

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ADOLPH AND FRANCES LOVLER	:	DECISION
for Redetermination of a Deficiency or for	:	DTA No. 810044
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1986 and 1987.	:	

Petitioners Adolph and Frances Lovler, 2880 Le Bateau Drive, Palm Beach Gardens, Florida 33410, filed an exception to the determination of the Administrative Law Judge issued on April 22, 1993. Petitioners appeared by Peter R. Newman, Esq. and Horowitz, Goldman & Ettelman, Esqs. (Steven A. Horowitz, Alfred S. Scope and Gary J. Nestler, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Both petitioners and the Division of Taxation filed briefs. Petitioners filed a reply letter brief received on August 26, 1993 which began the six-month period to issue this decision. Oral argument, requested by petitioners, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioners filed a request for a conciliation conference within 90 days of the issuance date of the Notice of Deficiency.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioners, Adolph and Frances Lovler, a Notice of Deficiency, dated March 4, 1991, for additional income tax due for the year 1986 in

the amount of \$112,652.11 plus penalty and interest for the total amount of \$190,486.28 and for the year 1987 in the amount of \$1,970.60 plus penalty and interest in the total amount of \$2,895.16.

Petitioners requested a conciliation conference.

By conciliation order dated October 4, 1991, the conferee dismissed the request on the ground that the request was not mailed until June 25, 1991 and, therefore, was late filed.

Petitioners contested the dismissal of their request for a conciliation conference by filing a petition dated October 16, 1991 with the Division of Tax Appeals. In that petition, petitioners alleged that on May 16, 1991 they filed a request for a conciliation conference; that they subsequently received a Notice and Demand for Payment of Tax Due dated June 17, 1991; and that in response to the Notice and Demand, petitioners' counsel wrote a letter dated June 25, 1991 annexing a copy of the May 16, 1991 request for a conciliation conference. The June 25 letter contained the following statements:

"On May 16, 1991, a request for a conciliation conference was made.

"Despite the timely filing of this request, my client has received a Notice and Demand for Payment of Tax Due, a copy of which is attached.

"Please mark your files to correctly record the timely receipt of the request for a conciliation conference and put a stop on any further collection."

In the petition, petitioners further alleged that the May 16, 1991 request was sent by ordinary mail in contrast to the normal practice of petitioners' counsel. The petition contained the following assertions:

"Since my file does not contain a certified mail receipt attached to my copy of the May 16, 1991 Request for Conciliation conference, I checked with the Secretary that handled the matter that day and she indicated that since there were three weeks left until the filing deadline, she sent it by regular mail. My other Secretary who usually handles all tax matters in the office was out that day. She know [sic] that all documents with filing deadlines in tax matters are routinely sent by this office via certified mail - return receipt requested, as indicated on my June 25th letter, but the other Secretary may have not been aware of that. Therefore, I have no proof of filing other than my file copy dated May 16, 1991.

"It is respectfully requested that a Conciliation Conference be held so that this matter may be litigated on the merits, and not on the failure of your mailroom or the U.S. Mail."

The Division filed an answer, dated April 3, 1992, alleging that petitioners were domiciliaries and statutory residents of New York State and that the Notice of Deficiency finally and irrevocably fixed the tax due because petitioners failed to request a conciliation conference within 90 days of the issuance of the Notice of Deficiency.

A hearing was held by the Division of Tax Appeals ("DTA") on January 7, 1993 for the sole purpose of determining whether the request for a conciliation conference was timely filed.

At the hearing, the Division submitted three separate affidavits of Donna Biondo, Jennifer Gable and Daniel D. LaFar; a copy of the Notice of Deficiency, which was dated March 4, 1991 and addressed to Adolph and Frances Lovler; and a copy of a page entitled certified record for non-presort manual mail. Typed on the one-page certified mail record was a certified number P001 060 813 listed next to the notice number L002374880 (which number also appears on the copy of petitioners' Notice of Deficiency). Next to both the certified number and notice number was the name and address of Adolph Lovler. The certified mail record page also contained the handwritten date of March 4, 1991 and a United States postal stamp dated March 4, 1991.

In the affidavit of Donna Biondo, identified as the Head Clerk of the Division's CARTS (Case and Resource Tracking System) Control Unit, she stated that she supervises the preparation for certified mailing of notices of deficiency as well as the transfer of the notices of deficiency to the District Office Control Unit of the District Office Audit Bureau from the Information Systems Management where the notices and certified record for non-presort manual mail are printed. She further stated that after the Notice of Deficiency has been mailed, a copy of the certified record with the U.S. Postal Service postmark is returned to the CARTS control

unit for storage and that it was from this unit that the copy of the certified mail record containing Adolph Lovler's name and address was retrieved.¹

In the affidavit of Jennifer Gable, who is identified as a Calculation Clerk in the Division's District Office Control Unit of the District Office Audit Bureau, she stated that when a Notice of Deficiency is received from the CARTS Control Unit, it is placed in a windowed envelope with the name and address of the taxpayer visible. This envelope is then wrapped in two copies of the certified record and delivered to the Division's mailroom where the envelope is sealed, metered and delivered to a United States Post Office for mailing by certified mail. She further stated that after examination of the copy of the notice and certified record, she could state without reservation that these documents were handled by the District Office Control Unit in the manner she described.

In the affidavit of Daniel D. Lafar, who is identified as the Division's principal mail and supply clerk, he stated that he was fully familiar with the operations and procedures of the mail room and that as part of his regular duties, he supervises the staff in the mail room. He explained that the mail room clerk compares the number of envelopes to the number of statutory notices and compares the certified control numbers on the envelopes to the certified control numbers listed on the certified record. He also stated that in this case there was only one statutory notice and one envelope. He further noted that when the Division's employee delivers the envelope and certified record to the U.S. Post Office, a postal employee verifies the address and certified control number on the envelope against the address and certified control number on the certified record before affixing a dated postmark to the certified record, a copy of which is then returned to the mail room for transferral to the CARTS Control Unit.

1

In her affidavit, Donna Biondo explained that when a Notice of Deficiency is issued to two taxpayers who are jointly liable, "exhibit 'A' only has the name of the primary taxpayer while exhibit 'B' contains the names of both taxpayers." In the latter part of her statement she incorrectly referred to the exhibits. The Notice of Deficiency which contains the names of both taxpayers is Exhibit "A" and the certified record, marked Exhibit "B," contains only the name of Adolph Lovler, the primary taxpayer.

At hearing, petitioners' counsel, Peter A. Newman, testified that on May 16, 1991 he personally mailed at the U.S. Post Office in Hicksville, New York, the request for a conciliation conference on behalf of Frances and Adolph Lovler. On cross examination, Mr. Newman responded as follows:

Q. "What type of mail did you use?"

A. "It was mail, ordinary mail."

Q. "It wasn't certified or registered?"

A. "No. That was a deviation from normal practice. And the reason it was not, it was after normal hours. I believe my secretary had gone home early that day and I just wanted to make sure it got mailed. I'd been planning to go away and I just went out and I didn't get a certified letter, I didn't get a certification on it."

Q. "Did your clients receive the Notice of Deficiency dated March 4, 1991, that's been received in evidence?"

A. "Yes, they did. That's not a factor. The receipt of the Notice of Deficiency is not in dispute." (Tr., pp. 8-9.)

Petitioners' counsel also submitted into the record a copy of the cover letter dated May 16, 1991 that he claimed had accompanied the original request for a conciliation conference.

In brief, the Division cites three Tax Appeals Tribunal cases in support of its position that proof of ordinary mailing is insufficient as a matter of law to prove timely request where there is no actual delivery of the request.

OPINION

In the determination below, the Administrative Law Judge held that Tax Law § 681(a) requires the Division to mail a Notice of Deficiency to the taxpayer at his or her last known address by certified or registered mail and, in the matter before us, the Division had demonstrated its general mailing procedure and provided evidence that this procedure was followed in this case.

The Administrative Law Judge also held that if the Notice is properly mailed, it constitutes a final assessment unless the taxpayer files a petition protesting the Notice within 90 days of the Division's mailing the Notice (see, Tax Law § 681[b]), or the taxpayer has the option of

protesting the Notice by requesting a conciliation conference in lieu of filing a petition for a hearing (see, Tax Law § 689[b]).

The Administrative Law Judge held that petitioners challenge only the date the conferee "deemed" to be the date of their request for a conciliation conference; petitioners did not argue that the Notice was not received by them, nor do they challenge the date of mailing or that the 90-day limitation period commenced on March 4, 1991.

The Administrative Law Judge further held that: 1) if ordinary mail is used, the sender bears the risk that the document may not be delivered at all; 2) the Tax Appeals Tribunal has consistently held that when there is no actual delivery of the document to the Division, oral testimony or other proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing of a document; 3) the conferee properly "deemed" the June 25, 1991 request as the date for calculating the timeliness of the request under the statute; and 4) because petitioners' request was not filed within 90 days of the March 4, 1991 Notice of Deficiency, the Division of Tax Appeals lacks jurisdiction to review the merits of the tax deficiency.

Finally, the Administrative Law Judge, in dismissing the petition, noted that petitioners could pay the assessment, file a timely refund claim, and if same is denied, file a timely petition with the Division of Tax Appeals for a review of the refund denial.

On exception, petitioners argue that the Division introduced only evidence relating to the mailing of a Notice of Determination,² dated March 4, 1991, while failing to introduce any evidence denying receipt of petitioners' request for a conciliation conference which Peter R. Newman, petitioners' attorney, testified was timely mailed by him on May 16, 1991 at the post office in Hicksville, New York.

2

While petitioners' representative refers to the Notice of Determination in his brief on exception, the evidence before us shows the Notice to be a Notice of Deficiency.

Petitioners further argue that: 1) the burden of establishing a prima facie case that the petition was timely mailed was met through Mr. Newman's clear and uncontradicted testimony; 2) the Division's burden of going forward in introducing evidence to contradict petitioners' case was never met; 3) the Notice of Determination was mailed after the statute of limitations had expired and no valid consent to extend the statute was ever executed; 4) the naked allegation of non-receipt without some proof is insufficient; and 5) nowhere in either the Tax Law or the applicable regulations is there a requirement that a Request for a Conciliation Conference must be sent by certified mail.

Finally, petitioners argue that the petition should be sustained, or alternatively, as a matter of administrative discretion, a courtesy conference should be held to ascertain the correctness of the defenses.

The Division argues that it met its burden of establishing when it mailed the Notice of Deficiency to petitioners, that there is no evidence of actual receipt of petitioners' request for a conciliation conference allegedly filed on May 16, 1991, and, since ordinary mail was used, Mr. Newman's testimony is insufficient to establish timely filing of a request for a conciliation conference.

The Division further argues that: 1) petitioners' raising of the statute of limitations defense in their memorandum of law and not in their petition or at hearing, denied the Division the opportunity to answer same; 2) since petitioners have failed to present a prima facie case, the statute of limitations defense must fail; and 3) petitioners' exception should be denied and the determination and statutory Notice should be sustained.

In reply, petitioners restate their argument on exception and admit that the issue of the statute of limitations waiver was not before the Tax Appeals Tribunal. Petitioners further argue in reply that: 1) "[i]n these times when governmental budgets are excessive, it seems to be a waste of resources, both petitioners and respondents, to litigate the issue of whether the conciliation request was timely filed" (Petitioners' reply brief, p. 1); and 2) "a common sense

approach be utilized that is within the normal Divisional guidelines" and "[i]t should hold a conference to determine if the statute of limitations had expired" (Petitioners' reply brief, p. 2).

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issue before her, we see no reason to analyze the issue any further; nor do we see any reason to hold otherwise and, therefore, affirm the Administrative Law Judge based on her determination.

We do, however, find it necessary to address petitioners' attempt to raise for the first time on exception, the statute of limitations defense issue which was not addressed at the hearing below.

To raise the defense, petitioners needed to establish a prima facie case showing the date on which the limitation period commenced, the expiration of the period, and receipt of mailing of the Notice after the running of the period (see, Matter of Jencon, Inc., Tax Appeals Tribunal, December 20, 1990). It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). Petitioners' failure to address this issue at the hearing below causes the defense to be waived, and, as stated previously, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Adolph and Frances Lovler is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Adolph and Frances Lovler is denied; and

4. The Notice of Deficiency dated March 4, 1991 is sustained.

DATED: Troy, New York
January 6, 1994

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

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