STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RICHARD SCHARFF	:	DECISION
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the Years 1980 through 1984.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 11, 1990 with respect to a petition of Richard Scharff, 3720 Collins Avenue, Miami Beach, Florida 33140 for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1980 through 1984 (File No. 805260).[1] The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel). Petitioner appeared by Anthony M. Abraham, Esq.

Both parties filed briefs on exception. Oral argument, at the request of the Division, was heard on May 16, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether failure of the Division to introduce into evidence the notice of deficiency deprives the Division of Tax Appeals of jurisdiction in this matter.

[1] All references in this decision to "New York" may be read as to both New York State and New York City.

II. Whether petitioner was subject to taxation as a resident of New York State for the years 1980 through 1984.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except that we modify findings of fact "1" and "7" as stated below.

We modify the Administrative Law Judge's finding of fact "1(a)" as follows:

> The Division of Taxation asserts a deficiency against petitioner but did not introduce into evidence the notice of deficiency assertedly issued to taxpayer. The petition filed by petitioner did not have a copy of the notices of deficiency attached to it. Petitioner filled in the blank spaces provided on the petition to indicate the numbers of the notices which were being petitioned. Petitioner attached a copy of the conciliation order being protested to the petition as required by the regulations of the Tribunal (20 NYCRR 3000.3[b][8]). The conciliation order sustained the assessments issued by the Division and made reference to the notices of deficiency using the same numbers as indicated on the petition. A hand printed note on the conciliation order states "This order issued before date of adjourned Conference 12-29-87. Underlying Notices of Assessment were misplaced by petitioner who was hospitalized." There is nothing to indicate who wrote the note. Petitioner's petition was introduced into evidence by the Division (Exhibit #1). Petitioner did not object to the absence of the notices at hearing.[2]

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[2]The original Administrative Law Judge's finding of fact "1(a)" read as follows:

> "The Division of Taxation issued notices of deficiency in the approximate aggregate amount of $46,363.04 including penalty and interest for the years 1980 through 1984 against petitioner, Richard Scharff*. The notices were sustained by a conciliation conferee in a letter to petitioner on the basis that 'the preponderance of evidence indicates that you had a permanent place of residence within New York City during the years in question.'
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> "*The amount in issue is approximate because the notices of deficiency were not placed in evidence; however, an accounts receivable printout in the file indicates that the notices were issued on September 8, 1986. It is noted that petitioner did not raise the absence of the notices of deficiency as an issue at hearing."

We modified this fact to more completely reflect the record.

Petitioner filed a motion with Supervising Administrative Law Judge Doris Steinhardt under section 3000.6(a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal for discovery and inspection and for a bill of particulars. Specifically, petitioner requested the "basis and documentation" for the points made in the conciliation conferee's decision. It was ruled that the information did not "pertain to the pleadings" and further that there was no "good cause" for discovery since "the issue of residency is factual in nature" and any difficulty which petitioner may have at hearing could be alleviated by the granting of a continuance.

Mr. Richard Scharff was born in 1926 in Germany. He came to this country in 1939 with his parents, Alfred Scharff and Erna Scharff. The family lived at Apartment 5C, 1290 Ocean Parkway, Brooklyn, New York. This was a five-room apartment with "massive" German furniture. Petitioner's father died in 1972. Mr. Scharff lived in this house at least until 1979. In 1980, according to petitioner's description, it had become a very run-down neighborhood with a very large "minority" population. Mr. Scharff never paid the utility or telephone bills. His mother was in good health and maintained the house at Ocean Parkway until her death in 1982. She was listed in the telephone book at that address with the phone number of 434-2660. Mrs. Scharff's estate maintained the apartment thereafter until sometime in 1984. This was done to provide storage for furnishings because of the very low rent of the premises.

Mr. Scharff never married.

Mr. Scharff was employed until 1979, when he retired, as the comptroller of a freight forwarding business located at the World Trade Center in Manhattan.

Mr. Scharff has not driven a car since 1974. He retained a New York driver's license (which showed the Brooklyn address) until May of 1982 when he did not renew it according to the records of the Department of Motor Vehicles.

A phone listing (769-7162) located in the Brooklyn phone book for an R. Scharff with no address did not belong to petitioner.

We modify the Administrative Law Judge's finding of fact "7" as follows:

> In 1979, when he retired, petitioner wanted to make some changes in his life and, in particular, wanted to do some writing

> and moved to Stamford, Connecticut, where he also happened to have some friends and where there was a good library. He lived in a hotel during his entire stay there. An affidavit of a friend he met there vouches for his presence there. Petitioner never intended to return to New York.
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> Petitioner did not live in New York after 1979 nor did he have any employment, job or business in New York after 1979. Petitioner did not own or lease real property in New York.[3]

Petitioner filed 1979 and 1980 Federal tax returns showing an address of Box 10903, Stamford, Connecticut. He filed 1979 nonresident returns for both New York State and New York City showing the same address. (His 1980 New York returns are not in evidence.) He filed Connecticut tax returns for 1979 and 1980. The 1979 return was filed in 1982 according to a form notice from the State of Connecticut. The 1980 return had omitted some disputable income and a late payment penalty was imposed.

In early 1980, Mr. Scharff desired to do some painting and began looking for appropriate artist's quarters. As of June 1, 1980, Mr. Scharff had a three-year lease on a large loft at 70 Van Houten Street, Paterson, New Jersey, on the top floor of a four-story commercial building. The loft measured about 80 feet by 50 feet and was furnished with all utilities. The rent was $250.00 per month. Petitioner had located the loft through the Greater Paterson Art Council. At this studio, Mr. Scharff was engaged in painting. He did acrylics, watercolors and ink paintings and was very pleased with his work there. Mr. Scharff lived at the studio according to the testimony of both himself and his landlord. He stayed there, overstaying his lease, until sometime in 1985 when he moved to Florida.

Mr. Scharff's 1981 Federal return and a 1981 New Jersey Gross Income Tax Resident Return was filed showing an address in care of a person in Jersey City, New Jersey, presumably

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[3]The original Administrative Law Judge's finding of fact "7" read as follows:

> "In 1979, when he retired, petitioner wanted to make changes in his life and, in particular, wanted to do some writing and moved to Stamford, Connecticut, where he also happened to have some friends and where there was a good library. He lived in a hotel during his entire stay there. An affidavit of a friend he met there vouches for his presence there."

We modified this finding of fact to more accurately reflect the record.

an accountant. For 1982 through 1984, the Federal return showed the address to be Post Office Box 6723, Jersey City, New Jersey. He filed New Jersey gross income tax returns for 1981 through 1984. The 1981 return shows the address of the person in Jersey City. The 1982 return is not in the record. The 1983 and 1984 returns show the address to be the Jersey City Post Office box.

When petitioner first rented the New Jersey Post Office box, he showed the Brooklyn, New York address as his address.

Mr. Scharff did not vote any place during the years in question.

In early 1985, Mr. Scharff moved to Florida.

Mr. Scharff denied having any bank accounts close to where he lived. He stated he had always dealt with major money centers "such as New York". There is nothing concrete in the record to show that Mr. Scharff had bank accounts in Brooklyn, or anywhere else in New York, before, during or after the years in question. In any event, Mr. Scharff had no property in New York during the years in question.

Mr. Scharff has, from time to time, since at least 1969, been a patient at the Fort Hamilton Veteran's Administration Hospital in Brooklyn. The hospital has his records; however, it is not clear from the record when his last visit there was.

Mr. Scharff testified that he spent less than 30 days a year in New York. He submitted no diary or other record to show that this was true.

OPINION

The Administrative Law Judge determined that petitioner was not taxable as a resident of New York during the years in question because he was not a domiciliary of New York and did not spend in excess of thirty days a year in the State. The Administrative Law Judge based his determination on the "forceful and categorical" testimony of petitioner coupled with the facts adduced at hearing.

The Administrative Law Judge, in his finding of facts, approximated the aggregate amount of the asserted assessment and in a footnote indicated that the amount of the assessment

at issue is approximate "because the notices of deficiency were not placed in evidence; however, an accounts receivable printout in the file indicates that the notices were issued on September 8, 1986. It is noted that petitioner did not raise the absence of the notice of deficiency as an issue at hearing." The Administrative Law Judge did not deal with the effect of the absence of the notice of deficiency in his determination.

The Division argues that the record at hearing does not support the determination of the Administrative Law Judge with regard to petitioner's domicile and that petitioner is taxable as a resident of New York because petitioner did not demonstrate that he changed his domicile or alternatively that if he changed his domicile, that he did not demonstrate that he did not spend more than 183 days a year in New York. The Division makes no reference to the absence of the notices of deficiency in the record.

Petitioner argues that the determination of the Administrative Law Judge is correct.

We affirm the determination of the Administrative Law Judge granting petitioner's petition. However, we do so solely on the ground that the Division, by failing to introduce the notices of deficiency into evidence, failed to show the existence of a valid assessment.

Tax Law § 681(a) requires the Division to send notice by certified or registered mail when it determines that there is a deficiency in income tax. The notice is the jurisdictional document which forms the basis for a valid assessment and allows the Division to proceed against the taxpayer in question, petitioner in this case. It is the notice which is protested by the taxpayer and which becomes an assessment if not protested by the taxpayer within ninety days from mailing of the notice by the Division (Tax Law § 681[b]).

This Tribunal is an adjudicative body of limited and statutorily created jurisdiction (see, Tax Law §§ 2008 and 681). Since the notice assertedly issued by the Division is not in evidence in this proceeding, we have no basis to determine the validity of the asserted assessment (see, Pietanza v. Commr., 92 T.C. 729; Magazine v. Commr., 89 T.C. 321; United States v. Wright, 658 F Supp 1, 86-1 USTC ¶ 9457; Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). Without proof of a valid notice of deficiency, we can reach no conclusion except that a valid

assessment does not exist. Since the failure to issue the notice is jurisdictional in nature and may be raised at any time, by a party, or by the adjudicating body and may not be waived (see, United States v. Wright, supra, 86-1 USTC ¶ 9457, at 84,120-84,121), we must find that we lack the jurisdiction to reach the merits of the case.

In reaching this conclusion we are cognizant of the fact that the regulations of the Bureau of Conciliation and Mediation Services require that a petition for a conciliation conference contain a copy of the notice (20 NYCRR 4000.3[b][vii]). Since the Bureau exercised jurisdiction in this case, perhaps the petition was in proper form when submitted to the Bureau, i.e., the notices were attached, and formed a proper basis for the Bureau's determination sustaining the assessment. However, that information is not in the record before us and any such inference by the Tribunal based on a supposition as to what was in the file before the Bureau of Conciliation would be inappropriate.

Finally, we deem it appropriate to comment on the importance for parties to proceedings before this Tribunal to understand the necessity of making a proper and complete record at hearing. One of the primary principles underlying the system enacted by the Legislature for the resolution of controversies between taxpayers and the Division of Taxation and Finance is the creation of an independent entity, i.e., the Division of Tax Appeals and the three member Tribunal which heads the Division, to resolve such controversies.

In this regard, neither the Tribunal nor any of the personnel of the Tribunal, including the Administrative Law Judges, has access to Division of Taxation's records or to the records or other documents which a taxpayer may have submitted to the Division; nor are any such records automatically made a part of the record in any proceeding before the Tribunal. Therefore, records and documents which may have been introduced by the taxpayer and the Division in a proceeding before the Bureau of Conciliation and Mediation Services (a part of the Division of Taxation and Finance) are not a part of the record unless introduced by one of the parties.

The Tribunal and the Administrative Law Judges must base their respective decisions on the record made by the parties in each case. The record is made before the Administrative Law

Judge generally at hearing. It may also be done in accordance with a stipulation of the parties without a hearing. The record so made consists of all notices, pleadings, exhibits or documents submitted into evidence in the proceeding at hearing or as part of the stipulation (Tax Law § 2016; 20 NYCRR 3000.13[a][1]; State Administrative Procedure Act § 302). It is only upon consideration of this record that our decision, and the determination of the Administrative Law Judge, may rest (State Administrative Procedure Act § 306[1]).

In the case at hand, the Administrative Law Judge makes reference to "an accounts receivable printout in the file (which) indicates that the notices were issued on September 8, 1986" (footnote 2 of the determination of the Administrative Law Judge). The transcript of the hearing before the Administrative Law Judge in this case makes no reference to the identity or introduction of any such file. Nor does the record indicate that this "file" was introduced into evidence as part of a posthearing submission with the permission or at the request of the Administrative Law Judge. Accordingly, the "file" is not part of the record at hearing and not part of the record on exception before this Tribunal. Utilization of this material by the Administrative Law Judge for any purpose was improper.

In view of our conclusion concerning the lack of jurisdiction of the Tribunal in this matter, we need not address the question of whether petitioner is taxable as a resident individual for the years at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Richard Scharff is granted.

DATED: Troy, New York
October 4, 1990

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner