STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARK A. ROTHBERG	:	DETERMINATION DTA NO. 823318
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1999 through 2009.	:	

Petitioner, Mark A. Rothberg, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1999 through 2009.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at One Penn Plaza, New York, New York, on September 15, 2011, with all briefs to be submitted by February 14, 2012, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition filed in this matter.

II. If so, whether petitioner has established that all taxes due have in fact been paid in full.

FINDINGS OF FACT

1. Petitioner, Mark A. Rothberg, is a New York resident who is employed in New Jersey. According to Division of Taxation (Division) records, petitioner filed a New York State and City

of New York Resident Income Tax Return for each of the years spanning the period 1994 through 2010. The Division reports no record of a return having been filed for 1993.[1]

2. The following chart sets forth, for each of the years 1993 through 2010, the amount of tax reported due on petitioner's return for each such year, the amount of tax assessed by the Division for each such year, and the reason for the Division's issuance of the assessments each of which was made by way of a Notice and Demand for Payment of Tax Due:[2]

TAX YEAR	TAX REPORTED PER RETURN	AMOUNT OF TAX ASSESSED	REASON FOR ASSESSMENT
1993	$0.00	$227.00	CP2000/no return filed
1994	$1,468.00	$1,468.00	timely filed/no remit
1995	$2,055.00	$2,055.00	timely filed/no remit
1996	$2,488.00	$2,488.00	timely filed/no remit
1997	$3,056.00	$3,056.00	timely filed/no remit
1997	$0.00	$293.00	CP2000/automated[3]
1998	$4,144.00	$4,132.00	timely filed/part paid
1999	$5,535.00	$5,536.09	NYC/Yonkers resident tax discrepancy
2000	$3,419.00	$3,419.00	timely filed/part paid

[1] The record includes copies of petitioner's returns, or printouts of electronic transcripts thereof, for the years 1999 through 2008. At hearing, the Division's witness provided information from the Division's records, in table form, concerning petitioner's returns as filed for the foregoing years, as well as for 1994 through 1998, and for 2009 and 2010.

[2] Although this matter has been captioned as spanning the years 1999 through 2009, information for the other noted years is relevant to resolution of the issue presented. The dollar amounts set forth reflect tax only and do not include penalties or interest on the amounts assessed.

[3] The Division's witness explained that the legend "CP2000" indicates an Internal Revenue Service (IRS) change was made to petitioner's federal income tax return, with that federal change (in turn) impacting petitioner's New York State return (e.g., presumably serving as the basis for the amount assessed in 1993 where no New York return was filed, and for the additional [second] assessment in 1997 following the Division's initial assessment of the amount set forth but not remitted with petitioner's return for that year).

2001	$4,283.00	$4,220.00	late filed/part paid
2002	$5,364.00	$5,301.00	timely filed/part paid
2003	$6,084.00	$6,021.00	late filed,/part paid
2004	$10,828.00	$10,765.00	timely filed/part paid
2005	$2,0008.00	$11,289.00	math error
2006	$11,987.00	$11,872.00	timely filed/part paid
2007	$8,133.00	$7,988.00	timely filed/part paid
2008	$8,354.00	$8,209.00	timely filed/part paid
2009	$8,880.00	$8,817.00	timely filed/part paid
2010	$9,212.00	$9,149.00	timely filed/part paid

3. On various dates between the years 2001 and 2009, the Division received certain portions of the federal income tax refunds owed to petitioner by the IRS as offsets against the various (foregoing) New York assessments outstanding against petitioner. The following chart sets forth these refund offset payments and certain other payments (including one New York State refund offset payment and three "manual" payments) made with respect to such outstanding assessments:[4]

Date Payment Received	Payment Amount	Tax Year To Which Payment Applied	Assessment To Which Payment Applied	Notes
08/03/01	$300.00	1994	L-011036823	IRS refund offset
11/22/02	$2,678.57	1994	L-011036823	IRS refund offset
11/22/02	$3,925.29	1995	L-012036424	IRS refund offset

[4] The IRS refund offset payment amounts, denominated "N" payments in the Division's records, do not include any other payments, such as estimated tax payments, W-2 withholdings or payments made with the filing of petitioner's New York tax returns. Such other payments would be accounted for via the difference between the "tax reported per return" versus the "amount of tax assessed," per the chart set forth in Finding of Fact 2, or as other "manual" payments, denominated "M" payments, such as direct payments made by a taxpayer or payments by levy or income execution.

11/22/02	$348.14	1996	L-013460952	IRS refund offset
06/13/03	$145.42	1994	L-011036823	IRS refund offset
06/13/02	$213.12	1995	L-012036424	IRS refund offset
06/13/03	$511.62	1993	L-014180061	IRS refund offset
06/13/03	$4,616.84	1997	L-014923792	IRS refund offset
07/15/05	$950.70	1997	L-014923792	IRS refund offset
07/15/05	$3,151.30	1998	L-016942663	IRS refund offset
07/25/08	$5,917.50	1998	L-016942663	IRS refund offset
10/22/08	$65.76	1997	L-018647571	IRS refund offset
07/25/08	$3,771.50	1999	L-018832795	NYS refund offset
06/22/09	$690.92	1997	L-018647571	M payment unspec.
06/22/09	$19.66	1998	L-016942663	M payment unspec.
06/22/09	$2,094.63	1999	L-018832795	M payment unspec.
08/28/09	$9,402.85	1999	L-018832795	IRS refund offset
08/28/09	$387.15	2000	L-019607720	IRS refund offset

The Division's witness also noted receipt of an IRS refund offset payment dated May 6, 2011 in the amount of $6,921.00, and of another "M" (manual) payment dated March 9, 2011 in the amount of $485.97.

4. The Division's witness explained that when payments are received, they are applied against the oldest outstanding assessment and, in order of application, first to tax, then to penalties (if any), and then to interest, to the extent of the dollar amount of the payment. Any excess payment is, in turn, applied against the next oldest outstanding assessment, under the same order of payment application protocol.

5. This proceeding was commenced, ultimately, in response to petitioner's receipt of a June 1, 2009 Division notice of levy against his bank account and notice of garnishment sent to

his employer. The amount shown as due and subject to payment via levy and garnishment, as of June 1, 2009, totaled $103,778.53, and consisted of the original warranted amounts $28,018.32 (Warrant ID E-0100004455-W003-1 docketed 08/14/03) plus $67,904.80 (Warrant ID E-010004455-W004-5 docketed 06/18/08), plus interest accrued on each of such original warranted amounts.

6. Petitioner, in turn, contacted the Division and alleged that in 2003, he had paid all outstanding New York taxes for all years prior to 2004, and had received a Notice of Warrant Satisfaction dated September 2, 2003 in connection with that payment. More specifically, petitioner maintained, and maintains herein, that in connection with refinancing his apartment in 2003, he paid $4,159.76 on August 18, 2003 in satisfaction of Warrant ID E-010004455-W002 (docketed 12/13/96). Petitioner claims this payment was a condition of closing on the refinancing, and was the only outstanding tax item of which he was made aware as the result of the title search performed by the real estate title company he utilized in connection with the closing. Petitioner maintains that he confirmed this understanding of his tax situation at the time (2003) via telephone conversation with Division personnel. No documentation to support petitioner's claim of full payment of all outstanding pre-2004 tax liabilities, other than the Warrant Satisfaction noted herein, was provided at hearing.

7. Petitioner further initially maintained that he has paid all New York taxes from 2004 forward by way of offsets against his annual federal income tax refunds as paid over to New York by the IRS. Petitioner notes that, since he is employed in New Jersey, his employment income is subject to tax by New Jersey, and since he is a resident of New York, his income from all sources is subject to tax by New York. Petitioner maintains, in turn, that his New Jersey liability is paid via withholding from his wages, that he receives from New York a resident credit

for such New Jersey liability paid, and that any differential or remaining New York liability "should have been" (and allegedly was) paid each year via the application of his federal refund as an offset against any such New York liability. In this regard, petitioner obtained information from the IRS showing the amounts of refund offsets paid over to New York for the years 2004 through 2008.[5]

8. Petitioner commenced a special proceeding in Supreme Court, New York County, seeking, ultimately, vacatur of the levies filed, vacatur of the two warrants underlying the levies, and a temporary restraining order pending determination of the tax issue by the Court. The proceeding was transferred and refiled in Supreme Court, Albany County. By a Decision and Order dated August 6, 2009, Justice Joseph Teresi dismissed the petition upon petitioner's failure to establish that he had exhausted his administrative remedies.

9. On or about August 24, 2009, petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). By a letter dated September 4, 2009, petitioner's request for a conciliation conference was rejected upon the premise that the assessments in question resulted from the issuance of notices and demands and that such documents did not confer the right to a conciliation conference or a hearing with respect to the assessments set forth thereon. Petitioner then filed a petition with the Division of Tax Appeals seeking a hearing on the assessments and a conclusion that all New York taxes due and owing had been paid for each of the years in question.

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[5] In response to petitioner's contacts with the Division following his receipt of the notice of levy (***see*** Findings of Fact 4 through 6), the Division did not initially acknowledge receipt of any payments from petitioner. As this proceeding progressed, the Division provided petitioner with the information as to payments received (including the IRS refund offset payments) and the applications thereof against his outstanding liabilities as set forth in the charts provided herein.

10. At hearing, the Division's witness provided a comparison of the amounts of tax assessed versus the amounts of payment credits for the years since 2003, as set forth below:[6]

Year	**Tax Assessed**	**(Payment Credit)**
2004	$10,765.00	$0.00
2005	$11,289.00	($4,102.00)
2006	$11,872.00	$0.00
2007	$7,988.00	$0.00
2008	$8,209.00	($9,754.76)
2009	$8,817.00	($12,595.21)
2010	$9,149.00	($6,921.00)
2011	-----	($485.97)
Total	$68,089.00	($33,858.94)

The net difference between the foregoing amounts of tax assessed and tax payment credits totals $34,230.06.

SUMMARY OF THE PARTIES' POSITIONS

11. Petitioner alleges that he first became aware of open tax liabilities in 2009 when he was subject to a levy filed by the Division in the amount of $103,778.53. Petitioner asserts that all outstanding liabilities for all years prior to 2004 had been paid in full and were extinguished when he satisfied an outstanding warrant in 2003 in connection with the refinancing of his home at that time (***see*** Finding of Fact 5). Petitioner claims he has no knowledge of any remaining unpaid assessment for years prior to 2004, and that he has no records concerning such earlier years against which the Division has applied payments. In this regard, petitioner maintains that the Division improperly applied certain payments and credits, most specifically consisting of

[6] As with the other tables presented in this determination, the dollar amounts set forth are exclusive of penalties and interest.

refund payments received as offsets by the Division from the IRS, to tax liabilities for years prior to 2004. Petitioner appears to assert that none of such payments should have been applied to periods prior to 2004, but rather were properly applicable to his liability (if any) on an ongoing basis from 2004 forward. Petitioner argues that the IRS payments received by the Division were sufficient to offset all or most of the amounts owed by petitioner for 2004 and thereafter.

12. Petitioner also asserts that the Division's objections to jurisdiction in this forum are unfounded. Petitioner maintains that because prehearing conferences were held and references were made to an upcoming hearing, the Division has effectively waived any jurisdictional objection and consented to resolution of the liability and payment issues on the merits herein.

13. The Division maintains, in contrast, that its objection to the petition on the basis of a lack of jurisdiction was clearly raised in its answer to the petition, and that jurisdiction has not been waived and cannot be conferred by waiver. The Division notes that the assessments in question resulted from instances of tax returns that were filed without remittance, or with only partial remittance, of tax shown as due thereon, and that the assessments were appropriately set forth by the Division on notices and demands for payment of tax due. The Division's position is that under these circumstances, there is no jurisdiction in this forum to address the merits of petitioner's case. Further, and as to the merits, the Division's witness provided petitioner with printouts identifying each payment received and the outstanding liability or liabilities to which each such payment amount was applied. The Division notes that petitioner has provided no documentation to establish that all pre-2004 liabilities had been satisfied, and maintains that the payments received were simply and properly applied as received to the outstanding assessments against petitioner under the Division's protocol of paying off tax, penalties and interest, as described (***see*** Finding of Fact 4).

CONCLUSIONS OF LAW

A. The first, and potentially dispositive, question is whether there exists jurisdiction to provide petitioner with a hearing on the merits of his petition. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal,*** 151 Misc 2d 326 [1991]). In the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (***Matter of Hooper***, Tax Appeals Tribunal, July 1, 2010).

B. Section 2006(4) of the Tax Law requires the Tax Appeals Tribunal:

> [t]o provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter.* (Emphasis added)

C. Tax Law § 2008(1), in turn, provides:

> All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax *deficiency*, a notice of determination of tax due, a denial of a refund or credit application . . . , or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law. (Emphasis added.)

D. Article 22 of the Tax Law, which imposes the state personal income tax, contains provisions that provide for, modify or deny the right to a hearing with respect to personal income tax (***see Matter of Dreisinger***, Tax Appeals Tribunal, July 20, 1989). Accordingly, it is necessary to look to the provisions of Article 22 of the Tax Law to determine petitioner's right to a hearing.

E. Tax Law § 681(a) provides for the issuance of a notice of deficiency if, upon examination of a taxpayer's return, the Division determines that there is a deficiency of income tax. Tax Law § 681(g) defines a "deficiency" as:

> the amount of tax imposed by this article, less (i) *the amount shown as the tax upon the taxpayer's return (whether the return was made or the tax computed by him or by the tax commission)*, and less (ii) the amounts previously assessed (or collected without assessment) as a *deficiency* and plus (iii) the amount of any rebates. For the purpose of this definition, the tax imposed by this article and the tax shown on the return shall both be determined without regard to payments on account of estimated tax or the credit for withholding tax; and a rebate means so much of an abatement, credit, refund or other repayment (whether or not erroneous) made on the ground that the amounts entering into the definition of a deficiency showed a balance in favor of the taxpayer. (Emphasis added.)

F. Tax Law § 682(a) specifies that the amount of tax which a return shows to be due, or the amount of tax which a return would have shown to be due but for a mathematical or clerical error, shall be deemed to be assessed on the date of filing of the return (including any amended return showing an increase of tax), and in the case of a return properly filed without computation of tax, the tax computed by the commissioner shall be deemed to be assessed on the date on which payment is due.

G. Tax Law § 689(b) provides the taxpayer with the right to file a petition for redetermination of a notice of deficiency without first having to pay the amount of tax in dispute. Tax Law § 689(c) grants to the taxpayer the right to file a petition for refund of tax paid. The combined effect of these provisions is to limit the right of a taxpayer to file a petition to situations where a notice of deficiency has been issued or an application for refund of tax paid has been made and denied. Neither of these circumstances is presented in this matter. Rather, when a taxpayer files a return (as did petitioner in the instant matter for the years in question [***see*** Finding of Fact 2]), he is self-assessing the amount of tax shown to be due on his return. For the years in issue, the amounts assessed and the Division's issuance of notices and demands for such amounts

resulted from petitioner's filing of tax returns showing tax due but without remittance of all of such tax, or from math errors (***see*** Finding of Fact 2). Under such circumstances, there is no assertion of a *deficiency* pursuant to Tax Law § 681(g). Accordingly, the Division is not required to issue a Notice of Deficiency (***see*** Tax Law § 681[a]), but may instead, as it did here, proceed directly to the issuance of a Notice and Demand (Tax Law § 689[b]) and issuance of warrants (Tax Law § 692[c]).[7]

H. The Legislature specifically confirmed that there is no right to a hearing under the foregoing circumstances by its enactment of Tax Law § 173-a(2), which provides as follows:

> Corporate and personal income taxes. With respect to any tax which incorporates or otherwise utilizes the procedures set forth in part VI of article twenty-two or article twenty-seven of this chapter, provisions of law which authorize the issuance of a notice and demand for an amount without the issuance of a notice of deficiency for such amount, including any interest, additions to tax or penalties related thereto, in cases of mathematical or clerical errors or failure to pay tax shown on a return, or authorize the issuance of a notice of additional tax due, including any interest, additions to tax 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 or notice of additional tax due for purposes of subdivision four of section two thousand six of this chapter. Any such notice and demand or notice of additional tax due shall not be construed as a notice which gives a person the right to a hearing under article forty of this chapter.

I. While petitioner argues that he is entitled to a hearing to determine whether he received proper credit for his payments by IRS refund offsets, and whether all outstanding tax liabilities against him for years prior to 2004 had been extinguished, he has not provided any document that confers jurisdiction or the right to such a hearing in the Division of Tax Appeals (***see Matter of Pacori***, Tax Appeals Tribunal, November 20, 2008). Neither Article 22 nor Article 40 of the Tax Law provides taxpayers with the right to a hearing to contest a Notice and Demand, but rather the

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[7] To the extent penalties were imposed, it follows that where no portion of such penalties are attributable to a "deficiency" as defined, the Division may properly assess such penalties by the issuance of a notice and demand pursuant to Tax Law § 685(a)(l) (***see Matter of Upland, Inc***., Tax Appeals Tribunal, April 12, 1990).

right to such a hearing, including a hearing to address the protocol pursuant to which the Division applies payments on outstanding assessments, is specifically denied by operation of law (***Id.***; ***see Matter of Chait***, Tax Appeals Tribunal, April 22, 2010; ***Matter of Brodmerkel***, Tax Appeals Tribunal, August 9, 2001). Finally, petitioner's argument that the Division waived or consented to jurisdiction and thus should be estopped from contesting the same is rejected. Subject matter jurisdiction is a rigid concept and the lack thereof generally cannot be cured by waiver, consent, estoppel, laches or other voluntary action (***see Matter of Scharff.***; ***Matter of Bolkema Fuel Co.***, Tax Appeals Tribunal, March 19, 1992).

J. Even assuming that jurisdiction existed to address the arguments raised by petitioner, the evidence provided is insufficient to support the same. Petitioner's argument that all of his outstanding liabilities prior to 2004 were closed and satisfied in connection with refinancing his apartment and his satisfaction of one outstanding warrant is simply unsupported. The record includes no documentation to establish that the warrant in question represented or covered all of the outstanding liabilities owed by petitioner. In fact, that warrant, docketed December 13, 1996, would apply to an outstanding liability (or liabilities) assessed prior to the date of docketing and, aside from the accrual of interest thereon between the docketing date and the satisfaction date, would not encompass liabilities concerning assessments for subsequent years. Thus, at a minimum, that particular warrant would not appear to pertain to any assessments for the years 1997 through 2003. Morever, petitioner's claim that his federal refund amounts applied as offsets against his New York liability "should have been" sufficient to eliminate such liabilities is undermined by the compilation of tax assessed versus payment credits as set forth in Finding of Fact 9. Indeed, even under the scenario most favorable to petitioner, where all of such payments

are directly offset against the assessed amounts on a year-by-year basis, the net result is payment of only slightly more than half of the assessed amounts (***see*** Finding of Fact 10).

K. The petition of Mark A. Rothberg is hereby dismissed.

DATED: Albany, New York
March 29, 2012

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE