

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DAVID MERRICK

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1968
through 1971 and 1973.

Petitioner, David Merrick, 246 West 44th Street, New York, New York 10036,
filed a petition for redetermination of a deficiency or for refund of unincorporated
business tax under Article 23 of the Tax Law for the years 1968 through 1971
and 1973 (File Nos. 32003 and 33123).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on February 7, 1985 at 1:15 P.M., with all briefs to be submitted by
June 12, 1985. Petitioner appeared by Neil H. Millman, Esq. The Audit Division
appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the notices of deficiency asserted against petitioner unincorporated
business tax liability for all the years under consideration, notwithstanding
the Audit Division's failure to list on the notices the years 1969, 1970 and
1973.

II. Whether the notices of deficiency were issued in a timely manner, "on
or before one year following close of proceedings" concerning prior taxable
years.

FINDINGS OF FACT

1. For an earlier period, the taxable years 1963 through 1967, the Audit Division had conducted an examination of the books and records of petitioner, David Merrick, and issued a Notice of Deficiency against him, asserting additional unincorporated business tax under Article 23 of the Tax Law for such years. During the course of the examination and the pendency of Mr. Merrick's administrative appeal to the Tax Commission, the Audit Division undertook an examination for the years 1968 through 1971 and 1973, the period under consideration in this proceeding.

2. On or about February 4, 1972, November 26, 1973 and March 15, 1976, petitioner executed three separate consents extending the period of limitations upon assessment of unincorporated business tax for the taxable periods 1968 and 1969, 1970 and 1971, and 1972 and 1973, respectively. Each consent agreement consisted of an Audit Division form (Form IT-75) upon which certain information was inserted; each stated that the tax could be assessed at any time on or before "one year following close of proceedings now pending for tax years 1963 - 1967...". The quoted language was typed by Audit Division personnel in a blank space appearing on the form.

3. On June 21, 1977, the Tax Commission rendered its decision on Mr. Merrick's petition for redetermination of the 1963 through 1967 deficiencies. Mr. Merrick subsequently instituted a proceeding pursuant to Article 78 of the Civil Practice Law and Rules for review of the Commission's decision. The decision of the Appellate Division, Third Department, rendered on June 7, 1979, confirmed the Commission's decision in part and annulled it in part; the decretal paragraph provides:

"The determination **should be** modified **by annulling so much**

income gains from the liquidation of the incorporated lighting companies and the royalties received from the use of petitioner's name on the jacket of a recording and from the purchase of rights from the composer and lyricist, and, as so modified, should be confirmed without costs, and the matter should be remitted to respondents for further proceedings not inconsistent herewith.'" Matter of Merrick v. Tully, 68 A.D.2d 289, 297.

A judgment in accordance with the decision was signed and entered on June 27, 1979.

By letter dated July 16, 1979, the Department of Law informed counsel to the Department of Taxation and Finance as follows:

"I have been advised by the attorney for the petitioner that he does not intend to seek leave to appeal the above-captioned matter. Accordingly I am returning your file."

According to Department of Law records, the Attorney General was not served by petitioner's representative with a copy of the Appellate Division's judgment. Via interagency mail, the Appellate Division forwarded a copy of its judgment to the Department of Law on September 11, 1979; the Attorney General, in turn, forwarded a copy of the judgment to counsel to the Department of Taxation and Finance on September 12, 1979.

4. Based upon Matter of Merrick v. Tully, the Audit Division recomputed the unincorporated business tax deficiencies asserted against petitioner for 1963 through 1967 and forwarded the recomputations to Mr. Millman (petitioner's representative) on September 13, 1979; the correspondence to Mr. Millman states:

"~~Based~~ on the Decisions of the State Tax Commission and the Appellate Division, your client's tax liabilities are on the attached sheet. Your client will soon receive Notice and Demands for the tax years 1965, 1966 and 1967 setting forth his tax liabilities including interest due. The 1963 and 1964 refunds will be applied on the 1965, 1966 and 1967 Notice and Demands."

5. On January 4, 1980, the Audit Division issued to petitioner **two** statements of audit changes, proposing increments to his unincorporated business tax liability for each of the years 1968, 1969, 1970, 1971 and 1973 in the respective amounts of \$5,059.64, \$5,967.83, \$3,214.76, \$6,701.85 and \$4,055.07, plus interest. Petitioner, by his accountant, objected to the proposed changes. By letter dated June 23, 1980, the Audit Division maintained the correctness of these changes; the correspondence states, in part:

"You stated that the taxpayer has no record of consent to the statute of limitations for years stated. After reviewing our files, we have located the signed waivers extending the statute of limitations for all the years involved to one year following the close of proceedings that were pending for tax years 1963 through 1967. The Appellate Division decision was dated June 7, 1979, thus, the statute was extended to June 7, 1980."

6. On July 24, 1980, the Audit Division issued to petitioner a Notice of Deficiency, asserting unincorporated business tax due in the amount of \$14,242.23 plus interest. Such sum represents the aggregation of the amounts proposed for 1968 through 1970 in the January 4, 1980 Statement of Audit Changes; the Notice of Deficiency, however, erroneously indicates the period for which the tax was asserted as 1968.

On July 24, 1980, the Audit Division issued to petitioner a second Notice of Deficiency, asserting unincorporated business tax due of \$10,756.92, plus interest. Again, the Notice erroneously indicates the period as 1971, although the amount asserted represents the aggregate of the amounts proposed for 1971 and 1973 by the Statement of Audit Changes.

CONCLUSIONS OF LAW

A. That although the notices of deficiency failed to correctly indicate the taxable years at issue, the statements of audit changes clearly apprised

business tax for 1968 through 1971 and 1973, and he was not misled. The notices of deficiency therefore asserted tax for the years 1968, 1969, 1970, 1971 and 1973. (Matter of Wayfarer Ketch Corp., State Tax Comm., June 11, 1982.)

B. That the second issue is whether the notices of deficiency dated July 24, 1980 were issued within one year from the close of the proceedings for the taxable years 1963 through 1967. Petitioner maintains, among other things, that the prior proceedings concluded with the Tax Commission's decision of June 21, 1977, relying upon the Commission's Rules of Practice and Procedure (20 NYCRR 601.1[d]). This argument is unconvincing in view of the right conferred upon taxpayers by Tax Law section 690(a) (made applicable to Article 23 by section 722[a]) to seek judicial review of Commission decisions. Moreover, subsection (e) of section 690 specifically provides that in the event a taxpayer makes timely application for judicial review, the Commission's decision does not become final until the "expiration of the time for all further judicial review...".

Petitioner maintains in the alternative that the close of proceedings occurred on June 7, 1979, the date of the Appellate Division decision in Matter of Merrick v. Tully. This argument, too, is unavailing. The culmination of an Article 78 proceeding is the judgment. (CPLR 7806; DePaula v. Memory Gardens, Inc., 90 A.D.2d 886 [3d Dept. 1982].)

It is the position of the Audit Division, on the other hand, that the term "close of proceedings" must take cognizance of the thirty-day period for initiation of an appeal from the Appellate Division judgment. The finality of the judgment entered is not affected, however, by the pendency of an appeal.

"The expression 'final judgment' has a well-defined meaning in the Civil Practice Act. It designates that judgment of the court of original jurisdiction by which the rights of the parties are adjudicated and determined. The finality of the judgment ~~sq~~ entered is not affected by the pendency of an appeal. In this State in the absence of a stay a judgment entered in the Supreme Court has complete finality... Though there may be a reversal and another final judgment, nevertheless, the first judgment was a final judgment in the action." Matter of Bailey, 291 N.Y. 534, 536-37 (1943), citing 265 A.D. 758, 761 (1st Dept. 1943).

(See also Slewett & Faber v. Board of Assessors, 80 A.D.2d 186, 200 [2d Dept. 1981].) Nor did the fact that the Appellate Division remitted the matter to the Commission "for further proceedings not inconsistent herewith" deprive the judgment of its finality.

"The mere fact that a matter is remitted to an administrative agency for further action following annulment of its determination on review in the courts does not of itself deprive the order of finality. The question always is whether the further action is merely ministerial or whether the agency still has the power and the duty to exercise quasi-judicial responsibility with respect to the issues. If all that is left for the agency to do is ministerial, then the order is final even though it contains a direction for remitter to the agency. If, on the other hand, the agency still has the power and the duty to exercise residual discretion, to take proof, or to make an independent record, its function remains quasi-judicial and the order is not final (citations omitted)." North American Holding Corp. v. Murdock, 6 A.D.2d 596, 599 (1st Dept. 1958).

(See also Mid-Island Hospital v. Wyman, 15 N.Y.2d 374 [1965].) Based upon the Appellate Division decision, the Audit Division recomputed the unincorporated business tax deficiencies, a purely ministerial action rather than an exercise of quasi-judicial responsibility.


Consequently, the close of proceedings involving taxable years 1963 through 1967 occurred with the entry of judgment on June 27, 1979, and the notices of deficiency were not issued in a timely fashion.

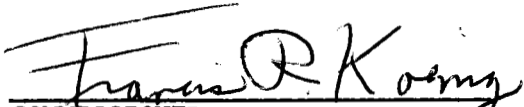
C. That the petition of David Merrick is granted, and the notices of deficiency issued on July 24, 1980 are cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER