

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

**HAROLD TARA** AND **BETTE TARA**

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22 :  
of the Tax Law for the Year 1979. :

---

Petitioners, Harold Tara and Bette Tara, 48 Brookwood Drive, Wayne, New Jersey 07470, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1979 (File No. 46251).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 5, 1986 at 9:15 A.M. Petitioners appeared by Brian C. Faranda, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division may, pursuant to the provisions of 20 NYCRR 601.6(c), amend its answer to conform to the proof by raising, for the first time at the hearing held herein, the issue of whether or not petitioners timely filed a petition for redetermination of a personal income tax deficiency.

II. If so, whether a petition for redetermination of said personal income tax deficiency was timely filed.

#### FINDINGS OF FACT

1. On July 16, 1982, the Audit Division issued to Harold Tara and Bette

in the amount of \$4,411.83, plus interest, for a total amount due of \$5,472.70. On April 8, 1983, the Audit Division issued to petitioners a Notice of Deficiency asserting additional tax due in the amount of \$4,411.83, plus interest of \$1,466.50, for a total amount due of \$5,878.33.

2. On July 20, 1983, the Tax Appeals Bureau of the State Tax Commission received from petitioners a petition dated July 2, 1983 which was signed by both petitioners. Attached thereto were several attachments including, among other things, an affidavit of petitioners which was dated and notarized on July 1, 1983. The Notary Public was Petitioners' representative, Brian C. Faranda, Esq. Mr. Faranda contends that the petition was signed in his presence by petitioners on July 2, 1983 and was mailed, by ordinary mail, on the same day by depositing it into a mailbox near his office. He had no specific recollection of mailing the petition, but contends that it would have been the normal procedure to take the signatures and mail the petition on the same day.

3. At the hearing held herein, the Audit Division raised, for the first time, the issue of whether or not petitioners timely filed a petition for redetermination of a deficiency of personal income tax for the year 1979. At the hearing, the representative of the Audit Division requested leave to amend its answer to conform to the proof. Petitioners objected to the motion and contend that the issue of timeliness could not be raised, for the first time, at the hearing since the Audit Division's pleadings never raised such issue.

4. After the Audit Division raised the issue of the timeliness of filing of the petition at the hearing, petitioners, at no time, requested an adjournment or stated that they were not prepared to offer proof relating to said issue. The hearing officer offered petitioners the option of proceeding with their proof with respect to the timeliness issue and the substantive matters relating

to the personal income tax deficiency or, in the alternative, of addressing the the issue of timeliness alone. Petitioners requested that the hearing address only the issue of timeliness. Petitioner Harold Tara was present at the hearing and, along with petitioners' representative, Brian C. Faranda, testified concerning the timeliness issue. At the conclusion of testimony, petitioners' representative, when queried if he wished to reserve time to submit additional evidence, answered that he did not wish to do so.

CONCLUSIONS OF LAW

A. That 20 NYCEU 601.6(c) provides, in pertinent part, as follows:

"The one exception to the requirement that a pleading be amended prior to a hearing **is** where a party, at the hearing, requests leave to amend a pleading to conform to the proof. In such an instance, the hearing officer shall determine whether such amendment would work to the prejudice of the adverse party, affect a person not present at the hearing or unduly delay the proceeding."

B. That the Audit Division's request to amend its answer, at the hearing, to address the issue of the timeliness of filing of the petition did not prejudice petitioners. Leave to amend the Audit Division's answer was properly granted and the issue of timeliness was, therefore, properly addressed at the hearing.

C. That section 681(b) of the Tax Law provides, in pertinent part, as follows:

"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, ~~...~~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."

D. That in Matter of Garofalo (State Tax Commn., September 28, 1983) and Matter of Mancuso (State Tax Commn., September 28, 1983) the State Tax Commissioner held the followinn:

"That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety day period. The petitioners have not shouldered their burden of proof under Tax Law § 689(e) to show that the petition was delivered to the Tax Commission. Proof of mailing by registered or certified mail was not shown. **Proof** of mailing by ordinary mail does not satisfy the requirement of proving delivery of the petition to the Tax Commission. See Deutsch v. Commissioner, 599 F.2d 44 (2d Cir.), cert. denied, 444 U.S. 1015."

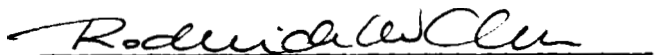
E. That the ninety day statutory period expired, in the present matter, on July 7, 1983. The petition was not received by the Tax Appeals Bureau until July 20, 1983, beyond the ninety day period prescribed by section 681(b) of the Tax Law. Petitioners have not carried their burden of proof under section 689(e) of the Tax Law to show that their petition was timely delivered. Upon the expiration of the ninety day period, the Notice of Deficiency became an assessment of the amount of tax and interest specified therein.

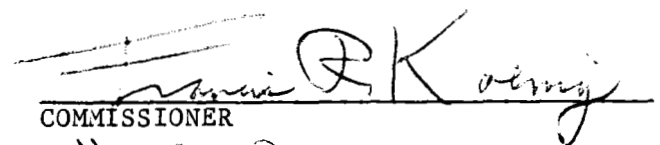
F. That the petition of Harold Tara and Bette Tara is denied and the Notice of Deficiency issued April 8, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 28 3987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER