

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRED S. LEE	:	ORDER
	:	DTA NO. 824618
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Year 2008.	:	

Petitioner, Fred S. Lee, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2008.

On November 17, 2011, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. Petitioner, appearing by Thomas P. Anselmo, Esq., and the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) submitted responses to the Notice of Intent to Dismiss Petition by January 17, 2012, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]).¹ After due consideration of the documents and arguments submitted by the parties and the pleadings and proceedings had herein, Arthur S. Bray, Administrative Law Judge, renders the following order.

¹ By letters dated December 12, 2011 and December 15, 2011, the time to respond to the Notice of Intent to Dismiss was extended to January 17, 2012.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the petition.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued a Notice of Deficiency, notice number L-035380725-6, dated March 21, 2011, which asserted a deficiency of New York State and New York City personal income tax in the amount of \$108,794.02 plus interest in the amount of \$16,957.07 for a balance due of \$125,751.09.

2. The Division of Tax Appeals received a petition, dated September 2, 2011, which was signed by a Mr. Charles R. Bennett, as petitioner's representative. In a letter dated September 26, 2011, the Division of Tax Appeals informed petitioner that the petition was rejected because, among other things, Mr. Bennett was not a qualified representative.

3. On September 20, 2011, petitioner's current representative, Thomas P. Anselmo, Esq., mailed, via the United States Postal Service, a second petition that challenged notice L-035380725-6. The petition was received on September 22, 2011.

4. On November 17, 2011, the Petition Intake Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition with respect to the latter petition. The notice stated, in pertinent part, as follows:

Pursuant to Tax Law § 2006(4), a petition must be filed within ninety days from the date of the issuance of a statutory notice.

The Notice of Deficiency (assessment number L-035380725) appears to have been issued on March 31, 2011, however the petition was not filed until September 20, 2011, or one hundred, eighty-three (183) days later.

5. The Division offered the affidavits of Bruce Peltier, Daniel A. Maney and Heidi Corina, employees of the Division. The first two affidavits concerned the mailing procedures

followed by the Division in mailing notices of determination. These affidavits describe the Division's standard mailing procedure including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets as well as the certified mail record (CMR) and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. The last affidavit pertained to correspondence between Ms. Corina and the Postal Service. The Division also offered a copy of the Certified Record for Presort Mail - Assessments Receivable containing a list of the conciliation orders allegedly issued by the Division on March 21, 2011, including the order allegedly issued to petitioner.

6. Heidi Corina is a Legal Assistant 2 in the Division's Office of Counsel. As part of her duties, Ms. Corina prepares U.S. Postal Service Form 3811-A. Form 3811-A is sent to the post office for mail delivered on or after July 24, 2000. The Postal Service will provide whatever information it has concerning delivery when delivery can be confirmed.

7. Attached to Ms. Corina's affidavit is a copy of the Form 3811-A. This form requests information regarding a piece of mail that was mailed on March 21, 2011 bearing certified mail item number 7104 1002 9730 0538 7638 and addressed to petitioner at 330 Spring St., Apt. 9A, New York, NY 10013-1391. This is the same number as the certified number on the CMR corresponding with the mailing of the Notice of Deficiency to petitioner on March 21, 2011. Also attached to Ms. Corina's affidavit is the Postal Service's response to the Form 3811-A request. The letter, on USPS letterhead dated December 7, 2011, refers to the certified mail number item and states in part: "The delivery record shows that this item was delivered on 03/23/2011 at 01:51 PM in New York, NY 10013." The letter also contains a scanned image of the signature of the recipient.

8. The last tax return filed by petitioner before the issuance of the Notice of Deficiency was a form IT-201-V, Payment Voucher for E-Filed Income Tax Returns. The payment voucher listed petitioner's address as 330 Spring Street Unit 9A, New York, NY 10013. This is the same address as appears on the notice and the petition.

SUMMARY OF THE PARTIES' POSITIONS

9. In response to the Notice of Intent to Dismiss, petitioner's current representative states that petitioner received the Notice of Deficiency. However, at that time, petitioner's prior representative, Mr. Bennett, chose to proceed by submitting an amended tax return for 2008 to the individual employed by the Division who was examining the return. He also decided that he would not request a conciliation conference because of the amended filing. On or about December 20, 2011, Mr. Bennett was informed by a tax compliance agent that the tax examiner never received the amended return or the accompanying letter that were offered in response to the Notice of Deficiency. He also avers that petitioner received a tax lien notification and a warrant, which were docketed on December 6, 2011. According to petitioner's representative, petitioner acted in good faith and attempted to address the concerns of the state. Petitioner's papers include an Amended Resident Income Tax Return (long form) for 2008, a copy of the Notice of Deficiency that is in issue in this proceeding and a copy of a letter dated December 21, 2011 wherein Mr. Bennett advised petitioner's current representative that the tax examiner never received the amended tax return or the accompanying letter.

10. The Division of Taxation states that since the petition was filed more than 90 days from the date the notice was delivered, it was untimely and the Division of Tax Appeals lacks jurisdiction to review the notice.

CONCLUSIONS OF LAW

A. There is a 90-day statutory time limit for filing either a petition for hearing or request for conciliation conference following the issuance of a Notice of Deficiency (Tax Law § 681[b]; § 689[b]). In most cases, where, as here, the timeliness of such a protest is at issue, the initial inquiry is whether the Division has carried its burden of demonstrating the fact and date of the mailing to petitioner's last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; Tax Law § 681[a]). In the present matter, however, the Division does not rely upon the date of issuance of the statutory notice, but rather the date of receipt of the notice by the taxpayer. Under such circumstances, the 90-day period for filing a petition or a request for a conciliation conference commences with the date of actual notice (*see Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]).

B. Here, the record shows that petitioner received actual notice of the subject notice of deficiency on March 23, 2011. Specifically, the Maney and Peltier affidavits establish the Division's standard mailing procedure, including the assigning of a certified control number to each notice, the listing of such certified control numbers on the mailing cover sheets as well as the CMRs, and the inclusion of such mailing cover sheets along with the notices in the windowed envelopes for mailing. A review of the mailing cover sheet related to the notice mailed to petitioner confirms that the control number listed thereon is consistent with the control number listed on the CMRs and the USPS responses to the Division's request for delivery information. The documentation provided to the Division by the USPS shows that article of mail bearing such certified control number was delivered to petitioner's address on March 23, 2011. Petitioner thus received actual notice of the subject notice of deficiency on that date.

C. Petitioner's request for a conciliation conference was filed on September 20, 2011,

well beyond 90 days from the date of actual notice. The request was therefore untimely filed (Tax Law § 689[b]; § 170[3-a][b]; *Matter of Riehm v. Tax Appeals Tribunal*). Consequently, the Division of Tax Appeals lacks jurisdiction to consider the merits of petitioner's protest (*see Matter of Deepak*, Tax Appeals Tribunal, December 22, 2011). In view of the principles set forth above, it is clear that petitioner's contention that, "[w]hile the initial petition was not in compliance with the Letter of the procedural requirements, it was and still is in conformity with the Spirit of those requirements," is not sufficient to permit a review of the merits of the petition. It is noted that the initial petition was also filed well beyond 90 days of the date of actual notice.

D. The petition of Fred S. Lee is hereby dismissed.

DATED: Albany, New York
March 22, 2012

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE