

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AARON AND CARLA KNAPP : DETERMINATION
for Redetermination of Deficiencies or for Refund of DTA NO. 826277
New York State and New York City Personal Income

Taxes under Article 22 of the Tax Law and the
Administrative Code of the City of New York for the
Years 2010 and 2011.

Petitioners, Aaron and Carla Knapp, 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 Administrative Code of the City of New York for the years 2010 and 2011.

On August 7, 2014, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4) on the basis that the Division of Tax Appeals does not have jurisdiction to hear the matter. An extension of time to respond to the Notice of Intent to Dismiss Petition by October 23, 2014 was granted to both parties. The Division of Taxation by Amanda Hiller, Esq. (Leo Gabovich) submitted its response to the notice on September 4, 2014. Petitioners, appearing by Robert Capilupi, Enrolled Agent, submitted their response on October 23, 2014, which date commenced the 90-day period for issuance of this determination (20 NYCRR 3000.5[d]; 3000.9[a][4]). After due consideration of the arguments submitted by the parties and the pleadings and proceedings had herein, Winifred M. Maloney, 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. On May 9, 2014, petitioners, Aaron and Carla Knapp, filed a petition with the Division of Tax Appeals that was stamped as received by the Division of Tax Appeals on May 13, 2014. The petition protested notices numbers L-039150000 and L-039150001, and a Bureau of Conciliation and Mediation Services (BCMS) consent, and sought the abatement of penalties assessed by same. Attached to the petition was a copy of a notice dated October 7, 2013 issued by BCMS Conciliation Conferee Patty Wong, a copy of a BCMS consent form, and copies of two notices and demands for payment of tax due.

2. The October 7, 2013 BCMS notice issued to petitioners advised them of the date, time and location of the conciliation conference to be held regarding (CMS No. 257902) New York State, New York City and Yonkers income tax asserted due for the years 2010 and 2011. This notice also explained the manner in which the conciliation conference would be conducted. Petitioners' former representative, John Cisneros, was copied on this notice.

3. On November 14, 2013, petitioners' former representative signed a BCMS consent (CMS No. 257902) relating to notices of deficiency L-039150000 and L-039150001 for New York State and New York City personal income tax due for the years 2010 and 2011. The consent form provides as follows:

	2010 & 2011
Tax	\$19,433.44
Penalty	4,515.42

Interest	3,201.74
TOTAL	\$27,150.50
Less: Payment(s)	-0-
BALANCE DUE	\$27,150.50

"I hereby agree to waive any right to a hearing in the Division of Tax Appeals concerning the above notice(s)."

4. Notice and Demand for Payment of Tax Due (Notice and Demand) Assessment ID number L-039150000-7, dated February 12, 2014, was issued to petitioners for personal income tax due for the year 2010.

Notice and Demand Assessment ID number L-039150001-6, dated February 12, 2014, was issued to petitioners for personal income tax due for the year 2011.

5. The Notice of Intent to Dismiss Petition advised that the petition was subject to dismissal on the basis that:

"the petitioner or petitioner's representative signed a consent form, on November 14, 2013, agreeing to waive any rights to a hearing with the Division of Tax Appeals concerning the protested notices. Therefore, the Division of Tax Appeals lacks jurisdiction to consider the merits of this petition."

SUMMARY OF PETITIONERS' POSITION

6. In their petition, petitioners assert that their former accountant, Mr. Cisneros, signed over their rights to contest the penalties without their knowledge. They further assert that prior to signing away their rights, Mr. Cisneros assured them that he was handling this matter for them. However, they contend that he failed to do the job he was paid to do and they are now paying penalties at a negligence level.

7. In opposition to dismissal, petitioner Aaron Knapp submitted a letter. Mr. Knapp, in his letter, contends that the petition should not be dismissed due to the behavior of his former

representative, Mr. Cisneros, who is well known by New York State and New York City for his behavior. Mr. Knapp further contends that he has been interviewed by the Manhattan District Attorney's Office and New York State regarding Mr. Cisneros's activities. According to Mr. Knapp, petitioners and their new representative are trying to resolve the current issue with the Division, and a payment plan has been set up for the years involved.

CONCLUSIONS OF LAW

A. Tax Law § 2006(4) sets forth the functions, powers and duties of the Tax Appeals Tribunal including, in relevant part, 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 § 170(3-a)(c) provides the following with respect to the powers and authority vested in the conciliation conferee:

“A conciliation conferee, all of whom, unless otherwise provided by law, shall be in the classified civil service, shall conduct the conciliation conference in an informal manner and shall hear or receive testimony and evidence deemed necessary or desirable for a just and equitable result. The commissioner of taxation and finance shall have the power to delegate authority to a conferee to waive or modify penalty, interest and additions to tax to the same extent as such commissioner is permitted under this chapter.”

The regulations promulgated thereunder specifically address the situation where, after the conferee has reviewed all the evidence, a proposed settlement is made and forwarded to the party requesting the conference for his approval or disapproval. The regulation at 20 NYCRR 4000.5(c)(3) provides, in part, as follows:

“(i) After reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent. In developing this proposed resolution, the conciliation conferee may contact either party to clarify any issues or facts in dispute.

(ii) Where the proposal is acceptable to the requester, the requester shall have 15 days to execute the consent and agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the statutory notice.”

As set forth in the facts, the consent form included language consistent with the regulation that called for the requesters to waive any right that they may otherwise have to a hearing in the Division of Tax Appeals “concerning the above notice(s).” In this case, the statutory notices are notices of deficiency L-039150000 and L-039150001.

C. Tax Law § 171(18) provides that the Commissioner of Taxation and Finance shall:

“Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the state . . .”

D. Pursuant to Tax Law § 171(18), the Division was authorized to enter into a written agreement with petitioners concerning the notices of deficiency. The consent in this matter was issued in accordance with BCMS procedures (*see* 20 NYCRR 4000.5[c][3]). Petitioners admit that Mr. Cisneros was representing them at BCMS regarding the two notices of deficiency, and that he signed the consent in his capacity as their representative. Although they claim that Mr. Cisneros signed away their rights to protest the penalties asserted in the notices without their knowledge, petitioners have presented no evidence to show that their former representative’s authority to act on their behalf was restricted in any manner. By signing the consent, petitioners’ former representative, as their agent, voluntarily discontinued proceedings before BCMS prior to the issuance of an order and, by the consent’s own terms, waived any rights to a hearing before the Division of Tax Appeals concerning all aspects of the notices of deficiency L-039150000 and

L-039150001, and agreed to the amount of tax plus interest and penalty due as indicated in the BCMS Consent (*see Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992).

E. As for petitioners' argument that the consent should be reopened due to their former representative's alleged nonfeasance and alleged misfeasance, it is meritless. To meet the burden of proof, petitioners must prove the requirements for reopening the consent, specifically that the written agreement was induced by fraud, malfeasance, or misrepresentations by the Division (*see* Tax Law § 171(18); *see also Matter of Brahms*, Tax Appeals Tribunal, July 3, 1997, *confirmed* 256 AD2d 822 [1998]). In the instant matter, petitioners did not allege that the Division committed fraud, malfeasance or misrepresented a material fact. As such, there are no grounds upon which to reopen the BCMS consent.

F. As noted above, under the terms of the executed BCMS consent (CMS No. 257902), petitioners waived any rights to a hearing before the Division of Tax Appeals concerning all aspects of notices of deficiency L-039150000 and L-039150001 (*see Matter of BAP Appliance*). Accordingly, the Division of Tax Appeals lacks jurisdiction to hear this matter.

G. The petition of Aaron and Carla Knapp is hereby dismissed.

DATED: Albany, New York
January 15, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE