

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ONE TO ONE NURSING CARE, INC. : DECISION
for Redetermination of a Deficiency or for : DTA No. 806160
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1986 :

Petitioner One to One Nursing Care, Inc., P.O. Box 406, Port Jefferson, New York 11777 filed an exception to the order of the Administrative Law Judge issued on October 31, 1991 with respect to its petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1986. Petitioner appeared by Irving Weintraub, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael C. Gitter, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in response to the exception. Oral argument was not requested.

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

ISSUE

Whether the Tax Appeals Tribunal has jurisdiction over the subject matter of the petition.

FINDINGS OF FACT

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

On or about December 14, 1987, the Division of Taxation (hereinafter the "Division") issued to petitioner a Notice and Demand for penalty in the amount of \$10,000.00, containing the following statement:

"Failure to file wage & tax statement forms IT-2102 or W-2 by the February 28 due date. Penalty is computed at 50.00 for each

late filed statement to a maximum penalty of 10,000.00. This penalty has been prorated according to the amounts withheld for each taxing jurisdiction."

The Bureau of Conciliation and Mediation Services (hereinafter "BCMS") issued a conciliation order, dated October 7, 1988, dismissing petitioner's request for a conciliation conference on the ground that the request was not timely filed. Petitioner filed a petition with the Division of Tax Appeals on October 19, 1988. By letter dated December 8, 1988, BCMS rescinded its original order. A conciliation conference was scheduled in this matter on August 24, 1989. Before the conference was held, petitioner was informed by two letters, dated August 8, 1989 and August 11, 1989 respectively, that there was no "right to protest" a notice and demand in BCMS. Accordingly, a conciliation conference was never held.

On September 3, 1991, the Division filed the instant motion to dismiss the petition on the ground that the Tax Appeals Tribunal lacks jurisdiction over the subject matter of the petition.

OPINION

The Administrative Law Judge dismissed the petition of One to One Nursing Care, Inc. on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition. The Administrative Law Judge held that Article 22 of the Tax Law does not provide the taxpayer with the right to petition a notice and demand, and petitioner's remedy is to pay the asserted penalty and file for a refund of the amount paid.

On exception, petitioner argues that section 685(h) permits the issuance of a penalty upon notice and demand, but also gives petitioner the right to show that the late filing was due to reasonable cause and not to willful neglect; thus, denying petitioner a hearing to show "reasonable cause" denies due process. Petitioner also argues that section 685(l), which deals with the issuance of a notice and demand, excepts any penalty under subsection (h) for purposes of section 681 and not the other way around. Further, petitioner states that Matter of Dreisinger (Tax Appeals Tribunal, July 20, 1989) is distinguished from the instant case in that penalties in Dreisinger were additions to a tax deficiency, while no tax is involved in the instant case.

Finally, petitioner asks for a favorable declaratory judgment cancelling the penalty and interest, or for such other and further relief which the Tribunal may deem just, proper and equitable.

The Division argues that there is no denial of due process because section 685(h) provides for the issuance of a notice and demand which allows a hearing to show reasonable cause only after payment of the penalty and the filing of a timely claim for refund. The Division argues that there is no denial of due process when a notice and demand is issued pursuant to Tax Law § 685(h). A hearing to show reasonable cause is available, but only after payment of the penalty, timely filing of a claim for refund, and a subsequent denial of the refund. It is then that petitioner's right to a hearing attaches. The Division agrees with the Administrative Law Judge's order and argues that the relief sought in Dreisinger and in the instant case, as well as the means to obtain a refund, are identical.

We find no basis in the record before us for modifying the order of the Administrative Law Judge in any respect. Therefore, we affirm the order of the Administrative Law Judge for the reasons stated in said order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner One To One Nursing Care, Inc. is denied;
2. The order of the Administrative Law Judge is affirmed;
3. The petition of One To One Nursing Care, Inc. is dismissed; and

4. The motion of the Division of Taxation is granted.

DATED: Troy, New York
June 4, 1992

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner