

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STRAWBERRY UNIFORMS, INC.	:	DETERMINATION
for Redetermination of Deficiencies or for Refund of	:	DTA NO. 826028
Corporation Franchise Tax under Article 9-A of the	:	
Tax Law for the Fiscal Years Ended May 31, 2005	:	
through May 31, 2011.	:	

Petitioner, Strawberry Uniforms, Inc., filed a petition for redetermination of deficiencies or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended May 31, 2005 through May 31, 2011.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Bruce D. Lennard, Esq., of counsel), brought a motion dated August 6, 2014, seeking dismissal in the above-referenced matter, or in the alternative seeking summary determination, pursuant to sections 3000.5 and 3000.9(a)(1) of the Tax Appeals Tribunal's Rules of Practice and Procedure. Petitioner, appearing by Matthew Hazan, EA, did not submit a response. The 90-day period for the issuance of this determination commenced on September 5, 2014, the date on which petitioner's time to serve a response to the Division of Taxation's motion expired. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Kevin R. Law, 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, Strawberry Uniforms, Inc., filed a petition with the Division of Tax Appeals in which it requests a refund of 80% of the monies levied from its bank account as a result of a warrant. The petition alleges that amounts were levied upon while an offer in compromise was pending and that the amount assessed was in error. Petitioner provided no factual allegations in the petition for its assertion that the amounts assessed were in error. There is no indication that petitioner requested a refund of the amounts levied on prior to the petition being filed in this matter.

2. The warrant levied on relates to the following notices and demands (the notices) issued to petitioner based on late filed corporation franchise tax reports without remittance of the tax reported due:

Assessment No.	Taxable Period	Report Due Date	Report Filing Date	Notice Date	Tax Reported	Tax Assessed
L038237456	6/1/04-5/31/05	8/15/05	5/14/12	7/5/12	\$600.00	\$800.00
L038237457	6/1/05-5/31/06	8/15/06	6/20/12	7/5/12	\$25.00	\$800.00
L038384590	6/1/06-5/31/07	8/15/07	6/20/12	8/2/12	\$25.00	\$800.00
L038384591	6/1/07-5/31/08	8/15/08	6/20/12	8/2/12	\$25.00	\$800.00
L038384592	6/1/08-5/31/09	8/17/09	6/20/12	8/2/12	\$25.00	\$25.00
L038384593	6/1/09-5/31/10	8/16/10	6/22/12	8/2/12	\$25.00	\$25.00
L039096339	6/1/10-5/31/11	8/15/11	12/17/12	2/28/13	\$25.00	\$25.00

3. Each of the corporation franchise tax reports filed by petitioner reported that petitioner was liable for the statutorily prescribed fixed dollar minimum tax. The reports for the fiscal years ended May 31, 2006 through May 31, 2008 incorrectly reported a fixed dollar minimum of \$25.00 rather than the statutorily proscribed \$800.00. The notices for those periods assessed the required fix dollar minimum tax of \$800.00 as indicated in the chart above. All of the notices assessed penalties for late filing and late payment as well as interest.

CONCLUSIONS OF LAW

A. Tax Law § 2006(5)(ii) provides that, pursuant to such rules as the Tax Appeals Tribunal may prescribe, any party may make a motion to dismiss the petition on the ground that the Tribunal lacks jurisdiction of the subject matter of the petition. The Tax Appeals Tribunal's Rules of Practice and Procedure provide for such a motion at 20 NYCRR 3000(9)(a)(ii).

B. The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Department of Taxation and Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140 [1991]). Its power to adjudicate disputes is exclusively statutory (*id*). 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]).

C. A proceeding in the Division of Tax Appeals is commenced by filing a petition “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 any other notice which gives a person the right to a hearing” (Tax Law § 2008[1]). Here, petitioner seeks a refund on the

ground that certain amounts were levied upon while an offer in compromise was pending, and that the amounts assessed were in error. While it is clear that there is jurisdiction in this forum over the denial of a refund (Tax Law § 2008[1]), there is no indication that a refund denial was ever issued by the Division of Taxation (Division) much less a refund claim filed with the Division for the amount paid as a result of the bank levy.

D. The warrant does not act to confer jurisdiction upon the Division of Tax Appeals as it is well established that the Division of Tax Appeals's jurisdiction does not extend to collection activities (*Matter of Club Marakesh v. Division of Tax Appeals*, Sup Ct., Albany Co., Nov 7, 1990, Keniry J.; *Matter of Driscoll*, Tax Appeals Tribunal, April 11, 1991; *Matter of Barrier Oil*, Tax Appeals Tribunal, July 29, 1999).

E. Like the warrant, the underlying notices may not be construed as notices which give a corporation a right to a hearing in the Division of Tax Appeals. The notices all stem from late filed corporation franchise tax reports without remittance of the amount reported due. On each of the reports petitioner reported it was liable for the fixed dollar minimum tax. In some instances petitioner correctly self-reported the amount of the fixed dollar minimum tax due but did not pay the same; in other instances while petitioner reported liability for the fixed dollar minimum tax it incorrectly reported the amount thereof but did not pay the same. In response thereto, the Division assessed the appropriate fixed dollar minimum tax due plus penalties and interest for late filing and late payment via notices and demands. Tax Law § 173-a[2] specifically denies a taxpayer a prepayment hearing for such notices.

F. The Division of Taxation's motion for dismissal is granted and the petition of Strawberry Uniforms, Inc., is dismissed with prejudice.

DATED: Albany, New York
November 20, 2014

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE