STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SUSANNE JAFFE	:	DETERMINATION DTA NO. 811546
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1981, 1982, 1985, 1986, 1988, 1989 and 1990.	:	

Petitioner, Susanne Jaffe, 350 East 79th Street, New York, New York 10021, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1981, 1982, 1985, 1986, 1988, 1989 and 1990.

On December 29, 1993 and January 5, 1994, respectively, petitioner, appearing pro se, and the Division of Taxation by William F. Collins, Esq. (Robert F. Tompkins, Esq., of counsel) signed a waiver of hearing and consented to have the threshold jurisdictional issues determined based upon submission of documents and briefs. The Division of Taxation was required to submit its documents by February 15, 1994. Petitioner's documents and brief were required to be filed by March 15, 1994. The Division of Taxation's brief and petitioner's reply were required to be filed by April 15, 1994 and April 29, 1994, respectively. All briefs and documents were filed within the prescribed periods. After due consideration of the evidence and briefs filed herein, Carroll R. Jenkins, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Tax Appeals has subject matter jurisdiction to determine the validity of income tax asserted against petitioner by way of a notice and demand.

II. Whether the petition in this matter was timely filed.

FINDINGS OF FACT

Susanne Jaffe ("petitioner") filed the petition in this matter dated as signed on January 6,

1993. The wrapper in which it was mailed bears a United States Postal Service postmark date of January 6, 1993. The petition and its mailing wrapper are indate stamped as received by the Division of Tax Appeals on January 8, 1993.

The address appearing on petitioner's 1985 New York State Resident Income Tax Return ("State Return" or "IT-201") is 300 East 42nd Street, Apt. 21-F, New York, New York 10016. This State return is dated April 11, 1986. The address appearing on petitioner's wage and tax statements ("W-2") which are attached to her filed State returns for tax years 1985, 1986, 1988 and 1989 is 300 East 40th Street (Ex. "G", "J", "K", "L").

Petitioner claims that during all relevant periods she resided in New York City ("the City") at 300 East 40th Street, Apt. 21-F. This address appears on petitioner's filed State returns for tax year 1986, dated April 12, 1987. This same address also appears on petitioner's State income tax returns filed for tax years 1988[1] and 1989.[2]

Petitioner's State return filed for tax year 1989 claims a refund of $253.00. Copies of documents generated by the Division of Taxation's ("Division") processing section which are attached to the return, show that the Division had, by June 8, 1990, updated its records to reflect petitioner's correct address, i.e., 300 East 40th Street, Apt. 21-F. The Statement of Income Tax Adjustment issued to petitioner, dated June 8, 1990, contains this address and grants petitioner a partial refund of $139.55. Petitioner continues to claim entitlement to a refund of $253.00 for this tax year (Ex. "N").

Based on the evidence in the record, the Division had changed its internal records to reflect petitioner's correct City address at 300 East 40th Street, Apt. 21-F by June 8, 1990.

The address appearing on petitioner's State return filed for 1990[3] is 401 East 34th Street in the City. Attached to this return is a one-page computation of tax due generated by the

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[1]Dated April 7, 1989.

[2]Dated April 7, 1990.

[3]Dated April 6, 1991.

Division's computer. This page shows that by August 7, 1991, the Division's computer records had already been changed to reflect petitioner's new address at 401 East 34th Street.

Copies of petitioner's State returns in evidence were all provided by the Division. All of the State returns were signed by petitioner seven to ten days prior to their April 15th due date. Since the returns in evidence do not show the Division's in-date stamp, for purposes of this determination, all of the returns are deemed to have been filed with the Division on April 15 of each year (Tax Law § 683[b][1]).

The Internal Revenue Service ("IRS") had made changes or corrections to petitioner's 1981 and 1982 Federal income tax returns, which resulted in a recomputation of the tax due. Petitioner agreed to these Federal changes, but allegedly failed to report these agreed Federal changes to the Division as required by law. Based on these Federal changes, the Division recomputed petitioner's income tax for 1981 and 1982. On September 29, 1988, the Division sent a Notice of Additional Tax Due to petitioner. This notice was addressed to 300 East 42nd Street, Apt. 21-F in the City and stated, in part:

> "The New York State Tax Department has been notified by the I.R.S. (Pursuant to Section 6103(D) of the Internal Revenue Code) that an adjustment was made to your Federal Income Tax Return for the above year(s). This notice is issued because of your failure to report the changes to New York State and shows the additional New York State and if applicable, New York City . . . tax due based on the unreported changes."

The second page of this notice explained that the changes in tax asserted were based on petitioner's rent/royalty and pension/annuity income, as well as changes in her itemized deductions. The Division noted that negligence penalties would be asserted based on petitioner's failure to report the agreed Federal changes to her tax. This notice asserted additional tax due, plus penalties and interest, for the respective years as follows:

Tax Year	1981		1982	
	State	City	State	City
Additional Tax Due	$3,618.47	$1,152.61	$ 815.10	$315.11
Interest	2,830.23	901.52	475.97	183.99
Penalties § 685(b)(1)	180.92	57.63	40.76	15.76

Total Due	$6,629.62	$2,111.76	$1,331.83	$514.86

Two notices and demands for payment of income tax due, dated January 6, 1989, were issued to petitioner asserting 1981 State and City income tax of $3,618.47 and $1,152.61, respectively, plus penalties and interest. Both notices were addressed to petitioner at 300 East 42nd Street, Apt. 21-F in the City. Petitioner never received these notices.

Two notices and demands for payment of income tax due, also dated January 6, 1989, were issued to petitioner asserting 1982 State and City income tax of $815.10 and $315.11, respectively, plus penalties and interest. Both notices were addressed to petitioner at 300 East 42nd Street, Apt. 21-F in the City. Petitioner never received these notices.

In comparing information contained on petitioner's State and Federal income tax returns for tax year 1985, the Division found that she had taken improper deductions and made mathematical errors in computing the tax due.

Based on the discrepancy in her deductions on her filed 1985 State return, a Statement of Audit Changes, dated January 24, 1989, was issued to petitioner asserting additional personal income tax due the State and City of $312.74 and $142.16, respectively, plus interest. The Division issued to petitioner a Notice of Deficiency (A8901243301C),[4] dated March 16, 1989, asserting State and City tax in the amount of $454.90, plus interest only. Affidavits by Stanley K. Devoe, Principal Clerk in the Division's Manual Assessments Unit, and Daniel LaFar, Principal Mail and Supply Clerk in the Division's mail room, deposed that this Notice of Deficiency was addressed and mailed to petitioner at 300 East 42nd Street in the City, rather than to her actual address at 300 East 40th Street in the City (Ex. "H" and "I"). The Division, in its brief, has agreed to cancel this assessment (Division's letter brief, p. 5).

[4]Upon the Division's adopting a new computer system, the State and City portion of this assessment was separated and new assessment numbers were assigned as follows. Notice No. L-000322900-1 asserted City income tax of $142.16, plus interest. Notice No. L-000238801-1 asserted State income tax of $312.74, plus interest. Both of these assessments are to be cancelled.

A Notice and Demand for Payment (R8611284077),[5] dated November 28, 1986, asserting additional State income tax in the amount of $1,001.19 was issued to petitioner based on alleged mathematical errors in calculating tax due on her 1985 return. The computer-generated statement of Income Tax Exception attached to petitioner's return sets forth the Division's calculation of the additional tax due for 1985 and shows petitioner's address as 300 East 42nd Street in the City.

The Division also issued notices and demands for payment of additional income tax due for tax years 1986, 1988 and 1990. For each of these tax years, the additional tax asserted was based upon alleged mathematical errors on petitioner's State income tax returns.

Based on claimed mathematical errors on petitioner's State return filed for tax year 1986, the Division determined additional tax due in the amount of $675.68, plus penalty and interest. A Notice and Demand for Payment (R8712306175),[6] dated December 30, 1987, was addressed to petitioner at 300 East 42nd Street in the City.

Based on petitioner's alleged mathematical errors on her State return for 1988, the Division determined additional tax due in the amount of $1,823.25, plus penalty and interest. A Notice and Demand for Payment (R8910165175),[7] dated October 18, 1989, was addressed to petitioner at 300 East 42nd Street in the City.

As noted, supra, the address appearing on petitioner's 1989 return, dated April 7, 1990, continued to be 300 East 40th Street, Apt. 21-F. On this return, petitioner claimed a refund of $253.00. The Division determined that petitioner had incorrectly claimed herself as an exemption on her State return. This resulted in a mathematical error in the computation of the tax due.

A Statement of Income Tax Adjustment, dated June 8, 1990, granted petitioner a partial

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[5]Also appears in the record under its new number, i.e., L-000058870-9.

[6]Also referred to in the record under its new number, i.e., L-004884271-1.

[7]Also referred to in the record under its new number, i.e., L-004884271-1.

refund of $139.55. This refund ($139.55) was applied towards payment of the notice and demand (L-000058870-9) which asserted tax of $1001.19, plus penalty and interest, for tax year 1985. Petitioner continues to claim entitlement to a refund of the additional $139.55 for this tax year. The Statement of Income Tax Adjustment sent to petitioner, and copies of other documents generated by the Division's processing section which are attached to her 1989 return, show that the Division had, by June 8, 1990, updated its records to reflect petitioner's correct address, i.e., 300 East 40th Street, Apt. 21-F (Ex. "L").

Based on claimed mathematical errors on petitioner's State return filed for tax year 1990, the Division determined additional tax due in the amount of $1,318.24, plus penalty and interest. A Notice and Demand for Payment (R9111141792),[8] dated November 25, 1991, was mailed to petitioner at her correct address at 300 East 40th Street in the City.

While copies of the notices and demands issued for tax years 1985, 1986, 1988 and 1990 were not offered in evidence by the Division, the notice numbers and amounts asserted in tax, penalty and interest for each year appear on the consolidated statement of liabilities issued to petitioner on October 9, 1992 (attached to Ex. "B"). The computation of additional tax claimed by the Division for each year is contained on a computer-generated printout attached to the IT-201 for each of the above years. The Division claims that the notices and demands were mailed. Petitioner does not deny it, and in fact states that she "has not nor [sic] is now claiming that Respondent never mailed any Notices of Deficiency" (Petitioner's brief, p. 4; Division's Ex. "P"). Therefore, there is sufficient evidence to determine how the additional tax claimed was computed.

It can also be reasonably inferred from evidence in the record that any correspondence, including notices of deficiency or notices and demands for payment of tax due, mailed by the Division to petitioner prior to June 8, 1990 was addressed and mailed to 300 East 42nd Street in the City (Finding of Fact "5").

The Division offered no evidence in the record with respect to the dates and office

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[8]Also referred to in the record under its new number, i.e., L-004884271-1.

mailing procedures followed with respect to the notices and demands in dispute ("the subject notices"). The Division has not disputed that the subject notices asserting tax for years 1981, 1982, 1985, 1986 and 1988 were mailed to 300 East 42nd Street in the City.

Except for 1990, there is no evidence in the record that the additions to tax asserted for tax years 1981, 1982, 1985, 1986 and 1988 were paid by petitioner prior to bringing this proceeding. There is a check attached to the petition made payable to "New York State Income Tax" in the amount of $725.00. A notation on the check states "1990 Income Tax."

Petitioner did not file a request for conciliation conference with the Division's Bureau of Mediation and Conciliation Services, but instead filed a petition with the Division of Tax Appeals dated January 6, 1993.

The only Notice of Deficiency issued in this matter asserted additional income tax due for tax year 1985. The Division in its brief has conceded the timeliness issue with respect to this notice and has agreed to cancel the Notice of Deficiency. Therefore, the remaining notices in dispute in this matter are notices and demands for payment of income tax due for 1981, 1982, 1985, 1986, 1988 and 1990, and a refund claim for 1989.

SUMMARY OF THE PARTIES' POSITIONS

The petition in this matter sets forth petitioner's claim that prior to October 1992 she had never received notice of any deficiencies in taxes due New York State (or New York City) for any of the years 1981, 1982, 1985, 1986, 1988, 1989 or 1990. In addition, the petition raises challenges to the merits of any alleged liabilities for such years.

The Division's answer affirmatively claims that the petition was not filed within 90 days of the issuance date of the statutory notice(s). More specifically, paragraph "4" of the answer states:

> "4. AFFIRMATIVELY ALLEGES that Petitioners' request for a hearing was dated January 6, 1993 and received by the Division of Tax Appeals on January 8, 1993 in excess of ninety (90) days from the date of the Notices issued in this matter; further, AFFIRMATIVELY ALLEGES such request was late filed pursuant to the provisions of Section 689(b) of the Tax Law."

Petitioner does not deny that the subject notices were mailed by the Division, but argues

that they were not mailed to her at her last known address as required by law. As a result of such failure, petitioner denies being notified that the State was asserting additional income tax for any of the periods involved here until October 1992.

The Division argues, with respect to tax years 1981 and 1982, that the additional tax asserted by notice and demand is based on petitioner's failure to report agreed changes to her Federal income tax return. The Division argues, however, there is no right to file a petition with the Division of Tax Appeals based on a notice and demand.

The notices and demands issued for tax years 1985, 1986, 1988, 1989 and 1990 were based on petitioner's mathematical errors on her income tax returns for those years. The Division argues that where such mathematical errors occur on a tax return it is only required to notify the taxpayer of her error, that additional tax is due and that the excess has been assessed. However, the Division again argues that the Division of Tax Appeals has no jurisdiction to entertain a petition based on the issuance of a notice and demand.

Petitioner notes that Tax Law § 681(e)(1) provides that a deficiency asserting tax based on a taxpayer's failure to report Federal changes in taxable income shall be deemed assessed on the date such notice is mailed unless the taxpayer files a report or amended return within 30 days after mailing of the notice. Petitioner questions how a taxpayer is to file a report or amended return within this 30-day period if she is never notified that a deficiency in tax is being asserted.

CONCLUSIONS OF LAW

A. Although the briefs of both parties have included arguments on the merits, this determination will be limited to the threshold issue of jurisdiction. The issue of whether the petition was timely filed has been raised as a defense by the Division. In such instances, the Division, with respect to a notice, bears the initial burden of establishing the date and manner of mailing of the notices giving rise to the liabilities in question (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990; Matter of Katz, Tax Appeals Tribunal, November 14, 1991). Establishing such date and manner of giving notice sets the "triggering" date from which the 90-

day period within which a petition must be filed is measured (Matter of Katz, supra). Until a Notice of Deficiency can be shown by the Division to have been mailed, "[n]o assessment of a deficiency in tax and no levy or proceeding in court for its collection shall be made. . ." (Tax Law § 681[c]).

To be "properly mailed," a Notice of Deficiency must be mailed by registered or certified mail to the taxpayer's last known address (Tax Law § 681[a]; see, Matter of Agosto v. Tax Commn. of the State of New York, 68 NY2d 891, 508 NYS2d 934, 935; Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Matter of Katz, supra). Once deemed "properly mailed," the "risk of nondelivery" is on the taxpayer; that is, once a notice is properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (Matter of Malpica, supra, citing Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025, appeal dismissed 34 NY2d 667, 355 NYS2d 1028). Rather, whether or not the notice is actually received, "'a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail'" (see, Matter of Katz, supra, citing Dorff v. Commissioner, 55 TCM 412; Cataldo v. Commissioner, 60 TC 522). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced (see, Matter of MacLean v. Procaccino, supra; Matter of Katz, supra). The date on the notice itself is not sufficient to establish the date of mailing (Matter of Wilson, Tax Appeals Tribunal, July 13, 1989).

B. In this case, a Notice of Deficiency was issued for only one year, i.e., 1985. The Division, in its brief, has agreed to cancel that notice, so it is no longer an issue. Except for petitioner's refund application[9] for 1989, all of the other notices in this case are "notices and demands." Therefore, the following discussion relates to tax and additions to tax asserted by notice and demand pursuant to Tax Law § 681(d) and (e)(1).

A Notice of Deficiency must be addressed to a taxpayer's last known address and be mailed

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[9]The refund claim will be dealt with separately, infra.

by registered or certified mail. It is intended to give notice of a deficiency in tax which, unless challenged by the taxpayer, shall become an "assessment" at the expiration of 90 days (Tax Law § 681[b]).

A notice and demand is similar to a Notice of Deficiency in that it too is intended by the statute to give the taxpayer notice of an asserted deficiency in tax (Tax Law § 692[b]). However, the tax asserted by a notice and demand has already been assessed, it is not the assessing document. In this case, the tax was self-assessed by petitioner when she filed her tax returns:

> "The amount of tax which a return shows to be due, or the amount of tax which a return would have shown to be due but for a mathematical error, shall be deemed to be assessed on the date of filing of the return . . ." (Tax Law § 682[a]).

Although a notice and demand is not the assessing document, the wording of the statute makes proper mailing of a notice and demand to the taxpayer a necessary precondition to asserting additional tax. Tax Law § 692(b), requires that:

> "The tax commission shall . . . give notice to each person liable for any amount of tax, addition to tax, penalty or interest, which has been assessed but remains unpaid, stating the amount and demanding payment thereof. Such notice shall be . . . sent by mail to such person's last known address . . ." (Tax Law § 692[b]; emphasis added).

Although the tax asserted by notice and demand may be "deemed" already assessed, the Legislature, by making provision for issuance of a notice and demand, clearly contemplated that taxpayers be provided with "notice" of asserted deficiencies in tax. Inasmuch as the "notice" functions of a notice of deficiency and a notice and demand are analogous, it is concluded that the cases cited, supra, at Conclusion of Law "A" have application here.

It is recognized that, unlike a notice of deficiency, a notice and demand need only be mailed by regular mail, not by registered or certified mail. However, in order for the Division to establish a presumption of receipt by the taxpayer and "trigger" the period of limitations discussed supra, and in order for the notice to be effective as a statutory notice asserting an addition to tax satisfying fundamental due process requirements, the Division must, at a

minimum, establish that the subject notices were mailed to the taxpayer's last known address as prescribed by Tax Law § 692. The term "last known address" is defined as the address shown on the taxpayer's last filed return (Tax Law § 691[b]).

In this case, although the address appearing on petitioner's 1985 income tax return was 300 East 42nd Street, Apt. 21-F, the address appearing on petitioner's personal income tax return for tax year 1986 was 300 East 40th Street, Apt. 21-F. The latter address constituted petitioner's "last known address" until she filed her 1990 personal income tax return on April 6, 1991. The evidence establishes that the notice and demand asserting tax for tax year 1990 is the only notice and demand that was actually mailed to petitioner's last known address. None of the other notices and demands in this proceeding were properly mailed to petitioner's last known address and therefore none provided effective "notice" to petitioner that additional tax was being asserted.

C. In addition to proving that the subject notices were mailed to the taxpayer's last known address, the Division must also provide evidence to establish the date the notices were mailed. Presumably, the quantum of proof required to establish proper mailing of a notice and demand, which does not require registered or certified mailing, would be less than that required for a notice of deficiency. However, the Division certainly must come forward with some evidence of proper mailing if it is to establish that the petition is untimely. In this case, the Division offered no evidence to prove the dates of mailing or to otherwise prove proper mailing of the subject notices. Therefore, the Division's claim that the petition is untimely filed is deemed abandoned, and the petition is deemed timely filed with respect to all of the notices and demands issued to petitioner.

D. It now must be determined whether the petition was timely filed with respect to petitioner's challenge to the partial denial of refund. Petitioner claimed a refund of $253.00 on her 1989 resident New York income tax return.[10] This refund claim was granted in the amount

[10]There being no evidence to the contrary, the claimed overpayment of tax for 1989 is deemed to have occurred in 1989.

of $139.55, but was otherwise denied by the Statement of Income Tax Adjustment dated June 8, 1990.

Tax Law § 687(a) generally requires that a claim for refund or credit under Article 22 be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever term expires the later. In this case, petitioner's 1989 income tax return, dated April 7, 1990, contained a refund claim for alleged overpayments of tax paid in 1989. The Division sent a Statement of Income Tax Adjustment, dated June 8, 1990, to petitioner's address at 300 East 40th Street, Apt. 21-F, in the City. This statement granted in part and denied in part her refund claim. Petitioner objected to the partial denial of her refund. Where a taxpayer has made a timely request for refund, Tax Law § 689(c) permits a taxpayer to file a petition with the Division of Tax Appeals for the amounts asserted in the refund claim if, in pertinent part:

> "(3) either (A) six months have expired since the claim was filed, or (B) the tax commission has mailed to the taxpayer, by registered or certified mail, a notice of disallowance of such claim in whole or in part.
>
> "No petition under this subsection shall be filed more than two years after the date of mailing of a notice of disallowance . . ." (emphasis added).

There is no evidence that the Division ever mailed petitioner a notice of disallowance ("denial letter") with respect to the disputed refund by registered or certified mail. Accordingly, the refund was deemed denied six

months after the date the return was filed (April 15, 1990), and petitioner can properly bring this petition contesting such denial.

E. As noted earlier, Tax Law § 689 allows a taxpayer to petition for a hearing only (1) to challenge tax deficiencies asserted in a Notice of Deficiency (Tax Law § 689[b]) or (2) to request a refund (Tax Law § 689[c]). Neither this section, nor any other section of Article 22, authorizes a taxpayer to petition for a hearing to challenge a tax deficiency asserted by a notice and demand.

However, Tax Law § 2006(4) imposes upon the Division of Tax Appeals the duty "[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless

a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter"(emphasis added) (see, Matter of Meyers v. Tax Appeals Tribunal, 201 AD2d 185, 615 NYS2d 90 [1994]).

No other provision of the Tax Law specifically provides for, modifies or denies a right to a hearing with respect to a notice and demand for personal income tax. That being the case, it is concluded that Tax Law § 2006(4) confers jurisdiction on the Division of Tax Appeals with respect to the notices and demands in this proceeding (see, Matter of Meyers v. Tax Appeals Tribunal, supra).

F. This matter will be scheduled for hearing on the merits in due course. Prior to such hearing date, the Division is directed to mail to petitioner's last known address a copy of each notice and demand which asserts additional tax in this proceeding. The petitioner is reminded that these notices do not constitute the assessment, but are merely bills asserting tax which the statute deems to have been assessed by her tax returns (Tax Law § 682[a]). In the hearing on the merits, it will be

petitioner's burden to show by clear and convincing evidence that the additional tax and additions to tax, asserted by these notices, is erroneous.

G. The petition of Susanne Jaffe is granted to the extent that she is entitled to a hearing on the merits of her petition. This case will be scheduled for hearing as soon as possible.

DATED: Troy, New York
October 31, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE