty actions were suspended."

For all periods in issue, petitioner John L. Matrone was an employee and chief executive officer of CIMM, Inc., a public company in which Mr. Matrone was a minority stockholder, owning less than 10% of the company's stock.

Petitioner Karen J. Kimmey was an assistant to the corporate secretary and also a minor shareholder and employee of CIMM, Inc.

Both petitioners deny that they were persons required to collect, truthfully account for and pay over the withholding tax due and owing for the periods herein, but neither deny that the taxes were in fact due. In fact, in his January 29, 1991 letter to Commissioner James M. Wetzler, Commissioner of the New York State Department of Taxation and Finance, Mr. Matrone pleaded for more time for the company "to make full payment of past due N.Y.S. Withholding Taxes on its own behalf" and that "[t]he Company recognizes the seriousness of the taxes due and the already considerable patience of the N.Y.S. Department of Taxation and Finance." Mr. Matrone added that it was his "strong conviction that this added time will result in the payment of this obligation...."

In the contact log kept by the Tax Compliance Division in this case, introduced in evidence as the Division's Exhibit "E", the entry for November 23, 1990 stated: "Received info from bank (FNB of Scotia) Only officers named are Karen Kimmey and John Matrone."

After the issuance of the notices of deficiency on or about January 18, 1992, the Division sent a letter to CIMM, Inc., to the attention of John L. Matrone, which enclosed and set forth the terms of the Deferred Payment Agreement between the Division and CIMM, Inc. The letter contained the following language:

> "Non-compliance with any of these conditions will default the Deferred Payment Agreement resulting in the execution of the warrants."

Said Deferred Payment Agreement, attached to the letter, was signed by John Matrone as "responsible office [sic]".

Printed on the back of the Deferred Payment Agreement are the specific terms of the

agreement which are meant to inform the taxpayer of the conditions of the agreement. The terms provide, in pertinent part, as follows:

> "I, the undersigned, declare that because of my present financial condition, as evidenced by the financial statement submitted, I am currently unable to pay in full New York State taxes. I agree that I am liable for all assessments listed on the reverse side of this agreement.
>
> "I understand, and agree, that if I fail to meet any conditions stated herein, or it is determined that collection of this tax is in jeopardy, the privilege of installment payments **will be withdrawn** and any tax warrants not already filed **will be filed**. The entire amount of my tax liability will be collected by any or all of the following methods:
>
> . Garnishee of wages.
> . Levy and seizure of any assets.
> . Issuance of assessments and enforcing of collection against responsible officers of a corporation.
> . Other appropriate enforcement techniques." (Emphasis in original.)

On March 4, 1991, petitioner John L. Matrone initiated a telephone conversation with the tax compliance agent, Mr. Victor Cardona, regarding the company's new monthly payment agreement. There was also conversation concerning the personal assessments issued to Mr. Matrone and Ms. Kimmey. Mr. Matrone's notes, recorded contemporaneously, stated as follows:

> "Also asked about personal penalty notice re: officer -- he said Div will not go after personal penalty while the Co is on the monthly plan.
>
> "We now understand individual penalty action is set aside but would be renewed if the company does not stay on monthly payments satisfactory to the Tax Div."

This note, stated also that "Karen listened in on phone conversation because she wanted firsthand understanding about her specific case."

Another telephone conversation between Mr. Matrone and Mr. Cardona occurred on May 23, 1991. After some discussion with regard to the company's financial reports, the conversation turned to personal liability. Mr. Matrone's notes stated as follows:

> "While talking to him -- asked again about hold in personal penalty action while the Co. is on the monthly payment plan -- since the original 90 day period just ended -- For assurance specifically told him we were assuming a new 90 day period would start if Company defaulted on monthly payment plan -- <u>He now said the two actions -- personal and Co. -- are separate -- should have asked for penalty hearing to protect us possibly for penalty -- as we have been saying to Tax Division all along -- within original 90 day period</u>." (Emphasis in original.)

The note also stated that Mr. Cardona told petitioners to write to the Bureau of Conciliation and Mediation Services for a hearing and provided the address for doing so.

There was no indication of these telephone conversations in the records or log of the Tax Compliance Division. Mr. Cardona recalled having many conversations with petitioners, but had no recollection of the specific contents of those conversations.

Mr. Cardona explained that the comment recorded in Mr. Matrone's March 4, 1991 memo of their telephone conversation with regard to his statement that the Division would not "go after personal penalty while the company is on the monthly plan" meant that if a corporation has a liability and personal assessments are issued, if the corporation has a Deferred Payment Agreement and/or is current with its payments, there is no collection action taken against the responsible persons. However, Mr. Cardona had no recollection of either petitioner ever telling him that they did not agree with the notices of deficiency and that, had either taxpayer indicated to him that he or she did not agree with said notices, he would have told them to protest the notices. Since this issue of protest did not arise until their May 23, 1991 conversation, Mr. Cardona did not instruct petitioners to file a request for a conference with the Bureau of Conciliation and Mediation Services.

During December of 1990, all area banks were served with levies for monies due from CIMM, Inc. The log in this case revealed that, on January 31, 1991, a package was delivered to the Commissioner's office, presumably the aforementioned January 29, 1991 letter to Commissioner James W. Wetzler from John L. Matrone, seeking "still more time" to pay their obligation.

It was at this juncture that Mr. Cardona was assigned the task of preparing a Deferred Payment Agreement between the Division and CIMM, Inc. This is the same February 1, 1991 agreement executed by Mr. Matrone and Mr. Cardona, referred to in Finding of Fact "8" above.

In response to their letters to the Bureau of Conciliation and Mediation Services requesting a conference on the notices issued to them in this matter, both John L. Matrone and Karen J. Kimmey received conciliation orders dated July 26, 1991, dismissing their requests

which were received by the Bureau on May 31, 1991.

On September 17, 1991, timely petitions were received by the Division of Tax Appeals requesting a review of said conciliation orders.

CONCLUSIONS OF LAW

A. As an alternative to proceeding directly to formal hearing, a taxpayer may request a conciliation conference in the Bureau of Conciliation and Mediation Services in the Department of Taxation and Finance (Tax Law § 170[3-a][a]; 20 NYCRR 4000.5[c]). The time for filing a request for conciliation conference is determined by the time period set out in the statutory provisions authorizing the assessment, in this case 90 days (Tax Law §§ 170[3-a][a]; 1138[a]; see, 20 NYCRR 4000.3[c]).

A notice is considered to have been mailed when it is delivered into the custody of the United States Postal Service for mailing (Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991 [wherein the Tribunal held that where the Division has failed to prove when it mailed the notices, but has been able to prove, by the taxpayer's receipt of the notices, that they were in fact mailed, the appropriate remedy is to deem the petition timely filed]).

It is clear that where the Division has denied the taxpayer a conciliation conference on the grounds that the request was not timely, the Division is required to establish when it mailed the notice (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Magazine v. Commr., 89 TC 321).

In the instant matter, no evidence was produced by the Division with regard to the proper issuance of the notices of deficiency herein. However, both petitioners conceded receipt numerous times in the pleadings, specifically conceding receipt of the notices "near the end of January 1991" in their May 23, 1991 letters to the Bureau of Conciliation and Mediation Services requesting a hearing.

Assuming the most liberal reading of this language used by both petitioners in their requests for conciliation conferences, i.e., a February 1, 1991 receipt date, it remains that

petitioners did not file their requests for a conciliation conference until May 23, 1991, 112 days after actual receipt.

Where the Division's evidence is not sufficient to prove the date of mailing of the notice, it is proper to use the date of delivery as the date from which the 90-day period runs to determine whether or not petitioners' request is timely (Matter of Avlonitis, Tax Appeals Tribunal, February 20, 1992). Both the instant matter and Avlonitis can be distinguished from Matter of Novar TV & Air Conditioner Sales & Serv. (supra) because the facts in Novar did not indicate a date of delivery that would have rendered the petitions untimely. Therefore, given the conceded receipt date of "near the end of January 1991", petitioners' request for a conciliation conference on May 23, 1991 was not timely filed.

B. Petitioners raise the argument that they were operating under a misunderstanding based upon two telephone conversations with the tax compliance agent, Victor Cardona, which took place on March 4, 1991 and May 23, 1991. However, petitioner John Matrone's notes of those conversations, when read in conjunction with the agent's testimony at hearing and petitioners' own testimony at hearing, does not establish detrimental reliance upon the advice of a Division employee.

There was never specific reference to a desire by petitioners to protest the notices. Further, there was no mention of a desire to protest in the January 29, 1991 letter to Commissioner Wetzler, presumably written after petitioners received the notices in issue. Petitioners' argument also ignores the explicit language on each of the 28 notices of deficiency issued to and received by them which clearly stated that the deficiency would become an assessment subject to collection if a request for a conciliation conference was not made within 90 days from the date of the notice. Then there were the terms of the Deferred Payment Agreement which clearly stated that if the terms and conditions of the agreement were not met, the privilege of installment payments would be withdrawn and that tax warrants not already filed would be filed and that the tax would be collected by, among many methods, the issuance of assessments and the enforcing of collection against responsible officers of the corporation.

There was ample notice to petitioners of their protest rights and the procedures the Division would follow in the event of default under the Deferred Payment Agreement.

Any misunderstanding herein was due to unilateral mistake by petitioners, not misinformation provided by the Division upon which they relied to their detriment. Petitioners failed to comply with the statutory requirement that a petition to contest the notices of deficiency must be filed within 90 days of the date of issuance of such notices of deficiency, or, in this case, within 90 days of receipt (Matter of Avlonitis, supra).[1]

C. The petitions of Karen J. Kimmey and John L. Matrone are hereby dismissed.

DATED: Troy, New York
June 10, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE

[1]It should be noted that petitioners herein are not entirely without redress because they can still obtain a hearing on the merits of their cases by paying the assessments or a portion thereof, filing a claim for refund within two years from the time of such payment (Tax Law § 687[a]) and thereafter (assuming the claim for refund is denied or deemed denied) filing a petition contesting such denial of refund pursuant to Tax Law § 689(c).