

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
LAWRENCE AND DORY ROSEN	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
and Unincorporated Business Tax under Articles	:	
22 and 23 of the Tax Law for the Years 1965	:	
through 1968 and 1970.	:	

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Petitioners, Lawrence and Dory Rosen, 9 Bluewater Hill South, Westport, Connecticut 06880, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1965 through 1968 and 1970 (File No. 805007).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 25, 1989 at 1:15 P.M., with all briefs to be submitted by September 22, 1989. Petitioner appeared by Stern and Miller, Esqs. (Mark Stern, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Andrew Zalewski, Esq., of counsel).

ISSUE

Whether petitioners timely filed a petition for redetermination of deficiencies for any or all of the years in question.

FINDINGS OF FACT

Petitioners, Lawrence and Dory Rosen, were residents of Connecticut and were not residents of New York State during all of the years 1965 through 1970, inclusive.

In 1976, following an audit, the Internal Revenue Service ("IRS") determined that petitioners owed additional personal income taxes and penalties for each of the years 1965, 1966, 1967, 1968 and 1970. Thereafter, deficiency notices were issued by the IRS for such years and, in turn, were challenged by the Rosens. Said challenge was brought before the United States Tax Court but eventually was settled between the parties in 1985.

On July 1, 1985, Leon Lebensbaum, Esq., petitioners' attorney in the Federal matter, filed notice of these Federal changes with the New York State Tax Commission, pursuant to Tax Law § 659. On June 12, 1987, the Division of Taxation issued to petitioners two statements of audit changes calculating additional tax due, plus penalty and interest, for each of the noted years. The statements explain that they are based upon Attorney Lebensbaum's letter of July 1, 1985.

Also on June 12, 1987, the Division of Taxation issued to petitioners two notices of deficiency asserting, respectively, deficiencies for 1965, 1966 and 1967 in the aggregate amount of \$10,128.64, plus penalty and interest, and for 1968 and 1970 in the aggregate amount of \$4,299.42, plus penalty and interest. It is noted that on both statements of audit changes as well as on both notices of deficiency, petitioner's address is listed as 6 Bluewater Hill, Westport, Connecticut, rather than 9 Bluewater Hill, Westport, Connecticut.

On September 11, 1987, petitioners filed a petition for redetermination of the above asserted deficiencies. Attached to this petition were copies of the subject notices. It is admitted by petitioners that this petition was filed one day beyond the 90-day time limit within which a petition must be filed. This one-day lateness is attributed by petitioners to their unavailability to appropriately review and sign the petition as prepared by their attorney.

On October 16, 1987, the Division of Taxation's Bureau of Conciliation and Mediation Services issued Conciliation Order #81679. This Order denies petitioners' request for conciliation conference upon the basis that the request therefor (i.e. the petition) was filed 91 days after the issuance of the notices of deficiency and therefore was not timely filed.

On January 9, 1988, petitioners filed a petition with the Division of Tax Appeals requesting a redetermination of the deficiencies in question, or, in the alternative, an order remanding the matter for a conciliation conference with the Bureau of Conciliation and Mediation Services. It is conceded by the Division of Taxation that this petition with the Division of Tax Appeals was filed within 90 days of the issuance of the conciliation order described above.

At hearing, the Division offered in evidence an affidavit of one Alberta Yarbrough, Principal Clerk, charged with the duty of supervising the issuance of notices of deficiency such as those at issue. Attached to this affidavit were copies of the notices in question as well as the Division's mailing log relative thereto. The affidavit describes the specific process by which such notices are mailed, and provides details as to the mailings of the subject notices. The affidavit states such notices are issued via certified mail, that a certified mailing record (the mailing log) inspected and stamped by the U.S. Postal Service is utilized in lieu of individual return receipt cards, and that the Division does not request, demand or receive individual return receipt cards from each individual certified (or registered) piece of mail issued. The attached certified mailing log (Postal Service Form 3877) describes the notices in question by reference to the years in question, lists petitioners by name and address and indicates two items were mailed to petitioners each with separate certified mailing numbers. The log is signed by the postmaster and bears a Postal Service date stamp of June 12, 1987. It should be noted that petitioner's address on the mailing log corresponds to their address as shown on the two subject notices, to wit, 6 Bluewater Hill, Westport, Connecticut. Said address differs from petitioner's correct address of 9 Bluewater Hill, Westport, Connecticut.

#### SUMMARY OF PETITIONER'S POSITION

Petitioners assert that the Division of Tax Appeals should find the petition, though admittedly filed late, to be jurisdictionally sufficient and grant a remand of the matter to the Bureau of Conciliation and Mediation Services for a conference. Petitioners argue that 20 NYCRR 3000.3, and its language to the effect that conciliation conferences are to be encouraged for the purpose of resolution of matters, provides the Division with equitable authority to remand the matter. Petitioners also maintain that the timeliness of the petition on the conciliation order (as filed with the Division of Tax Appeals) replaces or nullifies the untimeliness of the prior petition and thus confers jurisdiction. Further, petitioners note that the Division of Taxation's answer in this matter was not filed within the 60-day period set forth in

the Division of Tax Appeals' rules and regulations. In this latter vein, petitioner asserts that an untimely answer cannot be countenanced anymore than can an untimely petition. Finally, petitioners question the adequacy of the Division's proof of mailing of the subject notices per Tax Law § 681(a). Petitioners point out that the notices of deficiency in question were issued to petitioners at 6 Bluewater Hill, as opposed to 9 Bluewater Hill, and therefore were inappropriately issued. However, while noting that the Division does not possess individual return receipt cards for certified mailings, petitioners raise no assertion that the notices were not in fact received.

### CONCLUSIONS OF LAW

A. As of the June 12, 1987 date of issuance of the subject notices of deficiency, Tax Law § 681(b) provided as follows:

"Notice of deficiency as assessment.--After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section six hundred eighty-nine. If the notice of deficiency is addressed to a person outside of the United States, such period shall be one hundred fifty days instead of ninety days."

As of the same June 12, 1987 date, Tax Law § 689(b) provided, in pertinent part, as follows:

"Section 689. Petition to Tax Commission

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(b) Petition for redetermination of a deficiency. -- Within ninety days, or one hundred fifty days if the notice is addressed to a person outside of the United States, after the mailing of the notice of deficiency authorized by section six hundred eighty-one, the taxpayer may file a petition with the tax commission for a redetermination of the deficiency."

B. Pursuant to the foregoing, taxpayers, such as petitioners, who had received a Notice of Deficiency and wished to contest the same were statutorily required to file a petition with the former State Tax Commission within 90 days of the June 12, 1987 date of issuance of such Notice of Deficiency.

C. Effective September 1, 1987, the administrative adjudicatory functions of the former State Tax Commission were assumed by the then-newly created Division of Tax Appeals. As of such effective date,

"[a]ll proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency..." (Tax Law § 2008).

Further, Tax Law § 2006(4) provides that:

"[T]he liability of such person [who seeks review of taxes claimed to be due] shall

become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing...." (Compare Tax Law § 681[b].)

D. As an alternative to petitioning for a hearing in the Division of Tax Appeals, a taxpayer "may request a conciliation conference by filing a written request, and one conformed copy, with the Bureau of Conciliation and Mediation Services" ("BCMS") (see 20 NYCRR 4000.3[a]). BCMS is responsible for providing the conferences which had formerly been conducted by the State Tax Commission (Tax Law § 170.3-a). Tax Law § 170.3-a provides, in part, that BCMS shall provide a conference at the option of the taxpayer where the taxpayer has received:

"any written notice of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives rise to a right to a hearing under this chapter if the time to petition for such a hearing has not elapsed." (Emphasis added.)

The "time to petition for such a hearing" language of Tax Law § 170.3-a imposes the statutory 90-day petition time period upon the request for conciliation conference alternative. The timely filing of a written request, and one conformed copy, with the BCMS "suspends the running of the period of limitations for the filing of a petition for a hearing" (20 NYCRR 4000.3[c]).

E. Section 170.3-a(e) of the Tax Law provides that:

"[a] conciliation order shall...be binding upon the department and the person who requested the conference, except such order shall not be binding on such person if such person petitions for the hearing provided for under this chapter within ninety days after the conciliation order is issued..." (See also 20 NYCRR 4000.5[c][4].)

F. At the time the subject notices of deficiency were issued, petitions were to be filed with and appeals were to be heard by the former State Tax Commission. Thereafter, (effective September 1, 1987) a taxpayer could opt to take either of two routes to challenge a notice of deficiency, to wit, (a) file a request for a conciliation conference with BCMS or (b) file a petition for a hearing with the Division of Tax Appeals. However, the 90-day time period within which a taxpayer was required to respond to a Notice of Deficiency remained the same both before and after establishment of the Division of Tax Appeals (compare Tax Law §§ 681[b], 689[b] with Tax Law §§ 170.3-a; 2006.4).

G. In this case, the statutory notices of deficiency were issued on June 12, 1987. In order to have been timely, either a petition to the former State Tax Commission (prior to September 1, 1987), a petition to the Division of Tax Appeals or a request for conciliation conference was required to have been filed within 90 days thereof.<sup>1</sup> However, petitioners filed no such petition until September 11, 1987, which is admittedly one day in excess of said 90-day period. In response to this filing, and because the petition as filed requested a conference prior to hearing, the petition was treated as a request for conciliation conference. Accordingly, the Bureau of Conciliation and Mediation Services reviewed the petition and issued Conciliation Order #81679 on October 16, 1987 dismissing the petition as untimely per Tax Law §§ 681(b) and

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<sup>1</sup>Given that such 90-day period ended after the September 1, 1987 effective date of the creation of the Division of Tax Appeals, all three alternative filing options were available to petitioners.

689(b) (*i.e.*, as not filed within 90 days of June 12, 1987). Thereafter, petitioner filed a petition with the Division of Tax Appeals challenging the Conciliation Order. Initially, it is clear that since the petition filed with the Division of Tax Appeals to challenge the Conciliation Order (per Tax Law § 170.3-a[e]) was filed well within 90 days of the issuance of the Conciliation Order, said Order is not binding on petitioners but is subject to review in the Division of Tax Appeals (*see*, Conclusion of Law "E", *supra*). However, said review at this juncture is limited to a determination of whether said Order was in fact correct in its determination that no timely petition was filed.

H. Petitioner's request to waive the 90-day period within which the filing of a petition or request for conciliation conference must occur is denied. It has been admitted that neither a petition nor a request for

conciliation conference was filed within 90 days of the issuance of the notices of deficiency. Though unfortunate, there is thus no question that petitioners failed to comply with the statutory requirement that a petition to contest the notices of deficiency, or a request for conciliation conference must be filed within 90 days of the date of issuance of such notices of deficiency. Accordingly, Conciliation Order #81679 denying petitioner's request for conciliation conference on the basis of timeliness was correct. In turn, there is no jurisdiction herein to address the substantive merits of petitioner's case (Matter of Sak Smoke Shop, Inc., Tax Appeals Tribunal, January 6, 1989).

I. The other arguments advanced by petitioners, at hearing and by brief, provide no basis upon which to abrogate the statutory 90-day filing requirement. The fact that 20 NYCRR 3000.3 can be said to encourage taxpayers to file requests for conciliation conferences wherein matters may be resolved via presentations less formal than those at a full hearing in no way removes (or even speaks to) the 90-day statutory jurisdictional filing requirement as set forth hereinabove. Further, the fact that the Division of Taxation's answer was served approximately three months after the 60-day period specified by regulation (*see* 20 NYCRR 3000.4[a][1], 20 NYCRR former 601.6[a][1]), can not serve to confer jurisdiction over an untimely petition.<sup>2</sup> Finally, petitioners argue that the Division has not proven proper mailing of the subject notices of deficiency under Tax Law § 681(a), specifically because no return receipts for certified mail proving receipt by petitioners were produced and because the notices were addressed to petitioner's at 6 Bluewater Hill, as described. Such arguments are also unavailing. In brief, the Division has established mailing of the subject notices via certified mail in accord with the mandate of Tax Law § 681(a).<sup>3</sup> First, section 681(a) speaks

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<sup>2</sup>Petitioners also point to the substantial period of time between the years in question (1965-1968, 1970) and the present, arguing that delays have occurred during such period and maintaining that such time and delay factors should bear favorably on consideration of the timeliness of petition issue presented. However, the Division of Taxation did not become involved in this matter until July 1985 when petitioners filed the Notice of Federal Changes with the Division. The time span between the years in question and such notification is thus clearly attributable to matters occurring during the pendency of the Federal action and would not have involved the Division. In addition, no specific instances of delay thereafter occasioned by the Division (other than the late answer discussed above) or prejudice to petitioners resulting therefrom have been alleged or established. Hence, petitioner's "passage of time" argument is unpersuasive.

<sup>3</sup>Tax Law § 681(a) provides, in relevant part, as follows:

only of mailing but not of receipt. Further, there is neither allegation nor evidence of nonreceipt and, in fact, copies of the notices were attached by petitioners to the petition filed on September 11, 1987 thus indicating actual receipt thereof by petitioners. There is no argument that receipt occurred at a date much later than the date of issuance, thereby hampering or preventing petitioners from filing a timely and adequate response. Accordingly, the Division's lack of individual return receipt cards for certified mailing is irrelevant. Similarly, given no dispute by petitioners as to actual receipt of the notices, coupled with clear evidence of such receipt, the 6 versus 9 Bluewater Hill South address error is of no consequence (Matter of Agosto v. Tax Commission, 68 NY2d 891, 508 NYS2d 934).

J. The petition of Lawrence and Dory Rosen is hereby dismissed.<sup>4</sup>

DATED: Troy, New York  
November 9, 1989

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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"General.--If upon examination of a taxpayer's return under this article the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer. If a taxpayer fails to file an income tax return required under this article, the tax commission is authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of deficiency to the taxpayer. A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state. If a husband and wife are jointly liable for tax, a notice of deficiency may be a single joint notice, except if the tax commission has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be mailed to each spouse at his or her last known address in or out of this state."

<sup>4</sup>It should be noted that petitioners are not entirely without redress in that they can still obtain a hearing on the merits of their case by paying the tax and interest now due, filing a claim for refund within two years from the time of such payment (Tax Law § 687[a]) and thereafter (assuming the claim for refund is denied or is not acted upon within six months of the date it is filed and thus is deemed denied) filing a petition contesting such denial of refund pursuant to Tax Law § 689(c).