STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **MATTHEW J. RYAN** 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 2009.	DETERMINATION DTA NO. 830219

Petitioner, Matthew J. Ryan, filed a petition 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 2009.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on January 5, 2023, at 10:30 a.m., with the final brief to be submitted by April 20, 2023, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie M. Lane, Esq., of counsel).

ISSUE

Whether petitioner has met his burden of proving that the notice of deficiency issued by the Division of Taxation for the year 2009 was erroneous.

FINDINGS OF FACT

1. Petitioner, Matthew J. Ryan, filed petitions with the Division of Tax Appeals on December 31, 2020, challenging a conciliation order dismissing request dated December 11, 2020 (conciliation order).[1] The conciliation order, which was attached to the petitions,

[1] Petitioner simultaneously filed two separate petitions, one for the tax year 2000 and the other for the tax year 2009, both challenging the same conciliation order. The petition for tax year 2000 was dismissed by Order

references notice and demand number L-020421479, for tax year 2000, and notice of deficiency and notice and demand number L-041800571, for tax year 2009.

2. On April 17, 2010, petitioner filed an application for automatic six-month extension of time to file for individuals, form IT-370 (application), requesting additional time to file his New York State personal income tax return for the year 2009 (return). The application was in petitioner's name only, and listed an address in Troy, New York. The application did not show a balance due and no payment was remitted with the application.

3. The Division of Taxation (Division) received information from the Internal Revenue Service (IRS) indicating that petitioner had a New York address and sufficient income to require the filing of a New York State personal income tax return for tax year 2009. The information received from the IRS indicated that for 2009, petitioner had adjusted gross income of $96,273.00 and taxable income of $7,893.00.

4. The Division searched its records and determined that petitioner did not file a New York State personal income tax return for the year 2009.

5. By letter dated March 14, 2014, the Division informed petitioner that its records indicated that for 2009 petitioner had filed a federal income tax return, was a New York resident or nonresident with New York source income, and may be required to file a New York State income tax return, but that it had no record that petitioner filed a New York return for that year. The letter requested that petitioner respond within 30 days by either filing a New York State income tax return or explaining why he did not have to file.

6. Petitioner did not respond to the Division's March 14, 2014, letter and, on August 21, 2014, the Division issued to petitioner a statement of proposed audit changes (statement). The

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dated August 25, 2022 (***Matter of Ryan***, Division of Tax Appeals, August 25, 2022). The current determination addresses tax year 2009 only.

statement utilized the information received from the IRS and determined that petitioner had New York adjusted gross income of $96,273.00, applied a New York standard deduction, and asserted tax due of $5,683.00.

7. On September 8, 2014, petitioner responded to the statement indicating his disagreement with the amount due and asserting that he was a resident of Florida for 2009. Petitioner did not include any other documentation with his correspondence.

8. The Division sent correspondence to petitioner, dated December 19, 2014, requesting that he provide documentation to support his claim that he was a full-year resident of another state in 2009 and include a copy of the income tax return he filed with the other state. The correspondence further requested that if petitioner was a part-year resident of another state, he show the period of residence in New York. The correspondence further stated that if petitioner did file a 2009 New York State income tax return, he must provide a complete copy, including wage and tax statements.

9. On January 14, 2015, the Division issued to petitioner notice of deficiency number L-041800571, asserting tax in the amount of $5,683.00, plus interest and penalties for the tax year 2009.

10. The Division issued to petitioner notice and demand number L-041800571, for tax year 2009, on May 1, 2015.

11. Petitioner responded to the notice and demand by correspondence, dated June 24, 2015, disputing the tax determined due for 2009 and claiming that he filed an amended return carrying losses he had in 2010. Petitioner did not include a copy of an amended return with the correspondence. Additionally, no amended resident income tax return for 2009 was introduced into the record.

12. On or about July 9, 2018, petitioner sent the Division a copy of his U.S. Individual Income Tax Return, form 1040, for 2009 (2009 federal return), with a filing status of married filing separately. Petitioner reported a home address in Troy, New York, on the 2009 federal return and reported wage and salary income of $96,273.00. Attached to the 2009 federal return, among other items, was a form 1099-MISC, miscellaneous income, reporting nonemployee compensation to petitioner from Alex S. Joseph Associates, Inc., with an address in Dewitt, New York, in the amount of $7,024.52 and a form 1099-MISC, miscellaneous income, reporting nonemployee compensation to petitioner from Prime Rate and Return, LLC, with an address in Troy, New York, reporting nonemployee compensation in the amount of $80,000.00.

13. Petitioner filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) on September 30, 2020, seeking review of the notices for the tax years 2000 and 2009.

14. On December 11, 2020, BCMS issued a conciliation order dismissing request. The conciliation order determined that petitioner's protest of notices numbered L-020421479 and L-041800571 was untimely.

15. In response to the petitions filed on December 31, 2020 (***see*** finding of fact 1), the Division filed its answer on April 14, 2021.

16. Petitioner filed a reply to the Division's answer on April 28, 2021.

17. On March 4, 2022, the Division sought leave to amend its answer by letter to Supervising Administrative Law Judge Herbert M. Friedman, Jr., pursuant to 20 NYCRR 3000.4 (d). A copy of this request was sent to petitioner by certified mail. By letter of March 4, 2022, leave was granted by Supervising Administrative Law Judge Friedman.

18. Petitioner filed a motion, dated April 1, 2022, requesting reconsideration of the granting of leave for the Division to amend its answer. As part of his motion, petitioner also requested that he be granted "a Summary Judgement" based on the Division's failure to timely respond to his April 28, 2021 reply. Petitioner did not attach an affidavit to his motion. Petitioner further requested that, if his motion for reconsideration was denied, he be permitted a 10-month extension in which to reply to the Division's amended answer.

19. The Division opposed petitioner's motion and cross-moved to dismiss the petition or for summary determination on the grounds that the Division of Tax Appeals lacks subject matter jurisdiction over the petition with regard to the tax year 2000 and that the pleadings failed to state a claim for relief for the tax year 2009.

20. The Division did not offer proof of mailing of notice of deficiency number L-041800571.

21. By order dated August 25, 2022, the Division of Tax Appeals denied petitioner's motions for reconsideration of granting leave for the Division to amend its answer and for summary determination, granted the Division's cross-motion to dismiss with regard to notice and demand L-020421479 (tax year 2000), sustained the conciliation order dated December 11, 2020 for that notice, and denied the Division's cross-motion for summary determination with regard to notice of deficiency L-041800571 for the year 2009 (***see*** finding of fact 1). A hearing for tax year 2009 was subsequently held on January 5, 2023.

22. During the hearing in this matter, petitioner introduced a final judgment and decree of divorce, dated October 31, 2013, in the ***Matter of E. Colleen Ryan against Matthew J. Ryan*** (Sup. Ct, Rensselaer County), an Order, dated August 17, 2011, in ***Securities and Exchange Commission v Matthew John Ryan and Prime Rate and Return, LLC, individually and d/b/a***

American Integrity Financial Co., (1:10-CV- 513 NAM/RFT, 2015 [NDNY Aug. 17, 2011]), and a Joint Stipulation and Proposed Order, filed August 17, 2011, in ***Securities and Exchange Commission v Matthew John Ryan and Prime Rate and Return, LLC, individually and d/b/a American Integrity Financial Co.,*** (1:10-CV- 513 NAM/RFT, 2015 [NDNY Aug. 17, 2011]).

SUMMARY OF PETITIONER'S POSITION

23. Petitioner argues, in part, that he timely filed a New York income tax return for the year 2009, that a federal receiver was assigned for his personal and business assets, that said receiver verified petitioner's filing of the 2009 return, that he did not have taxable income because the receiver did not file a form 1099 related to Prime Rate and Return, LLC, for the year 2009, that the Division should have issued the notice to said receiver and not to petitioner personally, and that the Division is in violation of an asset freeze and was required to file a motion in federal court to contact petitioner.

CONCLUSIONS OF LAW

A. Addressing first the BCMS conciliation order dismissing request, issued on the basis that petitioner's protest for notice number L-041800571 was untimely, the initial inquiry regarding the timeliness of a protest is whether the Division has carried its burden of demonstrating proper issuance of the notice being challenged by mailing the same, by certified or registered mail, to petitioner's last known address (***see*** Tax Law § 681; ***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). In this case, the Division presented no evidence of either its standard procedure for mailing statutory notices or that such procedure was followed in this instance. As such, the Division has not met its burden of demonstrating proper mailing in the first instance (***see Matter of Ruggerite, Inc. v State Tax Commn.***, 97 AD2d 634 [2nd Dept

1983], ***affd*** 64 NY2d 688 [1984]). The consequences of this failure to establish the date and fact of mailing are that the period within which a protest must be filed does not commence, and that the presumption of receipt of a notice that ordinarily arises upon proof of proper mailing does not attach (***see Matter of Sugranes***, Tax Appeals Tribunal, October 3, 2002). A failure to prove proper mailing can be overcome by other evidence establishing actual receipt of a notice and the date of such actual receipt, and thereby commence the period within which a petition or a request for conference must be filed in order to be considered timely (***see e.g. Matter of New York City Billionaires Constr. Corp.***, Tax Appeals Tribunal, October 20, 2011). Where, as here, the Division's proof fails to establish the date of mailing of the notice, but where there is no question that the notice was in fact actually received, the time period for filing a protest against the notice is not triggered until the date of petitioner's actual receipt of the notice is established (***see Matter of Hyatt Equities, LLC,*** Tax Appeals Tribunal, May 22, 2008; ***Matter of Riehm v Tax Appeals Trib.***, 179 AD2d 970 [3d Dept 1992], ***lv denied*** 79 NY2d 759 [1992]), unless issuance of the assessment itself was precluded as time-barred by operation of the period of limitations thereon (***see Matter of Agosto v Tax Commn. of the State of New York***, 68 NY2d 891 [1986], ***revg*** 118 AD2d 894 [3d Dept 1986]; ***Matter of Rosen***, Tax Appeals Tribunal, July 19, 1990).[2] In this case, there is no question that the notice was received, by virtue of petitioner's filing of a request for conciliation conference, but there is no evidence in the record establishing a date of actual receipt prior to the date petitioner filed the request. As such, petitioner's protest of notice number L-041800571 is deemed timely and the Division of Tax Appeals has jurisdiction to address the merits of this matter.

[2] In this case, as the notice was based on petitioner's failure to file a return for the year at issue and petitioner has not met his burden of proof to establish such filing (***see*** Conclusion of Law E below), there was no statute of limitations on the issuance of the notice (***see*** Tax Law § 683 [c]).

B. Determinations of tax due made by the Division in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish that the determination is erroneous (***Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704, 595 NYS2d 398 [1993]).

Every resident individual of New York State having income subject to New York personal income tax is required to file an income tax return (***see*** Tax Law § 651 [a] [1]). Petitioner has the burden of proof to show that he was not required to file a resident income tax return for 2009, or that he filed such return and paid the tax required to be shown as due (***see*** Tax Law § 689 [e]). Petitioner has failed to meet this burden of proof.

While petitioner's initial response, dated September 8, 2014, to the Division's statement alleged that he was a resident of Florida for 2009, he has not presented any evidence to support such claim and has not raised this argument at the hearing in this matter. Moreover, the evidence in the record belies petitioner's allegation. Specifically, the information the Division received from the IRS indicated that petitioner had an address in New York State in 2009; the application for automatic six-month extension of time filed by petitioner for 2009 lists an address in Troy, New York; the copy of petitioner's 2009 federal income tax return that he sent to the Division reports an address in Troy, New York; and the forms 1099-MISC for 2009 list petitioner's address in Troy, New York.

C. Tax Law § 681 (a) provides, in pertinent part, as follows:

> "If upon examination of a taxpayer's return under this article the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer. If a taxpayer fails to file an income tax return required under this article, the tax commission is authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of deficiency to the taxpayer."

The Division commenced its audit of petitioner after it received information from the IRS indicating that he had a New York address and sufficient income to require the filing of a return for 2009, and a review of its records failed to disclose any New York State income tax return for the year 2009. The Division made a written request to petitioner for documentation to address the issue of his failure to file a personal income tax return for the year at issue. Petitioner failed to supply any documentation. Thus, the Division was authorized to estimate petitioner's personal income tax liability "from any information in its possession" (Tax Law § 681 [a]; ***see Lysek v Commissioner of Internal Rev.***, 34 TCM 1267 [1975], ***affd*** 583 F2d 1088 [9th Cir 1978]). Here, the Division had in its possession information from the IRS that petitioner reported on his federal income tax return for 2009. Pursuant to Tax Law § 681 (a), the Division was authorized to use this information to estimate petitioner's personal income tax liability for the year at issue.

D. Petitioner has failed to meet his burden of proving that the Division's estimation of his personal income tax liability for 2009 was erroneous. Petitioner's argument that he did not have taxable income in 2009 based on his allegation that a receiver did not file a form 1099 related to Prime Rate and Return, LLC, is not supported by the record. The information the Division received from the IRS, as well as the 2009 federal return submitted by petitioner, both show that petitioner had taxable income for the year at issue. The only documents introduced into the record by petitioner, the final judgment and decree of divorce, order and joint stipulation and proposed order (***see*** finding of fact 22), contain no evidence to dispute the Division's determination regarding his taxable income.

E. Petitioner's arguments that that he timely filed a New York income tax return for the year 2009, that a federal receiver was assigned for his personal and business assets and verified

his filing of the 2009 return, and that the Division is in violation of an asset freeze and was required to file a motion in federal court to contact petitioner, are likewise not supported by the record. Petitioner has presented no evidence to show that he filed a New York personal income tax return for 2009, nor that a receiver or anyone else filed a resident return on his behalf for 2009. Moreover, the order and joint stipulation and proposed order in ***SEC v Ryan***, introduced into the record by petitioner, do not support his argument that a federal receiver verified his filing of a 2009 return or that the Division was precluded from contacting petitioner directly regarding the audit or was barred from issuing a notice directly to him. Indeed, petitioner's allegations are directly contradicted by the Northern District Court's decision in ***SEC v Ryan*** (1:10-CV- 513 NAM/RFT, 2015 WL 5177635 [NDNY Sept. 4, 2015]), which found that a receiver was appointed over Prime Rate and Return, LLC, on May 3, 2010 and that on October 18, 2013, the Court discharged the receiver.[3] As such, contrary to petitioner's argument, the time

[3] In ***SEC v Ryan***, the Securities and Exchange Commission (SEC) brought a civil action against defendants Matthew John Ryan and Prime Rate and Return LLC (Prime Rate), individually and d/b/a American Integrity Financial Co. (American Integrity). Prime Rate was a limited liability company of which petitioner was the sole member. The SEC alleged an ongoing fraud orchestrated by petitioner and Prime Rate and sought the following relief: a judgment holding that defendants violated the securities laws, an injunction restraining defendants from committing future violations, appointment of a receiver, disgorgement of ill-gotten gains, and related relief. On May 3, 2010, the Court granted the SEC's application for emergency relief and entered an order to show cause imposing a temporary restraining order, asset freeze, and other emergency relief and appointing a receiver over Prime Rate. On June 7, 2010, with the parties' consent, the Court entered a preliminary injunction continuing the interim relief. On April 2, 2013, the Court entered a final consent judgment against Prime Rate ordering Prime Rate to pay a total of approximately $7.1 million in disgorgement and prejudgment interest and deeming that obligation satisfied by the receiver's prior payment to the SEC of $71,927.00, plus certain potential future payments. In August 2013, the receiver collected an additional $8,346.57, which he remitted to the SEC. On October 18, 2013, the Court discharged the receiver. Thereafter, the receiver recovered an additional $720.00, to be disbursed by the creditor directly to the SEC. On September 4, 2015, the Court granted the SEC's motion for summary judgment and permanently restrained and enjoined Mr. Ryan from committing future violations of the securities laws and rules, ordered that defendants disgorge all ill-gotten gains, and that this obligation is satisfied by the Amended Memorandum-Decision and Order (Amended Restitution Order) dated May 1, 2015, entered in *United States v. Ryan*, 1:10-CR-319 (N.D.N.Y.) (Dkt. No. 71); and granted the SEC's motion for release of funds (***SEC v Ryan***, 1:10-CV- 513 NAM/RFT, 2015 WL 5177635 [NDNY Sept. 4, 2015]). In the related criminal matter, petitioner pleaded guilty to one count of securities fraud, which charged that he used a manipulative and deceptive device or contrivance in contravention of SEC rules and regulations by withdrawing and misappropriating for his own use funds invested in American Integrity, and that such withdrawals and misappropriations were inconsistent with the representations made to, and the objectives of, American Integrity investors. In the plea agreement, Ryan consented to the entry of an order directing him to pay restitution as determined by the Court. At sentencing on October 12, 2011, the Court sentenced Ryan to 121 months incarceration followed by three years supervised release.

of appointment of the receiver for Prime Rate expired prior to the date the Division commenced the audit and issued the notice. As such, petitioner's arguments are rejected as meritless.

F. The petition of Matthew J. Ryan is denied and the notice of deficiency, dated January 14, 2015, is sustained.

DATED: Albany, New York
September 14, 2023

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE

Subsequently, the Court issued an Amended Memorandum-Decision and Order regarding restitution (***see Id.***; ***United States v Ryan***, 806 F3d 692 [2d Cir 2015]). Neither of those proceedings precluded the Division from auditing petitioner or issuing a notice to him for 2009.