

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT CHAMBERLIN	:	DECISION
for Redetermination of a Deficiency/Revision	:	
of a Determination or for Refund of NYS &	:	
NYC Personal Income Tax under Article 22 of	:	
the Tax Law and Chapter 46, Title T of the	:	
New York City Administrative Code for the	:	
Year 1983.	:	

Petitioner, Robert Chamberlin, 81 Columbia Street #3-C, New York, New York 10002, filed an exception to an order of the Administrative Law Judge issued on December 1, 1988 which dismissed as untimely petitioner's petition for redetermination of a deficiency/revision of a determination or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the New York City Administrative Code for the Year 1983 (File No. 806195). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Both parties filed briefs on exception.

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

ISSUE

Whether the Administrative Law Judge properly dismissed petitioner's petition as not timely filed.

FINDINGS OF FACT

A conciliation order dated July 29, 1988 was issued to petitioner. Petitioner's petition for hearing was received on October 28, 1988 or 91 days after the date on the conciliation order.

OPINION

On December 1, 1988 the Administrative Law Judge sua sponte dismissed petitioner's petition as untimely because it was not served within 90 days after the issuance of the conciliation order as required by Tax Law section 170.3-a(e).

Petitioner asserts that he has timely filed a petition for hearing and that the notice of exception was properly served on the Division.

The Division asserts the petition was not timely served and that the Division was not timely served with the notice of exception.

We reverse the Administrative Law Judge and remand this case for a hearing on whether the petition was timely filed and the notice of exception properly served.

The Laws of 1986, chapter 282, paragraph 32 provided a transition from the conference/hearing system that existed prior to September 1, 1987 to the new two-part system under the Bureau of Conciliation and Mediation Services and the Division of Tax Appeals. The relevant statutory language is contained in section 32 of Chapter 282 of the Laws of 1986 which provides in pertinent part that:

"This act . . . shall take effect September first, nineteen hundred eighty-seven and shall apply to all proceedings commenced in the division of tax appeals on or after such date and shall apply to all proceedings commenced prior to such date which have not been the subject of a final and irrevocable administrative action as of such effective date to the extent that this act can be made applicable" (Emphasis added.)

Under prior law and the regulations of the State Tax Commission, a prehearing conference could be scheduled by the Commission, in its discretion, to afford the parties an opportunity to resolve the issues. Under the new procedures, the taxpayer has the right to either petition for a hearing or to apply for a conciliation and mediation conference. In the latter case, the language in section 170.3-a(e) has particular application since a taxpayer would not have already filed a petition for hearing.

This Tribunal has not viewed the transition language in section 32 as requiring the application of the procedural requirements of section 170.3-a(e) so as to abrogate the rights of the petitioner to a hearing if a petition was timely filed for such a hearing prior to September 1, 1987 (Cap Equipment Rental Corp., Tax Appeals Tribunal, March 2, 1989).

The record before the Tribunal on this matter does not indicate whether petitioner proceeded under the new law directly to a request for a conciliation conference after the Notice of Deficiency was issued or whether petitioner timely filed a petition for hearing prior to September 1, 1987 and was referred to a conciliation conference by the former State Tax Commission. The record before us also does not indicate when the conciliation order was mailed. We know that a conciliation order dated July 29, 1988 was issued, but this alone does not prove the date of issuance (Matter of Robert G. Wilson & GSA Corporation d/b/a GSA Partners, Tax Appeals Tribunal, July 13, 1989). Without evidence of these facts we are unable to determine the timeliness of the instant petition.

We deal next with the Division's assertion that petitioners failed to serve a copy of their exception "on the Division of Taxation (or the Law Bureau)" (Division's brief p. 2). We note first that Tax Law section 2006(7) entitles either party to except to the determination of the Administrative Law Judge. In the case where taxpayers have appealed to the Tax Appeals Tribunal, 20 NYCRR 3000.11(a)(1) requires them to serve the Director of the Law Bureau, on behalf of the Division of Taxation, with a copy of the exception (see also, Matter of Marshall Farms USA, Inc., Tax Appeals Tribunal, August 4, 1988). As the Division submitted no evidence in support of its claim, for example, an affidavit, we are without any basis to conclude whether petitioners committed such an error.

Since we lack a factual basis to resolve any of the issues raised by the parties, we remand this matter for a hearing on the service and timeliness issues.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The order of the Administrative Law Judge is reversed; and

2. The case is remanded to the Administrative Law Judge for a new hearing to be held on the timeliness and service issues.

DATED: Troy, New York
September 14, 1989

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

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