

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LEONARD RAGOZIN	:	DECISION
	:	DTA No. 809709
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and the New York City Administrative	:	
Code for the Year 1987.	:	

Petitioner Leonard Ragozin, 465 West 23rd Street, Apt. 2A, New York, New York 10011, filed an exception to the determination of the Administrative Law Judge issued on October 8, 1992. Petitioner appeared by Charles L. Walker, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in response. Petitioner then submitted a reply brief received on February 18, 1993 which began the six-month period for the issuance of this decision.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Jones concur.

ISSUES

I. Whether the Division of Taxation issued a document to petitioner which stated that the deficiencies of New York State and New York City personal income taxes were based upon a Federal audit of his 1987 income tax return.

II. If so, whether the fact that a Federal audit never occurred resulted in such prejudice to petitioner as would warrant cancellation of the deficiencies of State and City personal income taxes.

FINDINGS OF FACT

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

On January 19, 1991, the Division of Taxation ("Division") issued a Statement of Audit Changes to Leonard Ragozin ("petitioner") which asserted a deficiency of New York State personal income tax of \$11,141.96, plus interest, and a deficiency of New York City personal income tax of \$4,410.62, plus interest, for the year 1987. On page two of the Statement of Audit Changes, the following explanation was set forth:

"AS AUTHORIZED BY SECTION 6103(D) OF THE INTERNAL REVENUE CODE, WE HAVE OBTAINED FROM THE INTERNAL REVENUE SERVICE THE AMOUNTS SHOWN ON YOUR FEDERAL TAX RETURN. THE ADJUSTMENT(S) SHOWN BELOW ARE BASED ON DISCREPANCIES FOUND WHEN WE COMPARED THE FEDERAL INFORMATION WITH YOUR NEW YORK RETURN.

"THE STARTING POINT FOR COMPUTING YOUR NEW YORK TAX IS FEDERAL ADJUSTED GROSS INCOME. YOUR TAX HAS BEEN RECOMPUTED AS SHOWN.

"THE ADDITIONAL TAX ON UNEARNED INCOME HAS BEEN RECOMPUTED.

"INTEREST IS DUE FOR LATE PAYMENT OR UNDERPAYMENT AT THE APPLICABLE RATE. INTEREST IS MANDATORY UNDER THE NEW YORK STATE TAX LAW.

"IF YOU HAVE ANY QUESTIONS ABOUT THIS NOTICE, CALL (518)457-4765. PLEASE REFER TO THE ASSESSMENT NUMBER, AS SHOWN ABOVE, WHEN CALLING OR WRITING. TO AVOID ADDITIONAL INTEREST, THE TOTAL DUE SHOULD BE PAID WITHIN 10 DAYS."

Pages one through three of the Statement of Audit Changes set forth the computations upon which the deficiencies were based.

On February 2, 1991, petitioner sent a letter to the Division which stated as follows:

"[t]he enclosed assessment states that 'Based upon a Federal Audit of your 1987 income tax, the following adjustments have been made'

"There was no Federal audit of my 1987 taxes."

On February 21, 1991, the Tax Compliance Division - Central Office issued a Correspondence Acknowledgement Notice (Form DTF-991) which informed petitioner that correspondence had been received from him and that no further collection or enforcement action would be taken until the issues raised had been resolved.

On April 5, 1991, the Division issued a Notice of Deficiency to petitioner in the amount of \$15,552.58 (\$11,141.96 State personal income tax and \$4,410.62 City personal income tax), plus interest, for a total amount due of \$20,071.13 for the year 1987.

In an envelope postmarked May 20, 1991, petitioner sent to the Tax Compliance Division a copy of the Notice of Deficiency on which he wrote, in red ink, "Please send me the detailed computation. I can't find it."

By letter to petitioner dated October 28, 1991, the Processing and Revenue Management Division enclosed a copy of petitioner's 1987 tax return along with copies of the Statement of Audit Changes and Notice of Deficiency.

On June 27, 1991, the Division of Tax Appeals received a petition (Form TA-10) from petitioner in which he contended, on page two thereof, that there was no valid justification provided for the assessment. Attached to the petition was a copy of the aforementioned Notice of Deficiency.

Both prior to and at the hearing held herein, the Division's representative asked petitioner to provide him with a copy of his 1987 Federal income tax return in order to attempt to resolve the discrepancy between the income reported on the Federal return and that reported on his State return. Petitioner refused to provide his Federal return and also refused, at the hearing, to address the substantive issues regarding the deficiencies despite being advised by the Administrative Law Judge that this was the proper forum in which to do so and, in addition, of the possible consequences of his refusal. Petitioner, nevertheless, chose solely to contend that the deficiencies must be cancelled because the Division stated that the deficiencies were based upon a Federal audit which, petitioner stated, never occurred.

OPINION

The Administrative Law Judge, based on Tax Law § 681(a), held that where the Division determines that a deficiency of income tax exists, the law requires only that a Notice of Deficiency be issued.

The Administrative Law Judge further held that: 1) there is no requirement to request and examine books and records before issuing a Notice of Deficiency to assert a deficiency of income tax; 2) all that is required is that there be a rational basis for the issuance of the Notice of Deficiency; and 3) by virtue of the discrepancy between the income reported on petitioner's Federal and State returns for 1987, it must be determined that a rational basis did exist for the issuance of the Notice of Deficiency.

In addressing petitioner's allegation that he received a bill and a letter from the Division which advised him that the asserted deficiencies of State and City income taxes were based upon a Federal audit (petitioner alleges such audit was nonexistent) of his 1987 tax return and that such correspondence was dated January 19, 1991, the Administrative Law Judge noted that, coincidentally, January 19, 1991 was also the date of the Statement of Audit Changes, which contained references to the Internal Revenue Service and to a specific section of the Internal Revenue Code.

Further, while petitioner maintains that he received a different piece of correspondence from the Division, admitting that he lost this bill and letter, was unsuccessful in attempting to obtain another copy and cannot produce, and thereby prove the existence of, these documents, the Administrative Law Judge noted that even if the Division did issue a tax bill with a letter explaining that the deficiencies were based upon a Federal audit, there was no prejudicial effect on petitioner.

In sustaining the Notice of Deficiency issued to petitioner and denying the petition, the Administrative Law Judge also noted that: 1) petitioner does not contend that the calculation of the deficiencies was erroneous in any way and, in fact, petitioner refused at the hearing to introduce any evidence or explanation as to why there existed a discrepancy between the income

he reported on his Federal return and the income reported on his State return; and 2) petitioner does not contend that the statutory notice, i.e., the Notice of Deficiency, contained any errors.

Petitioner (who appeared at the hearing below pro se, and on exception by Charles L. Walker, Esq.) took exception to the Administrative Law Judge's statement of the issues, arguing that the issue raised by the petition is whether petitioner received a Notice of Deficiency in accordance with section 681 of the Tax Law. Petitioner argues that the Division has not established that it duly served a Notice of Deficiency with Statement of Audit Changes on petitioner by certified or registered mail on January 19, 1991 or at any time. Petitioner further argues that the burden of proof to establish compliance with section 681(a) of the Tax Law is on the agency and there can be no presumption of tax liability until compliance is established. Therefore, petitioner argues that the failure of the Division to demonstrate compliance with the notice requirements of section 681(a) of the Tax Law invalidates the assessment and resulting collection procedures.

The Division agrees with, and adopts as its own reasoning, the determination of the Administrative Law Judge. The Division argues that although petitioner contends he did not receive a Notice of Deficiency in accordance with section 681 of the Tax Law, on two separate occasions petitioner included copies of the Notice in correspondence with the Division. The Division further argues that petitioner was requested to supply a copy of his Federal return so that the detailed entries might be reconciled, however he refused to do so; therefore, the Division was compelled to use the information supplied by the United States Government under an information exchange agreement.

Petitioner, in reply, argues that: 1) the fact that petitioner may have offered a Notice of Deficiency (dated on its face April 5, 1991) from the Division does not prove the timeliness of receipt or establish receipt in the proper statutory manner; 2) it is unknown from the record when or how petitioner obtained the document dated April 5, 1991; 3) petitioner was under no burden to prove, as the Division suggests, that the Division's assessment was in error because the presumption of correctness never arose in this matter since the Division never proved the

statutorily required certified mailing of a Notice of Deficiency to commence the action; and 4) the petition to dismiss the assessment as invalid should be granted and the determination of the Administrative Law Judge should be reversed.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge.

The issues framed by the Administrative Law Judge were whether the Division issued a document to petitioner which stated that the deficiencies of New York State and New York City personal income taxes were based upon a Federal audit of his 1987 income tax return and, if so, whether the fact that a Federal audit never occurred resulted in such prejudice to petitioner as would warrant cancellation of the deficiencies of State and City personal income taxes.

After a review of the record below and the evidence submitted, we find no merit in petitioner's assertion that the Administrative Law Judge erred in stating the issues. The petition filed on June 27, 1991 by petitioner Leonard Ragozin asserted only that "no valid justification was provided for this assessment."

We deal next with petitioner's argument, made for the first time on exception to this Tribunal, that the Division has not established that it duly served a Notice of Deficiency with Statement of Audit Changes on petitioner by certified or registered mail and that this failure to demonstrate compliance with the notice requirements of section 681(a) of the Tax Law invalidates the assessment and resulting collection procedures.

We reject petitioner's attempt to raise the issue of certified mailing of a Notice of Deficiency for the first time on exception.

"Although a party may raise a new legal issue on exception (see, Matter of Small, Tax Appeals Tribunal, August 11, 1988), a party may not raise factual issues on exception which were not addressed at the hearing (see, Matter of Clark, Tax Appeals Tribunal, September 14, 1992; see also, Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992). The raising of this factual issue by petitioner after the closing of the record deprived the Division of an opportunity to submit evidence of [proper] mailing of the [notice]" (Matter of Sandrich, Tax Appeals Tribunal, April 15, 1993).

Accordingly, we decline to consider petitioner's assertion of the certified mailing issue.

As previously stated, we find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated here and in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Leonard Ragozin is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Leonard Ragozin is denied; and
4. The Notice of Deficiency dated April 5, 1991 is sustained.

DATED: Troy, New York
July 22, 1993

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

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

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