STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

KEYBOARD()JOHN W. AND DORIS N. RIEHM :
DECISION

KEYBOARD()for Redetermination of a Deficiency or for:
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1982 and 1983. :

KEYBOARD()The Division of Taxation[1] filed an exception to the determination of the Administrative Law Judge issued on January 4, 1990 with respect to the petition of John W. and Doris N. Riehm, 1321 South College Avenue, Tyler, Texas 75701 for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 and 1983 (File No. 803437). Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Both parties filed briefs on exception. The Division of Taxation's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

Issue

I. Whether a notice of deficiency which was not mailed to petitioners' last known address as required by Tax Law § 681(a) is sufficient under Tax Law § 683(e) to suspend the three-year limitation period on assessments provided by Tax Law § 683(a).

Findings of Fact

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

In 1982 and 1983, the years here in issue, petitioners,

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[1]Petitioners also filed an exception but this exception was dismissed as untimely (Matter of Riehm, Tax Appeals Tribunal, July 26, 1990).

John W. and Doris N. Riehm, resided in Bronxville, New York. They also resided there in 1984 and 1985. Sometime in 1985 or 1986 they moved to Tyler, Texas. Petitioners timely filed joint New York State resident income tax returns for 1982 and 1983 bearing the mailing address 238 Pondfield Road, Bronxville, New York 10708.

A Notice of Deficiency was issued on April 10, 1986 to John and Doris Riehm for 1982 and 1983 asserting personal income taxes due in the amount of $52,342.23, plus a penalty for negligence under Tax Law § 685(b) of $2,617.11 and interest of $12,272.77, for a total of $67,232.11.

The notice was sent to petitioners at 238 Pondfield Road, Bronxville, New York 10708. This notice was not received by petitioners until after April 15, 1986. The Division of Taxation has agreed that the Bronxville address was not the last known address of petitioners.

Petitioners had informed the White Plains District Office of the Division of Taxation by letter dated March 17, 1986 of their change of address to Tyler, Texas. The March 17 letter was written in response to the receipt by petitioners of a Statement of Audit Changes from that office. The March 17 letter was received by the Division on March 31, 1986 and the district office acknowledged receipt of the letter and stated that petitioner's file had been sent "to Albany" and that they would

receive from Albany a deficiency notice.

The asserted deficiency includes a number of items: an increase in capital gains; disallowance of an investment credit in 1982; disallowance of a resident credit for failure of proof; addback of depletion in 1982; and a decrease in a partnership loss in 1983.

Most of the items of the deficiency have been agreed to by the parties. The sole remaining item in issue involves capital gains from sales of securities in 1982 and 1983 by the John W. Riehm Revocable Trust. The adjustment for capital gains asserted by the Division (after the capital gains deduction) is $986.64 for 1982 and $179,333.20 for 1983. The revised amount of tax due is $43,026.20 plus penalty and interest.

Mr. John Riehm created a revocable trust in 1982 in Texas with a Texas bank as trustee. The trust instrument provided that:

> "if any part of the corpus...is sold the proceeds shall be immediately reinvested as corpus and no portion thereof shall be considered to be distributable net income of the Trust as that term is defined in the Internal Revenue Code."

In 1982 and 1983 the Texas trustee sold some of the assets of the trust. The trust included capital gain from the sale of

the assets in its Federal tax returns for 1982 and 1983, but paid no tax. This same capital gain income, however, was included in the Federal tax returns of petitioners for 1982 and 1983.

Opinion

In the determination below, the Administrative Law Judge granted petitioners' request for cancellation of a deficiency pertaining to personal income tax assessed for the year 1982. Specifically, it was determined that 1) petitioners' new address, which was mailed to the Division of Taxation (hereinafter the "Division") on March 17, 1986, represented their "last known address" under Tax Law § 691(b); 2) the Division failed to comply with Tax Law § 681(a), which requires that a notice of deficiency be sent to the "last known address" within three years from the date a return is filed; and 3) therefore, the notice of deficiency for 1982 which was received by petitioners after the period of limitations had expired was not timely issued. The Administrative Law Judge also concluded that the capital gains from petitioners' trust were properly included in petitioners' 1983 income.

On exception, the Division contends that because petitioners actually received the notice of deficiency and had an adequate opportunity to file a timely petition, the purpose of section 681(a), to provide the taxpayer with actual notice of a deficiency, was achieved. Accordingly, it asserts that under Tax Law § 683(e), the statute of limitations was suspended at the time of mailing.

In response, petitioners contend that because the Division's mailing procedures did not comply with the compulsory language of Tax Law § 681(a), the statute of limitations had lapsed before a valid assessment could be made. Petitioners also note the absence of any New York case law or statute which permits the statute of limitations to be tolled upon mailing, when an address other than the "last known address" is used, and the notice of deficiency is not received until after the statutory period has lapsed. Petitioners assert that the Division's attempt to resolve this issue by reference to corresponding provisions of the Internal Revenue Code is incorrect, as the method of creating an assessment at the Federal level is independent of the mailing of a notice of deficiency. Petitioners also contend that, in the absence of statutory authority, it is improper to apply Federal law in deciding this question of State tax law.

We reverse the determination of the Administrative Law Judge with respect to the cancellation of the deficiency for 1982.

Tax Law § 683(a) provides that the assessment of tax must be made within three years after the date the return is filed. Before an assessment can be made, however, a notice of

deficiency must first be mailed to the taxpayer, who then has 90 days from the mailing to file a petition (Tax Law § 681[b]). The running of this three year statutory period is suspended when the notice of deficiency is mailed (Tax Law § 683[e]). If no petition is filed by the taxpayer within this 90-day period, the notice is deemed to be an assessment (Tax Law § 681[b]). Section 681(a) states that a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of [New York] state" (Tax Law § 681[a]).

The Division mailed a notice of deficiency on April 10, 1986, five days prior to the expiration of the three year statutory period. The notice was received by petitioners after this period had elapsed. Therefore, petitioners correctly state that unless the running of this statutory period was tolled upon the mailing of the deficiency, the receipt of notice does not fall within the three-year period required by Tax Law § 683(a). Petitioners argue that because the notice was not sent to petitioners' "last known address" as required by section 681(a), the notice of deficiency can become effective only when actual notice occurs. As petitioners received the notice outside of this three-year period, they argue that the notice of deficiency and, therefore, the assessment is void.

In support of their position, petitioners cite Matter of Panza (State Tax Commn., June 17, 1986). In Panza, the former Tax Commission held that where a notice of deficiency is not mailed to the taxpayer's "last known address" in accordance with section 681(a), the taxpayer has 90 days from the date of receipt to file a petition (Matter of Panza, supra). The issue of whether this mailing acted to toll the statute of limitations was not addressed, however, as the notice was received by the taxpayer within three years from the filing of the return. Petitioners argue that the holding in Panza, applied to the facts of this case, supports the conclusion that the running of the statutory period may be tolled only at the instant that actual notice is achieved.

A case factually similar to Panza was addressed in Matter of Agosto v. Tax Commn. (68 NY2d 891, 508 NYS2d 934, revg 118 AD2d 894, 499 NYS2d 457). In Agosto, decided subsequent to Panza, the New York Court of Appeals held that when the notice of deficiency is actually received by the taxpayer within three years from the filing of the return, the notice is valid despite a failure to use the taxpayer's "last known address" (Matter of Agosto v. Tax Commn., supra, 508 NYS2d 934, 935). In reversing the Appellate Division, the Court explicitly rejected a strict construction of section 681(a), grounding its interpretation upon the statute's legislative history which provides that the purpose for its enactment was to bring New York in conformity with the comparable Federal provision, Internal Revenue Code § 6212(a) and (b) (Matter of Agosto v. Tax Commn., supra, citing 1962 McKinney's Session Laws of NY, Memorandum of State

Department of Taxation and Finance, at 3536-3537, Executive Memoranda, at 3681-3682). Then, citing Federal case law as the primary authority for its decision, the Court held the notice to be valid, despite the failure to use the taxpayer's "last known address" (Matter of Agosto v. Tax Commn., supra, citing Pugsley v. Commr., 749 F2d 691, 85-1 USTC ¶ 9121; Goolsby v. Tomlinson, 246 F Supp 674). From this conclusion that an incorrectly addressed notice of deficiency, if received, may be valid to assess tax, it follows that the mailing of an incorrectly addressed notice of deficiency is effective to suspend the statue of limitations, if the notice is received.[2]

The decision in Agosto also indicates that the Division's reliance on Federal cases, interpreting analogous Federal law, is appropriate. In support of its position, the Division cites Clodfelter v. Commr. (527 F2d 754, 76-1 USTC ¶ 9166 [9th Cir 1975], cert denied 425 US 979, 48 L Ed 2d 805). In Clodfelter, a case in which the critical facts are identical to those present here, the Internal Revenue Service mailed a notice of deficiency to a taxpayer on the final day before the three year statute of limitations would expire. The notice was received by the taxpayer subsequent to the expiration of the period. Although the deficiency letter was mailed with an incorrect street number, the error was apparent and was readily corrected by the Post Office, resulting in no delay (Clodfelter v. Commr., supra, 76-1 USTC ¶ 9166, at 83,235). The issue was whether

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[2]In the determination below, the Administrative Law Judge interpreted Agosto to hold that the effective date of the notice of deficiency is not the date of mailing, but the date of physical delivery to the taxpayer. We disagree. In Agosto, notices of deficiency mailed to an address other than the taxpayer's "last known address" were received by the taxpayer within three years from the filing of his return (Matter of Agosto v. Tax Commn., supra, 508 NYS2d 934, 935). After the Tax Commission refused to accept his petition filed after the 90-day period had expired, the taxpayer brought an action seeking a judgment invalidating the notice, and directing the issuance of a new deficiency notice to his "last known address" (Matter of Agosto v. Tax Commn., supra, 499 NYS2d 457, 458). The Court of Appeals denied the petitioner's request, holding simply that the notice, received within the three year period, was valid. Thus, the issue of when the notice became effective was not before the Court, nor can it be inferred from the Court's summary rejection of the taxpayer's argument, that the Court concluded that the notice was not effective until received. In fact, the Court implicitly embraced a position converse to that advocated by petitioner, as evidenced by its adoption of the Federal approach as expressed in the Pugsley case (Matter of Agosto v. Tax Commn., supra, citing Pugsley v. Commr., 749 F2d 691, 85-1 USTC ¶ 9121 at 87,082 [notice is effective from the date of mailing]).

Internal Revenue Code §§ 6212(b)(1)[3] and 6503(a)(1)[4] operated to toll the statute of limitations as of the date of mailing. The United States Court of Appeals for the Ninth Circuit held that the statute of limitations was tolled at the time the notice was mailed (Clodfelter v. Commr., supra, 76-1 USTC ¶ 9166, at 83,236). The Court also held it to be irrelevant that the notice was not mailed to the "last known address," provided that the actual notice was achieved without prejudicial delay (Clodfelter v. Commr., supra). The Court reasoned that the legislative plan contemplated that a taxpayer would be provided with actual notice where such can be reasonably achieved, and that mailing authorized by section 6212 is merely one means to attain that end (Clodfelter v. Commr., supra;

see, Borgman v. Commr., 888 F2d 916, 89-2 USTC ¶ 9635 [1st Cir 1989]; see also, Sicker v. Commr., 815 F2d 1400, 87-1 USTC ¶ 9304 [11th Cir 1987]).

Petitioners seek to insulate this case from the direction established in Agosto, which adopted the approach that Tax Law § 681 should be interpreted in a manner consistent with its Federal counterpart (see, Internal Revenue Code § 6212[a] and [b]) by claiming that a fundamental difference exists between the State and Federal tax schemes. Petitioners claim that the different means by which an assessment is created under the two schemes prohibit reliance on Federal case law in this instance. Specifically, they contend that the New York Tax Law contains no counterpart to Internal Revenue Code section 6203, which provides in relevant part:

> "[t]he assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary" (Internal Revenue Code § 6203).

Petitioners argue that the significance of this provision in this case by stating, "the moment there is a recording in the Office of the Secretary of the Treasury, an assessment is made for Federal tax purposes. It is unrelated to any date of mailing of a notice of deficiency" (Petitioners' brief, p. 5).

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[3]Internal Revenue Code § 6212(b)(1) provides that a "notice of deficiency . . . if mailed to the taxpayer's last address, shall be sufficient."

[4]Internal Revenue Code § 6503(a)(1) states in relevant part:

> "The running of the period of limitations provided in section 6501 . . . shall (after the mailing of a notice under 6212[a]) be suspended for the period during which the Secretary is prohibited from making the assessment."

Thus, they contend that the Federal cases cited by the Division, which hold that errors in addressing a deficiency may not be fatal to the validity of the deficiency, are not applicable to this case.

However, the premise of petitioners' argument runs in direct conflict with the language of Internal Revenue Code § 6213(a), which provides in relevant part:

> "[e]xcept as otherwise provided . . . no assessment of a deficiency in respect of any tax imposed . . . shall be made . . . until such notice has been mailed to the taxpayer, [and] not until the expiration of such 90-day . . . period" (Internal Revenue Code § 6213[a], emphasis added).

This prerequisite to creating an assessment under the Federal scheme is further evidenced by the language of Internal Revenue Code § 6503(a)(1), which states in relevant part:

> "[t]he running of the period of limitations provided in section 6501 . . . shall (after the mailing of a notice under section 6212[a]) be suspended for the period during which the Secretary is prohibited from making the assessment" (Internal Revenue Code § 6503[a][1], emphasis added).

Thus, in light of the directive espoused in Agosto for interpreting Tax Law § 681(a), and after a careful examination of the State and Federal statutory schemes, we hold that when a mailing of a notice of deficiency provides the taxpayer with actual notice without prejudicial delay, the statute of limitations is tolled at the time of mailing, notwithstanding the fact that the notice was not mailed to petitioners' "last known address."

In adopting the rule set forth in Clodfelter, notice may be found to be insufficient upon a showing by petitioners that the Division's failure to mail the notice to petitioners' "last known address" resulted in prejudicial delay. However, as petitioners make no claim that they were prejudiced, nor provide facts in the record which support such a finding, we conclude that the mailing of the notice of deficiency tolled the statute of limitations at the time of mailing.

Further, we do not share the policy concern expressed by the Administrative Law Judge, who stated that such a holding would encourage sloppy practices by the Division. This concern suggests that the Division would lack incentive to carefully update their records to ensure that the notice is mailed to the proper address. However, this failure would place the Division in the precarious position of relying on the notice to

fortuitously reach the taxpayer in order to toll the statute of limitations upon mailing. To suggest that this substantial risk of forfeiting tax revenues would be entertained by the Division seems highly improbable.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed to the extent that it held the notice of deficiency was not timely for the year 1982 but is otherwise sustained;

3. The petition of John W. and Doris N. Riehm is granted to the extent indicated in conclusion of law "D" of the Administrative Law Judge's determination but is otherwise denied; and

4. The Division of Taxation is directed to modify the notice of deficiency dated April 10, 1986 in accordance with paragraph "3" above but such notice is otherwise sustained.

DATED: Troy, New York
April 4, 1991

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner