

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AVON DATACOM CORP. : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 816175
Personal Income Tax under Article 22 of the Tax Law for :
the Year 1990. :

Petitioner, Avon Datacom Corp., 60 Hoffman Avenue, Hauppauge, New York 11788, 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 1990.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 25, 1998 at 1:00 P.M., with all briefs to be submitted by February 15, 1999 which date began the six-month period for the issuance of this determination. Petitioner appeared by Eugene Lyle Stoler, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Jr., Esq., of counsel, at the hearing and Margaret T. Neri, Esq., of counsel, on the brief.).

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of withholding taxes as having been untimely filed.

FINDINGS OF FACT

1. On July 25, 1996, the Division of Taxation (“Division”) received a letter dated July 22, 1996 along with a copy of a form PR-189, Application for Refund of Employer’s Withholding Tax, seeking a refund of \$25,125.42 in withholding taxes paid for the tax year 1990 by Avon Datacom Corp. (“ADC”). The letter was addressed to “Mr. Mike Masterson, New York State - Problems Resolution” and was signed by Harold R. Martin who is ADC’s controller and chief financial officer.

Mr. Martin’s letter indicated that ADC’s officers were paid advances against income earned by the company but, in error, the payments had been set up on the payroll and appropriate taxes had been withheld as if the payments were payroll which, in fact, they were not. In addition to the form PR-189, Mr. Martin also attached documents which had been submitted to the Internal Revenue Service. He indicated that ADC had received Federal refunds of \$118,583.27, which included interest. The letter stated: “All of this was also documented to New York State at the same time and to date have not heard anything. Please accept this as a new filing.”

2. On November 21, 1996, a letter was issued to Mr. Martin from the Division’s Processing and Revenue Management Division which stated, in part, as follows: “A review of the 1990 account indicates that the year-end reconciliation (IT-2103) and W-2’s were never filed. Assessment L003810357 was issued for these forms and has never been responded to. We have no record of having received Application for Refund prior to this year.” On the basis that the statute of limitations expired as to tax year 1990, the Division denied ADC’s refund claim.¹

¹ The copy of this letter which was received into evidence at the hearing was undated. Both the Division’s answer and the Conciliation Order (CMS. No. 158613) dated October 3, 1997 indicate that the refund denial was dated November 21, 1996, and ADC has not disputed this date.

3. Harold R. Martin, ADC's controller and chief financial officer, appeared at the hearing held in this matter and testified concerning ADC's standard procedures for mailing returns and other such documents. Mr. Martin prepares financial statements and tax returns for ADC and 12 to 15 related companies.

He stated that in 1990 or 1991, he became aware that certain principals of the company were erroneously being paid wages rather than advances against earnings (*see*, Finding of Fact "1"). When he realized the error, he stated that he filed requests with both the Internal Revenue Service ("IRS") and the Division for refunds of Federal and State withholding taxes erroneously deducted and paid by ADC.

4. As indicated in Finding of Fact "1", Mr. Martin filed a claim for refund with the IRS, on behalf of ADC, seeking a refund of \$87,259.63 in Federal withholding taxes and \$31,323.64 in Social Security taxes. He filed a Federal form 941C, Statement to Correct Information, along with corrected payroll tax returns. The covering letter to the IRS, dated June 28, 1991, was written on the stationery of Avon Electrical Supplies, Inc., an affiliate of ADC.² The IRS refunded the appropriate amounts of tax to ADC pursuant to its refund request.

Mr. Martin testified that, while he filed a request for refund with the Division on June 28, 1991, he could not locate a copy of the refund claim due to the fact that there were two Federal audits in the interim and, in addition, the company had moved its location and many records were discarded.

² Harold R. Martin stated that all of the bookkeeping and preparation of tax returns are done in his office which is located at the main headquarters of Avon Electrical Industries, Inc. ADC has its offices at a different location.

5. A Conciliation Conference was held by the Division's Bureau of Conciliation and Mediation Services ("BCMS") on June 19, 1997. At the conciliation conference, the Division was represented by Donald Bullett, Tax Technician II.

Mr. Bullett's responsibilities include the review and processing of refund claims as well as advocating cases before BCMS. Mr. Bullett reviewed the file for ADC and also discussed the matter with the Division's Tax Compliance and Processing Bureaus. His review and search of ADC's files indicated that the Division did not receive a refund request for 1990 withholding taxes from ADC until July 1996 (*see*, Finding of Fact "1").

6. Harold R. Martin testified concerning the standard mailing procedures employed by ADC and its affiliates. Mr. Martin prepares the document and then gives it to the bookkeeper who, during the period at issue, was Terry Nobile.

Mr. Martin testified that the claims for refund of Federal and State withholding taxes were prepared and mailed at the same time. With respect to the claim for refund which petitioner contends was initially sent to the Division in June 1991, Mr. Martin stated that after preparing the form PR-189, Application for Refund of Employer's Withholding Tax, and attaching copies of other relevant documents (forms 941C, W-3C and W-2C), he asked the bookkeeper to type the envelope. He states that he saw her type the envelopes for both the State and Federal refund applications and then saw her put the documents into the envelopes. The normal procedure is for the bookkeeper to walk the mail into a room where a Pitney Bowes metering machine is located. At 12:00 noon and again at 4:00 P.M. each day, the mail is taken directly to the post office by "one of our warehouse people."

When asked if the refund claims were sent out by registered or certified mail, Mr. Martin stated, "I would be lying if I remembered because I wasn't the one that mailed it. But my gut reaction was that it was."

7. Mr. Martin testified that in January 1992, he realized that he had not received a response to his claim for refund from the Division. He stated that he then telephoned the Division and was told to write to the Withholding Tax Bureau which he did. In April 1992, he telephoned Ronald Michalak, head of the Division's Problems Resolution Unit, a person with whom he had had some dealings in the past. He subsequently wrote to Mr. Michalak concerning the failure of the Division to respond to his refund claim. Mr. Martin testified that he wrote to Mr. Michalak again because "we weren't getting anywhere." When he subsequently telephoned Mr. Michalak in March 1993, he was told that Mr. Michalak had retired.

Mr. Martin stated that he then got in touch with Mike Masterson, who also worked in the Problems Resolution Unit. Mr. Martin testified that he was told by Mr. Masterson to resubmit ADC's refund application and that Mr. Masterson would "walk it through the system." Accordingly, in July 1996, he resubmitted ADC's application for refund along with copies of documents previously submitted to the IRS. It is the July 1996 letter with accompanying documents which the Division claims was the initial claim filed by ADC.

8. At the hearing, petitioners introduced into evidence the following:

(a) a copy of the letter to Mike Masterson, dated July 22, 1996, along with a form PR-189, Application for Refund of Employer's Withholding Tax;

(b) a copy of the cover letter, dated June 28, 1991, sent to the IRS along with copies of four forms W-2c, Statement of Corrected Income and Tax Amounts, for each of the four

principals involved, a form W-3c, Transmittal of Corrected Income and Tax Statements, and a form 941C, Statement to Correct Information;

(c) a copy of a letter dated June 28, 1991, from Harold R. Martin to the Division's Tax Compliance Bureau which states that it is a formal request for the refund of \$25,125.42;

(d) a copy of a letter dated January 10, 1992, from Harold R. Martin to the Division's Withholding Tax Bureau;

(e) a copy of a letter dated April 25, 1992, from Harold R. Martin to Mr. Ronald Michalak of the Division's Problems Resolution Unit;

(f) a copy of a letter dated March 23, 1993, from Harold R. Martin to Mr. Ronald Michalak of the Division's Problems Resolution Unit.

9. The letter to the IRS (*see*, Finding of Fact "8[b]") dated June 28, 1991 was written on stationery of Avon Electrical Supplies, Inc. This letterhead had the name of the company at the top and its address (901 Long Island Motor Parkway, Hauppauge, L.I., N.Y. 11788) and three telephone numbers at the bottom. The letter was signed by Harold Martin, Controller.

Each of the letters addressed to the Division and dated June 28, 1991, January 10, 1992, April 25, 1992 and March 23, 1993 (*see*, Finding of Fact "8[c], [d], [e] and [f]") was written on an identical letterhead of "Avon Electrical Supplies Inc. ET. AL." which appears across the top. The company's address (901 Motor Parkway, Hauppauge, New York 11788), telephone number and fax number (there was no fax number on the letterhead used for the June 28, 1991 letter to the IRS) are in the upper right-hand corner of the letterhead. None of these letters was signed.

The July 22, 1996 letter to Mr. Mike Masterson of the Division's Problems Resolution Unit was written on the letterhead of Avon Electrical Supplies Inc. ET. AL. The company's

name, address (60 Hoffman Ave., Hauppauge, New York 11788), telephone number and fax number appear in the upper right-hand corner of the letterhead. The letter was unsigned.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner relies upon the testimony of its controller and chief financial officer, Harold R. Martin, to prove timely filing of its refund claim for the year at issue. Citing certain Federal cases (*Wood v. Commissioner*, 909 F2d 1155, 90-2 US Tax Cas ¶ 50,488; *Anderson v. United States*, 966 F2d 487, 92-1 US Tax Cas ¶ 50,308), petitioner maintains that oral testimony (such as that offered by Mr. Martin) can be sufficient to prove mailing of documents. It alleges that the testimony of its witness, a licensed professional (a certified public accountant) who is aware of the time constraints and filing requirements, together with the fact that both the Federal and State refund claims were subjected to the same mailing procedures and that the Federal refund claim was received in a timely manner is sufficient to prove that petitioner timely placed the claim for refund in the mail.

Petitioner cites to *T.J. Gulf, Inc. v. New York State Tax Commn.*(124 AD2d 314, 508 NYS2d 97) wherein the Court stated that the presumption of receipt arises upon the presentation of proof by the sender that it has a routine office practice and procedure for mailing which demonstrates that the document was, in fact, properly addressed and mailed. Petitioner contends that the testimony of Mr. Martin established that there was a standard procedure and that the procedure was followed in this case.

11. In response, the Division notes that Tax Law § 691(a) states that proof of timely mailing is either the U.S. Postal Service postmark date or the date of registration or certification by the U.S. Postal Service. It maintains that where a taxpayer uses ordinary mail, it bears the risk that the postmark may not be timely affixed or that the claim may not be delivered at all.

Further, the Division notes that in *Matter of Sipam* (Tax Appeals Tribunal, March 10, 1988), the Tribunal stated that proof of ordinary mailing is insufficient to prove timely filing where there is no actual delivery. As to petitioner's contention that *Wood v. Commissioner* (*supra*) and *Anderson v. United States* (*supra*) permit oral testimony to establish mailing of documents, the Division states that in *Matter of Dattilo* (Tax Appeals Tribunal, May 11, 1995), the Tribunal specifically declined to follow the holdings in those Federal cases.

CONCLUSIONS OF LAW

A. Tax Law § 687(a) provides that a claim for credit or refund of an overpayment of income tax must be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever is later. The taxpayer bears the burden of proving that the claim for refund was timely filed (Tax Law § 689[e]).

B. In *Matter of Sipam Corporation* (*supra*), the Tribunal stated: "Use of registered mail is prima facie evidence that the document was delivered. Where a taxpayer uses ordinary mail, the taxpayer bears the risk that a postmark may not be timely fixed by the postal service or that the document may not be delivered at all."³

Despite Mr. Martin's "gut reaction" (*see*, Finding of fact "6") that the refund claims were mailed by registered or certified mail, petitioner has produced no U.S. Postal Service receipts to corroborate his testimony. Absent such receipts and noting that Mr. Martin stated that he did not remember for certain and that he was not the one who mailed the refund claims, it must be presumed that the documents were mailed by ordinary mail.

³ The Tribunal's decision in *Sipam* noted that certified mail could be used as an alternative to registered mail.

C. In the case at issue, an employee of the Division, Donald Bullett, stated that in the course of his duties of reviewing and processing refund claims, he reviewed ADC's file and, in addition, discussed the matter with the Division's Tax Compliance and Processing Bureaus since Mr. Martin claimed to have sent letters to each. Mr. Bullett testified that his review and search of the Division's files reveals that the Division did not receive a refund request from ADC until July 1996 (*see*, Finding of Fact "5").

Absent actual delivery of the claim for refund which ADC claims was mailed on June 28, 1991, the Division asserts that the Tribunal's decision in *Sipam (supra)* is applicable since, in that case, the Tribunal held that proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing, where there is no actual delivery of the document in question. ADC, on the other hand, points to *Wood v. Commissioner (supra)* and *Anderson v. United States (supra)* as well as other Federal cases cited in its brief, for the proposition that a taxpayer can use extrinsic evidence to prove mailing even where there was no delivery of the document.

D. As the Division has correctly noted in its brief, however, the Tribunal, in *Matter of Dattilo* (Tax Appeals Tribunal, May 11, 1995), while acknowledging the holdings in *Wood* and *Anderson*, declined to follow those Federal cases. The Tribunal went on to say that even if it elected to follow the rule stated in *Wood* and *Anderson*, such a rule would not apply in *Matter of Dattilo* because in *Wood* and *Anderson*, witnesses testified that they had personally seen the postmark affixed. In *Dattilo*, that petitioner's testimony was that he deposited the document in a mailbox outside of the post office; there was no evidence that a postmark was actually affixed to the envelope containing the document to be filed.

The facts in the present matter are somewhat similar to the facts in *Dattilo* in that there has been no evidence presented to show that a postmark was ever affixed to ADC's claim for refund.

ADC's controller, Harold R. Martin, testified that he saw the bookkeeper type the envelopes for both the State and Federal refund claims and then put the refund claims in the envelopes. He then testified as to the mailing procedures at ADC (*see*, Finding of Fact "6") and admitted that he did not mail the documents. Absent actual proof of mailing, i.e., that a postmark was affixed to the envelope containing the refund claim allegedly sent on June 28, 1991, it must be found that the holding in *Matter of Sipam* is applicable in this case. Since there was no actual delivery of ADC's claim for refund, proof of ordinary mailing such as that offered through the testimony of Mr. Martin, is insufficient, as a matter of law, to prove timely filing.

E. In its letter submitted in lieu of a reply brief, ADC relies upon *T.J. Gulf, Inc. v. New York State Tax Commn.* (*supra*) and *Matter of Dattilo* (*supra*) for its assertion that a presumption of delivery arises upon presentation of sufficient evidence to show that the sender has a standard procedure for mailing by one with knowledge of such procedures and, in addition, evidence that this procedure was followed in the matter at issue. While the legal theory set forth by ADC is correct, its application to this case is not warranted.

A close examination of the evidence presented by this petitioner reveals that the letterhead used in the cover letter for the Federal claim for refund and the State claim for refund were not the same (*see*, Finding of Fact "9"). If, as Mr. Martin contends, both claims were prepared at the same time and were typed by the bookkeeper, it would certainly seem logical to assume that the cover letters accompanying the claims for refund would have been prepared on the same letterhead. Moreover, while Mr. Martin testified that he was unable to locate a copy of the claim for refund allegedly sent to the Division on June 28, 1991 (he produced copies of all documents sent to the IRS on the same date), he did locate a copy of the cover letter for the State refund claim along with other letters allegedly sent to the Division at subsequent intervals. The letters

of June 28, 1991, January 10, 1992, April 25, 1992 and March 23, 1993 were all written on the same letterhead. The fact that *none* of these was received by the Division seems rather curious.

Based upon the foregoing, it cannot be found that the testimony of ADC's controller, Harold R. Martin, was credible. Accordingly, ADC has failed to establish that its procedures for the mailing of documents was followed on June 28, 1991, the date on which it claims that it mailed the claim for refund to the Division.

F. The petition of Avon Datacom Corp. is denied.

DATED: Troy, New York
July 15, 1999

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE