

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	DETERMINATION
JACK AND NEVERE TENBEKJIAN	:	DTA NO. 818062
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1995 through 1997.	:	

Petitioners, Jack and Nevere Tenbekjian, 479 Ridgewood Avenue, Glen Ridge, New Jersey 07028, 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 years 1995 through 1997.

The Division of Taxation ("Division") by its representative, Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq., of counsel), brought a motion dated January 26, 2001, returnable February 26, 2001, for an order directing the entry of summary determination in favor of the Division on the ground that petitioners failed to file a request for a conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency. Petitioners' letter in opposition was filed with the Division of Tax Appeals on February 8, 2001, which date began the 90-day period for issuance of this determination.

Upon review of all of the papers filed in connection with this motion, Arthur S. Bray, Administrative Law Judge, renders the following determination.

FINDINGS OF FACT

1. In support of its motion for summary determination, the Division submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts that since petitioners did not file a request for a conciliation conference or file a petition with the Division of Tax Appeals within the 90-day period prescribed by Tax Law § 170(3-a)(a) and § 689(b), the late request for a conciliation conference was properly denied and the petition before the Division of Tax Appeals should be dismissed with prejudice for lack of jurisdiction.

2. The Division included with its affidavit a copy of its answer to the petition, dated December 7, 2000, the affidavit of Geraldine Mahon with attached exhibits, the affidavit of James Baisley, a copy of petitioners' nonresident and part-year resident return for 1998, the affidavit of Mary Sauter with an attached exhibit, a copy of the Request for Conciliation Conference, a copy of the envelope the request was mailed in and a copy of the Conciliation Order Dismissing Request, dated August 25, 2000.

3. As noted, the Division submitted a series of affidavits pertaining to the mailing of the notices. The first affidavit was that of Geraldine Mahon, a principal clerk of the Case and Resource Tracking System ("CARTS") control unit, attached to which was a copy of the certified mail record dated January 27, 2000 and a Notice of Deficiency dated January 27, 2000.

As part of her regular duties Ms. Mahon supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the "certified mail record." Each of the notices is assigned a certified control number which is recorded on the certified mail record.

The certified mail record pertaining to the mailing at issue consisted of 24 fan-folded (connected) pages and included the Notice of Deficiency issued to Jack Tenbekjian and Nevere Tenbekjian on January 27, 2000. The certified mail record has all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon. The document itself consists of 24 pages. Each of the pages has 11 entries with the exception of page 24 which has 8 entries for a total of 261 entries, and is a true and accurate copy of the certified mail record issued by the Division on January 27, 2000, including the Notice of Deficiency issued to Jack Tenbekjian and Nevere Tenbekjian on said date. In the upper left hand corner of the certified mail record, the printed date has been crossed out. This date was changed manually to "1-27-00." The original date, January 17, 2000, was the date that the certified mail record was printed, which is approximately 10 days in advance of the anticipated mailing of the notices. This procedure allows for sufficient

lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's Mail Processing Center so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

Each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this case, the postal representative placed a postmark on each page. A postal representative did not affix his or her initials or signature to the certified mail record.

The first page of the certified mail record indicates that a notice numbered L 017373653 was sent to Jack Tenbekjian, 479 Ridgewood Ave., Glen Ridge, New Jersey 07028-1715 by certified mail using control number P 911 205 583.¹ The notice number and the certified control number correspond with those found on the notice issued to petitioners on January 27, 2000. Further, in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

The procedures followed and described are the normal and regular procedures of the CARTS control unit.

4. The certified mail record in this case consists of 24 consecutively numbered pages wherein the certified control numbers run successively from P 911 205 577 on page 1 to P 911 205 837 on page 24. On the final page, there is a printed entry of 261 for the "total pieces and amounts listed." This number is not circled.

5. The Notice of Deficiency was dated January 27, 2000 and was addressed to Jack

¹ The certified mail record lists only the name of Jack Tenbekjian because it is standard procedure for the certified mail record to set forth the name of the primary taxpayer associated with the statutory notice. Thus, when as here, a husband and wife file a joint personal income tax return wherein the husband's social security number is listed in the place designated for the primary taxpayer, only the husband's name will appear on the certified mail record.

Tenbekjian and Nevere Tenbekjian, 479 Ridgewood Ave., Glen Ridge, NJ 07028-1715. The instructions on the notice stated, among other things, **"If we do not receive a response to this notice by 4/26/00:** This notice will become an assessment subject to collection action."

(Emphasis in original.) The notice asserted a deficiency of New York State personal income tax in the amount of \$76,125.20 plus interest in the amount of \$17,202.17 and penalty in the amount \$12,407.33 for a balance due of \$105,734.70.

6. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for 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. 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 Division's CARTS control unit. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The above

procedures 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.

7. The Division also submitted the affidavit of Mary Sauter, a Legal Assistant in the Office of Counsel. As part of her duties, Ms. Sauter prepares U.S. Postal Service Forms 3811-A for mailing. The Postal Form 3811-A is used by the mailer to request return receipts after mailing. A Form 3811-A is sent to the post office where the piece of mail in question was delivered. The delivery post office then completes the form by providing the mailer the delivery date and the name of the individual or organization that received the mail. Form 3811-A does not provide the mailer with the recipient's signature.

8. Attached to Ms. Sauter's affidavit is a copy of the Form 3811-A which was requested for petitioners herein. This form indicates that a piece of mail bearing article number P 911 205 583 and addressed to petitioners at the address listed on the subject notice was delivered to "J. Tenbekjian" on February 9, 2000.

9. As noted, the Division's motion papers included a copy of the envelope which contained petitioners' Request for Conciliation Conference, a copy of the Request for Conciliation Conference and a copy of the Conciliation Order Dismissing Request. The envelope indicates that the Request for Conciliation Conference was postmarked by a postal meter on August 8, 2000. The Request for Conciliation Conference was dated April 25, 2000 and bore an indated stamp from the Department of Taxation and Finance of August 10, 2000.

10. Petitioners' Nonresident and Part-Year Resident Income Tax Return for the year 1998 shows the same address as that used to mail the Notice of Deficiency.

11. In response to the motion, petitioners' representative submitted a letter which stated that the original notice contained a form to request a conciliation conference. Because of the pressure of the tax season, petitioners' representative states that the request for the conciliation conference was not filed until after April 15, 2000 but before the end of the 90-day period. He submits that he knew the urgency of the timely filing of the request and it was filed timely.

However, he does not have a receipt for the filing because the temporary personnel who worked during this period did not have the letter certified.

Since petitioners' representative did not receive a response to their request, on July 25, 2000 he followed up on the lack of a response. At this juncture, petitioners' representative learned that the Division did not have a copy of the request. Petitioners' accountant then sent a copy of the request to the Division and was told that their original request was untimely and the request for a conciliation conference was denied. They were also told that they should file another petition for a conciliation conference to challenge the conclusion that the request for a conciliation conference was untimely.

Petitioners' representative also communicated with Mr. Bernard Miller, an auditor who was assigned to this case. Mr. Miller told petitioners' representative that he did not have any knowledge of a request for a conciliation conference being filed and suggested that petitioners make another request. On August 8, 2000, petitioners' representative mailed a request for a conciliation conference which was received by the Bureau of Conciliation and Mediation Services ("BCMS") on August 10, 2000. Thereafter, petitioners received a document dated August 25, 2000 stating that the request was denied because it was filed late. During a subsequent conversation with the conciliation conferee, it was suggested that petitioners file a petition with the Division of Tax Appeals. This proceeding ensued.

SUMMARY OF PETITIONERS' POSITION

12. Petitioners' representative maintains that the problem is the result of the initial auditor questioning the allocation of salary between New York and New Jersey. The taxpayer did work in both states and filed tax returns in both New York and New Jersey which allocated his income based on his physical presence in each state. Petitioners' representative submits that there is virtually no difference between the tax rates in each state and that the burden of double taxation is a hardship on the taxpayer. Petitioners' representative states that "we would appreciate the allowance of timely filing so that we can discuss the original disallowance rather than a

conference to obtain the approval of the timely filing of a petition to be heard.” He also submits that he would appreciate leniency in this situation because he bears the burden of liability.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

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. 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 (emphasis added).

B. Section 3000.9(c) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is “arguable” (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This

section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” In this case, the record is clear that the address listed on the subject notices was petitioners’ last known address (*see*, Finding of Fact “10”). A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]).

D. Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for a conciliation conference with BCMS is at issue, it is incumbent upon the Division to demonstrate that the notice at issue was properly mailed and when it was mailed (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). This requires that the Division submit evidence sufficient to prove that it has established general mailing procedures and that those procedures were followed in this instance (*Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*). If the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of proper mailing arises (*MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112). If the Division is unable to meet this burden, the statutory time limit to file a petition is in effect tolled and the petition will be deemed timely filed (*Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995).

E. The affidavits of Ms. Mahon and Mr. Baisley contain sufficient proof to establish the standard procedure of the Division for issuing notices of deficiency (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

F. It is clear from the affidavit of James Baisley that the standard procedure for issuing notices of deficiency was not followed in this case. Mr. Baisley notes that a USPS employee will affix a postmark and his initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. Here, a USPS employee neither signed nor initialed the CMR. In addition, a USPS employee failed 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 result, the certified mail record is flawed because it does not indicate how many of the 261 pieces listed on the certified mail record were actually received at the post office (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995; *Matter of Turek*, Tax Appeals Tribunal, January 19, 1995).

G. In this case, the Division has submitted proof of the actual receipt of the Notice of Deficiency by petitioners. The receipt of the notice is established by the Division's introduction of the Postal Service Form 3811-A which confirms delivery of the notice to petitioners on February 9, 2000. Using this later date of actual receipt as the starting date for the 90-day period within which to protest the notice (*see, Matter of Kimmey*, Tax Appeals Tribunal, December 23, 1993; *Matter of Avlonitis*, Tax Appeals Tribunal, February 20, 1992), it is clear that the request for a conciliation conference, which was filed on August 10, 2000, was filed late.

H. Where, as here, 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 (*Matter of Sipam Corporation*, Tax Appeals Corporation, March 10, 1988). Further, since there is no evidence of a postmark or registration receipt that indicates timely mailing, testimony or other proof of the actual date of mailing will not be considered (*id*).

I. Petitioners' representative is apparently under the mistaken impression that there is discretion to consider the merits of the petition in the absence of a timely filing. Pursuant to Tax Law § 170(3-a)(a),(b) and § 689(b), petitioners had 90 days from the mailing of the notices of deficiency to file a request for a conciliation conference with BCMS. Here, it is clear that the request was filed well beyond the statutory deadline. There being no timely petition, the petition must be dismissed because the Division of Tax Appeals is without jurisdiction to review the substantive arguments presented (*Matter of Fresina*, Tax Appeals Tribunal, January 30, 1997; *Matter of Avlonitis, supra*). It is noted, however, 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).

J. The petition of Jack and Nevere Tenbekjian is dismissed.

DATED: Troy, New York
April 26, 2001

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE