

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TEG HC, INC. : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 850409
Pass-Through Entity Tax under Article 24-A of the :
Tax Law for the Year 2021. :

Petitioner, TEG HC, Inc., filed a petition for a redetermination of deficiency or for refund of pass-through entity tax under article 24-A of the Tax Law for the year 2021.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Colleen M. McMahon, Esq., of counsel), filed a motion on May 7, 2024,¹ seeking an order dismissing the petition pursuant to Tax Law § 2006 (6) and 20 NYCRR 3000.5 and 3000.9 (a) (1) (ii) or, in the alternative, granting summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5 and 3000.9 (b) (1). Petitioner, appearing by Darren Thomas, CPA, Esq., did not respond to the motion by June 6, 2024, which date commenced the 90-day period for the issuance of this determination.

Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

¹ The Division of Taxation initially filed a motion on February 13, 2024, which was subsequently withdrawn.

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction to consider the merits of the petition.

FINDINGS OF FACT

1. Petitioner, TEG HC, Inc., a holding company and New York State subchapter S corporation, elected to participate in the pass-through entity tax (PTET) program for 2021.

2. On December 13, 2021, petitioner filed with the Division of Taxation (Division) form DTF-653.2, payment of estimated tax for partnerships and S corporations subject to the PTET, for petitioner's 2021 tax year. With form DTF-653.2, petitioner made an estimated 2021 New York State PTET payment of \$86,012.00 on December 14, 2021.

3. On March 12, 2022, petitioner filed form DTF-653.3, request for six-month extension to file the PTET return and submitted \$0.00 with the request. On form DTF-653.3, petitioner indicated that, with a six-month extension, its 2021 PTET annual return would be due September 15, 2022.

4. On September 14, 2022, petitioner filed form DTF-653, PTET annual return, for 2021 (2021 return), indicating that it had \$24,080,830.00 in pass-through entity taxable income resulting in a total tax due of \$2,391,825.49 for 2021. Petitioner's 2021 return indicated that a payment of \$86,012.00 had already been made for 2021, and \$2,305,813.49 remained due. On September 14, 2022, petitioner remitted to the Division the remaining 2021 PTET liability of \$2,305,813.49.

5. The Division issued a notice and demand for payment of tax due (notice and demand), bearing assessment identification number L-057228627 and dated October 21, 2022, to petitioner that assessed \$88,594.13 in interest for the late payment of the 2021 tax. No penalties

were imposed.

6. Petitioner filed a request for a conciliation conference before the Division's Bureau of Conciliation and Mediation Services (BCMS) protesting the notice and demand. By conciliation order, CMS No. 000348335 (BCMS order), dated January 13, 2023, BCMS dismissed petitioner's request. The BCMS order stated that BCMS did not have jurisdiction over the matter as the notice and demand did not give petitioner rights to a hearing and, therefore, BCMS was precluded from addressing the merits of the case.

7. On February 7, 2023, petitioner filed a petition protesting the BCMS order.

CONCLUSIONS OF LAW

A. The Division brought a motion to dismiss the petition under sections 3000.5 and 3000.9 (a) (1) (ii) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9 (b) (1) of the Rules. A motion to dismiss the petition may be granted, as pertinent herein, if the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition (20 NYCRR 3000.9 [a] [1] [iii]).

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 [1]). The petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 7). 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 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 hearing is specifically provided for, modified or denied by another provision of this chapter” (Tax Law § 2006 [4]).

Article 24-A of the Tax Law generally incorporates all of the provisions of article 22 therein (*see* Tax Law § 866 [a]). With regard to a notice and demand, Tax Law § 173-a (2) provides:

“Corporate and personal income taxes. With respect to any tax which incorporates or otherwise utilizes the procedures set forth in part VI of article twenty-two or article twenty-seven of this chapter, provisions of law which authorize the issuance of a notice and demand for an amount without the issuance of a notice of deficiency for such amount, including any interest, additions to tax or penalties related thereto, in cases of mathematical or clerical errors or failure to pay tax shown on a return, or authorize the issuance of a notice of additional tax due, including any interest, additions to tax or penalties related thereto, shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand or notice of additional tax due for purposes of subdivision four of section two thousand six of this chapter. Any such notice and demand or notice of additional tax due shall not be construed as a notice which gives a person the right to a hearing under article forty of this chapter.”

C. The Division issued to petitioner a notice and demand. The notice and demand assessed interest due for petitioner’s failure to timely pay the PTET when it was due for tax year 2021. The Division is authorized to impose interest on any underpayment of tax (Tax Law § 684 [a]). Such interest “accrues on any balance of New York State personal income tax . . . due from the due date of the New York State personal income tax return (determined without regard to any extension of time to file), to the date of payment” (*see* 20 NYCRR 157.7 [a]).

As set forth above, Tax Law § 173-a (2) specifically denies the right to a hearing for a notice and demand based upon the failure to timely pay tax due as shown on a return, including any interest (*see Matter of Rothberg*, Tax Appeals Tribunal, January 17, 2013). As such, the

Division of Tax Appeals lacks subject matter jurisdiction over the petition.

D. The Division of Taxation's motion to dismiss is granted, and the petition of TEG HC, Inc. is hereby dismissed.

DATED: Albany, New York
August 29, 2024

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE