

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
REGINA GARZONE	:	DETERMINATION
for Redetermination of Deficiencies or for Refunds of	:	DTA NO. 830163
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 2008, 2009, 2012, 2013 and 2014.	:	

Petitioner, Regina Garzone, filed a petition for redetermination of deficiencies or for refunds 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 2008, 2009, 2012, 2013 and 2014.

A formal hearing by videoconference was held before Kevin R. Law, Administrative Law Judge, on February 16, 2023, with all briefs to be submitted by June 30, 2023, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by her husband, Stephen Garzone. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether the Division of Tax Appeals has jurisdiction to hear the matter.

FINDINGS OF FACT

1. For each of the tax years 2008, 2009, 2012, 2013 and 2014, petitioner, Regina Garzone, and her husband, Stephen Garzone, filed New York resident income tax return, forms

IT-201, under filing status two, i.e., “married filing joint return.”

2. On January 23, 2009, petitioner and her husband (collectively the Garzones) filed their 2008 return and reported \$24,544.00 of wages and claimed New York itemized deductions of \$71,082.00. On said return, the Garzones claimed a variety of credits including a special additional mortgage recording tax credit of \$11,000.00. The Garzones also claimed \$6,800.00 of estimated tax payments. The 2008 return lists an address in Staten Island, New York, for the Garzones.

3. On April 1, 2009, the Division of Taxation (Division) issued an account adjustment notice granting the Garzones a partial refund in the amount of \$14,012.00 and denying \$6,800.00 representing the amount claimed on the 2008 return as estimated tax payments. The account adjustment notice indicates that the Division had no record of the Garzones making any estimated payments.

4. On August 1, 2011, the Division issued a notice of deficiency, notice number L-036240489 (the 2008 notice), to the Garzones asserting tax in the amount of \$11,000.00 plus interest. The 2008 notice refers to a statement, dated June 8, 2011, for a detailed computation. This June 8, 2011, statement is not in the record. According to Angela Pettes, an audit group manager with the Division who testified at the hearing, the 2008 notice was issued denying the special additional mortgage recording tax credit claimed on the 2008 return.

5. On or about January 25, 2010, the Garzones filed their 2009 return and reported \$25,132.00 of wages and claimed New York itemized deductions of \$43,672.00. On said return, the Garzones claimed a variety of refundable credits as well a special additional mortgage recording tax credit of \$7,300.00. The 2009 return lists the same Staten Island, New York, address as listed on the 2008 return.

6. On August 1, 2011, the Division issued a notice of deficiency, notice number L-036240490 (the 2009 notice), to the Garzones asserting tax in the amount of \$7,300.00, plus interest. The 2009 notice refers to a statement, dated June 8, 2011, for a detailed computation. This June 8, 2011, statement is not in the record. According to Ms. Pettes, the 2009 notice was issued denying the special additional mortgage recording tax credit because the Garzones did not substantiate their eligibility for same when the 2009 return was audited.

7. On or about February 15, 2013, the Garzones filed their 2012 return and reported \$25,803.00 of wages and claimed New York itemized deductions of \$75,972.00 and requested a refund in the amount of \$3,026.00. This refund claim was comprised of various credits including an \$1,100.00 college tuition credit. The 2012 return lists the same Staten Island, New York, address as listed on the 2008 and 2009 returns.

8. On February 21, 2013, the Division issued an account adjustment notice to the Garzones advising them that the refund amount claimed on their 2012 return had been processed and such amount was being applied to the outstanding amount owed on the 2008 notice. This refund claim was comprised of various credits including the \$1,100.00 college tuition credit.

9. On March 11, 2013, the Garzones filed an amended 2012 return claiming an additional \$7,000.00 of refundable credits. The record does not disclose the nature of the additional credits claimed.

10. On June 26, 2015, the Division issued the Garzones a statement of proposed audit change asserting tax of \$725.00, plus interest, based upon the disallowance of, a portion of the college tuition credits claimed on the original 2012 return and the amended 2012 return.

According to the June 26, 2015 statement of proposed audit change, the Garzones were only

eligible for a \$375.00 college tuition credit rather than the \$1,100.00 as originally claimed.¹

11. On August 12, 2015, consistent with the June 26, 2015 statement of proposed audit change, the Division issued a notice of deficiency, notice number L-043244365 (the 2012 notice), to the Garzones asserting tax in the amount of \$725.00, plus interest.

12. On or about February 9, 2014, the Garzones filed their 2013 return and reported \$26,032.00 of wages and claimed New York itemized deductions of \$44,955.00 and requested a refund of \$12,448.00. The refund requested is comprised of a variety of credits, including a \$1,240.00 college tuition credit, in addition to \$9,200.00 of estimated tax payments. The 2013 return lists the same Staten Island, New York, address as listed on the 2008, 2009 and 2012 returns.

13. On February 19, 2014, the Division issued an account adjustment notice that processed a refund in the amount of \$3,248.00 but applied said amount to the outstanding amount due on the 2008 notice. The February 19, 2014 account adjustment notice denies that part of the refund claimed on the 2013 return comprised of estimated tax payments. The account adjustment notice indicated that the Division had no record of the Garzones making any estimated payments.

14. On August 23, 2016, the Division issued the Garzones a statement of proposed audit change asserting tax of \$489.88, plus interest, based upon the disallowance of a portion of the college tuition credit claimed on the 2013 return. According to the August 23, 2016 statement of proposed audit change, the Garzones were only eligible for a \$750.12 college tuition credit based on verified college tuition expenses rather than the \$1,240.00 as originally claimed.

15. On October 11, 2016, consistent with the August 23, 2016 statement of proposed

¹ Based upon the computation section, it does not appear that the refund claimed on the amended 2012 return was paid. The record does not indicate what audit activity, if any, was performed on this refund claim.

audit change, the Division issued a notice of deficiency, notice number L-045408031 (the 2013 notice), to the Garzones asserting tax in the amount of \$489.88, plus interest.

16. On or about April 6, 2015, the Garzones filed their 2014 return and reported \$26,212.00 of wages and claimed the New York standard deductions of \$15,650.00 and requested a refund of \$1,184.00. The refund requested is comprised of a variety of credits after reporting New York State and New York City tax due of \$483.00. The 2014 return lists the same Staten Island, New York, address as listed on the 2008, 2009, 2012 and 2013 returns.

17. On May 5, 2015, the Division issued the Garzones a notice and demand, notice number L-042849887 (2014 notice), asserting tax due of \$358.00, plus interest and penalty. The 2014 notice denied the earned income credits, the college tuition credit and the New York City enhanced real property tax credit, because the requisite forms to claim each of those credits were not attached to the 2014 return.

18. The petition was filed with the Division of Tax Appeals on December 7, 2020. The address appearing on the petition is the same Staten Island, New York, address that appears on the 2008, 2009, 2012, 2013 and 2014 returns. The petition challenges the subject notices alleging that there should be no tax liability in the subject tax years because Mr. Garzone was receiving disability income exempt from New York State tax. The petition also alleges that because these liabilities were discharged by the United States Bankruptcy Court as to Mr. Garzone, petitioner should also be released from liability and she claims that she is entitled to innocent spouse relief.

19. The Division's answer to the petition does not challenge the timeliness of petitioner's challenges to the underlying merits or otherwise raise an issue as to whether the Division of Tax Appeals has jurisdiction.

20. On or about January 21, 2021, petitioner applied for innocent spouse relief from the 2008, 2009, 2012, 2013 and 2014 notices.

21. At the hearing in this matter, the Division did not introduce the 2008 notice, the 2009 notice or a copy of the 2013 notice addressed to the Garzones. The 2013 notice originally submitted into evidence is addressed to a Heather Gosnick. At the hearing, Mr. Garzone stated he did not know who Heather Gosnick is. In addition, neither petitioner nor the Division introduced a copy of a notice denying innocent spouse relief to petitioner nor any conciliation orders referencing any of the notices at issue in this proceeding. Based on the absence of these notices, the Administrative Law Judge proposed dismissing the petition insofar as it challenged the underlying tax asserted in these notices.

22. The hearing record was left open for the parties to submit evidence concerning the Administrative Law Judge's intent to dismiss the petition with respect to these notices. Mr. Garzone then alleged that he and petitioner never received the underlying notices and requested that they be cancelled because they were not properly issued. Mr. Garzone claimed he and petitioner only became aware of the notices because of collection proceedings instituted against him and his wife. Petitioner alleges that because these taxes had been discharged against her husband in a Bankruptcy action, the Division cannot proceed against her. Based upon Mr. Garzone's allegations at the hearing, that the 2008, 2009, 2012 and 2013 notices were not properly issued, the Division was given the opportunity to submit proof that the Division properly issued same.

23. Petitioner did not appear at the hearing in this matter.

24. Post-hearing, the Division submitted three affidavits of Marianna Denier, dated March 15, 2023, and three affidavits of Susan Ramundo, dated March 15, 2023, that detailed the

regular process by which the Division effects the issuance of notices of deficiency by delivery of the same, properly addressed and with appropriate postage affixed into the custody of the United State Postal Service (USPS) for mailing via certified mail. Included with the affidavits were copies of certified mail records (CMRs) for the block of notices issued by the Division on August 1, 2011 (the 2008 and 2009 notices), August 12, 2015 (the 2012 notice), and October 11, 2016 (the 2013 notice) including the notices of deficiency issued to the Garzones on such dates along with copies of the notices and mailing cover sheets. The subject notices are all addressed to the Garzones at the same Staten Island, New York, address that appears on their 2008, 2009, 2012, 2013 and 2014 returns and on the petition filed in this matter. In addition, the 2013 notice indicates that separate copies of said notice were mailed to Heather Gosnick as legal representative for petitioner as well as for Mr. Garzone. Each CMR has been properly completed and each bears USPS postmarks confirming the articles listed thereon were mailed via certified mail on the dates claimed.

25. In addition, the Division submitted a copy of a conciliation order from the Division's Bureau of Conciliation and Mediation Services (BCMS) dated December 31, 2021 (order). The order references a notice dated May 13, 2021, that denied petitioner's application to be relieved from joint liability for a 2014 personal income tax liability.

CONCLUSIONS OF LAW

A. 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 New York State Dept. of Taxation and Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [Sup Ct, Albany County 1991]). Its power to adjudicate disputes is exclusively statutory (*id.*). The Division of Tax Appeals is authorized “[t]o provide a hearing as a matter of right, to any petitioner upon such

petitioner's request . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter" (Tax Law § 2006 [4]).

B. All proceedings in the Division of Tax Appeals "shall be commenced by the filing of 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 credit application . . . or any other notice which gives a person the right to a hearing" (Tax Law § 2008). For the reasons that follow, the Division of Tax Appeals lacks jurisdiction over the petition because: (i) petitioner never timely filed protests challenging the underlying merits of the 2008, 2009, 2012 and 2013 notices; (ii) the 2014 notice is not a notice giving rise to the right to a hearing before the Division of Tax Appeals; (iii) there is no notice in evidence that denied petitioner's claim for innocent spouse relief; and (iv) the Division of Tax Appeals does not have jurisdiction over collection matters.

C. In this case, after giving notice to the parties that the Administrative Law Judge proposed to dismiss that part of the petition because of the lack of statutory notices in the record, the Division came forth with complete copies of the 2008 notice, the 2009 notice, the 2012 notice and the 2013 notice, in addition to mailing proof that detailed the issuance thereof. At the hearing in this matter, petitioner asserted that the notices should be cancelled because she never received such notices and that she only became aware of such notices by virtue of collection activities undertaken by the Division. Petitioner's argument is rejected.

D. A taxpayer may protest a notice of deficiency by filing a petition for a hearing with the Division of Tax Appeals or a request for conciliation conference with BCMS (*see* Tax Law §§ 689 [b]; 170 [3-a]). It is well established that the 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced and that, accordingly,

protests filed even one date late are considered untimely (*see e.g. Matter of American Woodcraft*, Tax Appeals Tribunal, May 15, 2003; *Matter of Maro Luncheonette*, Tax Appeals Tribunal, February 1, 1996). This is because, absent a timely protest, notices of deficiency become fixed and final assessments and, consequently, the Division of Tax Appeals is without jurisdiction to consider the substantive merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

E. Where the timeliness of a taxpayer's request for a conciliation conference is in question, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered into the custody of the USPS (*Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice of deficiency of personal income tax is properly mailed, it is valid whether or not it is actually received (*see Matter of Olshanetskiy*, Tax Appeals Tribunal, February 28, 2019). Careful review of the documents and affidavits establish the general process by which the Division issues notices, such as those herein, by delivery of the same properly addressed and with appropriate postage affixed, into the custody of the USPS and that the foregoing procedure was carried out in this case. The CMRs have been properly completed and provide highly probative proof of mailing. The petition in this matter was filed on December 7, 2020, while the 2008 and 2009 notices were issued on August 1, 2011, the 2012 notice was issued on August 12, 2015, and the 2013 notice was issued on October 11, 2016, dates that fall well outside the 90-day time period to file either requests for conciliation

conference or petitions with the Division of Tax Appeals. Each of these notices were mailed to the Staten Island, New York, address appearing on the subject returns which is the same address used by petitioner as appears on the petition filed in this matter. Here, there is no indication that, prior to December 7 2020, petitioner and/or Mr. Garzone ever challenged the underlying merits of these notices by filing requests for conciliation conference with BCMS or petitions with the Division of Tax Appeals. Consequently, the Division of Tax Appeals is without jurisdiction to hear challenges to the underlying merits of these notices.²

F. Turning next to petitioner's challenge to the 2014 notice, this notice is a notice and demand which does not carry with it protest rights. Specifically, Tax Law § 173-a (2) provides that a notice and demand "shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand . . . for purposes of [Tax Law § 2006 (4)]." That statute also provides that "any such notice and demand . . . shall not be construed as a notice which gives a person the right to a hearing [in the Division of Tax Appeals]" (*see Matter of Moyler*, Tax Appeals Tribunal, October 13, 2022; *Matter of Kyte*, Tax Appeals Tribunal, June 9, 2011). Therefore, the petition is dismissed insofar as it challenges the merits of the 2014 notice.

G. Similarly, the Division of Tax Appeals is also without jurisdiction to determine whether petitioner should be relieved of liability as an "innocent spouse." Generally, spouses who choose to file a joint return are subject to joint and several liability for tax deficiencies under the Internal Revenue Code (IRC) (26 USC) § 6013 (d) (3) and the (Tax Law § 651 (b) (2). Since joint and several liability may prove to be unjust in certain circumstances, Congress, and the New York State Legislature, authorized relief from such liability under the innocent spouse

² Notwithstanding the Division's failure to challenge jurisdiction, the Division of Tax Appeals may not confer jurisdiction upon itself and is not precluded from addressing the issue of its own jurisdiction based upon the evidence in the record (*see Matter of Yoell-Mirel*, Tax Appeals Tribunal, September 21, 2015).

provisions of IRC (26 USC) § 6015 and Tax Law § 654. New York's innocent spouse rule is contained in Tax Law § 654 (a) and expressly incorporates the federal provisions regarding innocent spouse status found in IRC (26 USC) § 6015. Under Tax Law § 654, the Division of Tax Appeals has jurisdiction to determine whether the Division erroneously denied petitioner innocent spouse relief if the taxpayer applied for, and was denied such relief (*see* Tax Law § 654 [b] [1]; IRC [26 USC] § 6015 [e]), or may be used as an affirmative defense if a timely petition to a notice of deficiency was otherwise filed (*see Butler v Commissioner. of Internal Rev.*, 114 TC 276 [2000]). Here, the record does not contain a copy of a notice denying a request for innocent spouse relief nor, as previously determined, was there a timely petition filed with respect to the underlying notices. In fact, petitioner's application to be relieved of liability as an innocent spouse was filed with the Division after the petition herein was filed.³ Accordingly, the Division of Tax Appeals is without jurisdiction to hear this matter.

H. Finally, petitioner claims that because her husband's liability for the same tax liabilities was discharged by the United States Bankruptcy Court, her liability as a joint filer is similarly discharged. This is essentially a collection matter. It is well established that the jurisdiction of the Division of Tax Appeals does not extend to the Division's collection activities (*see Matter of Club Marakesh v Div. 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).

³ Petitioner's application seeking innocent spouse relief was filed on January 21, 2021, or subsequent to the December 7, 2020, date of filing of the petition in this matter.

I. The petition of Regina Garzone is dismissed.

DATED: Albany, New York
December 28, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE