

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL AND CHARLOTTE	:	DETERMINATION
LIPPMAN	:	DTA NO. 823374
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income	:	
Tax under Article 22 of the Tax Law for the	:	
Year 2004.	:	

Petitioners, Michael and Charlotte Lippman, filed a petition for revision of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2004.

On May 6, 2010, the Division of Taxation filed a motion requesting an order dismissing the petition or, in the alternative, granting summary determination of the proceeding pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). Accompanying the motion to dismiss, the Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted documents in support of dismissal. Petitioners, appearing by Michael M. Lippman, Esq., submitted a response in opposition to the Division's motion on June 8, 2010, and pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on that date. After due consideration of the documents submitted, Daniel J. Ranalli, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

FINDINGS OF FACT

1. Petitioners, Michael and Charlotte Lippman, were issued Notice of Deficiency L-029673672 dated May 27, 2008.

2. In protest of the notice of deficiency, petitioners requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS). The request, dated September 23, 2009, was mailed on September 24, 2009 and stamped received by BCMS on September 28, 2009.

3. Following this request, BCMS issued Conciliation Order Dismissing Request (CMS No. 235311) on October 16, 2009, denying petitioners' request for a conciliation conference, stating that because the "notice was issued on May 27, 2008, but the request was not received until September 28, 2009, or in excess of 90 days, the request is late filed."

4. On November 24, 2009, petitioners filed a petition with the Division of Tax Appeals seeking an administrative hearing to review the notice of deficiency at issue.

5. On March 10, 2010, the Division of Taxation (Division) filed an answer alleging that the petition at issue should be denied based upon untimeliness. Subsequently, the Division filed a motion, received on May 7, 2010, requesting an order dismissing the petition or, in the alternative, granting summary determination pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b).

6. To support its motion for summary determination, the Division submitted, among other documents, the affidavit of John E. Matthews, Esq.

7. Petitioners' last known address was 9 Inwood Lane East, Cortland Manor, NY 10567, for the purposes of issuing the notice of deficiency at issue on May 27, 2008, as obtained from a copy of petitioners' last tax return, for 2006, filed on December 31, 2007.

8. The Division also submitted the affidavit of James Steven VanDerZee, Principal Mail and Supply Supervisor in the Registry Unit of the Division's Mail Processing Center. This affidavit attested to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the United States Postal Service (USPS). More specifically, after a notice of deficiency is placed in the "Outgoing Certified Mail" area in the Mail Processing Center (MPC), a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. A certified mail record (CMR) is also received by the MPC for each batch of statutory notices. A mail processing clerk then checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR and then performs a random check of up to 30 pieces of the certified mail listed.

9. Once review takes place, a member of the MPC staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York, area. A USPS employee will then affix a postmark and his or her initials or signature to the certified mail record indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS will also either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record.

10. A review of the CMR confirms that a USPS employee initialed page 26 of the CMR, affixed a postmark to each page of the CMR and wrote the total number of pieces of certified mail received. Page 26 of the CMR listed 279 pieces of mail, and the handwritten number by the USPS employee reflects that amount.

11. On May 27, 2008, an employee of the MPC delivered one piece of certified mail addressed to petitioner, at 9 Inwood Lane East, Cortland Manor, NY 10567, to the USPS in Albany, New York, in a sealed postpaid windowed envelope for delivery by certified mail.

Additionally, the certified mail record lists only the name of Michael Lippman due to the fact that it is standard procedure for the CMR to contain the name of only one taxpayer associated with the statutory notice in instances where a joint return was filed.

12. The Division also provided the affidavit of Patricia Finn Sears, Tax Processing Specialist and Supervisor of the Refunds, Deposits, Overpayments and Control Units, including the Case and Resource Tracking System (CARTS) Control Unit of the New York State Department of Taxation and Finance (Department). CARTS refers to the Department's computer system for generating documents that include notices of deficiency issued to taxpayers. The computer generated statutory notices are predated with the anticipated date of mailing and each is assigned a certified control number.

13. Each batch of statutory notices is accompanied by a computer printout entitled "Certified Record for Presort Mail-Assessments Receivable." It lists each notice in the order the notice was generated and each notice's certified control number appears under the first heading, "Certified No." The assessment numbers are listed under the second heading, "Reference No." and the names and addresses of the taxpayers are listed under the third heading, "Name of Addressee, Street and PO Address," while the remaining heading lists postage and fees.

14. The CMR for the notice issued on May 27, 2008 to the petitioner consisted of 26 pages. Furthermore, the postal service representative affixed a postmark to each page of the CMR and stamped "Post Office Hand write total # of pieces and initial. Do Not stamp over written areas" on page 26. Specifically, the representative wrote 279 on page 26 and initialed each page of the CMR.

15. On page 7 of the CMR, notice of deficiency L-029673672 is indicated as being sent to Michael Lippman, 9 Inwood Lane East, Cortland Manor, NY 10567 by certified mail using control number 7104 1002 9730 0738 7209, and a postmark of May 27, 2008 is present.

16. On June 8, 2010, petitioners responded to the motion asserting that they had not received the notice of deficiency because they had changed their residence and the notice was never forwarded to the new address. Petitioners assert that their address at that time was 135 Southside Avenue, Hastings-On-Hudson, NY 10706, as a result of their former residence being foreclosed upon.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides an administrative hearing as a matter of right if an application for hearing is made within 90 days of the issuance of a notice of deficiency of tax due. As an alternative to petitioning for a hearing in the Division of Tax Appeals, the taxpayer “may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services” (20 NYCRR 4000.3[a]).

B. Tax Law § 170.3-a provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed.

The filing of a written request, and one conformed copy, with the BCMS “suspends the running of the period of limitations for the filing of a petition for a hearing” (20 NYCRR 4000.3[c]).

Pursuant to these provisions petitioners had 90 days from the date the notice was issued (May 27, 2008) to either request a conciliation conference or file a petition for a hearing.

Petitioners failed to do either within the required time period.

C. The Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond the 90-day time limit (*see Matter of Sak Smoke Shop, Inc.*, Tax Appeals Tribunal, January 6, 1989).

D. Where the timeliness of a taxpayer's protest against a notice or conciliation order is in question, the initial inquiry is on the mailing of the notice or conciliation order because a properly mailed notice or conciliation order 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 (*Matter of Katz*). 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 evidence of its standard mailing procedures through the affidavits of Patricia Finn Sears and James VanDerZee, Division

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

G. The production of the CMR by the Division constitutes sufficient documentary evidence to establish that the subject notice of deficiency was mailed as addressed to petitioners on May 27, 2008. The document listed: (1) name and address, (2) a corresponding certified control number, (3) U.S. Postal Service postmarks dated May 27, 2008, and (4) a postal employee's handwritten initials and documentation of the total number of pieces of mail delivered to the USPS. The CMR thus confirms both the date and fact of mailing of the subject notice (*see Matter of Rakusin*, Tax Appeals Tribunal, July 26, 2001).

H. In their affirmation in opposition, filed June 8, 2010, petitioners do not dispute that their Cortland Manor, New York, address was their proper address, i.e., last known address (*see* Tax Law § 691[b]), at the time they filed their request for conciliation conference. Petitioners' contention that they moved to a different address in New York is insufficient to establish such a move and insufficient to establish nonreceipt. Secondly, petitioners have not offered any proof that they attempted to notify BCMS or the Division of their claimed change of address. It is concluded, therefore, that the subject notice of deficiency was properly addressed to petitioners and thus properly issued to them on May 27, 2008.

I. The petition of Michael Lippman and Charlotte Lippman is hereby dismissed.

DATED: Troy, New York
August 4, 2010

/s/ Daniel J. Ranalli
ADMINISTRATIVE LAW JUDGE