

NO. CV 116010912S

GREGORY CUNNINGHAM : SUPERIOR COURT

: TAX SESSION

v. : JUDICIAL DISTRICT OF  
: NEW BRITAIN

COMMISSIONER OF REVENUE SERVICES : MAY 30, 2012

MEMORANDUM OF DECISION ON  
DEFENDANT'S MOTION TO DISMISS (#107)

The defendant commissioner of revenue services (commissioner) has moved to dismiss this appeal on the grounds that the court lacks subject matter jurisdiction to consider the appeal because the plaintiff failed to exhaust his administrative remedies.

The issue before the court is whether the plaintiff took a timely administrative protest of a jeopardy assessment within the statutorily provided 10-day notice period. The commissioner issued the taxpayer a Billing Notice and served it by regular first class U.S. mail. More specifically, the parties are at odds on whether the 10-day notice period runs from the mailing date of the Billing Notice or the date the taxpayer receives the Billing Notice.

Through its Audit Division, the commissioner conducted an income tax audit of the plaintiff for the taxable year ending December 31, 2008. The audit resulted in the

issuance of a jeopardy assessment in accordance with General Statutes § 12-729a.<sup>1</sup> The 2008 assessment was based on additional income tax, plus penalty and interest, computed on income that the plaintiff received from selling marijuana.

The 2008 assessment was formalized by the issuance of a Billing Notice that was served on the plaintiff by regular U.S. mail on February 18, 2011. The Billing Notice provided as follows:

“This is a notice of jeopardy assessment. To appeal, submit a written request for a hearing to the Commissioner stating your specific objections. *Your right to protest this assessment expires 02/28/2011, after which the assessment becomes a final [sic].* Appeal instructions and APL-002 can be downloaded at [www.ct.gov/Appeal](http://www.ct.gov/Appeal). For additional information regarding the appeal process, call 860-297-4775.”

(Emphasis added.)

The plaintiff contends that he received the Billing Notice on February 26, 2011, giving him only 2 days to file a protest based on the February 28, 2011 deadline listed in

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General Statutes § 12-729a provides, in relevant part, as follows: “(a) If the commissioner believes that the collection of any tax imposed under this chapter, including any amount of tax required to be deducted and withheld and paid over to the commissioner, will be jeopardized by delay, the commissioner shall make a jeopardy assessment of the tax, noting that fact upon the assessment and serving written notice thereof, personally or by mail, in the manner prescribed for service of notice of proposed assessment, on the person against whom the jeopardy assessment is made. Ten days after the date on which it is served, such notice shall constitute a final assessment except only for such amounts as to which such person has filed a written protest with the commissioner as provided in subsection (c) of this section.”

the Billing Notice. The plaintiff filed a protest with the commissioner on March 7, 2011, which was within a 10-day period following the receipt of the notice, but 17 days from the commissioner's mailing of the notice. In his objection to the commissioner's motion to dismiss, the plaintiff contends that "the Plaintiff's administrative appeal taken on March 7, 2011 was timely filed in accordance with the standards of due process guaranteed . . . by both the State and Federal constitutions."

It is the plaintiff's position that the commissioner failed to provide him with the full 10-day notice period and that this action deprived him of his constitutional right to adequate notice before being deprived of his property rights. The plaintiff cites to the fourteenth amendment to the United States constitution prohibiting any state from depriving any person of life, liberty, or property, without due process of law, and article first, § 8 of the Connecticut constitution containing the same prohibition.

The Billing Notice was served on the plaintiff by first class U.S. mail, not by certified or registered mail, in compliance with § 12-2f which provides as follows:

"Unless otherwise required by the general statutes, service of any notice provided by the Commissioner of Revenue Services may be made by first class mail and shall not require certified or registered mail. Any such notice to a person shall be addressed to such person's address as it appears in the records of the commissioner and service of such

notice shall be complete at the time of deposit in the United States Post Office or mail box by the commissioner or the authorized agent of the commissioner.”

Attached to the commissioner’s motion to dismiss is Exhibit B, the affidavit of Dana Napolitano, Associate Revenue Processor in the Compliance Support Unit of the Department of Revenue Services’ Audit Division. Ms. Napolitano averred that the Billing Notice was served on the plaintiff via first class U.S. mail on February 18, 2011.

In Taylor v. Commissioner of Revenue Services, 48 Conn. Sup. 410, 417, 849 A.2d 26 (2004), a case similar to the present case, the issue was whether the 10-day notice period ran from the date of mailing or the date of receipt of the commissioner’s notice of assessment. Because the commissioner chose to serve its notice by certified mail rather than by first class mail, the Taylor court noted that “[a]lthough the commissioner could have served the deficiency notice on the plaintiff by first class mail, the commissioner undertook to serve the notice by certified mail and obtained a postal receipt signed by the plaintiff to ensure that the plaintiff had actual notice of the deficiency assessment.”

The Taylor court concluded that “where the commissioner had the statutory discretion to use first class mail or personal service to serve the notice of assessment on the plaintiff, the use of certified mail with return receipt converted the notice from notice

by mail to notice by personal service, thereby delaying the commencement of the [10-day] period to file a petition for reassessment . . . .” Id., 418-19.

Section 12-2f gives the commissioner discretion to provide notice to a taxpayer by first class mail or certified or registered mail. In the present case, the commissioner served the Billing Notice by first class mail on February 18, 2011.

The language in § 12-2f makes service of the notice complete upon the recipient once the notice has been deposited in the U.S. Post Office or mail box. The 10-day notice provided for in § 12-729a commences on the date that the service is complete, in this case, by the commissioner depositing the notice in the hands of the U.S. Post Office.

As noted in Chatterjee v. Commissioner of Revenue Services, 277 Conn. 681, 688, 894 A.2d 919 (2006), “[a]ppellate jurisdiction is derived from the . . . statutory provisions by which it is created, and can be acquired and exercised only in the manner prescribed. . . . In the absence of statutory authority, therefore, there is no right of appeal. . . . This principle applies with equal force in tax appeals. Millward Brown, Inc. v. Commissioner of Revenue Services, 73 Conn. App. 757, 764, 811 A.2d 717 (2002) (‘[f]or jurisdictional purposes . . . we can see no distinction between tax appeals and other statutory appeals’).” (Citation omitted; internal quotation marks omitted.)

In the present case, the 10-day period in which the plaintiff could appeal the 2008 assessment to the commissioner began on February 18, 2011, the date of service, and

expired on February 28, 2011. As the commissioner points out, “the appeal process in a jeopardy assessment is a two step process beginning with an initial administrative appeal before the commissioner, then followed by an appeal from the commissioner’s administrative decision to the Superior Court.” Taylor v. Commissioner of Revenue Services, 48 Conn. Sup. 413. The plaintiff, having failed to comply with the statutory provision set forth in § 12-729a by filing a protest with the commissioner within 10 days from the mailing of the Billing Notice, deprives this court of subject matter jurisdiction to consider this appeal.

The plaintiff raises a constitutional issue that under the federal and state constitutions the plaintiff was deprived of due process by the statutory requirement that the protest must be filed within 10 days of the mailing of the Billing Notice, not from the date that the plaintiff received the Billing Notice.

The issue here is whether the statutory provision in § 12-2f authorizing the commissioner to use first class mail to serve the Billing Notice in a jeopardy assessment and providing that service of the notice is complete upon mailing deprived the plaintiff of procedural due process.

Addressing this issue, the court concludes that there is no constitutional deficiency in the enactment of § 12-2f which provided that service is complete on mailing. The

reason for this position is well stated in Chatterjee v. Commissioner of Revenue Services, 277 Conn. 695, that notes as follows:

“To protect government’s exceedingly strong interest in financial stability . . . [the United States Supreme Court has] long held that a [s]tate may employ various financial sanctions and summary remedies . . . in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment. Additionally, [s]tates may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme’s invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions. Indeed, such procedural devices secure the state’s ability to engage in stable financial planning.” (Citations omitted; internal quotation marks omitted.)

The state has provided a meaningful and comprehensive administrative process to deal with jeopardy assessments and the right of the taxpayer to protest jeopardy assessments, albeit in a short period of time.

With the enactment of § 12-2f, the legislature has clearly defined service as being complete from the date of mailing, not the receipt date of the Billing Notice.

For the above reasons, the commissioner's motion to dismiss is granted.

Accordingly, judgment may enter in favor of the defendant, without cost to either party.

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Arnold W. Aronson  
Judge Trial Referee