STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTIAN LOTTERER	:	DETERMINATION DTA NO. 819042
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1999.	:	

Petitioner, Christian Lotterer, 311 N. 1st Street #4, Campbell, California 95008, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 1999.

On January 27, 2003 and February 10, 2003, respectively, petitioner, appearing *pro se*, and the Division of Taxation by Mark F. Volk, Esq. (Kevin R. Law, Esq., of counsel) consented to have this controversy determined upon documents and briefs to be submitted by June 16, 2003, which date began the six-month period for issuance of this determination. After review of the evidence and arguments presented, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has sustained his burden of proving that he paid to the Division of Taxation the amount of tax reported due on his 1999 New York State Nonresident and Part-Year Resident Income Tax Return.

FINDINGS OF FACT

1. For the year 1999, Christian Lotterer ("petitioner") timely filed form IT-203, New York State Nonresident and Part-Year Resident Income Tax Return, on which he reported total New York State and New York City personal income tax due in the amount of $1,920.00. A form W-2, Wage and Tax Statement, issued by his employer, Marriott International Administrative Services, Inc., indicated that New York State tax in the amount of $1,343.25 and New York City tax in the amount of $77.87 had been withheld from his wages for the year. Accordingly, pursuant to the computations as set forth on the return, petitioner owed additional tax of $499.00.

2. Petitioner's 1999 return was prepared by H & R Block in Jersey City, New Jersey. Petitioner thereafter issued a check dated April 12, 2000 payable to the State of New York in the amount of $499.00. This check (No. 226) was drawn on petitioner's account at Citibank. The check was apparently presented for payment in Philadelphia, Pennsylvania and petitioner's bank statement for the period May 10 through June 11, 2000 indicates that the amount of $499.00 was deducted from petitioner's account balance for check no. 226 on June 8, 2000. The back of the check contains at least three sets of serial numbers (one set includes the reference to Philadelphia, Pennsylvania) but is not otherwise endorsed.

3. On August 25, 2000, the Division of Taxation ("Division") issued a Notice and Demand for Payment of Tax Due to petitioner assessing tax due in the amount of $499.00, plus penalty and interest, for a total amount due of $525.76. The Notice and Demand indicated that the assessment (and imposition of penalty and interest) was based upon petitioner's failure to pay the tax shown as due on his 1999 personal income tax return on or before the due date.

4. After a conciliation conference was held before the Division's Bureau of Conciliation and Mediation Services ("BCMS"), the Conciliation Order (CMS No. 186165) canceled the penalty which had previously been assessed. However, the Conciliation Order sustained the tax due ($499.00) and imposed interest computed at the applicable rate.

5. The Division submitted an affidavit of Peter Van Buren, Tax Technician II in the Audit Division, who reviews and processes audits of New York State personal income tax returns and also reviews cases for field audit and desk audit selection. Based upon his review of the present matter, Mr. Van Buren determined that on March 23, 2000, petitioner filed a 1999 New York State Nonresident and Part Year Resident Income Tax Return reporting tax due of $499.00. However, he also determined that the Division "has no record of receiving any payment for the tax reported due on such return."

Mr. Van Buren represented the Division at the conciliation conference held in this matter. In the course of the conciliation conference, he examined the check which petitioner contends was remitted to the Division along with his return. Mr. Van Buren determined that the check was not deposited or endorsed by the Division and offered the opinion that "the check could have possibly been cashed by the Internal Revenue Service in Philadelphia." Mr. Van Buren's affidavit did not explain the basis for his determination that the check was not deposited or endorsed by the Division.

6. The Division's representative, Kevin R. Law, Esq., filed an Affidavit of Forgery or Alteration with Citibank on February 3, 2003. The form and instructions for filing the form were provided to Mr. Law by petitioner. The Affidavit of Forgery or Alteration was sent to Citibank by certified mail, return receipt requested (the return receipt indicates that the affidavit was received by the CBNA Check Collection Unit in Ballwin, Missouri on February 6, 2003). Mr.

Law's affidavit indicated that the payee, the State of New York, never received the check or the proceeds thereof. Citibank did not respond to the Affidavit of Forgery or Alteration.

SUMMARY OF THE PARTIES' POSITIONS

7. Petitioner contends:

a. The photocopies of the canceled check payable to the State of New York along with the Citibank statement indicating that the sum of $499.00 was deducted from petitioner's account prove that he made the payment of tax at issue;

b. The Division's general statement that the payment was not received does not constitute proof thereof;

c. While the Division claims that the IRS *may* have received and deposited the check, petitioner, in an effort to substantiate such claim, telephoned the IRS and was informed that it has no record of having received this amount ($499.00);

d. The Division claims that because the depository was in Pennsylvania, this is proof that the State of New York did not receive the proceeds of the check; however, no proof has been submitted by the State to show that it maintains no bank accounts in Pennsylvania; and

e. Petitioner contacted Citibank to determine whether or not the proceeds of the check could be refunded to him (whereupon he would agree to pay this amount over to the State of New York). He was informed that no refund could be made to the payor. It is the payee which must contest the nonreceipt of the funds. According to petitioner, this is accomplished by submitting an affidavit of nonreceipt to Citibank which will then submit the matter to the Federal Reserve which will attempt to trace the funds. If the Federal Reserve determines that the funds

were not received by the intended payee due to forgery or other similar circumstances, the Federal Reserve will refund the payment.

8. In response, the Division maintains that petitioner's check was not deposited or cashed by the Division nor does the Division have any record of having received the check. The Division also maintains that it has no affirmative duty to file an affidavit of nonreceipt with the Federal Reserve. Based upon the foregoing, petitioner's responsibilities to the State of New York, i.e., his obligation to pay his 1999 personal income taxes, have not been satisfied and the tax remains due and owing.

CONCLUSIONS OF LAW

A. It is well established that a presumption of correctness attaches to a notice and demand properly issued by the Division and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383 ***lv denied*** 81 NY2d 704, 595 NYS2d 398; ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174).

In order to demonstrate that the assessment of tax in the present matter was incorrect, petitioner must prove that prior to the issuance of the notice and demand, he remitted payment of his 1999 tax liability ($499.00) to the Division.

B. It is clear from the record herein that petitioner filed a timely 1999 return. The affidavit of a Division employee, Peter Van Buren, Tax Technician II, concedes that on March 23, 2000, petitioner filed a 1999 New York State Nonresident and Part Year Resident Income Tax Return on which he reported tax due in the amount of $499.00. What is in dispute is whether or not a check for $499.00 accompanied the return and was, therefore, received by the Division along with the return.

C. ***Matter of Mutual Life Ins. Co. v. New York State Tax Commn.*** (142 AD2d 41, 534 NYS2d 565), dealt with the issue of whether the petitioner was liable for interest on an allegedly delinquent payment of withholding tax due. Petitioner had issued a check for payment of the full amount of tax due and had mailed the check in accordance with its normal business practices. When subsequently notified by the Division that this amount had not been paid and, accordingly, that penalty and interest were now due thereon, petitioner searched its accounts and discovered that the check for payment of the tax was still outstanding. Petitioner thereupon stopped payment on that check and sent a replacement check to the Division. However, the Division still insisted that interest was due from petitioner (the Division withdrew its assessment of penalty).

Petitioner, in ***Mutual Life Ins. Co.*** (***supra***), presented evidence that the check had been prepared and mailed in compliance with its normal procedures, procedures which had produced a previously perfect record of compliance with withholding tax requirements. Petitioner also submitted a carbon copy of the check, a voucher necessary for the drawing of the check and affidavits from those involved in the drawing and mailing of the check. In response, the Division failed to produce any evidence that it never received the check. Accordingly, the Court, in annulling the Division's determination that interest was due, noted that: "[t]he Department's burden in this regard was light. It needed only to produce some evidence of its procedures when receiving returns and checks or that it had conducted at least a cursory review of its files for the check" (***id***., 534 NYS2d at 567).

In the present matter, the affidavit of the Division's employee, Peter Van Buren, Tax Technician II, indicates that a cursory review of the Division's files for petitioner's check was, in fact, made thereby satisfying the Division's burden as set forth in ***Mutual Life Ins. Co.***. However, the facts in the matter at issue can be easily distinguished from those in ***Mutual Life***

Ins. Co. Unlike ***Mutual Life Ins. Co.***, this petitioner's return was actually received by the Division and, in addition, this petitioner's check was not still outstanding but had, in fact, been deposited (or cashed) and the amount of the check had been deducted from petitioner's checking account. These distinguishing facts therefore require the Division to shoulder a greater burden than merely to make a cursory review of its files for the check.

As previously noted, the check had several deposit serial numbers placed upon it. Accordingly, there are a number of questions which only the Division (or its employees) can furnish answers to, such as: (1) Whether Division employees recognize any of these deposit serial numbers or, in the alternative, whether these employees can state with any degree of certainty that the serial numbers were not those of the Division; (2) What the Division's procedures are upon receiving a return which has a check attached thereto; (3) From a review of petitioner's return, whether it can be determined if a check was, in fact, attached; and (4) What the Division's procedures are in attempting to ascertain whether a payment was received and, in this particular matter, whether such procedures were followed.

Clearly, when a return is filed in a timely manner and a check for payment of tax due is issued and is subsequently deposited (or cashed) and the amount of the check is deducted from a taxpayer's checking account, that taxpayer has done everything in his power to sustain his burden of proving delivery of the return and the check (***see***, Tax Law § 689[e]). He issued a check to the State of New York for full payment of his tax obligation and the amount of the check was deducted from his account.

While perhaps petitioner, who issued a check to pay his 1999 tax obligation, or the Division, which was the intended payee of the check and allegedly did not receive the $499.00, should have made a more diligent inquiry of the bank or banks which were involved in this

matter, the fact of the matter is that petitioner has paid the sum of $499.00 to someone. Accordingly, in such an unusual case as this, i.e., where petitioner has proven that he issued the check to the proper payee and that the check has been deposited or cashed, the Division must produce more evidence of nonreceipt than a mere general allegation that it searched its records and found no evidence of receipt of the check. Evidence as to the Division's procedures must be produced as well as proof that these procedures were followed in the particular instance in question. While there is no equity jurisdiction in proceedings before an Administrative Law Judge (***see***, Tax Law § 2010), to require petitioner to pay his tax liability twice by permitting the Division to offer a mere general denial of receipt where petitioner has sustained his burden of proving payment pursuant to Tax Law § 689(e) with such compelling evidence would violate the stated purpose of the Division of Tax Appeals which is, among other things, to provide "the public with a just system of resolving controversies with such department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies."

D. The petition of Christian Lotterer is granted and the Notice and Demand for Payment of Tax Due issued to petitioner on August 25, 2000 is hereby canceled.

DATED: Troy, New York
November 26, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE