

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
EMANUEL BUNTIN & ITALINA JAMES

DETERMINATION
DTA NO. 821006

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 under
the New York City Administrative Code for the Year 2001.

Petitioners, Emanuel Buntin & Italina James, 1454 Rockaway Parkway, Brooklyn, New York, 11236, 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 the New York City Personal Income Tax under the New York City Administrative Code for the year 2001.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq.), brought a motion, filed June 20, 2006, seeking summary determination in the above-reference matter pursuant to Tax Law §§ 3000.5, 3000.9(a)(I) and 3000.9(b). Petitioners appearing *pro se*, filed no response. Petitioner's response was due by July 20, 2006, which date thereafter commenced the 90 day period for this determination. After due consideration of the motion, the supporting documentation, affidavits, and all the pleadings herein, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner failed to file a timely request for Conciliation Conference following the issuance of a Notice of Deficiency so that summary determination in favor of the Division of Taxation is properly granted as a matter of law.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued a Notice of Deficiency, Assessment ID L-025106841-3 (“the notice”) dated March 3, 2005, to petitioners at two addresses, asserting that they owed \$5,549.00 of additional New York State and City personal income taxes, plus penalty and interest, on their joint tax return for tax year 2001. One notice was addressed to “Buntin-Emanuel J, James-Italina, 125 Schroeders Ave 2B, Brooklyn, NY 11239-2220,” and bore the certified mail control number on the cover page of 7104 1002 9730 0581 1171.

The second copy of the same assessment was addressed to “James-Italina, Buntin-Emanuel J, 752 E102 ST, Brooklyn, NY 11236,” asserting the same deficient amounts for the same tax year, 2001. Its cover sheet bore the certified mail control number of 7104 1002 9730 0581 1164.

2. On November 14, 2005, petitioner, Emanuel Buntin, sent the Division a Request for Conciliation Conference, contesting the amount in question for tax year 2001 for assessment L-025106941. The Request bore an address of 1454 Rockaway Parkway, Suite 183, Brooklyn, NY 11236. The mailing envelope indicated it was sent to the Division by certified mail, return receipt requested, and date-stamped as received by the Bureau of Conciliation and Mediation Services on November 16, 2005.

3. A Conciliation Conference was held in this matter and a Conciliation Order Dismissing Request (No. 211916), was issued to petitioners wherein their request for a conciliation conference was denied for the following reason: “[T]he Tax Law requires that a request be files within 90 days from the mailing date of the statutory notice. Since the notice was issued on March 3, 2005, but the request was not mailed until November 14, 2005, or in excess of 90 days, the request is late filed.”

4. The Division introduced a certified mailing log dated March 3, 2005, which showed that two documents were mailed; one to James-Italina, 752 E103 St, Brooklyn, NY 11236 bearing Certified No. 7104 1002 9730 0581 1164 and a second item mailed to Buntin-Emauel, 125 Schroeders Ave 2B, Brooklyn, NY 11239-2220. The log contained 273 pieces of mail listed, with appropriate redactions, certified as having been received on that date, with each page of the mailing log bearing a date stamp by the United State Post Office, Colonie Center branch of March 3, 2005.

5. The Division further offered into evidence its standard procedures for the issuance of notices of deficiency, and that the standard procedure was followed in this case. Along with its procedures and adherence thereto, the Division offered into evidence a copy of the Notice (mailed to two addresses), two affidavits of Division employees having knowledge of the facts of this case and familiar with the creation, processing and mailing of notices of deficiency, and the aforementioned mailing logs, to further establish the date both notices of the one assessment were mailed.

6. The Division additionally submitted computer files generated on May 25, 2006, entitled "PIT>Returns Processing" as evidence of petitioners' addresses on file with the Division. The most recent result produced by the search revealed the last known address the Division had for petitioner Buntin, under his social security number, was from Form IT-201 filed in February 2001 bearing the address of 125 Schroeders Ave 2B Brooklyn NY 11239. The most recent result produced by the search revealed the last known address the Division had for petitioner James, under her social security number, was from Form IT-201 filed in May 2004 bearing the address 752-E102 ST Brooklyn, NY 11236.

CONCLUSIONS OF LAW

A. In order for summary determination to be granted, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show 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]). Inasmuch as summary determination 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, Inc. V. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 94; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may reasonably be drawn from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*see, Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879, 881).

B. As applicable to this proceeding, Tax Law § 170(3-a) and regulation 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 to file a Request for Conciliation Conference. Where a taxpayer files a Request for Conciliation Conference and the timeliness of the 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). Without such proof, the appropriate remedy is to deem the request timely filed.

C. In this matter, the Division has presented sufficient evidence to prove that the Notice was properly mailed to petitioners at their last known addresses on March 3, 2005 (Tax Law § 681[a]). The statute does not require receipt by the taxpayers. Where the Division establishes

that the notice of deficiency has been properly issued, that it is sent by certified or registered mail to the taxpayer's last known address (or addresses, as in this case), the notice is valid and sufficient whether or not actually received.

D. Inasmuch as the protest to the Notice was filed November 14, 2005, more than 90 days from the date the Notice was issued, i.e. after June 1, 2005, it was untimely as filed, and the Division of Tax Appeals lacks jurisdiction to review the Notice on its merits.

E. Petitioner has introduced no evidence of the existence of either a triable issue or a material issue of fact, and none appears in the record. Accordingly, the Division has established that the evidence requires a determination in its favor.

F. The Division's motion for summary determination is granted and the petition of Emanuel Buntin and Italina James is hereby denied.

DATED: Troy, New York
October 16, 2006

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE