STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DONALD L. MAGGIN	:	DECISION
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1979 and 1980.	:	

Petitioner, Donald L. Maggin, 70 East 10th Street, New York, New York 10003, filed an exception to the order of the Administrative Law Judge issued on October 27, 1988 which dismissed petitioner's motion for a determination granting his petition for redetermination of a deficiency and refund of personal income taxes under Articles 22 and 30 of the Tax Law for the periods 1979 and 1980, and which granted the Division of Taxation's cross-motion to dismiss petitioner's petition (File No. 805482). Petitioner appeared by Michael M. Feinstein, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division filed a letter in opposition. At the request of petitioner, oral argument was heard on September 27, 1989.

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

ISSUES

I. Whether the Division of Taxation's failure to answer the petition within the time prescribed in the rules of the Tribunal should result in the granting of the petition on default pursuant to Tax Appeals Tribunal Rule § 3000.4(a)(4).

II. Whether the Division of Tax Appeals lacks jurisdiction over the petition because the error on the return prepared by petitioner is a mathematical error.

III. Whether the agreement between the Division of Taxation and petitioner with regard to his refund claim is a "closing agreement" pursuant to Tax Law § 171(18) which prevents the Division from issuing the notice and demand for additional tax at issue here.

FINDINGS OF FACT

We accept and repeat the facts found by the Administrative Law Judge except for finding of fact "10" which is modified below.

Petitioner filed a petition with the Division of Tax Appeals on April 21, 1988.

The Division of Tax Appeals acknowledged receipt of the petition, deemed to be in proper form, on April 27, 1988. On or about the same date, the petition was forwarded to the Division of Taxation ("Division"), Law Bureau, for an answer.

On August 25, 1988, petitioner filed a motion for determination on default.

The Division served an answer to the petition on September 21, 1988, approximately 147 days from the date receipt of the petition was acknowledged.

Petitioner timely filed a New York State and City personal income tax return for 1980 dated June 11, 1981. Enclosed with the return were (1) a State and City minimum income tax computation schedule (IT-220); and (2) a Federal Schedule C, Profit (or Loss) from Business or Profession.

The IT-220 showed a minimum taxable New York income of $18,338.00, with New York State and New York City minimum income tax due in the respective amounts of $1,100.00 and $458.00.

The Federal Schedule C showed total income of $57,395.00 derived from petitioner's business as an investment counselor.

On his State and City personal income tax return, petitioner reported total New York income of $320,976.00, with total taxes due on that amount of $57,881.00. The total tax due was calculated by inclusion of the $1,100.00 New York State minimum income tax and $458.00 New York City minimum income tax as shown on the IT-220.

Petitioner did not file 1979 or 1980 unincorporated business tax returns. In February 1983, the Division of Taxation issued to petitioner a Notice of Deficiency, asserting unincorporated business income tax due under Article 23 of the Tax Law for the years 1979 and 1980.

We modify finding of fact "10" of the Administrative Law Judge's order to read as follows:

> Following a Tax Appeals Bureau conference, the Division of Taxation determined that petitioner's unincorporated business tax liability was $1,307.43 for 1979 and $143.00 for 1980. Petitioner had previously filed an amended return for 1979, requesting a refund of personal income tax in the amount of $2,129.57. The Division agreed to offset the unincorporated business tax liability against petitioner's refund claim, resulting in a net amount of $679.14 plus interest due to petitioner. Petitioner withdrew his petition for redetermination of the unincorporated business tax deficiency for the years 1979 and 1980 based upon the Division's agreement.[1]

The Division forwarded the refund claim to the Office of the State Comptroller for payment. The Comptroller rejected the refund claim.

A review of petitioner's 1980 IT-220 discloses the following:

> (a) Line 17, Part I, shows total items of tax preference of $265,578.00.
>
> (b) Line 5, Part II, shows total New York subtractions of $66,394.00.
>
> (c) Line 1, Part III, calls for the entry of total items of tax preference from Part I, line 17. In petitioner's case, this amount

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[1]The Administrative Law Judge's finding of fact "10" read as follows:

> "Following a Tax Appeals Bureau conference, the Division of Taxation determined that petitioner's unincorporated business tax liability was $1,307.43 for 1979 and $143.00 for 1980. The Division agreed to offset this liability against petitioner's 1979 claim for refund of personal income tax in the amount of $2,129.57. Petitioner withdrew his petition for redetermination of a tax deficiency for the years 1979 and 1980, based upon the Division's agreement to refund $679.14 plus interest to petitioner."

The finding has been modified to clarify the actions of petitioner and the Division.

> was $265,578.00. Petitioner entered his New York subtractions of $66,394.00.

As a result of the error described above, petitioner calculated a minimum taxable income of $18,338.00. The correct amount was $217,522.00.

On December 18, 1986, the Division of Taxation issued two notices and demands to petitioner. The first asserted a New York State minimum income tax deficiency for 1980 of $11,202.30[2] plus interest. The second asserted a New York City minimum income tax deficiency for 1980 of $4,980.05 plus interest.

Enclosed with the notices and demands was the following explanation:

> "You filed a petition regarding the unincorporated business tax deficiencies for 1979 and 1980, Assessment #A830204076C.
> A conference was held and it was determined that your unincorporated business tax liability for 1979 was $1,307.43 and for 1980 it was $143.00. Since you filed a 1979 amended return requesting a refund of $2,129.57, the net refund was [sic] determined and agreed to was $679.14.
>
> The Office of State Comptroller did not approve this refund. The personnel found a mathematical error in the computation of your minimum tax for the year 1980 which results in an additional tax due rather than at [sic] refund.
>
> Instead of computing the minimum tax under Article 22 on total items of tax preference of $265,578.00, it was computed on the subtraction modification of $66,394.00. Since this error constitutes a math error, there is no statute of limitations.
>
> Minimum income tax is computed as follows:
>
> Minimum Income Tax Computation:

	NYS	NYC
Items of tax preference	$331,972.00	
Less capital gain modification	66,394.00	
Balance	$265,578.00	
Less specific deduction	5,000.00	
Balance	$260,578.00	
Less income taxes per return	43,056.00	
Minimum taxable income	$217,522.00	$217,522.00
Minimum Tax @ 6%	$ 13,051.32	
Minimum Income Tax @ 2½%		$ 5,438.05

[2]This amount represents minimum income tax due, reduced by the refund due to petitioner of $679.14 plus interest.

Minimum tax computed	1,100.00	458.00
Additional minimum-income tax due	$ 11,951.32	$ 4,980.05"

On February 4, 1987, petitioner filed a petition protesting the Notice and Demand for State taxes due. A conference was held by the Bureau of Conciliation and Mediation Services, and a Conciliation Order dated January 29, 1988 was issued denying petitioner's request for relief.

By his petition to the Division of Tax Appeals petitioner challenged both notices and demands, alleging two errors were made by the Commissioner of Taxation and Finance, as follows:

> "The Commissioner of Taxation and Finance erred in asserting an assessment barred by the Statute of Limitations.
>
> The Commissioner erred further by asserting an assessment for a taxable year which already had been finally disposed of by a Closing Agreement."

OPINION

The Administrative Law Judge held that as there is no statutory requirement for the filing of a responsive pleading to a petition, petitioner must show that the Law Bureau's late filing of its answer resulted in substantial prejudice to his position in order for him to prevail on his motion to dismiss on default. As petitioner did not show, or allege, that he was prejudiced by the Law Bureau's delay, the Administrative Law Judge denied petitioner's motion for a determination granting his petition on default. In addition, the Administrative Law Judge found that the error on petitioner's New York State personal income tax return (Form IT-220) for the year 1980 was a mathematical error and therefore petitioner did not have the right to a hearing to contest the demand for additional tax resulting from this error. She therefore granted the Division of Taxation's cross-motion to dismiss the petition for lack of jurisdiction.

Petitioner, in his exception, asserts that the Division of Tax Appeals is bound by its own rules which provide that the Law Bureau shall serve an answer within a specific time period. Petitioner also argues that the error appearing on his 1980 personal income tax return was not a mathematical error and that the statute of limitations bars the issuance of a notice and demand for additional tax for that year. Lastly, petitioner argues that he and the Division of Taxation had

entered into a "closing agreement" with regard to this tax year which was binding on the Division and cannot now be altered.

The Division of Taxation supports the order of the Administrative Law Judge dismissing the petition, arguing that substantial prejudice must result from any delay by the Law Bureau in issuing an answer to the petition. The Division further asserts that the error on petitioner's return was a mathematical error which does not give rise to the right to a hearing. The Division also asserts that no "closing agreement" pursuant to Tax Law § 171(18) is involved in this matter.

We uphold the order of the Administrative Law Judge.

We first address our conclusion that the petition should not be granted on default because of the Law Bureau's failure to serve an answer within the required time period.

The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

> "The Law Bureau shall serve an answer on the petitioner or the petitioner's representative, if any, within 60 days from the date the supervising administrative law judge acknowledged receipt of a petition in proper form." (20 NYCRR 3000.4[a][1].)

Petitioner asserts that the Division of Tax Appeals is bound by its own rules which provide for a definite period by which an answer is required, and it is therefore unnecessary for petitioner to allege or prove prejudice due to the delay. Petitioner cites Heller v. Chu (111 AD2d 1007, 490 NYS2d 326, appeal dismissed 66 NY2d 696, 496 NYS2d 424) in support of his position.

We agree with the Administrative Law Judge that the time period imposed upon an administrative agency for a responsive pleading is directory rather than mandatory (Matter of Geary v. Commissioner of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494, affd 59 NY2d 950, 466 NYS2d 304). This principle was applied explicitly to the rule of the former State Tax Commission which was substantially similar to § 3000.4(a)(1) (Matter of Hamelburg v. Tully, Sup. Ct., Albany County, April 16, 1979, Prior, J.; Matter of Santoro v. State Tax Commn., Sup. Ct., Albany County, January 4, 1979, Conway, J.). The Administrative Law Judge correctly held that an agency's failure to act within a specified period will not result in dismissal of the agency's action in the absence of a showing of substantial prejudice as a result of the delay (Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115

[1986]; Matter of Geary v. Commissioner of Motor Vehicles, supra; Matter of G. H. Walker & Co. et al v. State Tax Commn., 62 AD2d 77, 403 NYS2d 811; Matter of Hamelburg v. Tully, supra; Matter of Santoro v. State Tax Commn., supra; Matter of Dworkin Construction Co., Inc., Tax Appeals Tribunal, August 4, 1988).

The decision in Heller does not change the result here. The Third Department in Heller noted that the Court of Appeals "has indicated that, in some circumstances, an extensive delay may constitute substantial prejudice when it stated that 'the mere passage of time normally will not constitute substantial prejudice in the absence of some showing of actual injury'" (Heller v. Chu, supra; 490 NYS2d 326, 327 quoting in part Matter of Sarkisian Bros. v. State Div. of Human Rights, 48 NY2d 816, 424 NYS2d 125, 126). However, the Court found that the former State Tax Commission's unexplained delay of 12 years before answering the petition, scheduling and holding a hearing, and issuing a determination in the case before them, was the "type of delay that is not normal and should constitute substantial prejudice, even in the absence of some showing of actual injury" (Heller v. Chu, supra, 490 NYS2d 326, 327). In effect, the Court ruled that a delay of this length is in itself prejudicial.

The facts here are distinguishable from those in Heller. The Division served its answer approximately 87 days late. While the Division offers no explanation for the delay, we cannot conclude that the length of delay is in and of itself prejudicial. Further, petitioner here does not allege prejudice to his position from this period of delay. Under these circumstances, we cannot agree with petitioner that the delay in the Division's filing of its answer is sufficient to require a determination of default.

We caution that our conclusion here not be construed as sanctioning routine or systematic, unexplained, substantial delay in the filing of responsive pleadings. This Tribunal is charged by statute with the responsibility "for providing the public with a just system of resolving controversies with [the] department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). Our ability to carry out this responsibility is dependent, in large part, on each party timely filing

responsive pleadings which clearly set forth their position with respect to the relevant facts and the applicable law in the case.

We next consider the Administrative Law Judge's conclusion that the error on petitioner's tax return was a mathematical error which, under Tax Law § 681(d), does not give rise to a right to a hearing before the Division of Tax Appeals.

Tax Law § 681(d) states:

> "Exceptions for mathematical errors - If a mathematical error appears on a return . . . the Tax Commission [now the Division of Taxation] shall notify the taxpayer that an amount of tax in excess of that shown upon the return is due and that such has been assessed. Such notice shall not be considered as a notice of deficiency for the purposes of this section, . . . or subsection (b) of § 689 authorizing the filing of a petition with the Tax Commission [now the Division of Tax Appeals] based on a notice of deficiency."

The error made by petitioner was on the form used to calculate his minimum taxable income. In Part I of the return, petitioner was to list "Items of Tax Preference" which included "New York Subtraction from Federal Amounts" which were calculated in Part II. In Part III, petitioner was to compute his minimum taxable income using the total figure from Part I. Instead, petitioner used the total figure from Part II. As a result, petitioner calculated his minimum taxable income as $18,338.00 instead of $217,522.00.

Petitioner argues that this was not a mathematical error but an "arithmetic" error which is not governed by § 681(d). Petitioner cites the analogous provision in the Internal Revenue Code, § 6213, and the Congressional Committee report on this provision in support of his argument. If petitioner is correct that this was not a mathematical error under § 681(d), the statute of limitations in Tax Law § 683 would bar the assessment of additional tax. If the Division is correct and it is a mathematical error, then, pursuant to § 682(a), the tax was assessed on the date the return was filed and the Division's notice is not barred by the statute of limitations prescribed in section 683.

We agree with the Administrative Law Judge that the error made by petitioner on his return is covered by § 681(d). Support for this view can be found in the similar provision of the

Internal Revenue Code, § 6213(b), and the Congressional Committee report cited by petitioner. Internal Revenue Code § 6213(b) provides that assessments arising out of mathematical or clerical errors do not give rise to a right to file a petition with the Tax Court. A mathematical or clerical error is defined as "an entry on a return of an item which is inconsistent with another entry of the same or another item on such return" (IRC § 6213[g][2][C]). The Committee report, as reproduced in petitioner's brief, in commenting on this section states that "[t]his category is intended to encompass those entries where it is apparent which of the inconsistent entries is correct and which is incorrect." (Petitioner's Brief in support of his exception, dated February 16, 1989, pg. 5.)

In the case before us, it is clear from the face of the return which of the entries is incorrect and what number should have been used instead. The correct number was available from the return without the examination of additional documents or other calculations. The mistake made by petitioner is clearly the kind of mistake that is contemplated by the term "mathematical error" as it is used in Tax Law § 681(d). As a result, the notice and demand issued to petitioner does not give him the right to a hearing and the notice is not barred by the statute of limitations. As the Division of Tax Appeals lacks subject matter jurisdiction, the Division of Taxation's cross-motion to dismiss the petition pursuant to Tax Appeals Tribunal Rule § 3000.5(b)(1)(ii) was properly granted by the Administrative Law Judge.

On exception, petitioner additionally argues that there was a "closing agreement" pursuant to Tax Law § 171(18) between petitioner and the Division of Taxation as a result of the conference held with regard to petitioner's unincorporated business tax liability for the years 1979 and 1980. Without specifically saying so, petitioner appears to be arguing that this agreement precludes the Division of Taxation from assessing additional personal income tax for tax year 1980.

Tax Law § 171(18) states that the Commissioner of Taxation and Finance has the power to enter into a written agreement with a taxpayer relating to his tax liability which may not be reopened and modified as to the matters agreed upon.

It is not clear what document, if any, petitioner relies on as the written agreement here. In any case, petitioner's original conference concerned his liability for unincorporated business tax for the years 1979 and 1980. The Division agreed to offset petitioner's unincorporated business tax liability for those years against petitioner's claim for a refund of personal income tax for the year 1979. After the offset, petitioner was owed a refund of personal income tax of $679.14. This refund had no bearing on whether petitioner owed additional personal income tax for a separate tax year, 1980. We have already determined that the Division had a right to assess additional tax for that year. Tax Law § 171(18) clearly has no application here.

According, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Donald L. Maggin is denied;

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

3. The petition of Donald L. Maggin is dismissed.

DATED: Troy, New York
March 8, 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