

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ANTHONY LIBERATORE : DECISION
DTA NO. 821442

for Redetermination of Deficiencies or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Period October 1, 2002 to June 30, 2003. :

Petitioner, Anthony Liberatore, filed an exception to the order of the Administrative Law Judge issued on August 7, 2008. Petitioner appeared by Paravati, Karl, Green & DeBella, Esqs. (Peter A. Karl, III, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

On October 6, 2008, the Division of Taxation filed a notice of motion seeking an order pursuant to Tax Law § 20 NYCRR 3000.9(a)(1)(ii) dismissing the exception on the grounds that the Tax Appeals Tribunal lacks jurisdiction of the subject matter of the petition. The petitioner did not file a brief in support of his exception nor did he file a response to the Division of Taxation's motion.

ISSUE

Whether petitioner is entitled to an award of costs pursuant to Tax Law § 3030.

FINDING OF FACT

We find the fact as determined by the Administrative Law Judge. This fact is set forth below.

By letter dated July 23, 2008 and received by the Division of Tax Appeals on July 28, 2008, petitioner made an application for costs totaling \$5,000.00. Petitioner also provided an affidavit asserting that his net worth was less than two million dollars and a statement of paid legal fees rendered in connection with this matter.

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the requirements of Tax Law § 3030 and found that, since petitioner's small claims determination was issued on May 29, 2008 and petitioner filed his application for costs on July 23, 2008, such application was untimely filed as it was beyond the 30-day limit for applications for costs. Therefore, petitioner's application for costs was denied.

ARGUMENTS ON EXCEPTION

On exception, petitioner agreed that although the thirty day submission deadline was not complied with, consideration should be given in light of his medical condition.

The Division of Taxation ("Division"), in its Notice of Motion, argued that petitioner filed his application for costs beyond the thirty day time limit allowed. The Division also argued that the final determination in a small claims proceeding should be conclusive upon all parties and not be subject to review.

OPINION

Primarily, it is undisputed that petitioner did not timely file his application for costs. Since timeliness is not waivable, we cannot entertain the merits of petitioner's case.

Additionally, the Tax Appeals Tribunal does not have subject matter jurisdiction to hear petitioner's appeal from the order of the Administrative Law Judge.

Tax Law § 3030(c)(5)(A)(ii) provides that a party entitled to an award of costs is one who:

(I) within thirty days of final judgment in the action, submits to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this section

Small claims provisions contemplate an informal and simplified procedure before a presiding officer from whose determination there is generally no right of appeal. “The final determination of the presiding officer in the small claims unit shall be conclusive upon all parties and shall not be subject to review by any other unit in the division of tax appeals, by the tax appeals tribunal or by any court of the state (Tax Law § 2012 [ninth sentence]).” Section 3030(e)(2) states that a determination denying an award for costs is “subject to exception or review in the same manner as the determination.” Accordingly, since no appeal of the determination of the presiding officer in a small claims matter is permitted, we lack jurisdiction to entertain this exception (*see, Matter of Schifferle*, Tax Appeals Tribunal, August 7, 2008). As small claims matters are statutorily conclusive, expeditious and informal, it would be inconsistent to allow appeals of applications for costs in such cases to be pursued before the Tribunal and the courts.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Anthony Liberatore is denied;
2. The order of the Administrative Law Judge is sustained; and

3. The application for costs of Anthony Liberatore is dismissed with prejudice.

DATED: Troy, New York
January 29, 2009

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner