STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
EASTERN TIER CARRIER CORPORATION	:	DECISION
for Redetermination of a Deficiency or for Refund of Corporation Tax under Article 9 of the Tax Law for the Years 1984 through 1987.	:	

Petitioner Eastern Tier Carrier Corporation, 630 New Country Road, Secaucus, New Jersey 07094, filed an exception to the determination of the Administrative Law Judge issued on April 12, 1990 with respect to its petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1984 through 1987 (File No. 806466). Petitioner appeared by Tenzer, Greenblatt, Fallon & Kaplan (Sidney Mandel, Esq. and Glenn A. Busch, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Neither party submitted a brief on exception. Petitioner's request for oral argument was denied by the Tribunal.

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

ISSUE

Whether petitioner is entitled to a conciliation conference to address the underlying merits of the notices of deficiency issued to it by the Division.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we modify finding of fact "3(b)" as stated below.

Petitioner, Eastern Tier Carrier Corporation, is a New Jersey corporation. The Division of Taxation conducted a truck mileage tax, a fuel use tax and a corporation tax audit of petitioner's business operations for the years 1984 through 1987. As a result of this audit, the Division, on May 27, 1988, issued nine notices of deficiency to petitioner. On the face of each notice was the following statement: "A deficiency, as detailed on statement of audit adjustment attached or previously sent you, has been determined". An assessment number was stated on the face of each notice. They were numbers: C880527903F, C880527904F, C880527905F, C880527906F, C880527907F, C880527908F, C880527909S, C880527910S and C880527911S. The following statement was printed on the reverse side of each notice:

> "If you do not return the signed consent, the deficiency will become an assessment subject to collection, with interest to date of payment, unless you file a petition according to Section 1089 of the Tax Law and the Rules of Practice before the State Tax Commission, within 90 days after the date of this notice".

The nine notices of deficiency were mailed to petitioner by certified mail (number 26627) on May 27, 1988.[1] By letter dated and sent by Federal Express September 9, 1988, some 105 days from May 27, petitioner asked the Division to schedule a conciliation conference. The Division issued a Conciliation Order, dated September 30, 1988, denying petitioner's request for a conference on the ground that the request for conference was not received within 90 days of the issuance of the notices of deficiency.

The notices of deficiency were preceded by other written communications between the parties.

On or about January 29, 1988, the Division sent petitioner a form entitled "Consent to Field Audit Adjustment". The consent was accompanied by a cover letter which stated, in pertinent part:

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[1] In a letter addressed to "Mr. Skorenski, Bureau of Conciliation and Mediation Services", petitioner's representative alleged that the notices were not mailed until July 15, 1988 and were not received until July 18, 1988. However, by its petition, petitioner conceded that the notices were received on June 1, 1988.

"If you disagree with the findings, you may, within 30 days submit written evidence or information to substantiate your disagreement to the above address or you may request a conference at the District Office Audit Bureau in New York City. If you wish to be represented by an attorney, or agent, you must file a power of attorney. If no protest is filed, or if no agreement is reached by correspondence or conference, a statutory notice of deficiency will be issued which will become a statutory assessment unless petition is filed with the State Tax Commission within 90 days" [sic].

Finding of fact "3(b)" is modified to read as follows:

In response to this letter, petitioner sent a letter dated February 22, 1988, notifying the Division that it disagreed with the audit findings, requesting a conference to discuss those findings, and asking for power of attorney forms. Petitioner received no reply from the Division; therefore, a second letter was sent, dated May 10, 1988, which in its entirety read as follows:

"On February 22, 1988 I wrote a letter requesting a conference at the District Office Audit Bureau in New York City along with a request that I be mailed power of attorney forms. I also requested copies of the TMT and FUT tax bills. I have not received either a date for the conference, power of attorney forms nor copies of TMT and FUT tax bills. The request for the conference is a result of receiving forms DO356 to which we take exception.

"Kindly give this matter your attention and advise."[2]

A letter signed by Jim Hika, Tax Auditor II, was sent to petitioner in response to its letter of May 10. The date of reply is not known since the copy of the Division's letter placed in evidence bears no date. The letter states: "Please be advised that a conference will be scheduled before the Bureau of Mediation & Conciliation subsequent to the receipt of a letter of protest to the Formal Billing which will be issued shortly."

The Division issued to petitioner nine statements of audit adjustment dated May 27, 1988. The assessment numbers on these statements correspond to the assessment numbers on the

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[2] Finding of fact "3(b)" of the Administrative Law Judge's determination read as follows:

"(b) In response to this letter, petitioner sent a letter dated February 22, 1988, notifying the Division that it disagreed with the audit findings, requesting a conference to discuss those findings, and asking for power of attorney forms. Petitioner received no reply from the Division; therefore, a second letter was sent, dated May 10, 1988, repeating the statements made in the earlier letter."

This fact was modified to more fully reflect the record.

notices of deficiency. Petitioner conceded that these statement were received on May 29, 1988. Each statement included the following warning: "Important: Your failure to respond to this letter within 30 days will result in the issuance of a statutory Notice of Deficiency for the amount of this additional tax plus accrued interest. The issuance of this Notice represents the first formal step toward taking legal action to compel payment." The notices of deficiency referred to in the statement were issued contemporaneously with the statements of audit adjustment, rather than 30 days later.

On July 20, 1988, petitioner received two assessments of unpaid truck mileage tax and fuel use tax.

Petitioner's president, Marvin H. Weiner, was confused by the various statements contained in the documents issued by the Division. He believed that the Division's response to his May 10th letter guaranteed him a conciliation conference before the corporation tax deficiencies became fixed and final.

OPINION

The Administrative Law Judge determined that since the petition for hearing was not filed within 90 days of the issuance of the notices of deficiency by the Division, petitioner was not entitled to a conciliation conference.

On exception, petitioner reasserts the arguments made at hearing namely, that it is arbitrary and capricious to deny petitioner a conciliation conference, since the Division's letters led petitioner to believe that such a conference would be granted and that in any event petitioner had 120 days from the May 27, 1988 letter to request a hearing.

The Division relies on the determination of the Administrative Law Judge.

We reverse the determination of the Administrative Law Judge.

This case well illustrates the necessity for clear, effective communication between the Division and taxpayers with regard to the position of the Division on specific tax issues concerning that taxpayer and the rights, duties and obligations of the taxpayer with regard to

such issues. In the balance here is petitioner's right to protest a deficiency asserted as the result of an audit.

The essential facts are uncontroverted. The January 29, 1988 letter from the Division extended to petitioner the option of disagreeing with the proposed audit findings and of requesting a conference. The letter also stated that if petitioner wished to be represented by an attorney or agent, it would have to file a power of attorney. The letter further stated that ". . . if no protest is filed, or if no agreement is reached by . . . conference, a statutory notice of deficiency will be issued . . ." Petitioner, by letter of February 22, 1988, disagreed with the audit findings, requested a conference and also power of attorney forms.

At this juncture, it was reasonable for petitioner to conclude it would have the conference it requested since a clear offer of such was made by the Division and a clear request for the conference was made by petitioner. Moreover, since petitioner had requested a conference, a statutory notice would not be issued unless agreement could not be reached.

Petitioner received no response to its February 22, 1988 letter and sent a second letter dated May 10, 1988 wherein petitioner reiterated its request for a conference. The Division responded to this letter with a letter (undated) which indicated "that a conference will be scheduled before the Bureau of Mediation & Conciliation subsequent to the receipt of a letter of protest to the Formal Billing which will be issued shortly." Included with the letter were power of attorney forms which petitioner had requested as well as the truck mileage tax (TMT) and fuel use tax (FUT) tax bills requested by petitioner.

The Administrative Law Judge declared that this letter "is not a model of clarity". We agree. First, the letter refers explicitly to petitioner's May 10, 1988 letter in which petitioner reiterated its request for a conference. The letter then goes on to state that a conference would be scheduled (which the Division had offered and petitioner did request) subject to receipt of a letter of protest (petitioner had already sent two letters, one in February and one in May) to the "Formal Billing" (petitioner had protested the audit results).

Certainly, it was reasonable for petitioner to conclude that its request for conference had been acknowledged and granted.

On May 29, 1988, petitioner received nine statements of audit adjustment (dated May 27, 1988) each of which contained instructions which provided in part, that if petitioner did not agree with the statement, it could submit additional information pertinent to the case and that "failure to respond to this letter within 30 days will result in the issuance of a statutory Notice of Deficiency for the amount of the additional tax plus accrued interest. The issuance of this Notice represents the first formal step toward taking legal action to compel payment" (emphasis added). The message here was very similar to the January 29, 1988 letter, including the 30 day provision. In short, petitioner would have a conference and the statutory notice would not be issued unless agreement at conference was not reached.

On the same date under separate cover, petitioner also received nine notices of assessment which indicated that if not protested within 90 days, the notices would become fixed as assessments. It would not appear unreasonable for petitioner to wonder how these notices could be issued when petitioner did not yet have the conference which was first offered in the January 29, 1988 letter and which, it was reasonable to conclude, was verified by the undated May letter from the Division.

On another level, receipt of the statement of audit adjustments and the notices of deficiency on the same day raises legitimate questions as to the appropriate time frame for petitioner to request a conference: the 30 days in the statements of adjustment; the 90 days in the notices of deficiency; or, as petitioner apparently concluded, 120 days (the result of adding the two letters together).

When the smoke cleared, petitioner, by letter dated and sent by Federal Express on September 9, 1988, asked the Division to schedule a conciliation conference. The Division treated this letter as a petition and rejected the petition as untimely; a decision which the Administrative Law Judge affirmed. Under the circumstances, we strongly disagree.

In the present case, an objective reading of the documents results in stark confusion with regard to the procedure being followed by the Division in this case, particularly with respect to the rights of petitioner to protest the assessment. More to the point, what happened to the conference which the Division offered and petitioner accepted? There is absolutely no indication in the correspondence between the parties or in the record before us that the Division withdrew the offer of conference, canceled it, or took any action to indicate to petitioner a change with regard to the holding of a conference. Absent any such action by the Division, we conclude that petitioner was entitled to rely on the January 29, 1988 letter from the Division which offered it the opportunity to disagree with the audit findings and to submit written evidence or information to substantiate its disagreement or to request a conference. Further, it is clear that petitioner did rely on the letters, by twice requesting the conference, and as the current predicament indicates, petitioner did so rely to its detriment.

Finally, we must decide if a manifest injustice will result if the Division is not estopped from denying petitioner a conciliation conference (see, Matter of Sheppard-Pollock v. Tully, 64 AD2d 296, 409 NYS2d 847, citing Matter of Wolfram v. Abbey, 55 AD2d 700, 388 NYS2d 952). The facts before us are that the Division repeatedly informed petitioner in writing as to the procedure to be followed to resolve petitioner's audit results and then took actions which completely contradicted this statement of the procedure. The first of these contradictions was the Division's letter of January 29, 1988, which explicitly offered petitioner a conference that was never provided, despite petitioner's two requests. Subsequently, the Division informed petitioner that 30 days would pass between the issuance of the Statement of Audit Adjustment and the issuance of the notices of determination and that during this period petitioner could submit additional information; however, the notices were dated the same date as the Statement of Audit Adjustment. In the midst of all this, the Division issued the undated letter which is so ambiguous that it is absolutely useless in clarifying the procedure the Division intended to follow. We conclude that the Division clearly caused petitioner's confusion about the status of petitioner's protest and that to allow the Division to deny petitioner a conciliation conference

after it had subjected petitioner to this chaotic series of statements and actions with respect to the audit protest procedure would be a manifest injustice.[3] In reaching this result, we stress that it is based on the entire series of events in this case and that we do not intend to hold that any one of the Division's actions would necessarily justify this result. We also wish to clearly state that the Division's concept, to provide a taxpayer with several informal opportunities to resolve an audit, is a laudable one and to be encouraged. However, the facts of this case demonstrate that a taxpayer who receives incorrect and unclear statements about such a process is in a worse situation than if no such procedure existed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Eastern Tier Carrier Corporation is granted;

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

3. The case is remanded to the Division of Taxation's Bureau of Conciliation and Mediation Services to conduct a conciliation conference.

DATED: Troy, New York
December 6, 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

[3]The conclusion that petitioner should not forfeit its right to litigate its claim because of confusion caused by the government with respect to the status of the claim has been accepted by the Federal courts when holding that the Federal government should be estopped from raising the statute of limitations as a defense to a refund suit where the actions of the government misled the claimant into believing that the period of limitations had not expired (see, Haber v. United States, 831 F2d 1051, 87-2 USTC ¶ 9574, amended in part on rehearing 846 F2d 1379, remanded 89-2 USTC ¶ 9422, affd 904 F2d 45; Heath v. United States, 219 Ct Cl 582, 79-1 USTC ¶ 9147; Southeast Bank of Orlando v. United States, 230 Ct Cl 277, 82-1 USTC ¶ 9302).