STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LAWRENCE AND DORY ROSEN	:	DECISION
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax and Unincorporated Business Tax under Articles 22 and 23 of the Tax Law for the Years 1965 through 1968 and 1970.	:	

Petitioners, Lawrence and Dory Rosen, 9 Bluewater Hill South, Westport, Connecticut 06880, filed an exception to the determination of the Administrative Law Judge issued on November 9, 1989 which denied their petition for redetermination of a deficiency or for refund of New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1965 through 1968 and 1970 (File No. 805007). Petitioners appeared by Stern and Miller, Esqs. (Mark Stern, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

Petitioners filed a brief on exception. The Division filed a letter in lieu of a brief. Oral argument was not requested.

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

ISSUE

Whether petitioners timely filed a petition for redetermination of deficiencies for any or all of the years in question.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioners, Lawrence and Dory Rosen, were residents of Connecticut and were not residents of New York State during all of the years 1965 through 1970, inclusive.

In 1976, following an audit, the Internal Revenue Service ("IRS") determined that petitioners owed additional personal income taxes and penalties for each of the years 1965, 1966, 1967, 1968 and 1970. Thereafter, deficiency notices were issued by the IRS for such years and, inturn, were challenged by the Rosens. Said challenge was brought before the United States Tax Court but eventually was settled between the parties in 1985.

On July 1, 1985, Leon Lebensbaum, Esq., petitioners' attorney in the Federal matter, filed notice of these Federal changes with the New York State Tax Commission, pursuant to Tax Law § 659. On June 12, 1987, the Division of Taxation issued to petitioners two statements of audit changes calculating additional tax due, plus penalty and interest, for each of the noted years. The statements explain that they are based upon Attorney Lebensbaum's letter of July 1, 1985.

Also on June 12, 1987, the Division of Taxation issued to petitioners two notices of deficiency asserting, respectively, deficiencies for 1965, 1966 and 1967 in the aggregate amount of $10,128.64, plus penalty and interest, and for 1968 and 1970 in the aggregate amount of $4,299.42, plus penalty and interest. It is noted that on both statements of audit changes as well as on both notices of deficiency, petitioner's address is listed as 6 Bluewater Hill, Westport, Connecticut, rather than 9 Bluewater Hill, Westport, Connecticut.

On September 11, 1987, petitioners filed a petition for redetermination of the above asserted deficiencies. Attached to this petition were copies of the subject notices. It is admitted by petitioners that this petition was filed one day beyond the 90-day time limit within which a petition must be filed. This one-day lateness is attributed by petitioners to their unavailability to appropriately review and sign the petition as prepared by their attorney.

On October 16, 1987, the Division of Taxation's Bureau of Conciliation and Mediation Services issued Conciliation Order #81679. This Order denies petitioners' request for

conciliation conference upon the basis that the request therefor (i.e. the petition) was filed 91 days after the issuance of the notices of deficiency and therefore was not timely filed.

On January 9, 1988, petitioners filed a petition with the Division of Tax Appeals requesting a redetermination of the deficiencies in question, or, in the alternative, an order remanding the matter for a conciliation conference with the Bureau of Conciliation and Mediation Services. It is conceded by the Division of Taxation that this petition with the Division of Tax Appeals was filed within 90 days of the issuance of the conciliation order described above.

At hearing, the Division offered in evidence an affidavit of one Alberta Yarbrough, Principal Clerk, charged with the duty of supervising the issuance of notices of deficiency such as those at issue. Attached to this affidavit were copies of the notices in question as well as the Division's mailing log relative thereto. The affidavit describes the specific process by which such notices are mailed, and provides details as to the mailings of the subject notices. The affidavit states such notices are issued via certified mail, that a certified mailing record (the mailing log) inspected and stamped by the U.S. Postal Service is utilized in lieu of individual return receipt cards, and that the Division does not request, demand or receive individual return receipt cards from each individual certified (or registered) piece of mail issued. The attached certified mailing log (Postal Service Form 3877) describes the notices in question by reference to the years in question, lists petitioners by name and address and indicates two items were mailed to petitioners each with separate certified mailing numbers. The log is signed by the postmaster and bears a Postal Service date stamp of June 12, 1987. It should be noted that petitioner's address on the mailing log corresponds to their address as shown on the two subject notices, to wit, 6 Bluewater Hill, Westport, Connecticut. Said address differs from petitioner's correct address of 9 Bluewater Hill, Westport, Connecticut.

OPINION

The Administrative Law Judge denied petitioners' request for a hearing, finding that they filed an untimely petition protesting the notices of deficiency. He reasoned that, in spite of the

changes in the Tax Law giving a taxpayer the right to a conciliation conference upon receipt of a notice of deficiency, petitioners in this case were bound by the 90 day time limit within which to either ask for a conciliation conference or petition for a hearing. The petition for a redetermination of the deficiency, having been filed 91 days after receipt of the notices, was found untimely. In addition, the Administrative Law Judge found that the Division proved that the notices of deficiency were mailed and no allegation or evidence of non-receipt or prejudicially late receipt of the notices was in the record. He found that the regulations which encourage a conciliation conference are irrelevant to the issue of whether the petition was timely filed. He also found that the Division's late filing of an answer could not serve to confer jurisdiction over an untimely petition.

On exception, petitioners argue that due process requirements of notice were not met because the Division failed to prove it followed the mailing procedures outlined in Tax Law § 681(a), thereby rendering the deficiency invalid under Tax Law § 681(c). Arguing that the notices were sent to the wrong address and therefore failed to meet the minimum requirements of due process, petitioners assert that any evidence of receipt is immaterial. Petitioners also argue that the Division of Tax Appeals has jurisdiction to order a conciliation conference under 20 NYCRR 3000.3(e) and that not doing so is an abuse of discretion. Petitioners add that the Division's lateness in answering their petition of the conciliation order constitutes a waiver of the Division's position and requires a default disposition on the petition in favor of petitioners.

In response, the Division notes that petitioners did not appear at the hearing to offer testimony regarding the lateness of their petition for redetermination of the deficiency or the asserted inadequacy of the notices of deficiency. The Division also argues that petitioners rely on overruled case law in their assertion that an incorrect mailing address invalidates the notices of deficiency and argue that petitioners failed to show that the petition was late due to excusable neglect or that they were prejudiced in any way by the incorrect mailing label. The Division maintains that it met the requirements of Tax Law § 681(a).

We affirm the determination of the Administrative Law Judge.

Tax Law § 681(a) requires that the Division mail a notice of deficiency via certified or registered mail to a taxpayer's last known address. Here, the Division offered both an affidavit of an employee which explained the mailing procedures at the Division of Taxation and a copy of the certified mailing record. The affidavit both identifies the certified mailing record and explains how it indicates that the subject notices of deficiency were issued to petitioners. We conclude that this evidence is adequate to prove compliance with Tax Law § 681(a) (see, MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, at 112; cf., Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). Petitioners rely on the Appellate Division decision in Matter of Agosto v. State Tax Commn. (68 NY2d 891, 508 NYS2d 934, revg 118 AD2d 894, 499 NYS2d 457) for the premise that an incorrect mailing label does not meet the requirements of Tax Law § 681(a). In reversing the Appellate Division, the Court of Appeals held that where a "minor error" occurred in the address to which the notice of deficiency was sent and where the Division "determined that there was actual receipt in sufficient time to file a petition for redetermination of the deficiencies" the deficiency would stand (Agosto v. State Tax Commn., supra, 508 NYS2d 934, at 935). Under this standard the instant notices of deficiency must be sustained.

In this case, petitioners did not assert that the notices of deficiency were not received, that they were received too late to have adequate time to file a timely petition or that they were prejudiced in any specific way by the notice as it occurred. The notices were, in fact, admitted into evidence without objection, attached to the petition disputing them (Exhibit L). It is clear, therefore, that the notices of deficiency, though mailed to 6 Bluewater Hill South rather than 9 Bluewater Hill South, were received by petitioners. This is undisputed in the record. The notices will not be voided in their entirety because of a minor defect (see, Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892). The Division, therefore met its notice requirements under Tax Law § 681(a) and under the Agosto decision.

Petitioners' assertion that the Division of Tax Appeals has the jurisdiction to order a conciliation conference is misplaced. Tax Law § 170.3-a provides as follows:

> "(a) There shall be in the division of taxation a bureau of conciliation and mediation services which shall be responsible for providing conciliation conferences. Such conference shall be provided, at the option of any taxpayer or any other person subject to the provisions of this chapter, . . . where such taxpayer or any other such person has received any written notice of . . . a tax deficiency, . . . or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed . . . ." (Tax Law § 170.3-a[a], emphasis added.)

Section 170.3-a was effective September 1, 1987 and applies "to all proceedings commenced prior to [September 1, 1987] which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent this act can be made applicable . . ." (L 1986, ch 282, § 32).

The regulations promulgated pursuant to section 170.3-a provide that:

> "The request [for a conciliation conference] must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals and there can be no extension of those time limitations." (20 NYCRR 4000.3[c].)

Tax Law § 2006 requires the taxpayer to file a petition within 90 days from the time the liability is assessed otherwise their tax "liability shall become finally and irrevocably fixed" (Tax Law § 2006.4). The procedural provisions of Article 22 similarly require that a petition be filed within 90 days of the issuance of the notice of deficiency (Tax Law § 681[b]). Petitioners filed a petition for redetermination of the deficiency on September 11, 1987, 91 days after the notice of deficiency was sent to them on June 12, 1987. Since the 90 day time constraint is absolute and since a conciliation conference can be granted only when requested within the time limit outlined in Tax Law §§ 170.3-a, 2006(4) and 681(b), we cannot grant a conciliation conference.

The regulation upon which petitioners rely to support their argument that the Division of Tax Appeals has the jurisdiction to grant them a conciliation conference, 20 NYCRR 3000.3(e), provides in part:

> "Where a conciliation conference has not been conducted, and it appears that the petitioner intended to file a request for a

> conciliation conference or that a conciliation conference would serve a useful purpose, the Division of Tax Appeals may, at the request of the petitioner and with the consent of the Law Bureau, suspend action on the petition and refer the matter to the Bureau of Conciliation and Mediation Services"
> (20 NYCRR 3000.3[e], emphasis added).

This section presupposes that a valid petition is being considered at the time the request for a conciliation conference is made. This regulation does not, and could not, supplant Tax Law § 170.3-a which specifically allows a conciliation conference be granted "if the right to petition for a hearing has not elapsed" (Tax Law § 170.3-a). Since petitioners' original petition is untimely, the Division of Tax Appeals has no authority to refer the case to a conciliation conference.

Petitioners also argue that because the Division's answer to their petition appealing the dismissal of their petition for a redetermination was four months late, their petition for redetermination of the notices of deficiency should be granted by default. Though the Division's lateness in filing its answer is not to be condoned (see, Matter of Macbet, Tax Appeals Tribunal, May 17, 1990; Matter of Maggin, Tax Appeals Tribunal, March 8, 1990), it does not empower us to grant a conciliation conference which is not authorized by statute. Since we conclude that we are not authorized to order a conciliation conference, we reject petitioners' argument that the failure to grant such a conference is an abuse of discretion.

As noted by the Administrative Law Judge and the Division, petitioners are not without a remedy for their disputed tax assessment. Petitioners may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If petitioners' request for a refund is denied, they may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 170.3-a[a]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Lawrence and Dory Rosen is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Lawrence and Dory Rosen is dismissed.

DATED: Troy, New York
July 19, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner