

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
The Mutual Life Insurance Company of New York : AFFIDAVIT OF MAILING
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 :
Administrative Code of the City of New York for :
the Year 1978. :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 3rd day of July, 1986, he/she served the within notice of Decision by certified mail upon The Mutual Life Insurance Company of New York the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

The Mutual Life Insurance Company of New York
Attn: Seymour Sperber
1740 Broadway
New York, NY 10019

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
3rd day of July, 1986.

David Parchuck

Janet M. Snay
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 3, 1986

The Mutual Life Insurance Company of New York
Attn: Seymour Sperber
1740 Broadway
New York, NY 10019

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 1312 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
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
Administrative Code of the City of New York for
the Year 1978.

DECISION

Petitioner, The Mutual Life Insurance Company of New York, Attention: Seymour Sperber, 1740 Broadway, New York, New York 10019, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1978 (File No. 32513).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 16, 1982 at 9:30 A.M. Petitioner appeared by Robert Levy, Esq., and Charlotte Martin, Esq. The Audit Division appeared by Paul B. Coburn, Esq., (Paul A. Lefebvre, Esq., of counsel).

ISSUE

Whether petitioner is liable for the payment of interest assessed on the basis of alleged late payment of New York State and New York City income tax withheld.

FINDINGS OF FACT

1. On January 24, 1980, the Audit Division issued to petitioner, The Mutual Life Insurance Company of New York ("MONY"), a Notice of Unbalanced

Account which stated that a reconciliation of records revealed an underpayment of New York State and New York City tax withheld by petitioner as follows:

	<u>CITY</u>	<u>STATE</u>
Reconciliation shows amount withheld.....	327,711.99	2,381,078.25
Total tax paid or assessed on returns filed...	<u>315,711.99</u>	<u>2,290,578.25</u>
Imbalance.....	<u>12,000.00</u>	<u>90,500.00</u>
Total or Net Shortage.....	<u>\$102,500.00</u>	

2. By a letter dated January 31, 1980, MONY stated that a review of its records revealed all payments due had been timely submitted, but that a check in the amount of the above imbalance (\$102,500.00), pertaining to the period December 1, 1978 through December 15, 1978, remained outstanding. MONY further stated that it had placed a stop payment order on this outstanding check. Included with the letter of January 31, 1980 was a duplicate check replacing the original and outstanding check allegedly sent. Copies of these two checks show the original check was dated December 18, 1978, and the duplicate replacing it was dated February 1, 1980.

3. On March 31, 1980, the Audit Division issued to MONY a Notice and Demand for Payment of New York State and/or New York City Withholding Tax Due covering the period December 16, 1978 through December 31, 1978. This Notice acknowledged payment of the tax (\$102,500.00), but asserted penalty and interest due in the amounts of \$29,725.00 and \$8,805.67, respectively, covering the period from the date payment of the withholding tax was due (January 31, 1979) until the date of its payment (February 4, 1980).

4. By a letter dated April 14, 1980, MONY reiterated its position that a check had been timely mailed, but remained uncashed, and further requested abatement of the penalty and interest charges asserted above.

5. By a letter dated August 18, 1980, the Audit Division notified MONY that the penalty (\$29,725.00) would be cancelled, but that the interest (\$8,805.67) remained due. As explained subsequently at the hearing, "it was determined that in all probability a check was issued by the company ... Based on the probability the penalties [for late filing] were waived."

6. MONY protested the interest charge in a letter to the Audit Division dated December 8, 1980, and, on May 14, 1981, filed a petition for a hearing on this issue.

7. At the hearing, MONY presented copies of the two checks involved, a copy of the specific voucher pertaining to and necessary for the drawing of the original check and affidavits from those persons directly involved in the actual process of drawing and mailing both checks. According to these documents, the procedure used by MONY in drawing and mailing the original check for payment of the withholding taxes involved herein, which was the regular procedure followed by MONY when drawing and mailing checks in payment of accounts such as those for taxes, was as follows:

a) A numbered, dated voucher including the payee's name and address, the amount to be paid and other information is presented to MONY's cashiers operation division for disbursement of funds in the form of a check.

b) In response to the voucher, a numbered check is prepared in triplicate for the required amount and is manually signed by an authorized employee of the cashiers operation division. A check in an amount greater than \$25,000.00 requires two authorized signatures. The voucher is then stamped as "Paid" and is initialed by the employee(s) whose signature(s) appears on the check.

c) The check is given to a mail clerk in the cashiers operation division who compares the signed check with the voucher to establish accuracy and completeness of amount, address and signature(s). The check is then placed into either a window envelope with the payee's name and address exposed or into a self-addressed envelope furnished by the payee, and the envelope is sealed and placed in a mail tray for pickup by another mail clerk. Appropriate bookkeeping entries are made from the voucher and the voucher is then forwarded to MONY's archives for storage of records.

d) Mail from the cashiers operation division, including checks, is picked up from the mail trays there several times daily and brought to MONY's mail room to be weighed and have postage applied. The mail is then placed in trays for pickup.

e) The outgoing trayed mail is picked up from MONY's mail room four times daily by Mail Delivery Service, Inc., and is transported and delivered to the United States Post Office.

8. During the period at issue herein, MONY did not use certified or registered mail for sending payments of taxes due. Petitioner currently sends all tax returns and payments, however, via certified mail.

9. The original check dated December 18, 1978 has not been cashed by the State, has not been returned to MONY and remains uncashed and outstanding on MONY's books and records.

10. The funds from which withholding taxes are paid by MONY are kept in a non-interest bearing checking account. Thus, MONY asserts, the funds remaining in the account until the date of payment of the second or duplicate check resulted in no benefit to MONY.

CONCLUSIONS OF LAW

A. That the Personal Income Tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

B. That section 684 of the Tax Law, in pertinent part, provides for assessment of interest if "any amount of income tax is not paid on or before the last date prescribed in this article [Article 22] for payment...".

C. That section 691(a) provides as follows:

"If any return, declaration of estimated tax, claim, statement, notice, petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date, delivered by United States mail to the tax commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, or for making the payment, including any extension granted for such filing or payment, and only if such document or payment was deposited in the mail, postage prepaid, properly addressed to the tax commission, bureau, office, officer or person with which or with whom the document is required to be filed or to which or to whom such payment is required to be made. If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the tax commission, bureau, office, officer or person to which or to whom addressed. To the extent that the tax commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section. This subsection shall apply in the case of postmarks not made by the United States Post Office only if and to the extent provided by regulations of the tax commission." (Emphasis supplied.)

In order to be considered timely, a withholding tax return required by section 674 must be actually delivered to the Audit Division on or before the date

prescribed for filing, or it must be delivered to the Audit Division in an envelope bearing a United States postmark on or before such date. Where the return is sent via registered mail, the registration constitutes prima facie evidence of delivery. These rules apply with equal force to payments of personal income tax; the references in section 691(a) to "payment" were added by the Laws of 1971, Chapter 157.


D. That petitioner did not meet its burden of proof to establish timely payment of the withholding taxes involved herein. MONY admittedly did not utilize registered or certified mail to remit its payment. Proof of mailing by regular mail does not satisfy the requirement of proving delivery of the payment to the Audit Division. (See Matter of Joseph and Grace Garofalo, State Tax Comm., September 28, 1983 and Matter of Anthony and Mary Mancuso, State Tax Comm., September 28, 1983.)

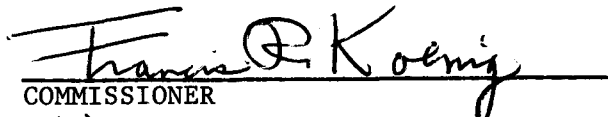
E. That the petition of The Mutual Life Insurance Company of New York is denied, and the Notice and Demand dated March 31, 1980 and modified on August 18, 1980 (see Finding of Fact "5") is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER