

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
MILDRED COLON	:	DECISION
<hr/>		
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 46, Title T of the	:	
New York City Administrative Code for	:	
the Year 1979.	:	

Petitioner, Mildred Colon, 2940 Ocean Parkway, Brooklyn, New York 11235, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the New York City Administrative Code for the year 1979 (File No. 64528).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1986 at 9:15 A.M. Petitioner appeared by Juris G. Cederbaums, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly mailed the Notice of Deficiency dated March 10, 1983 to petitioner pursuant to section 681(A) of the Tax Law.

II. Whether petitioner timely protested the March 10, 1983 Notice of Deficiency of personal income tax.

FINDINGS OF FACT

1. On December 8, 1982, the Audit Division mailed a Statement of Audit Changes to petitioner, Mildred Colon, which stated that petitioner had failed

to file a tax return for the year 1979 and that New York State tax liability was being computed based upon available Federal information.

2. Said Statement of Audit Changes also asserted penalties pursuant to Tax Law §§ 685(a)(1); (a)(2) and 685(c), for failing to file a return on or before the due date, failing to pay tax when due and for underestimation of tax; a negligence penalty was also asserted to conform to Federal audit adjustments.

3. The Statement of Audit Changes incorporated the total income from Federal sources, \$87,135.97, subtracted the standard deduction of \$2,400.00 and exemptions of \$700.00, to arrive at New York taxable income of \$84,035.97. On this figure, state and city taxes were calculated to be \$14,078.95, which, together with section 685(a),(1); (a)(2);(b) and (c) penalties of \$6,762.62, and interest of \$4,140.47, yielded a total amount due of \$24,982.04.

4. The Statement of Audit Changes was mailed to petitioner at her last known address, 300 West 55th Street, Apartment 6C, Manhattan, New York, on December 8, 1982, and was returned to the Department marked "return to sender, moved, not forwardable".

5. On March 10, 1983, the Tax Compliance Bureau issued a Notice of Deficiency against petitioner asserting additional tax due in the sum of \$14,078.95, with penalty of \$6,973.80 and interest of \$4,578.05, for a total amount due **of** \$25,630.80. Subsequently, on July 21, 1983, the Tax Compliance Bureau issued two notices and demands for payment of income tax due for the additional tax due to New York State and New York city.

6. The Audit Division's only evidence of mailing said Notice of Deficiency to the petitioner **is** a copy of a mailing log listing the petitioner by name and her address at 300 West 55th Street, Apartment 6C, Manhattan, New York 10019.

7. The mailing log bears the seal of the United States Postal Service in Albany, New York, dated March 10, 1983, and lists "1979, 79" under the column labelled "Remarks".

8. The Audit Division did not produce the return receipt, original notice and envelope, affidavits or testimony as to the accuracy or authenticity of the log, or affidavits or other evidence as to the course of business or office practices with regard to mailings or certification of mailing. In addition, other than the Postal Service seal, no signature or initials appear on the face of the mailing log.

9. Petitioner was arrested in September 1979 and sentenced on October 21, 1981 for four counts of criminal possession of a controlled substance. Petitioner was incarcerated in various institutions of the State of New York for a continuous period of three years from February of 1981 through February 22, 1984.

10. On July 18, 1985, following issuance of tax warrants against petitioner, her representative filed a petition in the form of a letter of protest.

11. The tax liability asserted in the Statement of Audit Changes and Notice of Deficiency was based upon various items, including cash, jewelry and narcotics seized in petitioner's apartment at the time of her arrest, rent expense and living expenses.

12. Petitioner contends that the Notice of Deficiency was never mailed to her by the Audit Division, that she never received same and that, therefore, proper service on her was not effected.

CONCLUSIONS OF LAW

A. That Tax Caw § 681(a) and Administrative Code of City of New York § T46-181.0(a) state, in pertinent part:

"A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.

B. That the presumption of delivery does not arise until adequate proof of mailing has been adduced. Caprino v. Nationwide Ins. Co. 34 AD2d 522. Further, there is a presumption in law that a letter properly addressed, stamped and mailed is duly delivered to the addressee. Gardam & Son v. Batterson. 198 N.Y. 175.

C. That the evidence of mailing the Notice of Deficiency submitted herein, to wit, the mailing log, was inadequate. Affidavits, testimony as to the accuracy or the authenticity of the mailing log, and affidavits or testimony as to the respondent's course of business or office practices which would tend to prove that mailing was effected are essential elements of proof needed to qualify a mailing log as proof of mailing. (MacLean v. Procaccino, 53 AD2d 965).

D. That whatever weight may be ascribed to the mailing log herein is overcome by the failure of the Audit Division to produce either the return receipt or the letter, as returned by the Post Office, or any further proof that the notice was mailed as required by Tax Law § 681(a) (MacLean v Procaccino, supra, p. 966; of. T.J. Gulf, Inc. v. New York State Tax Commn., A D 2 d — [3d Dept 1986] wherein a bulk sale notice, served upon petitioner by ordinary mail, was found properly mailed after the Audit Division submitted detailed testimony of office mailing practices and its compliance therewith, giving rise to a presumption of receipt.)


E. That, since the Audit Division failed to properly mail the Notice of Deficiency in accordance with Tax Law § 681(a), the letter of protest dated July 18, 1985 is deemed a timely filed petition.


F. That the petition of Mildred Colon is deemed timely filed and the matter is to be returned to the Tax Appeals Bureau for further proceedings not inconsistent herewith.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1987


PRESIDENT


COMMISSIONER


COMMISSIONER