STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUSANNE JAFFE	:	DECISION DTA No. 811546
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1981, 1982, 1985, 1986, 1988, 1989 and 1990.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 31, 1994 with respect to the petition of Susanne Jaffe, 350 East 79th Street, New York, New York 10021. Petitioner appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (Robert Tompkins, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a brief in opposition. The Division of Taxation's reply brief was received on April 11, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner DeWitt concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Tax Appeals has subject matter jurisdiction to determine the validity of income tax asserted against petitioner by way of a notice and demand.

II. Whether the petition in this matter was timely filed.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "9," "10," "13," "14," and "18" which have been modified. We have also omitted finding of fact "19" because it is not relevant. The Administrative Law Judge's findings of fact and the

modified findings of fact are set forth below.

Susanne Jaffe ("petitioner") filed the petition in this matter dated as signed on January 6, 1993. The wrapper in which it was mailed bears a United States Postal Service postmark date of January 6, 1993. The petitionand its mailing wrapper are indate stamped as received by the Division of Tax Appeals on January 8, 1993.

The address appearing on petitioner's 1985 New York State Resident Income Tax Return ("State Return" or "IT-201") is 300 East 42nd Street, Apt. 21-F, New York, New York 10016. This State return is dated April 11, 1986. The address appearing on petitioner's wage and tax statements ("W-2") which are attached to her filed State returns for tax years 1985, 1986, 1988 and 1989 is 300 East 40th Street (Ex. "G", "J", "K", "L").

Petitioner claims that during all relevant periods she resided in New York City ("the City") at 300 East 40th Street, Apt. 21-F. This address appears on petitioner's filed State returns for tax year 1986, dated April 12, 1987. This same address also appears on petitioner's State income tax returns filed for tax years 1988[1] and 1989.[2]

Petitioner's State return filed for tax year 1989 claims a refund of $253.00. Copies of documents generated by the Division of Taxation's ("Division") processing section which are attached to the return, show that the Division had, by June 8, 1990, updated its records to reflect petitioner's correct address, i.e., 300 East 40th Street, Apt. 21-F. The Statement of Income Tax Adjustment issued to petitioner, dated June 8, 1990, contains this address and grants petitioner a partial refund of $139.55. Petitioner continues to claim entitlement to a refund of $253.00 for this tax year (Ex. "N").

Based on the evidence in the record, the Division had changed its internal records to reflect petitioner's correct City address at 300 East 40th Street, Apt. 21-F by June 8, 1990.

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[1]Dated April 7, 1989.

[2]Dated April 7, 1990.

The address appearing on petitioner's State return filed for 1990[3] is 401 East 34th Street in the City. Attached to this return is a one-page computation of tax due generated by the Division's computer. This page shows that by August 7, 1991, the Division's computer records had already been changed to reflect petitioner's new address at 401 East 34th Street.

Copies of petitioner's State returns in evidence were all provided by the Division. All of the State returns were signed by petitioner seven to ten days prior to their April 15th due date. Since the returns in evidence do not show the Division's in-date stamp, for purposes of this determination, all of the returns are deemed to have been filed with the Division on April 15 of each year (Tax Law § 683[b][1]).

The Internal Revenue Service ("IRS") had made changes or corrections to petitioner's 1981 and 1982 Federal income tax returns, which resulted in a recomputation of the tax due. Petitioner agreed to these Federal changes, but allegedly failed to report these agreed Federal changes to the Division as required by law. Based on these Federal changes, the Division recomputed petitioner's income tax for 1981 and 1982. On September 29, 1988, the Division sent a Notice of Additional Tax Due to petitioner. This notice was addressed to 300 East 42nd Street, Apt. 21-F in the City and stated, in part:

> "The New York State Tax Department has been notified by the I.R.S. (Pursuant to Section 6103(D) of the Internal Revenue Code) that an adjustment was made to your Federal Income Tax Return for the above year(s). This notice is issued because of your failure to report the changes to New York State and shows the additional New York State and if applicable, New York City . . . tax due based on the unreported changes."

The second page of this notice explained that the changes in tax asserted were based on petitioner's rent/royalty and pension/annuity income, as well as changes in her itemized deductions. The Division noted that negligence penalties would be asserted based on petitioner's failure to report the agreed Federal changes to her tax. This notice asserted additional tax due, plus penalties and interest, for the respective years as follows:

Tax Year	1981	1982

[3]Dated April 6, 1991.

	State	City	State	City
Additional Tax Due	$3,618.47	$1,152.61	$ 815.10	$315.11
Interest	2,830.23	901.52	475.97	183.99
Penalties § 685(b)(1)	180.92	57.63	40.76	15.76
Total Due	$6,629.62	$2,111.76	$1,331.83	$514.86

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> Copies of two notices and demands for payment of income tax due, dated January 6, 1989, asserting 1981 State and City income tax of $3,618.47 and $1,152.61, respectively, plus penalties and interest were introduced into evidence (Exhibit "E"). Both notices were addressed to petitioner at 300 East 42nd Street, Apt. 21-F in the City. Petitioner never received these notices.[4]

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

> Copies of two notices and demands for payment of income tax due, also dated January 6, 1989, asserting 1982 State and City income tax of $815.10 and $315.11, respectively, plus penalties and interest were introduced into evidence (Exhibit "F"). Both notices were addressed to petitioner at 300 East 42nd Street, Apt. 21-F in the City. Petitioner never received these notices.[5]

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[4]Finding of fact "9" of the Administrative Law Judge's determination read as follows:

> "[t]wo notices and demands for payment of income tax due, dated January 6, 1989, were issued to petitioner asserting 1981 State and City income tax of $3,618.47 and $1,152.61, respectively, plus penalties and interest. Both notices were addressed to petitioner at 300 East 42nd Street, Apt. 21-F in the City. Petitioner never received these notices."
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> We modified this fact to more accurately reflect the record.

[5]Finding of fact "10" of the Administrative Law Judge's determination read as follows:

> "[t]wo notices and demands for payment of income tax due, also dated January 6, 1989, were issued to

In comparing information contained on petitioner's State and Federal income tax returns for tax year 1985, the Division found that she had taken improper deductions and made mathematical errors in computing the tax due.

Based on the discrepancy in her deductions on her filed 1985 State return, a Statement of Audit Changes, dated January 24, 1989, was issued to petitioner asserting additional personal income tax due the State and City of $312.74 and $142.16, respectively, plus interest. The Division issued to petitioner a Notice of Deficiency (A8901243301C),[6] dated March 16, 1989, asserting State and City tax in the amount of $454.90, plus interest only. Affidavits by Stanley K. Devoe, Principal Clerk in the Division's Manual Assessments Unit, and Daniel LaFar, Principal Mail and Supply Clerk in the Division's mail room, deposed that this Notice of Deficiency was addressed and mailed to petitioner at 300 East 42nd Street in the City, rather than to her actual address at 300 East 40th Street in the City (Ex. "H" and "I"). The Division, in its brief, has agreed to cancel this assessment (Division's letter brief, p. 5).

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

> A Notice and Demand for Payment (R8611284077),[7] dated November 28, 1986, asserting additional State income tax in the amount of $1,001.19 was allegedly issued to petitioner based on alleged mathematical errors in calculating tax due on her 1985 return. The computer-generated

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petitioner asserting 1982 State and City income tax of $815.10 and $315.11, respectively, plus penalties and interest. Both notices were addressed to petitioner at 300 East 42nd Street, Apt. 21-F in the City. Petitioner never received these notices."

We modified this fact to more accurately reflect the record.

[6]Upon the Division's adopting a new computer system, the State and City portion of this assessment was separated and new assessment numbers were assigned as follows. Notice No. L-000322900-1 asserted City income tax of $142.16, plus interest. Notice No. L-000238801-1 asserted State income tax of $312.74, plus interest. Both of these assessments are to be cancelled.

[7]Also appears in the record under its new number, i.e., L-000058870-9.

> statement of Income Tax Exception attached to petitioner's return sets forth the Division's calculation of the additional tax due for 1985 and shows petitioner's address as 300 East 42nd Street in the City.[8]

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

> The Division also allegedly issued notices and demands for payment of additional income tax due for tax years 1986, 1988 and 1990. For each of these tax years, the additional tax asserted was based upon alleged mathematical errors on petitioner's State income tax returns.[9]

Based on claimed mathematical errors on petitioner's State return filed for tax year 1986, the Division determined additional tax due in the amount of $675.68, plus penalty and interest. A Notice and Demand for Payment (R8712306175),[10] dated December 30, 1987, was addressed to petitioner at 300 East 42nd Street in the City.

Based on petitioner's alleged mathematical errors on her State return for 1988, the Division determined additional tax due in the amount of $1,823.25, plus penalty and interest. A Notice and Demand for Payment (R8910165175),[11] dated October 18, 1989, was addressed to petitioner at 300 East 42nd Street in the City.

As noted, supra, the address appearing on petitioner's 1989 return, dated April 7, 1990, continued to be 300 East 40th Street, Apt. 21-F. On this return, petitioner claimed a refund of $253.00. The Division determined that petitioner had incorrectly claimed herself as an

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[8]We modified finding of fact "13" of the Administrative Law Judge's determination by adding the word "allegedly" to the first sentence in order to more accurately reflect the record.

[9]We modified finding of fact "14" of the Administrative Law Judge's determination by adding the word "allegedly" to the first sentence in order to more accurately reflect the record.

[10]Also referred to in the record under its new number, i.e., L-004884271-1.

[11]Also referred to in the record under its new number, i.e., L-004884271-1.

exemption on her State return. This resulted in a mathematical error in the computation of the tax due.

A Statement of Income Tax Adjustment, dated June 8, 1990, granted petitioner a partial refund of $139.55. This refund ($139.55) was applied towards payment of the notice and demand (L-000058870-9) which asserted tax of $1001.19, plus penalty and interest, for tax year 1985. Petitioner continues to claim entitlement to a refund of the additional $139.55 for this tax year. The Statement of Income Tax Adjustment sent to petitioner, and copies of other documents generated by the Division's processing section which are attached to her 1989 return, show that the Division had, by June 8, 1990, updated its records to reflect petitioner's correct address, i.e., 300 East 40th Street, Apt. 21-F (Ex. "L").

We modify finding of fact "18" of the Administrative Law Judge's determination to read as follows:

> Based on claimed mathematical errors on petitioner's State return filed for tax year 1990, the Division determined additional tax due in the amount of $1,318.24, plus penalty and interest. A Notice and Demand for Payment (R9111141792),[12] dated November 25, 1991, was allegedly mailed to petitioner at her correct address at 300 East 40th Street in the City.[13]

It can also be reasonably inferred from evidence in the record that any correspondence, including notices of deficiency or notices and demands for payment of tax due, mailed by the Division to petitioner prior to June 8, 1990 was addressed and mailed to 300 East 42nd Street in the City (see, above).

The Division offered no evidence in the record with respect to the dates and office mailing procedures followed with respect to the notices and demands in dispute ("the subject

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[12]Also referred to in the record under its new number, i.e., L-004884271-1.

[13]We modified finding of fact "18" of the Administrative Law Judge's determination by adding the word "allegedly" to the second sentence in order to more accurately reflect the record.

notices"). The Division has not disputed that the subject notices asserting tax for years 1981, 1982, 1985, 1986 and 1988 were mailed to 300 East 42nd Street in the City.

Except for 1990, there is no evidence in the record that the additions to tax asserted for tax years 1981, 1982, 1985, 1986 and 1988 were paid by petitioner prior to bringing this proceeding. There is a check attached to the petition made payable to "New York State Income Tax" in the amount of $725.00. A notation on the check states "1990 Income Tax."

Petitioner did not file a request for conciliation conference with the Division's Bureau of Mediation and Conciliation Services, but instead filed a petition with the Division of Tax Appeals dated January 6, 1993.

The only Notice of Deficiency issued in this matter asserted additional income tax due for tax year 1985. The Division in its brief has conceded the timeliness issue with respect to this notice and has agreed to cancel the Notice of Deficiency. Therefore, the remaining notices in dispute in this matter are notices and demands for payment of income tax due for 1981, 1982, 1985, 1986, 1988 and 1990, and a refund claim for 1989.

OPINION

The Administrative Law Judge first addressed the issue of whether the petition was timely filed.

The Administrative Law Judge concluded that the Division did not meet its burden of proving the dates of mailing or to otherwise prove proper mailing of the subject notices. Therefore, he deemed the Division's claim that the petition was untimely filed to be abandoned, and the petition to be "timely filed with respect to all of the notices and demands issued to petitioner" (Determination, conclusion of law "C").

We do not agree. This conclusion overlooks the fact that there were no notices to petitioner since the Division failed to prove the fact and the date of the mailing of the notices. In Matter of Malpica (Tax Appeals Tribunal, July 19, 1990), we determined that such failure deprived this Tribunal of jurisdiction in the case and we dismissed on that basis. Since the three-year statute of limitations on the issuance of notices of deficiency (Tax Law § 683) had

expired, the Division was precluded from issuing new assessments for the periods at issue. Accordingly, our dismissal effectively ended the matter.

However, in this case, dismissal of the case on jurisdictional grounds would not end the matter with regard to the failure to report Federal changes since there is no statute of limitations on the issuance of the notice and demand for such failure (Tax Law § 683[c][1][C]). The Division can rectify its failure by issuing new notices. With respect to the mathematical errors, the same result occurs. Tax Law § 682 provides that the amount of tax which a return would have shown to be due, except for the mathematical error, shall be deemed to be assessed on the date of the filing of the return. The Division is merely required "as soon as practicable" to give notice to the taxpayer. Thus, the Division can rectify its failure by issuing new notices and demands to collect the tax for the years at issue.

In short, dismissal of the case on jurisdictional grounds merely puts off until another day the core jurisdictional question of whether petitioner can file a petition for hearing on notices and demands issued because of mathematical errors in a filed return or failure to report Federal changes in a return. Accordingly, we will proceed to the core question of whether petitioner is entitled to a hearing on the notices at issue.[14]

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[14]In its reply brief, the Division states that it will comply with the Administrative Law Judge's determination to issue new notices and demands for the mathematical errors:

> "[f]or unreported federal changes, new notices of additional tax due will be issued pursuant to § 681(e)(1) which will commence the thirty day period for the petitioner to explain how each notice of additional tax due is erroneous. If petitioner does not show a notice of additional tax due to be in error within the 30 day period, a notice and demand will be issued. Thus, the matter of proper notice, which petitioner continues to argue, is not in issue for math errors or unreported federal changes.
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> "Pursuant to § 681(a)(3), petitioner will have 10 days to pay the amounts shown on any newly issued notices and demands" (Division's reply brief, p. 2).

The Division also states that:

> "[s]o that the focus of this case will be directed at the extremely important question of whether the statutory provisions for mathematical errors and the failure to report federal changes provide specific denials of a hearing right, the Division will withdraw its argument that actual notice can replace the requirement of proving that a refund claim denial was sent by certified mail. Thus, the Division agrees that petitioner shall have a hearing on its refund claim for 1989" (Division's reply brief, pp. 2-3).

The Administrative Law Judge, relying on Matter of Meyers v. Tax Appeals Tribunal (201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519), held that:

> "Tax Law § 2006(4) imposes upon the Division of Tax Appeals the duty '[t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter' (emphasis added) (see, Matter of Meyers v. Tax Appeals Tribunal, supra).
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> "No other provision of the Tax Law specifically provides for, modifies or denies a right to a hearing with respect to a notice and demand for personal income tax. That being the case, it is concluded that Tax Law § 2006(4) confers jurisdiction on the Division of Tax Appeals with respect to the notices and demands in this proceeding (see, Matter of Meyers v. Tax Appeals Tribunal, supra)" (Determination, conclusion of law "E").

The Administrative Law Judge concluded as follows:

> "[t]his matter will be scheduled for hearing on the merits in due course. Prior to such hearing date, the Division is directed to mail to petitioner's last known address a copy of each notice and demand which asserts additional tax in this proceeding. The petitioner is reminded that these notices do not constitute the assessment, but are merely bills asserting tax which the statute deems to have been assessed by her tax returns (Tax Law § 682[a]). In the hearing on the merits, it will be petitioner's burden to show by clear and convincing evidence that the additional tax and additions to tax, asserted by these notices, is erroneous" (Determination, conclusion of law "F").

On exception, the Division asserts that this case is different from Meyers in that Meyers dealt only with section 685(1) which:

> "did not refer to hearing rights, [whereas] the Tax Law provisions concerning the instant case, § 681(d) (mathematical errors) and 681(e) (unreported federal changes) provide specifically that these notices and demands shall not be considered notices of deficiency for the purpose of filing a petition with the tax commission. Thus, this case has the specific denial that the Meyers case did not have" (Division's brief, p. 16).

The Division's argument is based on the wording of section 681(d) of the Tax Law.[15]

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[15]Section 681(d) of the Tax Law provides as follows:

> "Exceptions for mathematical errors.--If a mathematical error appears on a return (including an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax), the tax commission shall notify the taxpayer that an amount of tax in excess of that shown upon the return is due, and that such excess has been assessed. Such notice shall not be considered as a notice of deficiency for the purposes of this section, subsection (f) of section six hundred eighty-seven (limiting credits or refunds after petition to the tax commission), or subsection (b) of section six hundred eighty-nine

As explained by the Division, section 689(f) provides:

> "the notice of deficiency gives rise to a right to file a petition and § 681(d) makes it clear that the notice and demand for a mathematical error is not to be considered like a notice of deficiency for the purpose of providing a right to file a petition. Without § 681(d) it is already apparent that a notice and demand is not a notice of deficiency and that § 689(f) provides a hearing right only for a notice of deficiency without any mention of a notice and demand. Section 681(d) serves to make it emphatic that a notice and demand for a mathematical error does not provide a right to file a petition and is not to be likened to a notice of deficiency. The Division asserts that this constitutes a specific denial or modification of a right to a hearing for a notice and demand based on mathematical errors.
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> "To further clarify that an assessment for a mathematical error is complete when a return is filed and that there is no right to file a petition, § 681(d) adds that such assessment or collection shall not be prohibited by § 681(c) which provides the rule with respect to a notice of deficiency that an assessment, levy or collection proceeding shall not be made, begun or prosecuted until a notice of deficiency has been mailed to the taxpayer and the time for filing a petition to contest such notice has expired or until the decision of the tax commission if a petition was timely filed" (Division's brief, p. 7).

With regard to the notices and demands for the tax years 1981 and 1982 issued by the Division because of the failure of petitioner to report the Federal changes, the Division argues that:

> "the statute is clear that the notice and demand for federal changes will not provide a right to file a petition. In language similar to § 681(d) (concerning mathematical errors) § 681(e)(1) specifically states the [sic] such notice shall not be considered a notice of deficiency for the purpose of providing a right to file a petition. Moreover, as with the provisions for mathematical errors, the statute specifically states that the assessment and the collection thereof shall not be prohibited by subsection (c) of § 681, which prevents collection on a notice of deficiency until the time to file a petition has expired or a tax commission decision becomes final.
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> "As in the case of § 681(d) concerning mathematical errors, it is already apparent that a notice and demand is not a notice of deficiency and that § 689(f) mentions only the notice of deficiency as providing a right to a petition. Section 681(e)(1) serves to make it emphatic that a notice and demand for unreported federal changes provides no right to file a petition" (Division's brief, p. 12).

Finally, the Division addresses Tax Law § 2006(4), the core of the Meyers decision and

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(authorizing the filing of a petition with the tax commission based on a notice of deficiency nor shall such assessment or collection be prohibited by the provisions of subsection (c)."

asserts that the determination of the Administrative Law Judge in construing this section in this case is wrong. The Division argues that:

> "the language of § 681(d) (regarding mathematical errors) and § 681(e)(1) (regarding unreported federal changes) are emphatic in that notices and demands for the subject matter of those provisions cannot provide the taxpayer with a right to file a petition and that the rules limiting collection activities on a deficiency that is the subject of a notice and deficiency shall not limit the right of the Division to proceed with collection on these assessments. The discussions above have already explained how § 681(d) and § 681(e) specifically deny the right to file a petition and authorize the Division to proceed with collection.
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> "The Division argues that holding that the language of these statutes does not specifically deny or modify the right to a hearing, would mean that the exception in § 2006(4) becomes meaningless because there is no stronger language in the Tax Law for denying or modifying a right to a hearing [footnote omitted]. A rule of statutory construction is that the statute should not be interpreted so to make it meaningless. See McKinney's Statutes § 231 and cases cited therein" (Division's brief, pp. 13-14).

To review briefly, in Meyers petitioner filed a petition for a hearing arguing the Notice and Demand is the type of written notice for which Tax Law § 2006(4) provides jurisdiction to the Division of Tax Appeals for the holding of a hearing. This Tribunal rejected this argument by petitioner and determined that:

> "[n]o provision of Article 22 permits a petition to be filed from a Notice and Demand. Thus, petitioners must pay the penalties asserted due and apply to the Division for a refund. If the refund request is denied by the Division, Tax Law § 689(c) permits petitioners to file a petition with the Division of Tax Appeals challenging that denial" (Matter of Meyers, Tax Appeals Tribunal, June 3, 1993).

On appeal, the Appellate Division framed the issue before it as:

> "whether . . . [the] Tax Appeals Tribunal . . . properly determined that petitioners were not entitled to a hearing before paying the additions to tax imposed upon them pursuant to Tax Law § 685(c) . . . . Petitioners contend that they are entitled to a hearing pursuant to Tax Law § 2006(4) because nothing in the Tax Law specifically provides for, modifies or denies their right to a hearing in these circumstances" (Matter of Meyers v. Tax Appeals Tribunal, supra, 615 NYS2d 90, 91).

After reviewing our decision, the Court stated that:

> "[a]t best, [the Tribunal's] analysis establishes that the provisions of Tax Law article 22 . . . do not give petitioners a right to a prepayment hearing. Tax Law article 40, however, specifically provides for 'hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied' (Tax Law

> § 2000). Consistent with this policy, Tax Law § 2006(4) establishes a hearing as a matter of right upon request, 'unless a right to such a hearing is specifically provided for, modified or denied by another provision of [the Tax Law].' [The Tribunal's] analysis may establish that a right to such a hearing is not specifically provided for by another provision of the Tax Law, but it falls far short of establishing that the right to such a hearing is specifically modified or denied by another provision of the Tax Law. We conclude, therefore, that because the right to a prepayment hearing in the circumstances of this case is not specifically provided for, modified or denied by any other provision of the Tax Law, petitioners have the right to such a hearing pursuant to Tax Law § 2006(4)" (Matter of Meyers v. Tax Appeals Tribunal, supra, 615 NYS2d 90, 92).

The crux of the Division's position here is that sections 681(d) and 681(e) each deny petitioner a right to a hearing by providing that the notices required under each section shall not be considered a deficiency under section 681 or subsection (b) of section 689 (authorizing the filing of a petition with the tax commission based on a notice of deficiency) nor shall the assessment or collection of tax be prohibited by the provisions of subsection (c). The Division argues that this language distinguishes this case from Meyers since section 685(c), at issue in Meyers, did not have any such language. We agree with the Division to the extent that the language at issue here is different from that at issue in Meyers and that the language cited does not treat a notice and demand as a notice of deficiency. Also, as we know from Meyers, Article 22 does not provide a prepayment hearing in such cases. However, we disagree with the Division's conclusion that this language "modifies" or "denies" petitioner a right to hearing within the meaning of Tax Law § 2006(4). The Division's argument here is essentially no different than the rationale relied upon by this Tribunal in Matter of Dreisinger (Tax Appeals Tribunal, July 20, 1989) which formed the basis of our decision in Meyers which was rejected by the Meyers' Court.

In Dreisinger, the penalty imposed upon the taxpayers was for the late filing of a return (Tax Law § 685[a][1]) and for late payment of taxes (Tax Law § 685[a][2]). We noted that generally a notice of deficiency would be issued by the Division to the taxpayer for an asserted penalty and that the taxpayer had the right to contest such a notice of deficiency before having to pay the penalty (Tax Law § 689[b]). We went on to point out that:

> "[h]owever, Tax Law § 685(1) goes on to provide several exceptions to

this general procedure:

'For purposes of section six hundred eighty-one [which deals generally with the procedure for issuance of notices of deficiency], this subsection shall not apply to:

(1) any addition to tax under subsection (a) except as to that portion attributable to a deficiency;

(2) any addition to tax under subsection (c);

(3) any penalty under subsection (h) and any additional penalty under subsection (i); and

(4) any penalties under subsections (j), (k), (q), (r) and (s).' (Emphasis added.)" (Matter of Dreisinger, supra).

We concluded that in these situations the Division can proceed against the taxpayer by the issuance of a notice and demand and that Article 22 of the Tax Law does not provide the taxpayer with the right to petition a notice and demand.

We relied on the same rationale in Meyers where the penalty was imposed under section 685(c) which clearly falls within the exceptions listed in section 685(1). In our view, the exception in section 685(1), upon which we relied in Meyers, is of the same substantive effect as the language relied upon by the Division, namely, that the notice and demand is not a notice of deficiency and that Article 22 does not extend to petitioner the right to a prepayment hearing. As the Court in Meyers noted, however, this is not a denial of a right to a hearing in the context of Tax Law § 2006(4) (cf., Matter of Hall v. New York State Tax Commn., 108 AD2d 488, 489 NYS2d 787, relying on Matter of Parsons v. State Tax Commn., 34 NY2d 190, 356 NYS2d 593 [the absence of specific authority in section 1138(1) to deal with no remittance returns is a "modification" of the right to a hearing, thus precluding the former State Tax Commission from proceeding administratively to assess sales tax liability under identical language in former section 171(21) of the Tax Law]).

We conclude that if the Division, with respect to those returns which contain mathematical errors, properly issues to petitioner notices and demands asserting the additional tax due, then petitioner is entitled to file a petition for hearing with regard to such notices. If the petition is timely filed, petitioner will be entitled to a hearing. With respect to those returns

where Federal changes were not reported, petitioner is entitled to receive the notices provided in section 681(e) and the opportunity in that section to provide a response to the notice.

In so concluding, we appreciate the Division's argument that the very subject matter of the notices at issue, i.e., mathematical errors in a filed return and failure to report Federal changes, corrections or disallowances, raises serious doubt as to whether the Legislature intended to provide for the right to a pre-payment hearing.

Mathematical errors are nothing more than mistakes made by petitioner on the return which are detected by the Division in the processing of the return. For example, if the taxpayer's return indicates that 2 + 2 = 5, there is no apparent need for a pre-payment hearing to resolve the Division's correction that 2 + 2 = 4 since it is indisputable that the adjustment is correct on its face. Using petitioner's 1986 return as an example, the mathematical error made by petitioner was in the computation of her New York City tax from the tax tables in section 1304 of the Tax Law. In short, for 1986, the tax rate for taxable income over $25,000.00 was $675.00 plus 4.3% of the amount over $25,000.00. In doing her computation, petitioner failed to add the $675.00 to the 4.3% amount and entered only the 4.3% amount to her return. There is no dispute as to the nature of the adjustment by the Division, i.e., to add the $675.00 to petitioner's reported liability. Given the nature of the adjustment, it is understandable why the Legislature did not provide explicitly for a pre-payment hearing.

The same holds true for finally determined[16] Federal changes, corrections or

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[16]20 NYCRR 159.5 provides:

> "[f]inal determination. [Tax Law § 659] A final determination for purposes of this Part includes but is not limited to the following instances:
>
> (a) a closing agreement made under section 7121 of the Internal Revenue Code of 1954, as amended, finally and irrevocably adjusting and settling a taxpayer's Federal income tax liability;
>
> (b) an allowance by the Commissioner of Internal Revenue of a refund of any part of the Federal income tax shown on the taxpayer's Federal income tax return or of any deficiency thereafter assessed, whether such refund is made on the commissioner's own motion or pursuant to a judgment of a court;
>
> (c) the 90-day deficiency notice pursuant to section 6212 of the Internal

disallowances at issue here. Stated simply, there is no dispute as to the nature of the change and the fact that it occurred, i.e., it was made by the "United States internal revenue service or other competent authority" (Tax Law § 659). While these arguments have merit, they nevertheless do not overcome the holding in Meyers.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed to the extent that petitioner's right to a hearing for other notices and demands is recognized, if the Division of Taxation issues notices and demands, but such determination is otherwise reversed; and

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Revenue Code of 1954, as amended, unless a timely petition to redetermine the deficiency is filed in the Tax Court of the United States, in which event the judgment of the court of last resort affirming the deficiency, or the redetermination of the deficiency pursuant to a judgment of the court of last resort, is the final determination;

(d) the assessment of a deficiency pursuant to a waiver filed under section 6213 of the Internal Revenue Code of 1954, as amended, where no 90-day deficiency notice is issued; and

(e) the allowance of a tentative carry-back adjustment based upon the net operating loss carry-back pursuant to section 6411 of the Internal Revenue Code of 1954, as amended."

3. The petition of Susanne Jaffe is granted to the extent that she is entitled to file a petition for hearing with regard to any notices and demands properly issued by the Division of Taxation asserting additional tax due for the periods at issue in this case.

DATED: Troy, New York
September 21, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner