

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHARLES L. KYTE	:	ORDER
	:	DTA NO. 823713
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Tax under Article 22 of the Tax Law and the	:	
Administrative Code of the City of New York for the	:	
Year 2006.	:	

Petitioner, Charles L. Kyte, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2006.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition, dated July 9, 2010, on the ground that the Division of Tax Appeals lacks jurisdiction over this matter. The notice advised that each party was afforded a period of 30 days, or until August 9, 2010, within which to file written responses to the notice, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). On July 15, 2010, the Division of Taxation, by its representative, Daniel Smirlock, Esq., (John E. Matthews, Esq., of counsel) submitted a letter in support of dismissal. Petitioner, appearing pro se, filed a late response in opposition to dismissal on September 9, 2010. After due consideration of the documents and arguments submitted, Winifred M. Maloney, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner is entitled to an administrative hearing with respect to a certain Notice of Additional Tax Due issued by the Division of Taxation against him on January 25, 2010.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioner, Charles L. Kyte, a Notice of Additional Tax Due (Notice No. L-033233109-9), seeking payment of New York State and New York City personal income tax due for the tax year 2006.

2. The notice, dated January 25, 2010, provides, in part, as follows:

New York State has received information from the Internal Revenue Service (IRS) showing they adjusted your 2006 federal income tax return.

The IRS and New York State (NYS) are two separate taxing authorities. When the IRS changes or adjusts your federal income tax return, it may also affect your NYS income tax return. This can result in two different bills, one from the IRS and one from NYS.

NYS Tax Law requires you to report any changes made to your federal income tax return within ninety (90) days from the final IRS determination. We have no record that you reported the federal changes to NYS. Therefore, we have recomputed your New York tax(es) to include the federal changes.

Any payment you made to the IRS to satisfy the federal changes is a payment of federal tax. NY tax is still due as a result of the federal changes.

Our records indicate you were sent notification from the Internal Revenue Service on 03/10/2008, of the following changes to your 2006 federal income tax return.

<u>Changed Items</u>	<u>Net Change</u>	<u>Payer</u>
Dividend	\$5.00	From federal change
Pension annuity txb	\$13,975.00	Vanguard Fiduciary Trust Comp
Unemployment comp	\$11,178.00	From federal change

The Notice of Additional Tax Due assessed New York State and New York City tax due of \$2,619.63, plus interest.

3. On June 28, 2010, petitioner filed a petition with the Division of Tax Appeals protesting the Notice of Additional Tax Due.

4. On July 9, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The notice of intent provided, in relevant part, as follows:

Pursuant to § 173-a of the Tax Law, any notice of additional tax due or any notice and demand issued to a taxpayer without the issuance of a notice of determination or a notice of deficiency because of a mathematical or clerical error on a return or for failure to timely pay the tax due shown on a return shall not give that taxpayer a right to a hearing in the Division of Tax Appeals. 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.

CONCLUSIONS OF LAW

A. Tax Law § 2006 sets forth the functions, powers and duties of the Tax Appeals Tribunal including, in relevant part at subsection four thereof, as follows:

To 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.)

B. Tax Law § 659 provides that where a taxpayer's federal taxable income is changed or corrected by the Internal Revenue Service the taxpayer must report such change or correction to the Division of Taxation within 90 days after the final determination of such change or correction and either concede the accuracy of the federal change or state the taxpayer's basis for asserting that the change or correction is erroneous. If the federal change or correction is not reported within the 90-day period, the Division is authorized by Tax Law § 681(e) to issue a notice of additional tax due. Furthermore, where a taxpayer fails to report the federal change or correction as required, such a notice may be issued at any time (*see* Tax Law § 683[c][1][C]).

C. Tax Law § 173-a (as added by L 2004, ch 60, eff August 20, 2004), applying to notices and demands and notices of additional tax due issued on or after December 1, 2004, amended the Tax Law to specifically state that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, inter alia, the issuance of a notice of additional tax due.

D. The Notice of Additional Tax Due in this matter, based upon petitioner's failure to report federal audit changes to New York State for the year in question, was issued against petitioner on January 25, 2010. Accordingly, Tax Law § 173-a serves, as a matter of law, to preclude petitioner from obtaining a hearing with respect to the subject Notice of Additional Tax Due, which was issued after December 1, 2004 (*Matter of Held*, Tax Appeals Tribunal, February 22, 2007).

E. The petition of Charles L. Kyte is hereby dismissed.¹

DATED: Troy, New York
October 28, 2010

/s/ Winifred M. Maloney _____
ADMINISTRATIVE LAW JUDGE

¹ As noted previously, petitioner may not be entirely without recourse in this matter. That is, petitioner may pay the disputed tax sought by the Division via the Notice of Additional Tax Due and thereafter file a claim for refund. If such claim for refund is denied, petitioner may then proceed with a timely petition for a hearing to contest the refund denial.