

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTOPHER S. AND AVERY F. BRIGHTON	:	DETERMINATION
		DTA NO. 816838
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the	:	
Years 1993 and 1994.	:	

Petitioners, Christopher S. and Avery F. Brighton, 60 Rumson Road, Rumson, New Jersey 07760, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1993 and 1994.

The Division of Taxation, appearing by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion for summary determination on the ground that petitioners failed to file a request for conciliation conference with the Bureau of Conciliation and Mediation Services or file a petition with the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency.

The Division of Taxation, together with its Notice of Motion, submitted the affidavit of Christina L. Seifert, Esq., with attachments, including the affidavits of Geraldine Mahon and James Baisley, in support of its motion. Petitioners, appearing by Peter J. Maldjian, CPA, did not respond to the motion of the Division of Taxation. The Division of Taxation's motion was

filed on April 23, 1999. Petitioners' response was due on May 24, 1999 which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings, and the affidavits and other documents submitted in support of the motion of the Division of Taxation, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners timely filed their request for a conciliation conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Deficiency.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to Christopher S. and Avery F. Brighton ("petitioners") a Notice of Deficiency dated March 23, 1998 which was addressed to petitioners at "9 Serpentine Dr, Highlands, NJ 07732-2123." The notice bears assessment identification number L-014731354-7. The Notice of Deficiency asserted additional tax due in the amount of \$7,205.19, plus penalty and interest, for a total amount due of \$11,313.19 for the years 1993 and 1994. An identical notice was issued to Avery F. Brighton and Christopher S. Brighton addressed to 920 Park Avenue, Hoboken, NJ 07030-4250

2. Petitioners, Christopher S. and Avery F. Brighton, filed a request for a conciliation conference seeking review of a Notice of Deficiency of personal income tax dated March 23, 1998. The request appears to bear the signature of petitioners' representative, Peter J. Maldjian, CPA, and is dated August 13, 1998. The request and attached documents were initially mailed to "New York State Department of Taxation and Finance, Audit Division-Metropolitan D.O.-Income Tax, 55 Hanson Place, Brooklyn, New York 11217-1579," which forwarded the request

on to the Bureau of Conciliation and Mediation Services (“BCMS”). BCMS received the request on August 19, 1998.

3. On September 25, 1998, BCMS issued to petitioners a conciliation order denying their request for a conciliation conference. The conciliation order reasoned, in part, that “[t]he Tax Law requires that a request be filed within 90 days from the date of the statutory notice. Since the notice was issued on March 23, 1998, but the request was not received until August 19, 1998, or in excess of 90 days, the request is late filed.” The caption of the conciliation order refers to assessment L014731354.

4. In support of the motion for summary determination, the Division submitted affidavits from two Division employees, Geraldine Mahon and James Baisley, explaining the Division’s mailing procedures with respect to notices of deficiency; copies of certified mail records (“CMR”); and copies of the notices of deficiency which were sent to petitioners.

5. Geraldine Mahon is the Principal Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division. In her affidavit, Ms. Mahon described the Division’s general procedure for processing notices of deficiency prior to shipment to the Division’s mechanical unit for mailing.

She explained how she receives a computer printout or CMR and the corresponding statutory notices, each predated with the anticipated date of mailing and each assigned a certified control number. The CMR for the block of notices issued on March 23, 1998, including the notices issued to petitioners, consisted of 29 fan-folded (connected) pages. All pages are connected when the CMR is delivered into the possession of the U.S. Postal Service (“USPS”). The pages remain connected when the CMR is returned to Ms. Mahon’s office unless she requests that they be disconnected.

The CMR for the statutory notices mailed by certified mail on March 23, 1998, including the notices issued to petitioners, bears certified control numbers which run consecutively (P 911 003 513 through P 911 003 831). Each page contains 11 entries, for a total number of 319.

In the upper left hand corner of page 1 of the CMR, the date “3/12/98” was manually changed to “3/23/98.” The original date of “3/12/98” was the date that the entire CMR was printed. Ms. Mahon states that the CMR is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division’s Mechanical Section. The handwritten change of the date from “3/12/98” to “3/23/98” was made by personnel in the Division’s Mail Processing Section. The change was made to ensure that the date on the CMR conformed with the actual date that the statutory notices and the CMR were delivered into the possession of the USPS.

Each statutory notice is placed in an envelope by Division personnel and the envelopes are then delivered into the possession of a USPS representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the CMR. In this particular case, the USPS representative signed or initialed page 29 of the CMR, affixed a postmark to each page of the CMR and circled “319” to indicate that the total pieces listed on the CMR were the total number of pieces received and mailed.

Page 1 of the CMR indicates that a Notice of Deficiency, with notice number L014731354, was sent to Christopher S. Brighton, 920 Park Ave, Hoboken, NJ 07030-4205, by certified mail using control number P 911 003 522. In addition, page 2 of the CMR indicates that a Notice of Deficiency bearing the same notice number was sent to Avery Brighton, 9 Serpentine Dr, Highlands, NJ 07732-2123, by certified mail using control number P 911 003 531. A U.S.

postmark on each page of the CMR confirms that the notices of deficiency were sent on March 23, 1998.

Ms. Mahon states that in the regular course of business and as a common office practice, the Division does not request, demand or retain return receipts from certified or registered mail generated by CARTS. The procedures followed and described in Ms. Mahon's affidavit were the normal and regular procedures of the CARTS Control Unit on March 23, 1998.

6. James Baisley is the Chief Mail Processing Clerk in the Division's Mail Processing Center. He supervises the entire mail processing staff, including the staff that processes and delivers outgoing mail to the various branches of the USPS.

Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated "Outgoing Certified Mail." A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of

standard procedure, the CMR is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS on the following day by a member of the Mail Processing Center staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon.

Mr. Baisley reviewed the copy of the CMR listing the pieces of certified mail delivered to the Colonie Center branch of the USPS by the Mail Processing Center staff on March 23, 1998. A review of the CMR indicates that a USPS employee signed page 29 of the CMR, affixed a postmark to each page of the document and circled the total number of pieces received by the USPS. As to the total number of pieces of certified mail received, the last page of the CMR indicates that 319 pieces were delivered to the USPS.

Based upon Mr. Baisley's review of the affidavit of Geraldine Mahon, including the exhibits attached to the affidavit (copies of the CMR and notices of deficiency), and his personal knowledge of the procedures of the Mail Processing Center, he was able to determine that an employee of the Mail Processing Center delivered two pieces of certified mail addressed to "BRIGHTON-CHRISTOPHER S, 920 PARK AVE, HOBOKEN, NJ, 07030-4205" and "BRIGHTON-AVERY F, 9 SERPENTINE DR, HIGHLANDS, NJ 07732-2123" to the Colonie Center branch of the USPS in Albany, New York in sealed, postpaid windowed envelopes for delivery by certified mail. Mr. Baisley states that the names of Avery F. and Christopher S. Brighton and the respective addresses, as set forth on the statutory notices, would have been displayed in the windows. He further notes that a Notice of Deficiency was also sent under

separate cover to Lynn A. Conover, 126 Half Mile Road, Red Bank, NJ 07701, who was Avery F. Brighton's representative at the time the notices were issued.

Based upon his review of the CMR, Mr. Baisley could determine that a member of his staff obtained a copy of the CMR delivered to and accepted by the USPS on March 23, 1998 for the records of the Division's CARTS Control Unit. He stated that the procedures in his affidavit are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and he also stated that these procedures were followed on March 23, 1998.

7. For the year 1995, petitioners filed a form IT-203, Nonresident and Part-Year Resident Return on which they listed their address as 9 Serpentine Dr, Highlands, NJ 07732. Only Mr. Brighton's name appears at the top of the return, but both petitioners have signed the return. On their 1996 nonresident return filed in April 1997, the same address was listed on the return. Again, only Mr. Brighton's name appears on the top of the return, with Mrs. Brighton's name and social security number having been crossed out. As with the 1995 return, however, both petitioners have signed the return. For the year 1997, petitioners again filed a form IT-203, Nonresident and Part-Year Resident Return, on which they listed the same address. As with the earlier returns, only Mr. Brighton's name appears on the top of the return, but both petitioners' social security numbers appear on the return and both petitioners have signed the return.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there

is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; *see also*, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially guided by the following regulation:

The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1], *see also*, Tax Law § 2006[6].)

Furthermore, a motion for summary determination made before the Division of Tax Appeals is “subject to the same provisions as motions filed pursuant to section three thousand two hundred twelve of the CPLR.” (20 NYCRR 3000.9[c]; *see also*, ***Matter of Service Merchandise, Co.***, Tax Appeals Tribunal, January 14, 1999.) Summary determination is a “drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Moskowitz v. Garlock*, 23 AD2d 943, 259 NYS2d 1003, 1004; *see*, *Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the “procedural equivalent of a trial” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179), undermining the notion of a “day in court,” summary judgement must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court “to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist” (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). If any material facts are in dispute, if the existence of a triable issue of fact is “arguable,” or if contrary inferences may be reasonably drawn from undisputed facts, the motion must be denied

(*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. Petitioners in this case did not respond to the motion of the Division for summary determination. Therefore, petitioners are deemed to have conceded that the facts as presented in the affidavits submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, *supra* at 179; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458, 461). Such evidence in this matter includes the petition and the attachments submitted with the petition (20 NYCRR 3000.9[b][1]).

C. A petition contesting a Notice of Deficiency for personal income tax must be filed within 90 days after the mailing of the notice by certified mail to the taxpayer's last known address in or out of the State (Tax Law § 681[a], [b]; § 689[b]). As an alternative to filing a petition with the Division of Tax Appeals, a taxpayer may request a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services; the time period for filing such a request is also 90 days (Tax Law §170[3-a][a]). The filing of a petition or a request for conciliation conference is a prerequisite to the jurisdiction of the Division of Tax Appeals (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

D. Petitioners' Highlands, New Jersey address was the address set forth on both their 1995 and 1996 returns which were the last two returns filed by them prior to the issuance of the Notice of Deficiency (*see*, Finding of Fact "7"). Petitioners do not contend that the Highlands address to which the Notice of Deficiency was sent by the Division was incorrect nor do they allege that

they did not receive the Notice of Deficiency. Accordingly, it is hereby determined that the Division sent the Notice of Deficiency to petitioners' last known address in accordance with the provisions of Tax Law § 681(a).¹

E. When the timeliness of a request for a conciliation conference or a petition is at issue, the Division bears the burden of proving both the date and fact of mailing of the statutory notice (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A notice is mailed when it is delivered to the custody of the United States Postal Service (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992).

The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and, second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Geraldine Mahon and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing, by certified mail, of notices of deficiency. The affidavits generally describe the various stages of producing and mailing notices of deficiency and attest to the authenticity and accuracy of the copies of the notices of deficiency and the certified mail record submitted as evidence of actual mailing herein. The documents establish that the general mailing procedures described in the Mahon and Baisley affidavits were followed with respect to the Notice of Deficiency issued to petitioners.

¹There is nothing in the record to explain the mailing of the Notice of Deficiency to Mr. Brighton at the Hoboken, New Jersey address. However, the record establishes that the Highlands, New Jersey address was petitioners' last known address and a Notice of Deficiency was mailed to both petitioners at such address.

Petitioners' names and address appear on page one and two of the certified mail record which bears a USPS postmark of March 23, 1998 along with the initials or signature of a postal service employee. There are 319 certified control numbers listed on 29 pages and the USPS employee who initialed or signed the certified mail record indicated that he received 319 items for mailing. The Division has, therefore, established that it mailed the Notice of Deficiency to petitioners by certified mail on March 23, 1998. Accordingly, the 90-day period for the filing of petitioners' Request for Conciliation Conference commenced on March 23, 1998; official notice is taken that such 90-day period expired on June 22, 1998 (since June 21, 1998 fell on a Sunday). Clearly, petitioners' Request for Conciliation Conference which was dated August 13, 1998 and received at BCMS on August 19, 1998 was untimely.

F. Finally, it is noted that petitioners are not without recourse here, for they may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If their request for a refund is denied, petitioners may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law §§ 689[c]; 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

G. The Division's motion for summary determination is granted, and the petition of Christopher S. and Avery F. Brighton is hereby dismissed.

DATED: Troy, New York
July 8, 1999

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE