

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JEREMY WIESEN : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 827455
NYS and NYC Personal Income Tax under Article 22 :
of the Tax Law and the New York City Administrative :
Code for the Years 2009 and 2011. :
:

Petitioner, Jeremy Wiesen, filed a petition for redetermination of a deficiency or for refund of NYS and NYC personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2009 and 2011.

On February 26, 2016, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On May 11, 2016, petitioner, appearing pro se, submitted a brief in opposition to dismissal. On April 6, 2016, the Division of Taxation, by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel), submitted documents in support of dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this determination commenced on May 12, 2016. After due consideration of the documents submitted, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the petition in this matter is properly subject to dismissal.

FINDINGS OF FACT

1. Petitioner, Jeremy Wiesen, filed a petition with the Division of Tax Appeals on January 26, 2016. Attached to the petition were: a conciliation order (CMS No. 265328) dated October 2, 2015, a one-page letter from petitioner dated January 25, 2016 and a one-page letter from Jack B. Goldhaber, CPA, dated January 25, 2016.

2. The conciliation order sustained a Notice of Deficiency, No. L-042253882, dated December 5, 2014, that was issued to petitioner for the tax years 2009 and 2011.

3. In his letter attached to his petition, petitioner acknowledged that he missed the deadline for the timely filing of his petition. Petitioner asserts that he has relied on his accountant for over 30 years and that his accountant was out of the country during the months leading up to the deadline for petitioning the conciliation order issued to him. Additionally, there is a one-page letter from his accountant which sets forth the weeks he was out of the country.

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

“Pursuant to § 170(3-a)(e), the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed in excess of ninety (90) days following the issuance of a BCMS conciliation order.

In this case, the conciliation order, CMS No. 265328, was issued to petitioner on October 2, 2015. However, the petition in this matter was not filed with the Division of Tax Appeals until January 26, 2016, or one hundred and sixteen (116) days later.”

5. In petitioner’s response to the Notice of Intent to Dismiss Petition, he argues that the Division of Tax Appeals should exercise its jurisdiction to review the Notice of Intent to Dismiss if it believes there is a justifiable excuse. Petitioner requests that the two letters attached to his

petition be considered in “waiving [his] failure to meet the petition deadline.” Additionally, petitioner argues the substantive issues underlying the issuance of the Notice of Deficiency.

6. The Division of Taxation (Division) submitted an affidavit and attached documents in response to the Notice of Intent, pointing out that a conciliation order was issued to petitioner on October 2, 2015, as evidenced by documentation showing that the order was mailed to petitioner by certified mail at his last known address. The Division argues that since the petition herein was not filed until January 26, 2016, it was untimely filed and the Division of Tax Appeals lacks jurisdiction to review the notice.

CONCLUSIONS OF LAW

A. 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 Trib.*, 151 Misc2d 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 . . .

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.”

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. Under Article 22 of the Tax Law, there is a strict 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals (Tax Law §§ 689(b); 170[3-a][e]; 20 NYCRR 4000.5[c][4]), and the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond such 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

E. Petitioner does not dispute that his petition was untimely filed. Rather, petitioner argues that his excuse for his late filing be considered by the Division of Tax Appeals. In light of this admission, the Division of Tax Appeals is without jurisdiction to address the merits of the notice.

F. The petition of Jeremy Wiesen is hereby dismissed.

DATED: Albany, New York
July 14, 2016

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE