STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
E. JOHN LOWNES, III	:	DETERMINATION DTA NO. 810962
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1971.	:	

Petitioner, E. John Lownes, III, Dalton Ridge Road, P.O. Box 72, Dalton, New Hampshire 03598, 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 1971.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on March 24, 1993 at 9:15 A.M., with all briefs due by July 12, 1993. Petitioner, represented by Hodgson, Russ, Andrews, Woods & Goodyear (Robert D. Plattner, Esq., of counsel), filed his brief on May 19, 1993. The Division of Taxation, represented by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel), filed its brief on June 30, 1993. Petitioner filed his reply brief on July 7, 1993.

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to determine the timeliness of a petition once a Notice and Demand, warrant and levy have been issued on the Notice of Deficiency.

II. Whether the Division of Tax Appeals should dismiss or stay action on a petition because there is an action pending at the Supreme Court by the same parties on the same controversy.

III. Whether the petition filed in 1992 was timely filed within 90 days of issuance of a Notice of Deficiency, dated July 29, 1974.

FINDINGS OF FACT

Petitioner, E. John Lownes, III, filed a timely nonresident New York State income tax return for 1971. On that return, he listed his mother's address in Providence, Rhode Island as his home address and stated that in 1971 he worked 138 days in New York State. A W-2 form from petitioner's employer indicated that $1,474.00 had been withheld from petitioner for New York State income tax in 1971.

Petitioner testified at hearing that a $1,110.23 refund, which was reported on the tax return, was received by him on June 16, 1972. In support of this testimony, a copy of the cover page to Mr. Lownes' 1971 return was submitted into the record. The cover page was on the letterhead of Christiansen and Company, petitioner's accountant, and contained a handwritten notation indicating receipt of a $1,110.23 refund on June 16, 1972.

The Division of Taxation ("Division") sent a letter, dated December 4, 1972, to petitioner at the Providence, Rhode Island address[1] informing him that it was auditing his 1971 income tax

return. The Division requested further information concerning the basis for his allocation of New York wage income and a detailed schedule of itemized deductions and all days petitioner claimed he worked outside New York State. In the letter, the Division requested a reply within 30 days.

The Division sent a letter, dated September 6, 1973, to petitioner again requesting the information requested in the December 4, 1972 letter.

The Division submitted into the record a copy of a Statement of Audit Changes, dated December 28, 1973, addressed to petitioner at the Providence, Rhode Island address stating that because he did not reply to the letters dated December 4, 1972 and September 6, 1973, the Division recalculated his New York State income tax for 1971. The Division disallowed the

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[1]The Providence, Rhode Island address was petitioner's mother's address from 1927 until the early part of 1975. Petitioner testified that he visited his mother on a regular basis and that any mail she received for him she either mailed or gave to him when they visited.

129 days claimed as non-New York work days and determined that the $56,476.29 indicated as wage income on the withholding statement was New York wage income. The Division also disallowed the itemized deductions and allowed only the standard deduction.

The Division also submitted into the record a copy of a Notice of Deficiency, dated July 29, 1974, addressed to petitioner at the Providence address, stating a tax deficiency for 1971 in the amount of $5,789.41, plus interest, for the total amount of $6,584.30. Stamped on both the copy of the Notice of Deficiency and the copy of the Statement of Audit Changes was the notation "90 day letter no petition filed."

The Division submitted into the record a copy of a Notice and Demand for Payment of Income Tax Due, dated December 20, 1974, addressed to petitioner at the Providence address, indicating New York income tax due for 1971 in the amount of $5,789.41, plus interest, for the total amount of $6,720.46.

Petitioner testified at hearing that the first time he had any indication that New York income tax was due for 1971 was a telephone call he received from a person identifying himself as a collection agent for the State of New York and informing him that he owed taxes from the year 1971. Petitioner testified that the next morning he spoke to his accountant in Providence who advised him to call the State Tax Compliance Bureau in Albany. Petitioner testified that he immediately spoke to a person from the Tax Compliance Bureau, described the telephone conversation from the previous evening and was advised to write a memorandum to the Bureau.

Petitioner wrote a letter, dated October 28, 1982, to the New York State Tax Compliance Bureau, stating the following:

> "Last evening I had a disturbing telephone call from someone in Boston by the name of Santos who said he is a collection agent for you, and that I owed a considerable amount which is due for the tax year 1971. I do not believe I owe any back taxes to the State of New York, and would like to clear up this matter, and am writing at the suggestion of your telephone agent who I called this morning. May I please hear from you?"

At the bottom of the letter, petitioner included his social security number and address in New Hampshire.

Petitioner testified that he never received a response to his letter. He also stated that he

felt it was unnecessary to pursue the matter further because he indicated in the letter his current address, received no response to the letter and had no evidence that there was any levy against him other than the "very disturbing phone call from this person in Boston."

In April of 1992, petitioner was notified by Shearson, Lehman, Hutton, Inc. that the Division served a tax compliance levy on petitioner's account in its New York office. The levy was based on a warrant with a $26,330.59 balance as of April 14, 1992.

Petitioner filed a petition, dated June 25, 1992, with the Division of Tax Appeals challenging the $26,330.59 asserted as tax owing. Petitioner alleged that he never received a Notice of Deficiency with respect to a 1971 personal income tax deficiency; that the Division failed to send a copy of the notice to petitioner at his last known address;[2] that the Division improperly deemed non-New York income earned by petitioner in 1971 as New York income; and that the Division improperly imposed penalties that were unwarranted under the facts and circumstances.

The Division filed an answer, dated August 21, 1992, stating that petitioner failed to file a timely petition within 90 days of issuance of the Notice of Deficiency, dated July 29, 1974.

Petitioner filed an Order to Show Cause, dated July 10, 1992 and returnable July 31, 1992, with Supreme Court, Albany County, requesting the court to enjoin the Division from executing on and enforcing a warrant for income taxes "pending the determination of the special proceeding commenced herein . . . ." In the petition before the court, petitioner requested that the Division's assessment of taxes against petitioner be declared invalid along with all warrants and levies issued on the basis of such assessment.

On the timeliness issue, the Division submitted three affidavits during the March 23, 1993 hearing before the Division of Tax Appeals. The affidavits were by three employees of the Division -- Charles Bellamy,

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[2]At hearing, petitioner clarified his position on this issue by noting that the last known address was the Providence, Rhode Island address of petitioner's mother. Petitioner contends that no notice was sent to this address.

William Bullock and Nicholene Davis -- all of whom were familiar with the operations and procedures used by the Division in issuing and mailing notices of deficiency during the 1970's.

In the affidavit by Charles Bellamy, he described the procedures followed by the Division in issuing notices and demands during the 1970's. He noted that after the expiration of the statutory 90 days in which to file a petition challenging a Notice of Deficiency, the Division would separate those case files, for which no petitions were filed, for issuance of a Notice and Demand. He stated that approximately 30 days after expiration of the 90-day period, an employee would write instructions on the Statement of Audit Changes in the taxpayer's file to update the interest on the deficiency for the period up until the issuance of the Notice and Demand. Mr. Bellamy asserted that evidence existed that this procedure was followed by the handwritten notation "none" next to the printed line "date consent received" on petitioner's Statement of Audit Changes, and by Beverly Murray's signature, dated November 1974, under the printed line "Notice and Demand Authorized By". In addition, handwritten under the printed words "Interest Instructions" was the notation "on 5789.41 4-15-1972 to date." Mr. Bellamy stated that this notation directed an audit examiner to compute interest on $5,789.41 from April 15, 1972 to the date of the issuance of the Notice and Demand. Referring to a Notice and Demand Worksheet attached to the affidavit, Mr. Bellamy noted that updated interest was computed to the December 20, 1974 mailing date of the Notice and Demand.

In the affidavit by William Bullock, he described the procedure for the issuance of the Statement of Audit Changes ("SOAC"). He also pointed out certain notations on the Division's copy of the SOAC which indicated that (1) no response was received from petitioner to the SOAC, (2) that the file was transferred to another unit for issuance of a Notice of Deficiency on the projected date of July 29, 1974,[3] and (3) that interest was updated for the period up until the

[3]Mr. Bullock noted that in the upper right hand corner on the SOAC, the date "12/28/73" (date the SOAC was sent) was crossed out and replaced with the stamped date of "Jul 29 1974" (the projected date a Notice of Deficiency would be sent).

projected July 29, 1974 issuance date.[4]

In the affidavit by Nicholene Davis, she stated that during the 1970's her job duties included tracking notices of deficiency and manually preparing them for mailing. Ms. Davis noted that as a matter of practice, the SOAC was a document on which the Division recorded certain events in the chain of processing the case; that on petitioner's SOAC in the right hand corner was the stamp "CLOSED Jun - 6 1974 90 DL" indicating that on June 6, 1974 the case was transferred to another division, Division 50, for the issuance of the Notice of Deficiency; that "90 DL" referred to a "90 day letter"; that on petitioner's SOAC the Division number "AG-1-04" was crossed out over which was written 50, indicating that the case was sent to Division 50; and that Division 50, for which she worked, manually mailed out notices on a monthly basis.

Ms. Davis stated that it was the regular practice to send out notices of deficiency, which asserted amounts over $1,000.00, by certified mail, return receipt requested ("CMRRR"); that she would place each notice into an

envelope, fill out a Postal Service Form 3877 listing each sequential certified number and the taxpayer's name and address that appeared on each envelope. She then would compare the list with the envelopes and deliver the envelopes containing the notices and the Form 3877 to an employee from the Division's mail room. The mail room employee would then deliver the envelopes to the U.S. Postal Service.

Ms. Davis concluded that based on this office procedure and because petitioner's Notice of Deficiency asserted an amount greater than $1,000.00, the notice would have been sent CMRRR. Ms. Davis also noted that if an envelope was returned to the Division as undeliverable, or unclaimed, the envelope and its contents would be returned to an audit

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[4]Mr. Bullock noted that the notation "int up dated to" was stamped on the bottom of the SOAC and that the interest amount ($672.44), which reflected the interest due at the time the SOAC was sent, was crossed out. Above the crossed out interest was the handwritten amount of $794.89, which represented interest due for the period up until July 29, 1974.

examiner for a better address; that any notices sent CMRRR which were not returned were presumed received by the taxpayer; that return receipts were labeled with a date that was at least 90 days from the date of the notice's issuance in order to track whether the taxpayer responded within 90 days. According to her affidavit, once the 90-day period elapsed, the notices for which the Division had return receipts but no taxpayer response were stamped, as well as the SOAC, with the notation "90 DAY LETTER NO PETITION FILED." Thereafter, the file was transferred to a person responsible for the preparation and mailing of a Notice and Demand. Ms. Davis asserted that:

> "[u]nder no circumstances would the file be transferred for Notice and Demand, or would the '90 DAY LETTER NO PETITION FILED' stamp be affixed, if we had not received a return receipt back evidencing receipt of the Notice of Deficiency by the taxpayer."

At the hearing, the Division was granted permission to amend its answer to affirmatively state (1) that the Division of Tax Appeals ("DTA") had no jurisdiction to entertain the petition inasmuch as the Notice of Deficiency was fixed and final and reduced to judgment in 1975, and (2) that the petition should be dismissed pursuant to Tax Law § 2006.5(iv) because there is an action pending in the Supreme Court, Albany County, between the parties on the same controversy.

SUMMARY OF THE PARTIES' POSITIONS

The Division contends that pursuant to Tax Law § 2006.5(iv), the DTA should either dismiss or stay action on the petition pending the Supreme Court decision and that it met its burden of proving that a Notice of Deficiency was properly issued to petitioner on July 29, 1974.

Petitioner argues that the DTA has discretion to retain jurisdiction on this petition even though an action is pending in court between the same parties; that if the DTA finds the Notice of Deficiency to be invalid because the Division did not demonstrate proper mailing, petitioner can then pursue relief in court to have the warrant and levy quashed; that the fact the Division converted the Notice of Deficiency into a judgment is not relevant to whether the DTA has jurisdiction to decide the timeliness issue; and that the Notice of Deficiency is invalid because

the Division failed to demonstrate that the notice was mailed to petitioner and petitioner proved that the notice was never received.

CONCLUSIONS OF LAW

A. In its motion to amend its answer, the Division questioned whether the DTA had jurisdiction to entertain a petition on the timeliness issue once the underlying Notice of Deficiency was fixed and final and a subsequent Notice and Demand was issued and warrant executed. In its brief, the Division does not appear to pursue or clarify this point further.

A Notice of Deficiency finally and irrevocably fixes the tax liability unless the taxpayer files a petition for a hearing within 90 days of the issuance of the notice (Tax Law §§ 681[b]; 2006.4). The issue under review is whether the notice finally and irrevocably fixed the tax liability because petitioner did not file a timely petition. In turn, the outcome of this threshold issue is determinative of whether petitioner is entitled to an administrative hearing on the substantive claim that no deficiency was owed. Depending on petitioner's success after a hearing, petitioner may then pursue whether the warrant is valid. The mere issuance of a Notice and Demand and warrant in themselves does not necessarily deprive the DTA of jurisdiction in deciding the threshold issues of timeliness or whether a Notice of Deficiency was ever sent to petitioner. The Division has cited no authority in support of this principle and none can be found.

B. The Division argues that based on Tax Law § 2006.5(iv), the DTA should either dismiss or stay action on the petition pending the decision of Supreme Court. The Division contends that "it would be an abuse of discretion to act in a manner that would impinge upon the Supreme Court's jurisdiction before the court has had a chance to rule" (Div. Brf., p. 5); that "the Tax Law does not confer on an Administrative Law Judge the statutory authority to dismiss or stay a Court proceeding involving the same parties and controversy" (Div. Brf., p. 6); that for the DTA to proceed would pose the "greatest potential to waste the resources of the litigants and the Division of Tax Appeals" (id.); that there are no issues that would require a court to defer to the special expertise of the DTA; and that "a wait-and-see approach at the administrative level

is most consistent with the principles of stare decisis, res judicata, collateral estoppel and judicial economy" (Div. Brf., p. 10).

The Division's contention that the DTA does not have the statutory authority to dismiss or stay a Court proceeding involving the same parties or controversy is not the issue before the DTA. Petitioner commenced a proceeding in both a court of law and an administrative agency. The only issue before the DTA is whether it should dismiss or stay the proceeding before it. Tax Law § 2006.5(iv) provides that a party may file a motion to dismiss the petition on the ground there is an action pending between the same parties on the same controversy in a court. The statute further provides that "an administrative law judge need not dismiss upon this ground but may make such determination as justice requires . . . ." Under the regulations, a party may make a motion for an order which is appropriate under the Tax Law and the CPLR (20 NYCRR 3000.5[a]). Under CPLR 2201, the court in which an action is pending may grant a stay of proceedings "in a proper case, upon such terms as may be just." A proper case is found when a party demonstrates good cause for granting a stay of action (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:7, at 11).

The Division has not demonstrated good cause for granting either a dismissal or stay of the administrative proceedings. In fact, "[i]t is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (Watergate II Apartments v. Buffalo Sewer Authority, 46 NY2d 52, 57, 412 NYS2d 821, 824). Underlying this principle is the notion that the administrative agency should be afforded the opportunity to prepare a record reflective of its "expertise and judgment" prior to an Article 78 review by the courts (id.). In its brief, the Division asserts that the DTA has no greater familiarity and expertise with respect to the application of Tax Law § 681(a) than the courts. The Division cites Matter of Maclean v. Procaccino (53 AD2d 965, 386 NYS2d 111) as an example of the "many cases" where the courts have decided this issue. I have found no such cases other than Article 78 reviews. In fact, the court's decision in Matter of Maclean v. Procaccino involves an Article 78 review. Contrary to the Division's views, the

case law indicates that the more orderly and appropriate procedure fostering judicial economy would be for the parties to exhaust administrative remedies before judicial review (see, Matter of 550 Central Avenue Deli Corp. v. Commr. of Taxation & Fin., 188 AD2d 845, 591 NYS2d 590, 592, lv denied 81 NY2d 706, 597 NYS2d 936; cf., Watergate II Apartments v. Buffalo Sewer Authority, supra at 57; Matter of Holzman v. Commr. of Dept. of Taxation & Fin. of the State of NY, Supreme Court, Albany County, Conway, J., September 14, 1993 [court dismissed a taxpayer challenge to a notice and resultant warrant because it fell within the realm of an Article 78 review and the four-month limitation period had expired]).

Moreover, the Division has not demonstrated that the case should be stayed or dismissed based on exceptions to the exhaustion rule. Such exceptions include when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or would cause irreparable injury (Watergate II Apartments v. Buffalo Sewer Authority, supra at 57). In its petition, petitioner has not claimed that the Division's action is unconstitutional or wholly beyond its grant of power and the Division has not argued irreparable injury or futility.

C. Tax Law § 681(a) provides that if the Division determines there is an income tax deficiency, it must mail a Notice of Deficiency to the taxpayer at his or her last known address by certified or registered mail. If such notice is properly mailed, it shall constitute a final assessment, whether or not actually received by the taxpayer, unless the taxpayer files a petition protesting the notice within 90 days of the Division's mailing the notice (Tax Law § 681[b]; see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025; cf., Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517).

When the timeliness of a filed petition is at issue, the Division must demonstrate proper mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). To show that the notices

were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and the adherence to this procedure when mailing the notices at issue (Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra). A properly completed Postal Service Form 3877 represents direct documentary evidence of the date and the fact of mailing (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992) and, therefore, is highly probative evidence that the notice was sent to the address specified (Matter of Accardo, Tax Appeals Tribunal, August 12, 1993 [and cases cited therein]).

Here, the Division introduced evidence of its procedures for mailing and for issuance of a Notice and Demand, which it sends when a petition is not filed within 90 days of issuing a Notice of Deficiency. However, the Division has no Postal Service Form 3877, return receipt or other direct documentary evidence of the date or fact of mailing.

In Matter of Maclean v. Procaccino (supra), the Appellate Division found that the Division of Taxation's mailing log was insufficient proof of mailing. However, the court specifically noted that its holding rested on the fact that the mailing log was the only evidence of mailing and that the Division failed to submit "affidavits or testimony as to the accuracy or authenticity of [the] log" and failed to produce "affidavits or other evidence as to [the Division's] course of business or office practices which would tend to prove that the instant mailing was, in fact, effected" (id., 386 NYS2d at 112). In this case, three affidavits were submitted into the record by persons familiar with the Division's mailing practices in the 1970's. These affidavits described the procedures followed by the Division to ensure proper mailing and explained the notations on the SOAC and Notice of Deficiency. These notations reflected the Division's form of recordkeeping in processing notices; however, these notations are not even as probative as a mailing log in proving mailing. Despite the thoroughness in detail provided by the affidavits concerning the procedures used in processing tax deficiencies, there is nothing in this record to confirm the fact, or date, of mailing of this particular Notice of Deficiency.

Notwithstanding Ms. Davis' confidence that the notation "90 DAY LETTER NO

PETITION FILED" would never be stamped on the Notice of Deficiency, or that the file would never be transferred for the preparation of a Notice and Demand, unless the Division had not received a return receipt back evidencing receipt of the Notice of Deficiency by petitioner, such evidence does not prove that petitioner received the Notice of Deficiency or that the notice was properly mailed to petitioner. Inasmuch as the date on the notice itself is insufficient to establish the date of mailing (Matter of Wilson, Tax Appeals Tribunal, July 13, 1989), information stamped by the Division on the notice is also insufficient proof of the date or fact of mailing. Absent direct evidence that the actual mailing procedures described were followed in this particular instance, it cannot be determined that petitioner filed an untimely petition with respect to the Notice of Deficiency.

D. The petition of E. John Lownes, III is granted to the extent that he is entitled to a hearing before the Division of Tax Appeals on the substantive issues of his petition, and is otherwise denied.

DATED: Troy, New York
December 16, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE