

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
SANDRA HORVITZ AND JOHN C. HORVITZ : DECISION
for Redetermination of a Deficiency or for Refund of : DTA Nos. 811868
New York State and New York City Personal Income Taxes : and 811876
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Year 1986. :
:

Petitioners Sandra Horvitz and John C. Horvitz, 77 Park Avenue #6F, New York, New York 10016, filed an exception to the determination of the Administrative Law Judge issued on December 16, 1993. Petitioners appeared by Herbert Bard, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter on July 29, 1994 stating it would not be filing a brief, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners timely filed their requests for a conciliation conference with the Bureau of Conciliation and Mediation Services.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

The Division of Taxation ("Division") issued to Sandra Horvitz a Notice of Deficiency, dated October 16, 1989, for income tax due in 1986 in the amount of \$4,964.50, plus penalty and interest. The Division also issued to John C. Horvitz a Notice of Deficiency, dated

October 16, 1989, for income tax due in 1986 in the amount of \$5,084.40, plus interest and penalty.

On December 10, 1992, petitioners each mailed separate requests for a conciliation conference. The Bureau of Conciliation and Mediation Services ("BCMS") received those requests on December 14, 1992. In support of these facts, the Division submitted with its motion for summary determination papers: (1) copies of the requests for a conciliation conference, stamped received by the BCMS on December 14, 1992 and (2) copies of the envelopes addressed to the BCMS from Horvitz & Associates, Inc. with a U.S. Postal Service stamp dated December 10, 1992 and a BCMS stamp indicating receipt on December 14, 1992.

By conciliation orders dated February 5, 1993, the conferee dismissed the two requests because the underlying notices of deficiency were issued on October 16, 1989 and the 90-day period for requesting a conference had expired.

Petitioners filed separate petitions, dated May 4, 1993, containing identical allegations. Among those allegations was the following:

- "4. On July 13, 1989, New York State Department of Taxation and Finance issued a statement of personal income tax audit changes assessing the minimum tax, interest and a negligence penalty. Taxpayer did not understand the reason for the assessment and wrote to New York State requesting further explanation.
- "5. New York State did not respond to taxpayer's request except to continually send collection notices. Upon receipt of each notice taxpayer responded to New York State that he needed an explanation for the assessment before tax could be paid.
- "6. Finally on May 9, 1991, more than a year and a half after the taxpayer initially requested an explanation for the assessment the state provided an explanation of the minimum tax assessment. Upon receipt of this correspondence, taxpayer ascertained that the assessment of additional minimum tax was correct and promptly paid additional tax plus interest to date on June 13, 1991.
- "7. Taxpayer requested elimination of penalties for negligence (Sec. 685(b)) and failure to pay tax timely (Sec. 685 (a)(2)) due to reasonable cause. The negligence penalty should be eliminated due to reasonable cause since the taxpayer engaged and relied on a professional accountant to prepare his returns properly (see matter of Phoenix, TSB-H-86 (109)). The penalty for failure to pay timely should be eliminated since the state did not respond

promptly to the taxpayers [sic] request for explanation of assessment. When explanation was finally provided, taxpayer promptly paid tax and interest."

The Division filed motions for summary determination pursuant to 20 NYCRR 3000.5(c)(1) before the Division of Tax Appeals on October 13, 1993. In the affidavits of Christina Seifert, she states that summary determination is warranted on the ground that petitioners failed to file a request for a hearing or conciliation conference within 90 days of the issuance of the notices of deficiency.

In the affidavits of Donna Biondo, she stated that she supervises the processing of notices of deficiency prior to mailing; that a certain mail record is printed and records the certified control number printed on each notice that is to be mailed; and that the certified mail record is delivered, along with the notices that it records, to the U.S. Postal Service where it is affixed with a U.S. Postal Service postmark or initialed by a Postal Service representative. Attached to Ms. Biondo's affidavits was a copy of an eight-page certified mail record, the first page of which contains the certified number P 001 060 708 next to the name and address of John C. Horvitz, 77 Park Ave. #6F, New York, NY 10016, and the certified number P 001 060 709 next to the name and address of Sandra Horvitz, 77 Park Ave. #6F, New York, NY 10016. The mailing record consists of eight consecutively numbered pages with consecutive certified numbers starting on page one with the certified number P 001 060 701 through certified number P 001 060 785 on the last or eighth page. The last page contains the handwritten notation "85" and initials next to the printed words "Total Pieces received at post office." The last page also contains a U.S. Postal Service stamp with the date October 16, 1989.

In the affidavits of Daniel LaFar, he stated that he has been the principal mail and supply clerk since 1978 and is fully familiar with the operations and procedures of the mail and supply room. He described these procedures as follows: a member of the staff weighs and seals each envelope, places postage and fee amounts on the letters, records the postage and fee amounts on the mail record, counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record, and delivers the stamped envelopes to the U.S.

Postal Service where a postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service.

In the affidavits of Martin Dolan, he stated that as part of his regular duties he oversees the daily computer operations of the Division's computer system, which stores information and generates printed documents including notices of deficiency that are sent to taxpayers. He explained that it is the Division's regular business practice to retain microfiche copies of statutory notices for "the purposes of reducing paper usage and the amount of personal resources devoted to the filing of hard copies of statutory notices." He further described the manner in which the microfiche copies of statutory notices are generated and retained by the Division. Attached to his affidavits were the microfiche copies of the notices of deficiency sent to Sandra Horvitz and John C. Horvitz, respectively. In the upper right hand corner of these copies are the certified mail numbers corresponding to the certified numbers printed next to the respective names of Sandra and John C. Horvitz on the certified mail record.

In addition to the facts found by the Administrative Law Judge, we find the following:

On January 14, 1994, petitioners filed an exception to the December 16, 1993 determination of the Administrative Law Judge. This exception was forwarded to the Chief Administrative Law Judge as it appeared to be a request to reopen the record. On March 24, 1994, an order was issued denying petitioners' motion to reopen the record. No exception was filed with respect to this order. Petitioners' January 14, 1994 exception was held in abeyance pending the outcome of the motion to reopen and is now being addressed by this decision.

OPINION

The Administrative Law Judge found that the Division established proper mailing of the notices of deficiency to petitioners on October 16, 1989 by submitting affidavits describing its general mailing procedure and the mailing records which showed that the procedure was followed in this matter. The Administrative Law Judge further found that petitioners did not mail their requests for conciliation conferences until December 10, 1992 and the requests were not received by BCMS until December 14, 1992. Therefore, the Administrative Law Judge determined that the requests were not filed within 90 days of the issuance of the notices of deficiency and dismissed the petitions.

The Administrative Law Judge, relying on Winegrad v. New York Univ. (64 NY2d 851, 487 NYS2d 316), also determined that the Division, by the evidence it submitted, made a showing that no material issues of fact were in dispute and that petitioners were only raising a legal issue regarding abatement of penalties. Based on this determination, the Administrative Law Judge granted the Division's motion for summary determination.

The Administrative Law Judge further found that petitioners' assertion, that penalties should be eliminated because the Division did not respond promptly to their request for an explanation of the tax assessment, does not in any way excuse petitioners' late filing of the conciliation requests.

The only issue properly before this Tribunal is the one of timeliness. In their exception, petitioners have not addressed the timeliness issue but, instead, have addressed the substantive issue of abatement of penalties. Without a timely filed petition, this Tribunal has no jurisdiction over the matter and cannot address the substantive issue raised by petitioners. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sandra Horvitz and John C. Horvitz is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petitions of Sandra Horvitz and John C. Horvitz are dismissed.

DATED: Troy, New York
January 12, 1995

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

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