

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HECTOR KALB	:	SMALL CLAIMS DETERMINATION DTA NO. 820653
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Year 2001.	:	

Petitioner, Hector Kalb, 235 West 56th Street, #16P, New York, New York 10019, 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 and New York City personal income pursuant to the New York City Administrative Code for the year 2001.

A small claims hearing was held before Winifred M. Maloney, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 26, 2006 at 9:50 A.M., with all evidence to be submitted by August 15, 2006, which date began the three-month period for the issuance of this determination. Petitioner appeared by Erwin M. Rosenfeld. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

ISSUE

Whether the Division of Taxation properly denied petitioner's request for a conciliation conference on the basis that the request was not timely filed.

FINDINGS OF FACT

1. As a result of an audit of petitioner's New York nonresident income tax return for the year 2001, the Division of Taxation ("Division") issued a Statement of Proposed Audit Changes ("statement"), dated December 6, 2004, to petitioner, Hector Kalb, at "235 W 56 ST 16P, New York, NY 10019-4328." The statement asserted that an additional \$15,513.81 of New York State and City personal income tax was due for the year 2001, together with interest of \$2,666.65. The Statement of Proposed Audit Changes contained the following explanation:

Your 2001 New York State tax return was selected for review. The recomputation of your return has resulted in additional New York State and New York City tax due.

A review of the information provided on your 2001 nonresident return indicates that you do not meet the substantial presence test required to file as a nonresident alien (Federal 1040NR).

Additionally, the information on your return shows that you have been present in the United States in excess of 183 days and, accordingly, ineligible for the tax treaty income exclusion claimed on your personal service income unrelated to studying and training.

We have, therefore, disallowed the income exclusion claimed and computed your liability as a full-year New York State and New York City resident.

You have been allowed the appropriate New York City school tax credit.

Interest is due for late payment or underpayment at the applicable rate. Interest is required under the New York State Tax Law.

Under separate and certified mailing, a Notice of Deficiency will be issued to you. Under New York State Tax Law, if you are not in agreement and wish to pursue this matter further, you must either file a request for a Conciliation Conference with the Bureau of Conciliation and Mediation Services or a Petition with the Division of Tax Appeals within 90 days after the date of the notice. Any protest filed prior to the issuance of the Notice of Deficiency is not valid as a petition.

2. Upon receipt of the Statement of Proposed Audit Changes, petitioner immediately forwarded it to his tax consultant, Erwin Rosenfeld. Rather than calling the Division at the telephone number provided in the Statement of Proposed Audit Changes, Mr. Rosenfeld prepared a Request for Conciliation Conference for petitioner which was sent to the Bureau of Conciliation and Mediation Services (“BCMS”) sometime in late December 2004. On the Request for Conciliation Conference form, petitioner’s current address was listed as 235 W 56th Street #16P, New York, NY 10010-4328. Erwin M. Rosenfeld, 69 Schrade Rd, Briarcliff, NY 10510, was listed as taxpayer’s representative on the Request for Conciliation Conference form. However, while the box next to the phrase “[i]f a power of attorney is attached, check this box” was checked on the Request for Conciliation Conference form, the record does not include a copy of the properly executed power of attorney.

3. On or about January 7, 2005, BCMS sent a letter to petitioner notifying him that his request for a conciliation conference was premature because neither a Notice of Deficiency nor a refund denial had been issued for the 2001 tax year. The letter further notified petitioner that, once either a Notice of Deficiency or a refund denial was issued, he could re-file the request for a conciliation conference within the time frame specified in the notice that he received. This letter, addressed to petitioner at “235 West 56th Street - #16P, New York, NY 10019-4328,” was subsequently received by him.

4. On January 31, 2005, the Division issued a Notice of Deficiency (“notice”) to petitioner asserting that he owed \$15,513.81 of additional New York State and City personal income taxes for the year 2001. The notice was addressed to petitioner at “235 W 56 ST 16P, New York, NY 10019-4328.”

5. On May 26, 2005, the Division issued a Notice and Demand for Payment of Tax Due (“Notice and Demand”) to petitioner asserting that \$15,513.81 of New York State and City personal income tax was due for the year 2001, together with interest of \$3,213.61. The Notice and Demand was addressed to “Kalb-Hector, Rosenfeld, 69 Schrade Rd., Briarcliff, NY 10510-1408,” the address set forth on petitioner’s 2004 New York State Resident Income Tax Return (Form IT-201) which was filed on or about March 2, 2005.

6. On May 31, 2005, petitioner used the payment document enclosed with the Notice and Demand to file a request for a conciliation conference.

7. On June 24, 2005, BCMS issued a Conciliation Order Dismissing Request which stated as follows:

The Tax Law requires that a request be filed within 90 days from the mailing date of the statutory notice. Since the notice was issued on January 31, 2005, but the request was not mailed until May 31, 2005, or in excess of 90 days, the request is late filed.

The request filed for a Conciliation Conference is denied.

8. Petitioner timely protested the Conciliation Order Dismissing Request by filing a petition with the Division of Tax Appeals and this proceeding ensued. Since the Division has raised the issue regarding the timeliness of petitioner’s Request for Conciliation Conference, the scope of the small claims hearing held herein was limited to this threshold jurisdictional issue. In instances such as this where the timeliness of the Request for Conciliation Conference is in dispute, the Division has the burden of proving proper mailing of the notice.

9. To establish the date that the notice was mailed, that it has a standard procedure for the issuance of notices of deficiency and that the standard procedure was followed in this case, the Division offered in evidence its certified mail records, a copy of the Notice of Deficiency, a copy of petitioner’s 2003 New York State Resident Income Tax Return (Form IT-201) filed on April

15, 2004 and three affidavits of employees having knowledge of the facts of this case or familiar with the creation, processing and mailing of notices of deficiency. The above evidence, taken together, sufficiently establishes that the Division has a standard procedure for issuance of notices of deficiency and that said procedures were followed with respect to the notice issued to petitioner.

SUMMARY OF PETITIONER'S POSITION

10. While petitioner concedes that the address listed on the Notice of Deficiency was his last known address, he contends that he did not receive the notice. He further contends that his representative, Mr. Rosenfeld, did not receive the Notice of Deficiency. Petitioner asserts that a properly executed power of attorney was attached to the premature Request for Conciliation Conference filed sometime in late December 2004 and, therefore, the Division was on notice that Mr. Rosenfeld was his representative prior to the issuance of the Notice of Deficiency at issue in this matter. He maintains that the first notice that either he or his representative received, concerning the asserted deficiency for the year 2001, was the Notice and Demand issued May 26, 2005 and, upon receipt of that notice, a conciliation conference was promptly requested.

CONCLUSIONS OF LAW

A. As applicable to this proceeding, Tax Law §§ 689(b) and 170(3-a) and 20 NYCRR 4000.3(c) provide that when a Notice of Deficiency is issued to a taxpayer, such taxpayer has 90 days from the date of the Notice of Deficiency to file a Request for Conciliation Conference. Where a taxpayer files a Request for Conciliation Conference and the timeliness of said request is in question, the Division has the burden of proving that the notice was properly mailed (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). In the instant matter, the

Division has presented sufficient evidence to prove that the notice was properly mailed to petitioner at his last known address¹ on January 31, 2005 (Tax Law § 681[a]). The statute does not require actual receipt by the taxpayer. Where the Division establishes that the Notice of Deficiency has been properly issued, that is, sent by certified or registered mail to the taxpayer's last known address, the notice is valid and sufficient whether or not actually received (*see, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *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 667, 355 NYS2d 1028).

B. Although I have concluded that the Division has established that it properly mailed the Notice of Deficiency to petitioner on January 31, 2005, my analysis does not end there. While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see, Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988, *citing Matter of Bianca v. Frank*, 43 NY2d 168, 401 NYS2d 29). Petitioner contends that a purported power of attorney which appointed Mr. Rosenfeld as his representative was attached to the premature Request for Conciliation Conference filed with the Division sometime in late December 2004 prior to the notice being issued. Petitioner submitted a photocopy of an unsigned power of

¹ The address of 235 W 56 ST 16P, New York, NY 10019-4328, to which the Notice of Deficiency was sent by certified mail on January 31, 2005, was the address set forth by petitioner on his 2003 New York State Resident Income Tax Return filed on April 15, 2004, his premature Request for Conciliation Conference and his petition to the Division of Tax Appeals.

attorney. I find that evidence insufficient to prove that a power of attorney running to Mr. Rosenfeld was on file with the Division prior to the Notice of Deficiency being issued.

C. Since the 90-day period was not tolled in this case, in order to timely protest the Notice of Deficiency, petitioner was required to file the request for conciliation conference within 90 days of January 31, 2005, i.e., on or before May 1, 2005. In 2005, May 1st fell on a Sunday, therefore petitioner had until the next business day, or Monday, May 2, 2005, to file his request (*see*, General Construction Law § 25-a). There is no dispute in the instant matter that petitioner's request for a conciliation conference was filed on May 31, 2005 and that said request was mailed twenty-nine days after it was required to be filed. Accordingly, it must be concluded that the request for a conciliation conference was filed beyond the statutory 90-day time period for the filing of such a request and that the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest (*Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989) and the petition must be dismissed.

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

E. The petition of Hector Kalb is hereby dismissed.

DATED: Troy, New York
November 9, 2006

/s/ Winifred M. Maloney
PRESIDING OFFICER