STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
DONAL A. MEYERS	:	
for Redetermination of a Deficiency or for Refund of Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1988.	:	
	:	DECISION
In the Matter of the Petition	:	DTA NOS. 810251 and 810523
of	:	
DONAL A. MEYERS AND VIVIAN SHEVITZ	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1990.	:	

Petitioners Donal A. Meyers and Vivian Shevitz, 50 Main Street, Mount Kisco, New York 10549, filed exceptions to the orders of an Administrative Law Judge issued on May 21, 1992 and July 30, 1992 granting the Division of Taxation's motions to dismiss petitioners' petitions for lack of subject matter jurisdiction. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

Both petitioners and the Division of Taxation filed briefs and supplemental briefs, the last of which was filed on December 9, 1992. Petitioners' requests for oral argument were denied. The Tax Appeals Tribunal's six-month period to issue this decision began on December 9, 1992.

Commissioner Jones delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs. Commissioner Dugan did not participate.

ISSUE

Whether a taxpayer has a right to a hearing before the Division of Tax Appeals to challenge a penalty asserted in a Notice and Demand.

FINDINGS OF FACT

We find the following facts.

The Division of Taxation (hereinafter the "Division") issued a Notice and Demand for Payment of Tax Due, dated September 3, 1991, to petitioner, Donal A. Meyers, in the amount of $158.36. In the Notice and Demand, the Division explained that the amount due constituted a penalty because petitioner did not prepay enough of his 1988 tax either by having tax withheld or by paying estimated tax. The Division further noted that the penalty is based on the lesser of (1) 90% of the total tax due for 1988 (including minimum tax) or (2) 100% of the total tax due for 1987 (including minimum tax) if a 1987 return was filed and that return covered 12 months. The Division, therefore, computed the tax on 90% of the total tax due for 1988, and the penalty at the effective average annual rate of .04942.

Mr. Meyers filed a petition, dated December 2, 1991, challenging the penalty on the ground that it was improperly assessed by means of a Notice and Demand rather than by a Notice of Deficiency, thereby rendering the notice void on its face. The Division filed an answer dated February 28, 1992 alleging, inter alia, that "there exists no provision of the law permitting a hearing or challenge of the penalties imposed." On March 6, 1992, Mr. Meyers replied to the Division's answer arguing that Tax Law § 1092(b) does not permit the issuance of a Notice and Demand in the absence of a prior tax assessment against him and, therefore, such notice was "invalidly issued and a nullity."

Pursuant to 20 NYCRR 3000.5, the Division brought a motion, dated March 24, 1992, requesting the Division of Tax Appeals to issue an order dismissing the petition for lack of subject matter jurisdiction. The Administrative Law Judge issued an order dated May 21, 1992 based on the affirmation in support of the motion by Kevin A. Cahill, dated March 24, 1992, and

upon the exhibits attached thereto, and an affirmation in opposition to the motion by Donal A. Meyers, Esq.

The Division issued a Notice and Demand, dated January 16, 1992, to petitioners Donal A. Meyers and Vivian Shevitz for a tax penalty plus interest for the year 1990 in the amount of $1,637.75. In the Notice and Demand, the Division set forth the computation of the tax penalty noting that the penalty for late payments for estimated tax amounted to $1,567.00. Petitioners filed a petition, dated February 11, 1992, stating, inter alia, (1) that the Notice and Demand was void because it failed, on its face, to inform them of the basis of the penalty asserted; (2) that the Notice and Demand was the improper vehicle for imposing a penalty and, instead, the penalty should have been assessed by a Notice of Determination or a Notice of Deficiency; (3) that the Tax Appeals Tribunal's holding in Matter of Dreisinger (Tax Appeals Tribunal, July 20, 1989) wrongly held that a Notice and Demand does not confer hearing rights under the Tax Law; and (4) that the Division incorrectly computed the penalty imposed for underpayment of estimated tax.

Pursuant to 20 NYCRR 3000.5, the Division brought a motion, dated May 20, 1992, before the Division of Tax Appeals requesting an order dismissing the petition for lack of subject matter jurisdiction. The Administrative Law Judge issued an order dated July 30, 1992 based on the affirmation by Kevin A. Cahill in support of the motion and the exhibits attached thereto, and the affirmation by Donal A. Meyers in opposition to the motion to dismiss.

By letter dated November 16, 1992, the Secretary to the Tribunal advised petitioner Donal A. Meyers that DTA Nos. 810251 and 810523 were being combined for consideration by the Tribunal because both cases concern the same or related taxpayers and similar issues, the difference being the tax years involved.

OPINION

The Administrative Law Judge issued two orders granting the Division's motions to dismiss each of the petitions because of lack of subject matter jurisdiction. Citing Matter of Dreisinger (supra), the Administrative Law Judge held that petitioners did not have the right to

hearings before the Division of Tax Appeals to challenge penalties for failure to pay the required amount of estimated tax which were asserted in Notices and Demands. The Administrative Law Judge found that Tax Law § 689 allows a taxpayer to petition for a hearing only (1) to challenge tax deficiencies asserted in a Notice of Deficiency (Tax Law § 689[b]) or (2) to request a refund (Tax Law § 689[c]). Since petitioners had neither received a Notice of Deficiency nor been denied a refund, the Administrative Law Judge determined that petitioners could not receive a hearing with the Division of Tax Appeals on their petitions.

On exception, petitioners assert that the Administrative Law Judge improperly concluded that Tax Law § 689 restricts a taxpayer's hearing rights to the specific instances contained in Tax Law § 689(b) and (c) because the fact that hearings are provided in certain specific instances by these sections does not mean that hearings in other instances are not available. Petitioners argue that the Notice and Demand is the type of written notice for which Tax Law § 2006.4 and 20 NYCRR 4001.1(i) provide jurisdiction to petition for a hearing. Petitioners further argue that Tax Law § 692 requires the amount noticed in a Notice and Demand to have been previously assessed in some other manner. Petitioners assert that the Tribunal's decision in Dreisinger is incorrect and should be reversed.

The Division relies on the decision of the Tribunal in Dreisinger.

We uphold the determination of the Administrative Law Judge.

The issue presented by these cases was previously addressed by the Tribunal in Dreisinger. In that case, we held that the petitioners were not entitled to a hearing on their petition challenging penalties asserted due by a Notice and Demand, but rather, that in order to obtain a hearing the petitioners were required to first pay the amount asserted to be due and then file a claim for refund. Petitioners urge us to reverse our decision; however, we can find no reason to alter our conclusion or the reasoning supporting that conclusion contained in that decision.

As is fully articulated in the Dreisinger decision and in the orders of the Administrative Law Judge, Tax Law § 685(l) provides that certain types of penalties and additions to tax need not be asserted by a Notice of Deficiency (from which a petition may clearly be filed with the

Division of Tax Appeals pursuant to Tax Law § 2008). The penalties asserted to be due from petitioners for failure to pay estimated taxes (Tax Law § 685[c]) fall within this section (see, Tax Law § 685[l][2]). No provision of Article 22 permits a petition to be filed from a Notice and Demand. Thus, petitioners must pay the penalties asserted due and apply to the Division for a refund. If the refund request is denied by the Division, Tax Law § 689(c) permits petitioners to file a petition with the Division of Tax Appeals challenging that denial.

The equivalent provisions of the Internal Revenue Code operate in the same manner. The Internal Revenue Code gives the Secretary of the Internal Revenue Service the authority to assess taxes (26 USC § 6201) and to notify a taxpayer of a tax deficiency (26 USC § 6212[a]). Internal Revenue Code § 6213 provides that a petition may be filed from a Notice of Deficiency and that collection of the deficiency cannot begin until the time for filing a petition has expired or the decision of the Tax Court has become final. Internal Revenue Code § 6654 provides for additions to the tax if an individual has failed to pay estimated income tax in the required amount. Further, while Internal Revenue Code § 6665(a) provides that additions to tax "provided by this chapter shall be paid upon notice and demand and shall be assessed, collected and paid in the same manner as taxes," this section does not apply in the case of additions to tax under § 6654 except when the addition is attributable to a deficiency or when no return has been filed (26 USC § 6665[b]). Thus, when a return has been filed, a Notice of Deficiency need not be issued to collect additions to tax for failure to pay estimated taxes in the required amount. Taken together, these provisions operate in the same way as the equivalent provisions in the Tax Law, i.e., a petition may be filed only for amounts assessed by a tax deficiency notice; when a return has been filed, the amount due from the failure to pay estimated taxes is not required to be assessed by a tax deficiency notice and prepayment review of the amount asserted due is not allowed (see, Meyer v. Commissioner, 97 T.C. 555 [in which the Tax Court held that additions to tax for failure to pay estimated income tax in the required amount were not subject to the deficiency procedures and, therefore, the court lacked jurisdiction to hear a prepayment challenge to these amounts even though they had been asserted to be due by Notice of Deficiency]; see

also, Fendler v. Commissioner, 441 F2d 1101, 71-1 USTC ¶ 9380 [in which the court stated that a Notice of Deficiency was not required to assert amounts due as additions to tax for failure to file returns and for failure to pay estimated tax]).

Petitioners' argument that Tax Law § 692 requires that the amount asserted due must first be "assessed" in some other manner before a Notice and Demand may be issued was not specifically addressed in the Dreisinger decision. Tax Law § 692, in pertinent part, reads as follows:

> "(b) Notice and demand for tax.-The tax commission shall as soon as practicable give notice to each person liable for any amount of tax, addition to tax, penalty or interest, which has been assessed but remains unpaid, stating the amount and demanding payment thereof" (Tax Law § 692[b]).

We agree with petitioners that the language of this section supports the conclusion that the amount asserted due in a Notice and Demand must have been previously "assessed" in some other manner. However, we do not agree that this means that the amount due could only have been assessed by some other document issued by the Division. Rather, in our view, this language refers to an amount "which has been assessed" either by the taxpayer through the filing of a return containing a "self-assessment" of tax due, or by the Division pursuant to the various Notice of Deficiency procedures. The language of Tax Law § 682(a) defining the date when an amount of tax is deemed to be "assessed" supports this conclusion. When the amount of tax due is shown on a return, the amount is "deemed to be assessed on the date of filing of the return" (Tax Law § 682[a]). When the amount is assessed by the Division in a Notice of Deficiency, the assessment date is calculated based on the various requirements associated with the mailing date of the Notice of Deficiency (see, Tax Law §§ 682 and 681).

Further support for the view that an "assessment" can originate either by self-assessment measured by amounts contained on the taxpayer's return, or by an assessment issued by the taxing authority pursuant to the deficiency procedures, can be found in the Tax Court's decision in Estate of DiRezza v. Commissioner (78 T.C. 19). In that case, the Tax Court was required to decide whether it had jurisdiction to redetermine the disputed amount of an addition to tax for

late filing and late payment which was based on an additional amount of estate tax asserted by the Commissioner after the original return had been filed. Interpreting a procedural section similar to current Code section 6665, the Tax Court noted that the former Code section, which had been interpreted to require deficiency procedures for all additions to tax and penalties, had been specifically amended to allow deficiency procedures for additions to tax related to additional tax deficiencies but not for additions to tax which were attributable to the tax shown on the return (Estate of DiRezza v. Commissioner, supra, at 29). The Tax Court held that the availability of the deficiency procedures, including the right to a prepayment review of the disputed amount by the Tax Court, depended on the "*type* of assessment" (emphasis in original), i.e. whether the additions to tax were self assessed (because they were measured by amounts contained in the taxpayer's return) or assessed by the taxing authority (because they were measured by an additional amount of tax which the taxing authority asserted was due) (Estate of DiRezza v. Commissioner, supra, at 27).

Similarly, Tax Law § 685(l) provides that the Notice of Deficiency procedures of Tax Law § 681 are not required for certain additions to tax and penalties which are measured by amounts contained on the return. Thus, since the addition to tax for failure to pay the proper amount of estimated tax under Tax Law § 685(c), like the addition to tax for the late filing of tax returns under section 685(a)(1) (the subject of the petition in Dreisinger), is measured by the amount of tax admitted to be due by the taxpayer in his return, this addition to tax falls into the category of an amount which has been "assessed" by the taxpayer and for which the Notice of Deficiency procedures including prepayment hearing rights are not available (Matter of Dreisinger, supra).

We are not persuaded by petitioners' argument that pursuant to 20 NYCRR 4000.1(i) of the Division's regulations, all Notices and Demands except for the types specifically mentioned in the regulation are "statutory notices" from which a request for a conciliation conference can be made and, thus, for which a petition to the Division of Tax Appeals can be filed. This regulation, like the similar definitional section in the Tribunal's regulations (20 NYCRR 3000.1[k]), defines a statutory notice as "any written notice of the commissioner which advises a person of a tax

deficiency, determination of tax due, assessment or denial of a refund, credit or reimbursement application . . . or any other notice which gives the person a right to a hearing in the Division of Tax Appeals" (20 NYCRR 4000.1[i], emphasis added). Because neither the Division nor the Tribunal can provide hearing rights not otherwise provided by statute, and as we have discussed above and in Dreisinger, Article 22 does not provide for a hearing from a Notice and Demand, this language does not mean that a conciliation conference (or a hearing at the Division of Tax Appeals) will be available from any written notice from the Commissioner but rather refers to a notice of an assessment by the Commissioner. As we have already discussed, the amounts contained in the Notices and Demands issued to petitioners have been self-assessed because they are based on amounts contained in petitioners' returns.

Even if we thought it was appropriate to permit the introduction of additional evidence at the Tribunal level (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991), the material appended to petitioners' supplemental brief is irrelevant to this matter. Whether the Division has, in a matter which is not now before us, assessed a tax deficiency by way of Notice and Demand when a Notice of Deficiency or Notice of Determination was required, is properly left to a proceeding involving that matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Donal A. Meyers (DTA No. 810251) is denied;

2. The exception of Donal A. Meyers and Vivian Shevitz (DTA No. 810523) is denied;

3. The orders of the Administrative Law Judge dated May 21, 1992 and July 30, 1992, respectively, are affirmed; and

4. The petitions of Donal A. Meyers and Donal A. Meyers and Vivian Shevitz are denied.

DATED: Troy, New York
June 3, 1993

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

/s/Maria T. Jones
Maria T. Jones
Commissioner