

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CHIJOKE I. AJOKU : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 822098
York State and New York City Personal Income Tax under :
Article 22 of the Tax Law and the Administrative Code of :
the City of New York for the Years 1999, 2001 and 2003. :
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Petitioner, Chijioke I. Ajoku, 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 Administrative Code of the City of New York for the years 1999, 2001 and 2003.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Barbara J. Russo, Esq., of counsel), brought a motion dated May 23, 2008 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner filed a letter and other documents in response to the Division of Taxation's motion on July 7, 2008,¹ which date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

¹ Petitioner was granted leave to respond to the Division's motion beyond the usual 30-day period prescribed in section 3000.5(b) of the Rules of Practice and Procedure.

ISSUES

I. Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of notices of deficiency for the tax years 1999 and 2003.

II. Whether the Division of Tax Appeals has jurisdiction to consider petitioner's protest of a Notice of Additional Tax Due for the tax year 2001.

FINDINGS OF FACT

1. On January 29, 2008, petitioner, Chijioke I. Ajoku, filed a petition with the Division of Tax Appeals. The petition protests the following notices:

a.) a Notice of Deficiency dated November 21, 2002, bearing assessment identification number L-021810970-4 and addressed to petitioner at "601 E. 18th St. 106, Brooklyn, NY 11226-7346." The corresponding "Mailing Cover Sheet" bears petitioner's name and address as noted above and certified mail control number 7104 1002 9739 0137 8815.

b.) a Notice of Deficiency dated October 22, 2007 with assessment identification number L-029100093-1 and addressed to petitioner at "153 07 73 Ave. 3B, Flushing, NY 11367-3045." The corresponding "Mailing Cover Sheet" bears petitioner's name and address as noted above and certified mail control number 7104 1002 9730 0350 6222.

c.) a Notice of Additional Tax Due dated January 3, 2005 bearing assessment identification number L-024914367-9 and addressed to petitioner at "601 E 18th St. Apt 106, Brooklyn, NY 11226-7346." The corresponding "Mailing Cover Sheet" bears petitioner's name and address as noted above.

2. Petitioner did not file a Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services with regard to any of the noted assessment identification numbers.

3. The November 21, 2002 Notice of Deficiency asserts tax due of \$17,620.48 for the tax year 1999. In explanation, this notice indicates that petitioner filed an amended return for 1999 on May 14, 2000 and that, on June 27, 2001, the Division issued to petitioner an erroneous refund of \$18,237.25. The notice indicates that the correct refund amount should have been \$616.77. Hence, the Notice of Deficiency asserts the difference between the erroneous refund and the correct refund amount as additional tax due.

4. Petitioner has paid \$17,156.90 of the 1999 deficiency and, according to the Division's answer, has a remaining balance due of \$463.58.

5. The October 22, 2007 Notice of Deficiency asserts \$1,263.00 in additional income tax due, plus penalty and interest, for the year 2003. This deficiency was computed by the Division based on information provided by the Internal Revenue Service and petitioner's New York employment information. Petitioner did not file a New York income tax return for 2003.

6. The January 3, 2005 Notice of Additional Tax Due assesses \$2,312.08 in additional tax due, plus penalty and interest, for the year 2001. The Notice of Additional Tax Due is based on federal audit changes to petitioner's 2001 income. The Internal Revenue Service notified the Division of such changes, which indicated an increase to petitioner's wage income of \$8,306.00, an increase to petitioner's interest income of \$17,620.00, and an increase to petitioner's taxable interest income of \$63.00, for a total increase in income of \$25,989.00. Petitioner did not report the 2001 federal audit changes to the Division.

7. The increase to petitioner's interest income as reported to the Division by the IRS is in error. It is apparently related to the erroneous refund for 1999 and the subsequent Notice of Deficiency issued in respect of that year. In 2008, the Division issued to petitioner a corrected Form 1099-INT for 2001 showing zero interest income from New York State.

8. Notices of deficiency, such as those at issue with respect to the 1999 and 2003 tax years, are computer-generated by the Division's Computerized Case and Resource Tracking System (CARTS) Control Unit. The computer preparation of such notices also includes the preparation of a certified mail record (CMR). The CMR lists those taxpayers to whom notices of deficiency are being mailed and also includes, for each such notice, a separate certified control number.

9. Each computer-generated notice of deficiency is predated with its anticipated mailing date and each is assigned a certified mail control number. This number is recorded on the CMR under the heading "Certified No." The certified number for each notice appears on a separate one-page Mailing Cover Sheet that is generated by CARTS for each notice of deficiency. The CMR lists a printing (or "run") date and time in its upper left corner which is generally about 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage, and mailing. The run date on the CMR is manually changed at the time of mailing by Division personnel to conform to the actual date of mailing of the notices.

10. In this case, the CMR pertaining to the Notice of Deficiency dated November 21, 2002 lists a run date of "20023151700" (meaning November 11, 2002 at 5:00 P.M.), above which the date "11/21/02" has been handwritten. The CMR pertaining to the Notice of Deficiency dated October 22, 2007 lists a run date of "20072841700" (meaning October 11, 2007 at 5:00 P.M.), above which the date "10/22/07" has been handwritten.

11. After notices of deficiency, along with accompanying mail cover sheets and appropriate enclosures, are placed in window envelopes by Division personnel, the envelopes are then placed in an area designated by the Division's Mail Processing Center for "Outgoing

Certified Mail.” A staffer weighs and seals each envelope and affixes postage and fee amounts thereon. A Mail Processing Center clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk also performs a random review of up to 30 pieces of mail against the information contained on the CMR.

Thereafter, a Mail Processing Center employee delivers the stamped envelopes and associated CMR to one of the various branch offices of the U.S. Postal Service in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service and affixes a dated postmark or the employee’s initials (or signature) or both to the CMR.

12. In the ordinary course of business a Mail Processing Center employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

13. The CMR related to the Notice of Deficiency dated November 21, 2002 is a 29-page, computer-generated document entitled “Assessments Receivable - Certified Record for Non-Presort Mail.” This CMR lists 311 certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified control number is a notice identification number (under the heading “Reference No.”), the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

14. Information regarding the Notice of Deficiency dated November 21, 2002 is contained on page 12 of this CMR. Specifically, corresponding to the certified control number 7104 1002 9739 0137 8815 is reference number L 021810970 (*see* Finding of Fact 1[a]), along with petitioner’s name and an address, which is identical to that listed on the November 21, 2001 Notice of Deficiency and on the related Mail Cover Sheet.

15. Each page of this CMR bears the postmark of the Colonie Center Branch of the U.S. Postal Service dated November 21, 2002 and the initials of a Postal Service employee.

16. On page 29 of this CMR there is a preprinted entry of “311” corresponding to the heading “Total Pieces and Amounts Listed.” This entry has been manually circled and the initials of a Postal Service employee appear below it.

17. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the circled “311” as the “total pieces” figure indicate that all 311 pieces of mail listed on this CMR were received at the post office.

18. The CMR related to the Notice of Deficiency dated October 22, 2007 is a 217-page, computer-generated document entitled “Certified Record for Presort Mail - Assessments Receivable.” This CMR lists 2,378 certified control numbers, each of which is assigned to an item of mail listed thereon. That is, corresponding to each listed certified control number is a notice identification number (under the heading “Reference No.”), the name and address of the addressee, and postage and fee amounts. There are no deletions from the list.

19. Information regarding the Notice of Deficiency dated October 22, 2007 is contained on page 120 of this CMR. Specifically, corresponding to the certified control number 7104 1002 9730 0350 6222 is reference number L 029100093 (*see* Finding of Fact 1[b]), along with petitioner’s name and an address, which is identical to that listed on the Notice of Deficiency dated October 22, 2007 and on the related Mail Cover Sheet.

20. Each page of this CMR bears the postmark of the U.S. Postal Service General Mail Facility in Albany, New York, dated October 22, 2007.

21. At the bottom of page 217 of this CMR there is a preprinted entry of “2,378” corresponding to the heading “Total Pieces and Amounts.” Below the total pieces entry, and

below the heading “Total Pieces Received at Post Office,” there is a stamp which states “Post Office - Hand write total # of pieces and initial.” Below this stamp the number “2,378” has been manually written. The initials of a postal service employee appear next to the handwritten “2,378.”

22. The affixation of the Postal Service postmarks, the initials of the Postal Service employee, and the handwritten “2,378” as the “total pieces” figure indicate that all 2,378 pieces of mail listed on this CMR were received at the post office.

23. The facts set forth above in Findings of Fact 8 through 22 were established through affidavits of Patricia Finn Sears and James Steven VanDerzee. Ms. Sears is employed as a supervisor in the Division’s CARTS Control Unit, and her duties include supervising the processing of notices of deficiency. Mr. VanDerzee is employed as a mail and supply supervisor in the Division’s Registry Unit, and his duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the U.S. Postal Service.

24. The fact that the Postal Service employee either circled (*see* Finding of Fact 16) or wrote (*see* Finding of Fact 21) the total number of pieces received on the CMR to indicate that this was the number of pieces received at the post office was established through the affidavit of Mr. VanDerzee. Mr. VanDerzee’s knowledge of this fact is based on his knowledge that the Division’s Mail Processing Center requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of such pieces on the CMR.

25. The Division generally does not request, demand or retain return receipts from certified or registered mail.

26. Petitioner's 1999 amended return, filed on May 14, 2000, reports as petitioner's address "601 E 18 Street, #106, Brooklyn, NY 11226."

27. Petitioner's 2001 New York income tax return, filed on April 15, 2002, reports as petitioner's address "601 E 18 St. 106, Brooklyn, NY 11226-7344."

28. Petitioner's 2006 New York resident income tax return, filed April 15, 2007, reports petitioner's address as "153 07-73 Ave 3-B, Flushing, NY 11367-3045."

29. Petitioner's 2003 federal income tax return filed with the Internal Revenue Service on April 11, 2006, reports petitioner's address as "153-07 73rd Avenue Apt 3B, Flushing, NY 11367-3045."

30. The Division's notices of deficiency list various options available to a taxpayer if the taxpayer disagrees with the notice. Included among the options listed is the filing of a petition with the Division of Tax Appeals.

SUMMARY OF PETITIONER'S POSITION

31. By letter dated July 3, 2008, and submitted in opposition to the Division's motion, petitioner contended that he moved from the 601 E. 18th St. 106, Brooklyn, NY 11226-7346 address as listed on the Notice of Deficiency dated November 21, 2002 as of June 2000. Petitioner thus asserts that he never received the November 21, 2002 Notice of Deficiency in a timely manner.

32. Similarly, petitioner asserts that he did not receive the Notice of Additional Tax Due dated January 3, 2005 mailed to the Brooklyn address because he moved from that address in June 2000.

33. Petitioner concedes that he received the Notice of Deficiency dated October 22, 2007 in a timely manner, but asserts that he did not file any protest of the notice because he was unaware of his right to file a petition protesting the notice with the Division of Tax Appeals.

CONCLUSIONS OF LAW

A. A motion for summary determination may 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 (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal 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 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). 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” (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). “To defeat a motion for summary judgment the opponent must . . . produce ‘evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,’ and ‘mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’” (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992] *citing Zuckerman v. City of New York*).

C. There is a 90-day statutory time limit for filing a petition following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). Pursuant to Tax Law § 681(b) the notices of deficiency in this case would be binding upon petitioner unless he filed a timely petition with the Division of Tax Appeals. The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

D. Where, as here, the timeliness of a taxpayer's protest of a notice of deficiency is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice of deficiency creates a presumption that such document was delivered in the normal course of the mail (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (*id.*). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

E. The mailing evidence required is two-fold: First, there must be proof of a standard procedure used by the Division for the issuance of statutory notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see Matter of Katz; Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991).

F. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Patricia Finn Sears and James Steven VanDerzee, Division

employees involved in and possessing knowledge of the process of generating and issuing notices of deficiency.

G. The Division also presented sufficient documentary proof, i.e., the respective CMR's, to establish that the subject notices of deficiency were each mailed as addressed to petitioner on the dates claimed. Specifically, with respect to the Notice of Deficiency dated November 21, 2002 the CMR lists certified control numbers with corresponding names and addresses and bears U.S. Postal Service postmarks dated November 21, 2002. Additionally, a postal employee circled "311" as the "total pieces" number and added his or her initials to the CMR to indicate receipt by the post office of all pieces of mail listed thereon. Similarly, the CMR related to the Notice of Deficiency dated October 22, 2007 also lists certified control numbers with corresponding names and addresses and bears U.S. Postal Service postmarks dated October 22, 2007. Additionally, a postal service employee wrote the number "2,378" as the total pieces number and added his or her initials on the last page to indicate receipt by the post office of all pieces of mail listed thereon.

H. Both of the CMR's in the record have thus been properly completed and therefore constitute documentary evidence of both the date and fact of mailing in each instance (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001). Accordingly, the Division has established that it mailed the subject notices of deficiency as claimed on November 21, 2002 and October 22, 2007, respectively.

I. Tax Law § 681 directs the Division to mail a notice of deficiency to a taxpayer at his or her "last known address." Tax Law § 691(b) defines a taxpayer's "last known address" as the address given in the last tax return filed by him or her, unless subsequently thereto the taxpayer has notified the Division of a change in address.

J. The Division has established that the Notice of Deficiency dated November 21, 2002 was mailed to petitioner at the address given on his 2001 New York return, filed April 15, 2002, which was the last return filed by petitioner as the date of issuance of the November 21, 2002 notice (*see* Finding of Fact 27). The Division has also established that the Notice of Deficiency dated October 22, 2007 was mailed to petitioner at the address given on his 2006 New York return filed April 15, 2007, the last return filed by petitioner as of the date of issuance of the October 22, 2007 notice (*see* Finding of Fact 28). It is concluded therefore that the notices of deficiency at issue were properly addressed to petitioner at his last known address pursuant to Tax Law §§ 681 and 691.

K. Where a notice of deficiency has been properly mailed, Tax Law § 681 does not require actual receipt by the taxpayer (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990). The statutory scheme thus places the risk of nondelivery upon the taxpayer, and the 90-day period in which to file a protest is not tolled where a properly mailed notice is not delivered to the taxpayer. Accordingly, even if petitioner did not receive the notice of deficiency dated November 21, 2002 as he claimed (*see* paragraph 31), his petition protesting that notice was nevertheless untimely and must, therefore, be dismissed.²

L. Pursuant to the foregoing discussion, the subject notices of deficiency were properly issued to petitioner on November 21, 2002 and October 22, 2007, respectively. As noted, petitioner's petition was filed on January 29, 2008. This date falls beyond the 90-day period of

² It should be noted, however, that petitioner is not entirely 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).

limitations for the filing of a petition and was therefore untimely filed (*see* Tax Law § 681[b]; § 689[b]).

M. The Notice of Additional Tax Due, dated January 3, 2005, was issued by the Division pursuant to Tax Law § 681(e)(1) in response to unreported federal audit changes for the tax year 2001 (*see* Finding of Fact 6). Such a notice is considered an assessment as of the date of mailing (Tax Law § 681[e][1]) and is not a “notice of deficiency” for purposes of filing a petition with the Division of Tax Appeals (Tax Law § 681[e][2]). As relevant herein, Tax Law § 689 restricts the right to petition the Division of Tax Appeals to a review of taxes asserted by notices of deficiency. The combined operation of Tax Law § 681(e) and § 689 thus denies taxpayers the right to a hearing to review taxes assessed by notices of additional tax due issued in response to unreported federal changes. Accordingly, the Division of Tax Appeals has no authority to review the subject Notice of Additional Tax Due and, with respect to such notice, the petition must be dismissed for lack of jurisdiction (*see* Tax Law § 2006[4]).

N. Since jurisdiction is lacking, the Division of Tax Appeals is without authority to modify the Notice of Additional Tax Due (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989), the apparent error in the calculation of tax for 2001 notwithstanding (*see* Finding of Fact 7).

O. The Division of Taxation’s motion for summary determination is granted and the petition of Chijioke I. Ajoku is dismissed with prejudice.

DATED: Troy, New York
October 2, 2008

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE