

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**JAMES J. KLOCEK** : DETERMINATION  
for Revision of a Determination or for Refund of Personal : DTA NO. 822316  
Income Tax under Article 22 of the Tax Law for the :  
Year 2000. :

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Petitioner, James J. Klocek, filed a petition for revision of a determination or for refund of personal income tax under Article 22 of the Tax Law for the year 2000.

Petitioner, appearing pro se, and the Division of Taxation, by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel), waived a hearing and agreed to submit the matter for a determination based on documents and briefs to be submitted by August 31, 2009, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed his New York State resident income tax return for the year 2000 and paid the tax due.

***FINDINGS OF FACT***

1. On August 14, 2006, the Division of Taxation (Division) issued a Statement of Audit Changes to petitioner, James J. Klocek, which explained that the Division did not have a record of petitioner filing a New York State income tax return for the year 2000. In order to determine the amount of tax due, the Division utilized federal information and computed the tax on the

basis that petitioner was a resident of New York State. Petitioner was further advised that the penalties were imposed for late filing (Tax Law § 685[a][1]), negligence (Tax Law § 685[b][1]) and negligence or intentional disregard of the Tax Law (Tax Law § 685[b][2]). Petitioner was advised that, if he had filed a New York State income tax return for the year 2000, he should provide a complete copy of it to the Division including wage and tax statements. In addition, if he had made a payment with the return, he was asked to provide the deposit serial number stamped on the face of the check.

2. On the basis of the explanation set forth in the Statement of Audit Changes, the Division issued to petitioner a Notice of Deficiency, dated October 10, 2006, which asserted that personal income tax was due for the year 2000 in the amount of \$5,839.00 plus penalties and interest for a balance due of \$11,461.11.

3. On or about July 18, 2007, petitioner sent a facsimile copy of a U.S. Individual Income Tax Return and a New York State Resident Income Tax Return for the year 2000 to the Division. The New York State return showed a balance due of \$5,993.00. The tax returns were unsigned and undated but bore the name and address of a tax preparer.

4. Petitioner filed a Request for a Conciliation Conference. Following the conference, which was held on October 1, 2007, the Bureau of Conciliation and Mediation Services denied the request and sustained the Notice of Deficiency.

5. On December 24, 2007, the Division received a facsimile copy of a New York State Resident Income Tax Return for the year 2000, which was signed and dated on December 24, 2007. This return reported that a refund was due in the amount of \$1,587.00.

6. On January 27, 2009, the Division conducted a search of its files and was unable to locate a personal income tax return for petitioner for the year 2000 prior to the unsigned return received on July 18, 2007 and the signed return received on December 24, 2007.

### ***SUMMARY OF THE PARTIES' POSITIONS***

7. Petitioner argues that he paid a tax preparer to complete his 2000 federal and state income tax returns and that he has always filed his income tax returns and paid his liabilities. Petitioner submits that the Division may have lost or misdirected his return. In support of this argument, petitioner notes that he received an assessment of sales tax for a period of time that the company involved with the notice was out of business. According to petitioner, it took years to correct this mistake, and he had to overcome a great deal of confusion. Petitioner believes that this experience shows that it is possible that mistakes can be made and that something went awry after the income tax return was sent to New York State.

8. The Division states that while petitioner has provided evidence that a New York State return was prepared in conjunction with a federal return, he has not provided any evidence that he filed a return or paid the balance due.

### ***CONCLUSIONS OF LAW***

A. In *Matter of Savadjian* (Tax Appeals Tribunal, December 28, 1990), the Tribunal was presented with the issue of whether the taxpayer had filed a return for the year in issue. In reaching the conclusion that the taxpayer had not sustained his burden of proof, the Tribunal set forth the governing principle as follows:

Where a document has not been received by the Division of Taxation, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Filler*, Tax Appeals Tribunal, August 24, 1989; *Matter of WSD United Transp.*, Tax Appeals Tribunal, July 27, 1989). Therefore, petitioner's testimony that he mailed the 1981 tax return on April 10,

1982 is insufficient to establish that the return was received by the Division of Taxation, absent any proof of certified or registered mailing.

It follows from *Savadjian*, that the copy of the returns and the argument that there may have been confusion on the part of the Division are similarly insufficient to prove that petitioner timely filed his personal income tax return for the year 2000 (*see also Matter of Geller*, Tax Appeals Tribunal, August 20, 1998). Therefore, petitioner has not overcome the presumption of correctness that is borne by a notice of deficiency that is properly issued under the Tax Law (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, [1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Tivolacci v. State Tax Commn.*, 77 AD2d 759 [1980]).

B. The amounts reported on the income tax return received on December 24, 2007 have not been given any weight since documentation has not been presented substantiating a change in the amounts reported. Moreover, a claim for refund would be barred by the statute of limitations (Tax Law § 687[a]).

C. The petition of James J. Klocek is denied and the Notice of Deficiency, dated August 14, 2008, is sustained together with such penalties and interest as are lawfully due.

DATED: Troy, New York  
February 18, 2010

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE