STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SAMUEL WILLIAMS	:	DECISION DTA No. 810552
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of theTax Law and the New York City Administrative Code for the Year 1987.	:	

Petitioner Samuel Williams, 844 Rushing Springs Road, Lincoln, Alabama 35096, filed an exception to the determination of the Administrative Law Judge issued on October 14, 1993. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioner did not file a brief. The Division of Taxation filed a letter opposing the exception. Petitioner filed a reply, received on March 14, 1994, which date began the six-month period to issue this decision.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUES

I. Whether the use of the words "must" and "shall" in the Tax Law and New York City Administrative Code, rather than the word "required", renders compliance therewith voluntary rather than mandatory.

II. Whether, if mandatory, these statutes are in conflict with the Fourth, Fifth, Seventh and Fourteenth Amendments of the United States Constitution.

III. Whether Article III of the United States Constitution requires that the Federal courts, rather than the Division of Tax Appeals, have jurisdiction over this proceeding.

FINDINGS OF FACT

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

Pursuant to a review of the tax returns of Coyne Electrical Contractors, Inc. ("Coyne") of Bronx, New York by the Division of Taxation("Division"), it was discovered that Coyne had issued a Form W-2 (Wage and Tax Statement) indicating that petitioner, Samuel Williams, had received wages, tips or other compensation in the sum of $60,925.31 for the year 1987. The Wage and Tax Statement revealed that Federal income tax had been withheld, but no State or local income taxes had been withheld by Coyne from the amounts paid to petitioner.

By letter dated December 15, 1988, the Division advised petitioner that it had no record of any return having been filed by him and that, pursuant to Tax Law § 632, he was required, as a nonresident who performed services in New York, to report the income earned from those services. The Division sent petitioner New York nonresident returns and requested that he file the returns along with payment of any taxes, interest and penalties computed to be due. This letter further requested petitioner to reply thereto within 20 days and advised him that failure to reply would result in the issuance of a bill based upon available information.

On December 29, 1988, the Division's auditor, Clifton G. Smith, Jr. (who had issued the December 15, 1988 letter), spoke with petitioner by telephone at which time petitioner made clear that he wanted a letter from the Division stating that he was required to file a return. When the auditor responded that a bill, based upon available information, would be issued, petitioner stated that he would sue the Division and the auditor for violating his constitutional rights.

On July 10, 1989, the Division issued a Statement of Proposed Audit Changes to petitioner asserting State tax due in the amount of $4,472.22 and City tax due in the amount of $274.17

(total tax due of $4,746.39), plus penalty and interest, for a total amount due of $7,038.24 for the year 1987.[1]

On June 4, 1990, a Notice of Deficiency was issued to petitioner in the amount of $4,746.39 (State tax of $4,472.22 and City tax of $274.17), plus penalty and interest, for a total amount due of $7,719.79 for the year 1987.

At the hearing, the auditor testified that since petitioner refused to furnish any information relating to exemptions or deductions, the deficiency at issue herein was computed by allowing one exemption ($900.00) and the standard deduction ($3,600.00). Based upon petitioner's address, the deficiency was computed on the basis that, for the entire year at issue, petitioner was a nonresident of the State and City of New York.

In November 1992, petitioner commenced an action in the United States District Court for the Northern District of Alabama (the Division's Law Bureau and its representative, Arnold Glass, were named defendants) seeking (1) an injunction barring the Division of Tax Appeals from hearing this matter for want of jurisdiction; (2) an order stating that the Federal courts have jurisdiction; and (3) seeking that the court determine whether any of petitioner's constitutional rights were violated and, if so, whether criminal charges should be brought against any persons responsible therefor.

On December 28, 1992, the United States District Court for the Northern District of Alabama, Eastern Division, issued an order dismissing petitioner's action for lack of subject matter and in personam jurisdiction.

On November 16, 1992, petitioner brought a motion, before the Division of Tax Appeals, for an order dismissing the present proceeding on the ground that the Division of Tax Appeals lacks subject matter jurisdiction. On January 22, 1993, petitioner brought a motion for an order precluding the Division from giving evidence at hearing relative to items of which particulars

---

[1]The Statement of Proposed Audit Changes indicated that late-filing penalty (Tax Law § 685[a][1]), negligence penalty (Tax Law § 685[b][1]), negligence or intentional disregard penalty (Tax Law § 685[b][2]) and penalty for underpayment of estimated tax (Tax Law § 685[c]) had been imposed.

were demanded and not delivered. By order of Administrative Law Judge Jean Corigliano dated February 1, 1993, petitioner's motion for an order to dismiss was denied and his motion for an order of preclusion was also denied.[2]

OPINION

The Administrative Law Judge, in his determination, discussed various sections of New York Tax Law relating to when an income tax return is to be filed, who is to file, what is taxable income as well as pointing out that Chapter 19 of Title 11 of the New York City Administrative Code contains similar provisions relating to the City earnings tax on nonresidents. Further, the Administrative Law Judge quoted McKinney's Consolidated Law of NY, Book 1, Statutes § 177(a) as it relates to the Legislature's use of appropriate language in statutes to express its intention and § 177(c) with relation to peremptory language.

In the determination below, the Administrative Law Judge held that despite petitioner's general protestations to the contrary, "there has been no evidence produced herein which indicates that the New York State Legislature intended that the statutory language of the Tax Law was to receive anything other than a peremptory construction" (Determination, conclusion of law "B") and as to petitioner's contention that paying income taxes is voluntary, a similar contention has already been addressed in Matter of Fahy (Tax Appeals Tribunal, April 5, 1990).

The Administrative Law Judge also held that "[i]t is clear, therefore, that the Division of Tax Appeals has jurisdiction over this proceeding despite petitioner's protestations to the contrary" (Determination, conclusion of law "C") (see, Article 40 of the Tax Law, added by chapter 282 of the Laws of 1986, more particularly, Tax Law § 2000). Further, the Administrative Law Judge concluded that the jurisdiction of the Division of Tax Appeals and the Tax Appeals Tribunal does not encompass challenges to the constitutionality of a statute on its face, since at this administrative level of review, statutes are presumed to be constitutional.

---

[2]The order directed the Division to cite, at the hearing, the statutory authority for its position that petitioner was required to file New York State and New York City personal income tax returns. The Division's representative cited Tax Law §§ 601(e), 607(a), 631(b)(1)(B), 651(a)(3) and 652 as statutory authority.

The Administrative Law Judge determined: 1) the statutes which must be presumed at this administrative level of review to be constitutional are, therefore, properly applicable to petitioner; 2) the Division properly issued a Notice of Deficiency asserting State and City taxes due for the year 1987 due to petitioner's failure to file a return and pay the proper amount of tax; and 3) since petitioner, who was given an opportunity to present evidence as to additional exemptions, deductions, etc., which might have reduced the amount of the deficiency, but failed to do so, the Notice of Deficiency had a rational basis and must, therefore, be sustained in its entirety.

On exception, petitioner argues the Administrative Law Judge erred in advising him that he could still preserve his constitutional objections while furnishing information to the Division of Tax Appeals and that this matter is beyond the jurisdiction of the Division of Tax Appeals and the Tax Appeals Tribunal.

Further, in requesting that the Notice of Deficiency be set aside and an Offer in Compromise be accepted, petitioner's notice of exception includes a copy of his 1987 Federal Income Tax Return with schedules, a financial statement, installment payment agreement, medical bills and divorce judgement and agreement, all information not made a part of the record before the Administrative Law Judge.

On February 22, 1994, the Division filed a letter opposing petitioner's exception further advising it would not be filing a brief but would rely on the decision of the Administrative Law Judge. The Division's letter also points out: 1) it is not within the purview of the Division of Tax Appeals to rule upon an "offer in compromise" and 2) the documents submitted by petitioner with his notice of exception may not be considered by the Tax Appeals Tribunal as they were not part of the record below.

On March 10, 1994, petitioner filed a letter arguing that the Division letter dated February 22, 1994 should not receive any consideration by the Tax Appeals Tribunal as it was not filed within the allowed time frame.

We affirm the determination of the Administrative Law Judge.

We will first address petitioner's argument that no consideration should be given to any part of the Division's letter of February 22, 1994.

On January 21, 1994, the Secretary to the Tax Appeals Tribunal, in acknowledging receipt of petitioner's notice of exception, advised petitioner that since he was not submitting a brief in support of his exception "any brief in opposition submitted by the other party must be served by February 17, 1994." The Division's letter (dated February 22, 1994) was received by the Office of the Secretary to the Tax Appeals Tribunal on February 23, 1994. The letter was, therefore, six days late.

The question presented is what is the effect of late-filing a document which is not required to be filed by the Tax Law and while allowed under 20 NYCRR 3000.11(b)(2), is also not required by the regulation. This is not a case involving a document required to be filed within a certain time frame to confer subject matter jurisdiction (cf., Matter of Marshall Farms USA, Tax Appeals Tribunal, August 4, 1988 [where an exception (the document that confers subject matter jurisdiction on the Tax Appeals Tribunal) was dismissed]). Therefore, we will look to the circumstances of the individual case to determine whether the late-filing of a brief by a party requires striking the party's brief.

Petitioner has not provided any arguments that would cause us to modify our decision in Matter of O'Keh Caterers Corp. (Tax Appeals Tribunal, November 5, 1992) wherein we stated:

> "[b]ased on the facts before us, we simply cannot find that the filing of the brief one day late was so unreasonable that the serious sanctions requested by petitioner are appropriate" (Matter of O'Keh Caterers Corp., supra).

The only factual difference in the present case is that the letter from the Division is six days, not one day, late. We do not find that the late filing in this case was so unreasonable that petitioner's request is appropriate. The letter from the Division is, therefore, accepted.

Next, we must address and reject petitioner's attempt at this late date to place before this Tribunal the additional evidence which was made a part of his notice of exception, namely, the tax return and schedules, a financial statement, installment payment agreement, medical bills and divorce judgement and agreement, all of which are not part of the record below.

As we held in Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988)."

As to petitioner's "Offer in Compromise," the Tax Appeals Tribunal lacks statutory authority to accept or even consider said offer.

Finally, because we find that the Administrative Law Judge completely and adequately addressed the issues before him, we see no reason to analyze these issues further, nor do we see any reason to hold otherwise and, therefore, affirm the Administrative Law Judge based on his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Samuel Williams is denied;

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

3. The petition of Samuel Williams is denied; and

4. The Notice of Deficiency issued on June 4, 1990 is sustained.

DATED: Troy, New York
September 1, 1994

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

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