

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
COUNTRY HOUSE CORP. :
for Redetermination of Deficiencies or for Refund of :
Personal Income Tax under Article 22 of the Tax Law : DETERMINATION
for the Periods July 1, 2006 through September 30, 2006, : DTA NO. 824403
January 1, 2007 through December 31, 2007, April 1, 2007 :
through September 30, 2007, and January 1, 2008 through :
June 30, 2008, and for Revision of Determinations or for :
Refund of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods September 1, 2006 through :
November 30, 2006, March 1, 2007 through February 29, :
2008, and June 1, 2009 through August 31, 2009. :
:

Petitioner, Country House Corp., filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the periods July 1, 2006 through September 30, 2006, January 1, 2007 through December 31, 2007, April 1, 2007 through September 30, 2007, and January 1, 2008 through June 30, 2008, and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods September 1, 2006 through November 30, 2006, March 1, 2007 through February 29, 2008, and June 1, 2009 through August 31, 2009.

The Division of Taxation, by its representative, Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated December 16, 2011, seeking summary determination in the above-referenced matter pursuant to sections 3000.5, 3000.9(a)(1) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner filed a response to the motion on

January 17, 2012. Accordingly, the 90-day period for the issuance of this determination began on January 17, 2012. After due consideration of the motion papers and pleadings filed in this matter, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction over the petition filed in this matter.

FINDINGS OF FACT

1. Petitioner, Country House Corp., filed a petition with the Division of Tax Appeals indicating a protest of 15 withholding tax and sales and use tax assessments.

2. Specifically, the petition protests the following sales and use tax assessments made by notices and demands issued by the Division of Taxation (Division) to petitioner:

| Assessment No. | Notice Date | Assessment Reason | Assessment Status ¹ |
|----------------|-------------|-----------------------|--------------------------------|
| L033250422 | 02/11/10 | Late filed - no remit | Open - balance due |
| L028166109 | 02/01/07 | Dishonored check | Closed - full paid |
| L029427597 | 03/07/08 | Late filed - no remit | Closed - full paid |
| L029689494 | 05/27/08 | Late filed - no remit | Open - balance due |
| L029987282 | 06/16/08 | Late filed - no remit | Open - balance due |
| L030095803 | 05/27/08 | Late filed - no remit | Open - balance due |

3. The sales and use tax notices and demands assess tax reported due but not paid, plus penalties for late filing of returns and late payment of tax pursuant to Tax Law § 1145(a)(1).

¹ The assessment status for each assessment under protest in this matter is as of the date of the "Assessments Receivable - Assessment History" document in the record pertaining to each assessment. These dates range from November 7, 2011 to December 16, 2011.

4. The petition also protests the following withholding tax assessments made by notices and demands issued by the Division to petitioner:

| Assessment No. | Notice Date | Assessment Reason | Assessment Status |
|----------------|-------------|------------------------|--------------------|
| L027991349 | 12/04/06 | Late filed - full paid | Open - balance due |
| L030162242 | 06/02/08 | Late filed - no remit | Open - balance due |
| L030162243 | 06/02/08 | Late filed - no remit | Open - balance due |
| L030162244 | 06/02/08 | Late filed - no remit | Open - balance due |
| L030162245 | 06/02/08 | Late filed - no remit | Open - balance due |
| L030170183 | 06/05/08 | Late filed - full paid | Closed - abatement |
| L031021020 | 11/24/08 | Late filed - part paid | Open - balance due |

5. The withholding tax notices and demands assess tax reported due but not paid, plus penalties for late filing of returns and late payment pursuant to Tax Law § 685(a)(1) and (2).

6. Finally, the petition protests the following withholding tax assessments each made by issuance to petitioner of a Notice of Failure to File Return and Demand for Payment of Penalty Due:

| Assessment No. | Notice Date | Assessment Reason | Assessment Status |
|----------------|-------------|-------------------|--------------------|
| L029294682 | 10/22/07 | Late filed | Closed - abatement |
| L029620864 | 01/22/08 | Late filed | Closed - abatement |

7. These notices assert penalty under Tax Law § 685(v)(1) for failure to file a completed Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return (Form NYS-45).

SUMMARY OF PETITIONER'S POSITION

8. Petitioner contends that it is unable to understand what additional tax is proposed and why; that there is no justification for charging additional taxes or evidence of how such

additional taxes were determined; that there were errors in the assessments and errors in the posting of payments. Petitioner submitted copies of withholding and sales and use tax returns, copies of checks and other evidence of various payments to the Division in support of its claims.

9. Petitioner also contends that the Division illegally seized and damaged its property, apparently in the course of civil enforcement of certain assessments. As a result, petitioner contends that it suffered \$6,532.50 in damages to its property and business losses of \$27,837.50. In support of this part of its claim, petitioner submitted photos of the purported damage to its property, a summary of the various damages it allegedly sustained, and a copy of an estimate to refinish wood floors.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by 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, 573 NYS2d 140 [1991]).

Accordingly, absent 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. The Division of Tax Appeals is authorized to “provide a hearing as a matter of right, to any petitioner upon such petitioner’s request . . . unless a right to such hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006[4]).

C. The Division of Taxation is authorized to issue a notice and demand for payment of sales and use taxes reported due where a taxpayer fails to remit payment with its return and for penalties arising from failure to timely file or failure to timely remit payment for the amount reported due (*see* Tax Law § 173-a[3][a], [b][1]). Such a notice and demand may not be

construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[3][c]).

D. The Division of Taxation is authorized to issue a notice and demand for payment of income tax, including withholding tax, where a taxpayer fails to remit payment for the amount reported due on a return and for penalties arising from a failure to timely file a return and timely remit tax reported due (*see* Tax Law §§ 173-a[2], 682[a], 685[1], 692[b]). Such a notice and demand may not be construed as a notice which gives a person a right to a hearing in the Division of Tax Appeals (*see* Tax Law § 173-a[2]).

E. Accordingly, petitioner's right to a hearing in the Division of Tax Appeals with respect to the notices and demands for payment of sales and use tax and withholding tax is specifically denied pursuant to Tax Law § 173-a(2) and (3)(c). The Division of Tax Appeals thus lacks subject matter jurisdiction to consider the merits of petitioner's protest of such notices and demands (*see* Tax Law § 2006[4]; *Matter of Chait*, Tax Appeals Tribunal, April 22, 2010).²

F. As noted, the assessments referenced in Findings of Fact 6 and 7 impose a penalty pursuant to Tax Law § 685(v)(1) for failure to file a complete Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return (Form NYS-45). Tax Law § 685(v)(1)(D) delegates the adjudication of all disputes regarding the imposition of this penalty to the New York State Department of Labor. Petitioner's hearing rights with respect to penalties imposed under this section have thus been "specifically provided for, modified or denied" by Tax Law §

² Although petitioner has no prepayment hearing rights with respect to the notices and demands, it may pursue a post-payment remedy by paying the disputed amounts and then timely filing claims for refund (*see* Tax Law §§ 687, 1139[c]). If such claims are denied, petitioner would have hearing rights in the Division of Tax Appeals by timely filing a petition protesting the refund claim denials (*see* Tax Law §§ 689[c], 1139[b]).

685(v)(1)(D), and the Division of Tax Appeals is not authorized to provide petitioner with a hearing with respect to these notices (*see* Tax Law § 2006[4]).³

G. Regarding petitioner's complaint of property damage and business losses resulting from the Division of Taxation's alleged illegal seizure of its property, Tax Law § 2008(1) 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 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.

As petitioner's complaint of civil damages is not a tax deficiency, determination or refund claim denial, and considering that there is no provision in the Tax Law providing a right to a hearing on the subject of such damage claims, this part of petitioner's protest is also beyond the jurisdiction of the Division of Tax Appeals.

H. The Division of Taxation's motion for summary determination is granted and the petition of Country House Corp. is dismissed.

DATED: Albany, New York
March 8, 2012

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE

³ This jurisdictional discussion is academic, considering that these penalties were abated and the assessments closed (*see* Finding of Fact 6).