## STATE OF NEW YORK

# TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	·	
YACOV HAREL	:	DECISION DTA NO. 829515
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2014 and 2015.	:	
	:	

Petitioner, Yacov Harel, filed an exception to the determination of the Administrative Law Judge issued on May 5, 2022. On December 12, 2022, the Tax Appeals Tribunal (Tribunal) issued a notice of intent to dismiss exception on the ground that petitioner's exception was not timely filed. The Tribunal granted the parties until January 17, 2023 to respond. The Division of Taxation, appearing by Amanda Hiller, Esq. (Linda Farrington, Esq., of counsel), filed a response on December 21, 2022. Petitioner, appearing by David I. Faust, Esq., filed a response on January 17, 2023, which date commenced the six-month period for the issuance of this decision.

On its own motion, after reviewing the determination of the Administrative Law Judge, petitioner's exception, the relevant records of the Division of Tax Appeals, and the parties' responses to the notice of intent to dismiss exception, the Tribunal renders the following decision.

## **ISSUE**

Whether petitioner timely filed an exception to the determination of the Administrative Law Judge.

## FINDINGS OF FACT

We find the following facts.

1. On May 5, 2022, the Division of Tax Appeals mailed, by United States Postal Service (USPS) certified mail, copies of the determination of the Administrative Law Judge to petitioner at an address in Israel and to Brian J. Gloznek, CPA, as petitioner's representative, at an address in New York.

2. The address to which the determination was mailed to petitioner matches the address given on his petition. At the time of such mailing, this was the last known address for petitioner in the records of the Division of Tax Appeals.

3. Petitioner executed power of attorney forms dated November 1, 2017 and February 12, 2019, each of which designate Mr. Gloznek as petitioner's "primary individual representative" in this matter. Mr. Gloznek is also listed as petitioner's representative on the petition and he signed the petition in that capacity.

4. The power of attorney forms state that copies of notices and other communications related to the matter will be mailed to the "primary individual representative" listed on the form unless the taxpayer designates another representative to receive such mailings. Petitioner did not designate any other representative to receive copies of notices or other communications in connection with this matter.

5. The address to which the determination was mailed to Mr. Gloznek matches the address for Mr. Gloznek given on the power of attorney forms. At the time of such mailing, this was the last known address for Mr. Gloznek in the records of the Division of Tax Appeals.

6. The hearing in this matter was held on June 18, 2021. Petitioner appeared at the hearing by Mr. Gloznek and David I. Faust, Esq. Mr. Faust is listed as an "additional individual

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representative" on the power of attorney form dated February 12, 2019.

7. At the hearing, Mr. Faust made an opening statement, cross-examined the sole witness, addressed the Administrative Law Judge, and submitted a post-hearing brief. Although present, Mr. Gloznek did not participate in the hearing.

8. On or about September 2, 2022, petitioner, appearing by Mr. Faust, filed an Article 78 petition with the Third Department of the Appellate Division of the Supreme Court of the State of New York seeking to annul and set aside the May 5, 2022 determination of the Administrative Law Judge. In response, the Office of the Attorney General brought a motion to dismiss on the ground of petitioner's failure to exhaust his administrative remedies. By a decision and order dated December 1, 2022, the motion was granted, and the Article 78 proceeding was dismissed.

9. On December 5, 2022, petitioner filed an exception to the May 5, 2022 determination.

10. On December 12, 2022, the Tribunal issued a notice of intent to dismiss exception on the ground that petitioner's exception was not timely filed.

#### **ARGUMENTS IN RESPONSE TO THE NOTICE OF INTENT TO DISMISS**

Petitioner contends that service of the May 5, 2022 determination was defective because it was not mailed to him at the address listed on his last filed New York income tax return at the time of such mailing. Petitioner asserts that Tax Law § 689 (a) requires the mailing of a determination to a taxpayer's last known address. As petitioner observes, last known address is generally defined in Tax Law § 691 (b) as a taxpayer's address as given in their last filed return. Petitioner claims that he listed a London, England address on his New York income tax return filed on August 27, 2021 and that this was his last filed return as of May 5, 2022. Petitioner thus argues that the Division of Tax Appeals was required to use the London, England address in serving him with the determination. Petitioner also contends that the service of the determination was defective because a copy was not mailed to Mr. Faust.

Given these claimed defects, petitioner contends that the Division of Tax Appeals failed to give notice of the determination in accordance with the Tax Law and that the 30-day period to file an exception to the Tax Appeals Tribunal had not commenced when petitioner filed his exception on December 5, 2022. Petitioner thus maintains that his exception was timely filed.

The Division of Taxation agrees with the proposed dismissal.

#### **OPINION**

Pursuant to Tax Law § 2010 (4), an administrative law judge determination finally decides a matter in the Division of Tax Appeals unless a party timely files an exception for review of the determination with this Tribunal in accordance with Tax Law § 2006. Timely filing means that an exception, or an application for an extension of time to file an exception, must be filed within 30 days after the giving of notice of the determination (Tax Law § 2006 [7]). As our jurisdiction is limited by statute, we may not consider the merits of an exception filed beyond the 30-day time limitation or, where an extension has been granted, such extended limitations period (*Matter of Yim*, Tax Appeals Tribunal, March 16, 2020).

Tax Law § 2006 (14) authorizes this Tribunal to adopt rules of practice and procedure appropriate to the performance of its duties (*see* Tax Appeals Tribunal Rules of Practice and Procedure [Rules] 20 NYCRR 3000.0 et seq.). The giving of notice requirement in Tax Law § 2006 (7) is met by mailing the determination in accordance with section 3000.23 (a) of the Rules (20 NYCRR 3000.23 [a]). The determination must be enclosed in a post-paid "properly

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addressed" wrapper and mailed using certified or registered USPS mail (*id.*).<sup>1</sup> Service of the determination is complete upon proper mailing (*id.*). Hence, the 30-day limitations period to file an exception or to request an extension of time to file an exception begins to run from the date of such mailing (*Matter of Roemer*, Tax Appeals Tribunal, May 20, 1999).

Properly addressed for purposes of 20 NYCRR 3000.23 (a) means a petitioner's last known address as indicated in the records of the Division of Tax Appeals (*see Matter of Jake Restaurant Corp.*, Tax Appeals Tribunal, April 14, 2016). A petitioner bears the burden of notifying the Division of Tax Appeals of a change of address prior to the date of mailing of a determination (*see Matter of Caires*, Tax Appeals Tribunal, May 27, 2004).

Here, the May 5, 2022 determination was addressed to petitioner at his last known address as shown in the records of the Division of Tax Appeals. Accordingly, it was properly addressed and properly served under 20 NYCRR 3000.23 (a).

As noted, petitioner contends that, pursuant to Tax Law § 689 (a), the Division of Tax Appeals was required to use the London, England address in serving him with notice of the determination because, according to Tax Law § 691 (b), the London, England address was his last known address at that time. Tax Law § 689 (a) (as amended L 1962, c 40) provides, in relevant part, that notice of a decision following an administrative proceeding before the former State Tax Commission shall be given by certified or registered mail at the taxpayer's "last known address." Tax Law § 691 (b) (as added L 1962, c 1011) provides that "[f]or purposes of this article, a taxpayer's last known address shall be the address given in the last return filed by him,

<sup>&</sup>lt;sup>1</sup> These mailing requirements mirror the language in Tax Law § 2016 regarding the giving of notice of a Tax Appeals Tribunal decision. 20 NYCRR 3000.23 (a) thus makes the notice requirements for Tribunal decisions imposed by statute applicable to all determinations and orders issued by the Division of Tax Appeals.

unless subsequently to the filing of such return the taxpayer shall have notified the tax commission of a change of address."

Petitioner's argument fails on both the law and the facts.

As to the law, by enacting article 40 of the Tax Law (Division of Tax Appeals), effective September 1, 1987 (*see* Tax Law § 2000 et seq., L 1986 c 282), the Legislature made clear its intent that the administrative adjudication of disputes between taxpayers and the Division of Taxation would be governed by the newly created Division of Tax Appeals and Tax Appeals Tribunal.<sup>2</sup> As noted, the Legislature authorized the Tribunal to adopt the Rules to enable it to perform its duties (Tax Law § 2006 [14]). The requirements for proper service of an administrative law judge determination in 20 NYCRR 3000.23 (a) are included among those rules.

The Legislature's intent is underscored by Tax Law § 690 (e) (added by L 1987, c 401), which provides that, with respect to personal income tax, "a determination of an administrative law judge in the division of tax appeals shall become final in accordance with [Tax Law § 2010 (4)]." As noted, Tax Law § 2010 (4) refers to Tax Law § 2006, which provides for the 30-day limitations period and also authorizes the enactment of our Rules, including rules regarding service of determinations at 20 NYCRR 3000.23 (a). In other words, Tax Law § 690 (e) provides that article 40 controls the issuance of determinations in the Division of Tax Appeals. Furthermore, there are similar provisions throughout the Tax Law. Tax Law §§ 1090 (e) (article 27 [corporate tax procedure]) and 1147 (d) (article 28 [sales and use tax]) contain language identical to Tax Law § 690 (e). Tax Law §§ 251 (article 11 [mortgage recording tax]), 288 (article 12-A [tax on motor fuel]), 478 (article 20 [tax on cigarettes and tobacco products]) and

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<sup>&</sup>lt;sup>2</sup> Previously, administrative hearings to resolve controversies between taxpayers and the Department of Taxation and Finance were held before the former State Tax Commission.

510 (article 21 [highway use tax]) expressly provide that tax disputes are to be resolved in the Division of Tax Appeals.

The impracticality of compliance by the Division of Tax Appeals with petitioner's proposed construction of Tax Law §§ 689 and 691 also weighs against petitioner's position. As a separate and independent division within the Department of Taxation and Finance (Tax Law § 2002), the Division of Tax Appeals does not have access to the records of the Division of Taxation and thus does not have access to a taxpayer's last filed tax return. It would thus be administratively burdensome, at the very least, for the Division of Tax Appeals to definitively ascertain a petitioner's last known address as defined in Tax Law § 691 (b), that is, their address as given in their last filed income tax return, before giving notice of a determination. Under the canons of statutory construction, such an impractical result is properly avoided (McKinney's Cons Laws of NY, Book 1, Statutes §§ 141-143).

Given the clear application of article 40 to the issuance of administrative law judge determinations, the portion of Tax Law § 689 (a) dealing with the giving of notice of decisions, upon which petitioner's argument relies, is properly viewed as a vestige of the former system of administrative adjudication under the State Tax Commission, inapplicable to the later-enacted system of administrative adjudication under the Division of Tax Appeals. Moreover, under such circumstances, the definition of last known address in Tax Law § 691 (b) is, by its own terms, inapplicable to the giving of notice of such determinations because, as noted, that definition limits itself to article 22 purposes.

We thus reject petitioner's contention that the Division of Tax Appeals must mail notice of an administrative law judge determination to a petitioner in accordance with Tax Law §§ 689 and 691.

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Petitioner's argument also fails on the facts. As noted, petitioner contends that, at the time the determination was mailed, he had obtained a new address in London, England and had filed a New York personal income tax return using that address. Petitioner has not, however, provided any evidence of this factual claim. Unsubstantiated assertions are insufficient to defeat a notice of intent to dismiss (*Matter of Goutos*, Tax Appeals Tribunal, February 28, 2019). Petitioner has thus failed to establish this essential fact and his argument must be rejected accordingly.

Regarding petitioner's contention that service of the determination was flawed because a copy was not mailed to his attorney, a copy of an administrative law judge determination must be served on a party's representative and any limitations period arising from the issuance of that notice does not begin to run until such service is completed (*see Bianca v Frank*, 43 NY2d 168, 173 [1977]; *Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003).

As noted, a copy of the May 5, 2022 determination was mailed to Mr. Gloznek, who was designated as petitioner's primary representative on the power of attorney forms attached to the petition. This meets the Division of Tax Appeals' obligation to serve a petitioner's representative with a copy of the determination (*see Matter of Alvarenga*, Tax Appeals Tribunal, May 28, 2015; *Matter of Hyatt Equities, LLC*, Tax Appeals Tribunal, May 22, 2008).

Contrary to petitioner's contention, the Division of Tax Appeals was not required to serve Mr. Faust with a copy of the May 5, 2022 determination. Although Mr. Faust, and not Mr. Gloznek, presented petitioner's case at the hearing, the power of attorney appointing Mr. Gloznek as petitioner's primary representative remained in effect. As noted, that document expressly provides that all relevant notices and communication would be mailed to Mr. Gloznek as the primary representative.

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Pursuant to the foregoing discussion, we find that service of notice of the May 5, 2022 Administrative Law Judge determination was in all respects proper. The 30-day limitations period to file an exception with this Tribunal commenced as of that date. The exception in the present matter, filed on December 5, 2022, was therefore untimely and must be dismissed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

On the Tax Appeals Tribunal's own motion, the exception of Yacov Harel is dismissed, with prejudice.

Dated: Albany, New York April 27, 2023

> /s/ Anthony Giardina Anthony Giardina President

/s/ Dierdre K. Scozzafava Dierdre K. Scozzafava Commissioner

/s/ Cynthia M. Monaco Cynthia M. Monaco Commissioner