

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| RICHARD X. AND CHRISTEL BOVE | : | DECISION |
| for Redetermination of a Deficiency or for | : | |
| Refund of Personal Income Tax under Article 22 | : | |
| of the Tax Law for the Years 1985 and 1986. | : | |

Petitioner Richard X. and Christel Bove, 135 Noe Avenue, Chatham, New Jersey 07928 filed an exception to the determination of the Administrative Law Judge issued on September 7, 1990 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 and 1986 (File No. 806824). Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth Schultz, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation submitted a letter in lieu of a brief. Petitioners' request for oral argument was denied.

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

ISSUE

Whether petitioners timely filed a petition for redetermination of a deficiency.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioners, Richard X. and Christel Bove, were residents of New Jersey and were not residents of New York State during the years 1985 and 1986.

On October 26, 1987, the Division of Taxation (the "Division") wrote a letter to petitioners advising them that their 1985 and 1986 New York State personal income tax returns had been selected for audit. The letter requested that petitioners bring to the Division's New York District Office on the appointment date indicated their books and records relating to the years at issue, including verification concerning the allocation of days worked outside New York State. The letter was addressed to petitioners at a New Jersey address. Upon receiving the Division's letter, Mr. Bove immediately responded by letter indicating that he had changed his residence to Florida and would be unable to meet with the auditor on the appointment date because of such change, but would attempt to obtain the requested information from his previous employers. On March 29, 1988, Mr. Bove wrote to his two previous employers in New York City requesting all expense reports submitted during 1985 and 1986. Mr. Bove did not receive a response to his requests from either employer.

On July 27, 1988, the Division issued to petitioners a Notice of Deficiency asserting deficiencies for 1985 and 1986 in the aggregate amount of \$11,512.25, plus penalty and interest. The notice was addressed to petitioners' Florida address.

At the hearing, petitioner Richard Bove testified that he received the Notice of Deficiency and, within two days of its receipt, filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. Petitioner testified that the request was sent by ordinary mail. The Bureau of Conciliation and Mediation Services has no record of receiving this request.

On March 22, 1989, petitioners filed a request for a conciliation conference that was received by the Bureau of Conciliation and Mediation Services on March 27, 1989. The request referred to assessment numbers relating to the year 1986. In response, the Bureau of Conciliation and Mediation Services issued Conciliation Order #94749 on April 21, 1989 for the year 1986. This order denied petitioners' request for conciliation conference upon the basis

that the request therefor was filed in excess of 90 days after the issuance of the Notice of Deficiency and therefore was not timely filed.

On December 20, 1989, petitioners sent a letter to the Bureau of Conciliation and Mediation Services which was treated by the Bureau as a request for a conciliation conference. The letter and attached documents referred to assessment numbers for the years 1985 and 1986. On March 2, 1990, the Bureau of Conciliation and Mediation Services issued Conciliation Order #102007 for the years 1985 and 1986. This order also denied petitioners' request for a conciliation conference upon the basis that the request therefor was filed in excess of 90 days after the issuance of the Notice of Deficiency and therefore was not timely filed.

On April 13, 1989, petitioners filed with the Division of Tax Appeals a petition for a hearing. Subsequently, on May 9, 1989, petitioners filed with the Division of Tax Appeals a second petition for a hearing.

At hearing, the Division offered in evidence an affidavit of the Principal Clerk of the Manual Assessments Unit, charged with the duty of supervising the issuance of notices of deficiency such as the one at issue. Attached to this affidavit was a copy of the notice in question as well as the Division's certified mail record 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 mail record is inspected and stamped by the U.S. Postal Service on the date of mailing, 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 mail record describes the notice in question by reference to a certified control number, lists petitioners by name and address and indicates that an item was mailed to petitioners on July 27, 1988 by way of a U.S. Postal Service stamp. The certified control number is also shown on the top of the Notice of Deficiency.

OPINION

The Administrative Law Judge dismissed petitioners' petition as petitioners did not within 90 days from the issuance of the Notice of Deficiency file a request for a conciliation conference or a petition.

On exception, petitioner Richard Bove asserts that within two days after receiving the Notice of Deficiency he filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. Petitioners also allege that the Division mismanaged or misplaced documents relating to their case. Petitioners further assert that it was improper for another employee of New York State to preside over their hearing with the Division.

The Division, in its brief on exception, asks that the Administrative Law Judge's determination be affirmed in full. The Division, relying on Matter of Sipam Corp. (Tax Appeals Tribunal, March 10, 1988), argues that even if petitioner Richard Bove's testimony was sufficient proof of mailing of the first purported request for a conciliation conference, proof of ordinary mailing is insufficient to prove timely filing when there is no actual delivery. The Division further maintains that petitioners' allegations of lost documents are speculative and do not establish that the request, purportedly sent within two days after receipt of the Notice of Deficiency, was lost by the Division. The Division further denies petitioners' allegations of bias on the part of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

Tax Law § 681(b) provides that:

"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 . . ."

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:

" . . . the 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 . . ." (cf., Tax Law § 681[b]).

Petitioners also had the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services upon receipt of the Notice of Deficiency rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day time period for filing a petition (20 NYCRR 4000.3[c]). Tax Law § 170(3-a)(a) provides, in part, that the Bureau shall provide a conference at the request 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.)

Since there is no evidence of actual receipt of petitioners' request for a conciliation conference allegedly filed two days after receipt of the Notice of Deficiency and ordinary mail was used, petitioners' oral testimony is insufficient to establish that they timely filed a petition or request for a conciliation conference within 90 days from the issuance of the Notice of Deficiency (see, Matter of Messinger, Tax Appeals Tribunal, March 16, 1989; Matter of Sipam Corp., supra). The request for a conciliation conference filed on March 22, 1989 was the first request for a conference received by the Bureau of Conciliation and Mediation Services. The 90-day period for filing a petition or requesting a conciliation conference expired on October 25, 1988. Therefore, petitioner's March 22, 1989 request was untimely. Petitioners' petition filed on April 13, 1989 was not a timely petition as it was also not filed within 90 days

of the issuance of the Notice of Deficiency. Without the timely filing of a request for a conciliation conference, petitioners' challenge to the Notice of Deficiency cannot be heard by the Division of Tax Appeals.

Petitioners' allegation that documents were lost by the Division is without merit. Petitioners have offered no proof or evidence to substantiate this claim.

Petitioners' assertion of impropriety with regard to their hearing is also without merit. The Division of Tax Appeals was created to provide "the public with a just system of resolving controversies with [the] department of taxation and finance" (Tax Law § 2000). Further, Tax Law § 2002 provides as follows:

"[t]here shall be in the department of taxation and finance a separate and independent division of tax appeals to be operated and administered by a tax appeals tribunal. The powers, functions, duties and obligations of the division shall be separate from and independent of the authority of the commissioner of taxation and finance."

Section 303 of the State Administrative Procedure Act provides as follows:

"[e]xcept as otherwise provided by statute, the agency, one or more members of the agency, or one or more hearing officers designated and empowered by the agency to conduct hearings shall be presiding officers. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding . . ."

The hearing in this matter was conducted by an Administrative Law Judge who is clearly authorized by statute to conduct such hearings. Petitioners have offered no evidence of bias on the part of the Administrative Law Judge. Based on the record before us, we find that petitioners received an impartial, unbiased hearing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Richard X. and Christel Bove is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Richard X. and Christel Bove is dismissed with prejudice.

DATED: Troy, New York
February 22, 1991

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner