

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANCINE S. AND WILLIAM J. GILLEN : DETERMINATION
 : DTA NO. 822139
for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Taxes :
and the Yonkers Income Tax Surcharge under Articles 22 :
and 30-A of the Tax Law and the Administrative Code :
of the City of New York for the Year 2003. :

Petitioners, Francine and William Gillen, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes and Yonkers income tax surcharge under Articles 22 and 30-A of the Tax Law and the Administrative Code of the City of New York for the year 2003.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated July 16, 2008 seeking dismissal of the petition, or in the alternative, summary determination in its favor pursuant to 20 NYCRR 3000.5 and 3000.9(a)(i) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, dated July 16, 2008, and attached exhibits supporting the motion. Petitioners did not file a response to the Division of Taxation's motion. Accordingly, the 90-day period for the issuance of this determination began on August 15, 2008, the due date for petitioners' response. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners' request for a conciliation conference was filed in a timely manner.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Francine S. and William J. Gillen, a Notice of Deficiency, dated July 30, 2007, addressed to petitioners at a Brooklyn, New York, address. The notice bore assessment identification number L-028684903-3 and asserted additional personal income tax for the year 2003 in the amount of \$1,469.99, plus penalty and interest.

2. On November 9, 2007, the Bureau of Conciliation and Mediation Services (BCMS) received petitioners' Request for Conciliation Conference, which was signed by Francine Gillen and was dated November 1, 2007. This request was sent by Federal Express "Standard Overnight" service on November 5, 2007. The Request for Conciliation Conference contained the same Brooklyn, New York, address for petitioners as that used by the Division in issuing the Notice of Deficiency.

3. On November 30, 2007, BCMS issued a Conciliation Order Dismissing Request (CMS No. 221533) to petitioners. The order stated, in part, 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 July 30, 2007, but the request was not mailed until November 5, 2007, or in excess of 90 days, the request is late filed.

4. Statutory notices, such as the Notice of Deficiency at issue herein, are computer-generated by the Division's Case and Resource Tracking System (CARTS). Each notice is predated with the anticipated date of mailing, and each is assigned a certified control number. The certified control number for each notice appears on a separate one-page mailing cover sheet

(form DTF-997), which also bears, among other things, a bar code and the taxpayer's mailing address.

5. Each batch of statutory notices is accompanied by a computer printout entitled "CERTIFIED RECORD FOR PRESORT MAIL - ASSESSMENTS RECEIVABLE" (CMR). The CMR lists each statutory notice in the order that it is generated in the batch. The certified control numbers, and the names and addresses of the taxpayers to whom notices are being issued appear on the CMR. The upper left corner of the CMR lists the date and time the CMR was produced.

6. Each batch of statutory notices together with its associated CMR is forwarded to the Division's Mail Processing Center. Each statutory notice within the batch is preceded by its mailing cover sheet and is accompanied by any required enclosures. These statutory notices, which are ready for mailing by the Division, are received by the Mail Processing Center in an area designated for "Outgoing Certified Mail."

7. The Division's Mail Processing Center follows a series of regular procedures in the ordinary course of delivering outgoing mail to branch offices of the U. S. Postal Service (USPS). A member of the Mail Processing Center staff puts each statutory notice and the associated documents into a windowed envelope and then weighs and seals each envelope and places postage and fee amounts on the envelope. A Mail Processing Clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and also performs a random review of up to 30 pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR. Thereafter, a member of the Mail Processing Center staff delivers the sealed, stamped envelopes to a branch of the

USPS in the Albany, New York area. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the USPS.

8. The CMR for the batch of statutory notices issued on July 30, 2007, including the Notice of Deficiency pertaining to petitioners, is an 18-page document with each page numerically identified in the upper right corner. The “Run” information lists the date and time that the entire CMR was printed. The initial (printing) 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. In this case, the handwritten date “7-30-07” appears in the upper left hand corner of page one of the CMR.

There are 11 entries on each page of the CMR, except for page 18 which has 5 entries, for a total of 192 entries. Page 11 of the CMR reflects that a statutory notice numbered L-028684903, the same assessment identification number as appears on the Notice of Deficiency, the Request for Conciliation Conference and the Conciliation Order, was sent to “Gillen-Francine S,” at a “Brooklyn, NY 12230-4680” address, by certified mail using certified control number “7104 1002 9730 0205 6582.”¹ A USPS postmark of the Colonie Center, New York branch office of the USPS dated July 30, 2007 is stamped on each page of the CMR. The postal employee also wrote his or her initials and manually circled the number “192” after the printed statement “TOTAL PIECES AND AMOUNTS” on page 18 of the CMR, in compliance with the Division’s specific request that postal employees either circle the number of pieces of mail received or write the number of pieces received on the CMR in order to indicate the number of

¹ The CMR lists only the name of petitioner Francine S. Gillen in accordance with the Division’s standard procedure under which a CMR contains only the name of the “primary” taxpayer associated with a statutory notice. Specifically, where a husband and wife file a joint personal income tax return on which the wife’s social security number is listed in the place designated for the “primary” taxpayer, only the wife’s name will appear on the CMR.

pieces of mail actually received at the post office. In addition, this same postal employee's initials appeared on each page of the CMR.

9. The CMR is the Division's record of receipt by the USPS for pieces of certified mail. In the ordinary course of business and pursuant to the practices and procedures of the Division's Mail Processing Center, each CMR is picked up at the post office by a staff member on the day following its initial delivery and is returned to the originating office which, in this case, is the CARTS Control Unit. In the regular course of business and as a common practice, the Division does not request, demand or retain individual return receipts from certified or registered mail generated by CARTS.

10. The facts set forth in Findings of Fact 4 through 9 were established through the affidavits of Patricia Finn Sears, sworn to on July 15, 2008, and James Steven VanDerZee, sworn to on July 15, 2008. Ms. Sears is employed as the Supervisor of 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 Registry Unit, and his duties include supervising Mail Processing Center staff in delivering outgoing mail to branch offices of the USPS.

11. The address on the subject Notice of Deficiency and the associated mailing cover sheet was the same as the address given on petitioners' joint New York State personal income tax return (form IT-201) for the year 2006 electronically filed on or before April 15, 2007, and the most recent return filed when the Notice of Deficiency was issued. In addition, the same address was used by petitioners on their request for conciliation conference, and on their petition filed in this matter.

12. On February 25, 2008, petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the Conciliation Order dated November 30, 2007 and the underlying Notice of Deficiency. In their petition, petitioners assert, among other things, that they timely mailed forms requesting a conference or hearing twice. The first time was via regular mail and the second time was “via Express Mail along with other documents regarding a prior year’s information.” Petitioners did not attach any documents to the petition to support their claim that they timely filed any protest against the Notice of Deficiency.

CONCLUSIONS OF LAW

A. A motion for summary determination shall be granted:

if, upon all 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. Here, petitioners did not respond to the Division’s motion; they are therefore deemed to have conceded that no question of fact requiring a hearing exists (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, 326 [1984], *lv dismissed* 62 NY2d 942 [1984]). Moreover, petitioners presented no evidence to contest the facts alleged in the Sears and VanDerZee affidavits; consequently, those facts may be deemed admitted (*see Kuehne & Nagel v. Baiden*, at 544, 369 NYS2d at 671; *Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992]). Upon all of the proof presented, and for the reasons that follow, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where it has been determined 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 or out of this state.” In this case, the record clearly establishes that the address listed on the subject Notice of Deficiency was petitioners’ last known address.

D. 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 BCMS, within 90 days of the mailing of the notice of deficiency (*see* Tax Law § 689[b]; § 170[3-a][a]; 20 NYCRR 3000.3[c]). If a taxpayer fails to file a timely protest to a statutory notice, the Division of Tax Appeals has no jurisdiction over the matter and is precluded from hearing the merits of the case (*see Matter of Cato*, Tax Appeals Tribunal, October 27, 2005; *Matter of DeWeese*, Tax Appeals Tribunal, June 20, 2002).

E. Where the taxpayer files a petition or request for conciliation conference, but the timeliness of the petition or request is at issue, the Division has the burden of proving proper mailing of the notice of deficiency (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). A statutory notice is mailed when it is delivered to the custody of the USPS (*see Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice of deficiency is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his last known address by certified or registered mail, that notice is valid and petitioner in turn bears the burden of proving that a timely protest was filed (*Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990).

F. The evidence required of the Division in order to establish proper mailing is two-fold: first, there must be proof of a standard mailing procedure used by the Division provided by one with knowledge of the relevant procedure; and second, there must be proof that the standard

procedure was followed in this particular instance (*see Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv. Supra*). In this case, the Division has met its burden of establishing proper mailing. Specifically, the Division was required to mail the Notice of Deficiency to petitioners at their last known address (Tax Law § 681[a]; *see Matter of Wilson, Tax Appeals Tribunal, July 13, 1989*). As indicated by the CMR and the affidavits of Ms. Sears and Mr. VanDerZee, the Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) statutory notices, the Division has offered adequate proof to establish the fact that the Notice of Deficiency at issue was actually mailed to petitioners at their last known address by certified mail, on July 30, 2007, the date appearing on the subject notice and on the CMR. The Sears and VanDerZee affidavits describe the various stages of producing and mailing statutory notices, and attest to the authenticity and accuracy of the Notice of Deficiency and of the CMR submitted as proof of actual mailing. These documents establish that the general mailing procedures described in the Sears and VanDerZee affidavits were followed with respect to the Notice of Deficiency issued to petitioners. In sum, the Division has established that it mailed the Notice of Deficiency to petitioners by certified mail on July 30, 2007 (*see Matter of Gordon, Tax Appeals Tribunal, November 10, 2005*).

G. In order to be considered timely, any protest, i.e., a conciliation conference request or a petition, against the Notice of Deficiency had to have been filed within 90 days thereafter, that is, by October 28, 2007. As this date fell on a Sunday, the subsequent day, Monday, October 29, 2007, became the statutory deadline (General Construction Law §§ 20, 25-A). Unfortunately, the Request for Conciliation Conference in this matter was not filed until it was mailed on November 5, 2007, and the petition was not filed thereafter until it was mailed on February 25, 2008, and thus neither was a timely challenge allowing for review of the Notice of Deficiency. Petitioners

did not respond to the subject motion or otherwise provide any document or other evidence to establish that any other protest against the Notice of Deficiency was filed within the 90-day period. Since a protest was not timely filed as required by statute, there is no jurisdiction to proceed with this matter (Tax Law § 170[3-a][e]; § 689[b]; 20 NYCRR 4000.5[c][4]).²

H. The Division of Taxation's motion for summary determination is granted and the petition of Francine S. and William J. Gillen is dismissed.

DATED: Troy, New York
October 30, 2008

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE

² Petitioners may not be entirely without recourse in this matter. That is, petitioners may pay the disputed tax and, within two years of payment, file a claim for refund (Tax Law § 689[c]). Upon its denial, petitioners may then proceed with a timely petition for a hearing to contest the refund denial.