

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>PC TOUCH SERVICES INC.</b>	:	DECISION
	:	DTA NO. 824703
for Redetermination of a Deficiency or for Refund	:	
of New York State Personal Income Tax under	:	
Article 22 of the Tax Law for the Period	:	
October 1, 2010 through December 31, 2010.	:	

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Petitioner, PC Touch Services Inc., filed an exception to the order of the Administrative Law Judge issued on February 9, 2012. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

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

***ISSUE***

Whether the Division of Tax Appeals has subject matter jurisdiction to entertain the petition.

***FINDINGS OF FACT***

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

The Division of Taxation (Division) issued to petitioner, PC Touch Services, Inc., a Notice and Demand for Payment of Tax Due dated February 18, 2011 (Assessment # L-035429062), in the amount of \$179.96 plus penalty and interest for a balance due of \$181.51. The computation section of the notice stated that the Division had compared the tax withheld as reported on petitioner's quarterly return for the quarter ending December 31, 2010 to all of the payments applied to that quarter, and concluded that petitioner owed the amount shown due because the return was unpaid. This section also stated that penalty was imposed for late payment of the tax shown on the return and that interest was imposed for late payment or underpayment.

On October 28, 2011, the Division sent petitioner a Response to Taxpayer Inquiry concerning Assessment number L-035429062 and protest identification number K-120142683-4. The letter explained that the Division was unable to accept an amended Form NYS-45-X (Amended Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return) for the fourth quarter of 2010 because the amount of the annual tax withheld, which was reported on that return, did not match the amount of tax actually withheld during 2010. The Division stated that in order to make an adjustment to its records, petitioner would need to submit a Form NYS-45-X or a Form NYS-45ATT (Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return - Attachment) with the correct figures. Since this was not done, the assessment was sustained.

On November 2, 2011, petitioner filed a petition with the Division of Tax Appeals challenging Assessment number L-035429062 and protest identification number K-120142683-4. Petitioner asserts that the Commissioner of Taxation and Finance (Commissioner) failed to

understand that its implementation of new technology can lead users to make mistakes; that the failure of the Commissioner to listen to the user of its computer systems led it to collect tax, penalty and interest for the same period from two different taxpayers; and that the Commissioner engages in a “run-around” to avoid giving the appropriate refund to taxpayers.

On December 8, 2011, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, which stated, in pertinent part:

“The instant petition appears to have been filed on November 2, 2011 in protest of both a Response to Taxpayer Inquiry, dated October 28, 2011, and a Notice and Demand for Payment of Tax Due, issued on February 18, 2011. Neither of the two notices constitutes a statutory document and therefore, neither is sufficient to confer jurisdiction upon the Division of Tax Appeals to consider the merits of the petition.”

***THE ORDER OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted that the petition appeared to challenge both a Notice and Demand, dated February 18, 2011 and a Response to Taxpayer Inquiry, dated October 28, 2011. The Administrative Law Judge concluded that regardless of which document was being challenged, the matter was dismissed because the Division of Tax Appeals lacked jurisdiction to review either document.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner raises the same arguments as it did below. Specifically, petitioner continues to argue that the Commissioner of Taxation and Finance did not abide by the Tax Law or regulations. Therefore, petitioner requests that the matter be returned to the Administrative Law Judge to conduct a hearing or, in the alternative, that the Tribunal make its own decision on the matter.

The Division argues that the Administrative Law Judge correctly decided the relevant

issues and that the order should be affirmed.

### ***OPINION***

We affirm the order of the Administrative Law Judge.

With regard to the Response to Taxpayer Inquiry, a proceeding in the Division of Tax Appeals is commenced by filing a petition challenging a statutory notice pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal (Tax Law § § 2000, 2006 [4]; 20 NYCRR 3000.1 [k]). The Rules of Practice and Procedure of the Tax Appeals Tribunal require that where a statutory notice has been issued, it must be attached to a petition for purposes of determining whether the petition is timely filed (20 NYCRR 3000.3 [b] [8]). With respect to Article 22 of the Tax Law, this requirement would be satisfied by providing a copy of either a Notice of Deficiency, Notice of Determination or a refund denial. Petitioner included a copy of the Response to Taxpayer Inquiry with its petition, which does not constitute a statutory document. Therefore, the Division of Tax Appeals is without jurisdiction to consider this matter.

With regard to notices and demands, the Tax Law provides that:

“Provisions of law which authorize the issuance of a notice and demand for an amount without the issuance of a notice of determination for such amount, including any interest or penalties related thereto, shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand for purposes of subdivision four of section two thousand six of this chapter in cases of mathematical or clerical errors or failure to pay the tax due shown on the return or for any stamps purchased, and any interest or penalties related thereto. Any such notice and demand shall not be construed as a notice which gives a person a right to a hearing under article forty of this chapter” (Tax Law § 173-a [c]).

The Tax Appeals Tribunal has the power to provide a hearing as a matter of right to any petitioner pursuant to such rules and regulations as may be provided by the Tax Appeals Tribunal, unless a right to a hearing is specifically provided for, modified or denied by another

provision of law (*see* Tax Law § 2006 [4]). In this case, petitioner sought to obtain a hearing with regard to a notice and demand, for which a right to a hearing is specifically denied by Tax Law § 173-a (c). Consequently, the Division of Tax Appeals is without jurisdiction to hear and determine this matter (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010).

Pursuant to § 173-a of the Tax Law, any notice of additional tax due or notice and demand issued to a taxpayer without the issuance of a notice of determination or a notice of deficiency shall not give that taxpayer a right to a hearing in the Division of Tax Appeals in cases of a mathematical or clerical error on a return or failure to timely pay the tax due shown on a return. As such, the only option for such a taxpayer is to pay the tax, apply for a refund and then petition for a hearing if the refund claim is denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of PC Touch Services Inc. is dismissed;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of PC Touch Services Inc. is dismissed with prejudice.

DATED: Albany, New York  
August 23, 2012

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner