

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition
of
VLADIMIR TESS
for Redetermination of a Deficiency 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
Year 2019.

DETERMINATION
DTA NO. 850514

Petitioner, Vladimir Tess, filed a petition for redetermination of a deficiency 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 year 2019.

The Division of Taxation, by its representative, Amanda Hiller, Esq. (Stefan M. Armstrong, Esq., of counsel), brought a motion dated April 8, 2024, seeking an order of dismissal or, in the alternative, summary determination, in the above-referenced matter pursuant to Tax Law § 2006 (5) (ii) and section 3000.9 (a) (1) (ii) and (b) (1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Accompanying the motion was the affirmation of Stefan M. Armstrong, Esq., dated April 8, 2024, and annexed exhibits. Petitioner, appearing pro se, submitted a “Memorandum in Opposition to Motion to Dismiss” and an attached exhibit on April 25, 2024. The 90-day period for issuance of this determination commenced on May 8, 2024. Based upon the motion papers and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On November 13, 2020, the Division of Taxation (Division) issued to petitioner, Vladimir Tess, a notice and demand for payment of tax due (notice and demand) bearing assessment number L-052371542 for tax year 2019. This notice and demand was issued because petitioner had not paid the full amount of tax reported on his form IT-201, New York State resident income tax return, for tax year 2019. Specifically, the notice and demand assessed tax in the amount of \$431.00, interest in the amount of \$10.85 and penalty in the amount of \$2.15, for a current balance due in the amount of \$444.00. The Division assessed interest because the tax was underpaid. The Division also imposed a penalty for late payment of the tax shown on the return pursuant to Tax Law § 685 (a) (2).

2. On or after May 9, 2022, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notice and demand.

3. On January 20, 2023, BCMS issued a conciliation order dismissing request (conciliation order), CMS No. 000348651, to petitioner. The conciliation order stated:

“The Bureau of Conciliation and Mediation Services does not have jurisdiction over this matter. The notice at issue, by law, shall not be construed as a notice which gives a person rights to a hearing. If the notice is full paid and a timely refund filed, denial of such refund may afford rights.

Therefore, the Bureau of Conciliation and Mediation Services is precluded from making a determination on the merits of this case.

The request filed for a Conciliation Conference is dismissed.”

4. On April 18, 2023, petitioner filed a timely petition with the Division of Tax Appeals in protest of the conciliation order. The petition was date stamped received by the Division of Tax Appeals on April 20, 2023. Review of section V of the petition indicated that notice/assessment ID number L-052371542 was being challenged. In his petition, petitioner asserted that all evidence proves that the Division “has voluntarily discharged [him] from further liability by an agreement & estoppel” and therefore, he “is no longer liable for principle [sic] or interest in accord with NY UCC 3-601(1)(i) or (2).” Attachments to the petition include, among other items, the conciliation order and a “Response to Taxpayer Inquiry” (Response to Taxpayer Inquiry), dated November 4, 2022, from the Division’s Office of Processing and Taxpayer Services (OPTS) liability resolution unit.

5. The Response to Taxpayer Inquiry stated that the tax type was income tax and bore “Protest ID: K-222634472-5” and assessment ID: “L-052371542-3.” This letter provided in part, as follows:

“This is in response to your letter concerning the above assessment(s).

The Internal Revenue Service, which is a federal agency, is a separate taxing authority from the New York State Department of Taxation and Finance, which is a state agency.

The information you sent indicates that payment was made to the Internal Revenue Service rather than to New York State.

As a result, the assessment is sustained.”

The Response to Taxpayer Inquiry indicated that the current balance due on assessment ID: L-052371542 was \$563.98.

6. As noted above, the Division brought a motion seeking an order dismissing the petition or, in the alternative, summary determination in its favor. In support of the motion, the Division submitted: (i) the affirmation of Stefan M. Armstrong, Esq., its representative, dated

April 8, 2024; (ii) a copy of notice and demand, assessment ID: L-052371542; (iii) a copy of conciliation order, CMS No. 000348651; (iv) a copy of the petition filed on April 18, 2023 and received by the Division of Tax Appeals on April 20, 2023; and (v) a copy of the answer and cover letter, each dated July 19, 2023.

7. Petitioner responded to the Division's motion by a "Memorandum In Opposition to Motion to Dismiss," along with an attached exhibit consisting of the Response to Taxpayer Inquiry described above (*see* findings of fact 4 and 5). Petitioner asserts that the Response to Taxpayer Inquiry, "bearing Protest ID: K-222634472-5" is a notice that "grants jurisdiction to this court to hear subject matter" of the petition. Petitioner further asserts that the Division's responding letter is a document "issued by a departmental head and appears to be a decision subject to this review."

CONCLUSIONS OF LAW

A. The Division brought a motion to dismiss the petition under section 3000.9 (a) (1) (ii) of the Tax Appeals Tribunal's Rules of Practice and Procedure (Rules) or, in alternative, a motion for summary determination under section 3000.9 (b). The petition in this matter was filed within 90 days of the conciliation order (*see* finding of fact 4). While the Division of Tax Appeals does have jurisdiction over every petition timely filed, that does not confer subject matter jurisdiction over either the Response to Taxpayer Inquiry or the notice and demand, because neither document gives rise to hearing rights before the Division of Tax Appeals pursuant to Tax Law § 173-a (2).

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 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]).

C. With respect to the Response to Taxpayer Inquiry, Tax Law § 2008 (1) 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, a determination of tax due, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration 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. The response to Taxpayer Inquiry was an informal document explaining that the information petitioner sent to the Division regarding payment on the notice and demand indicated that payment was made to the Internal Revenue Service not to New York State. It is not a statutory document giving petitioner a right to a hearing in this matter (*see Matter of PC Touch Servs. Inc.*, Tax Appeals Tribunal, August 23, 2012 [where it was concluded that a Response to Taxpayer Inquiry did not constitute a statutory document and, therefore, the Division of Tax Appeals was without jurisdiction to consider that matter]).

E. With regard to the 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.”

F. The Division issued to petitioner a notice and demand for payment of tax due. Notice and demand L-052371542 assessed tax of \$431.00, plus interest and penalty, for failure to pay income tax when it was due for tax year 2019. 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 (*see Matter of Rothberg*, Tax Appeals Tribunal, January 17, 2013). As such, the Division of Tax Appeals is without jurisdiction to hear and determine the substantive issues in this matter regarding the notice and demand issued for tax year 2019 (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010; *see also Matter of PC Touch Servs. Inc.*).

G. The Division of Taxation’s motion to dismiss is granted, and the petition of Vladimir Tess is hereby dismissed.

DATED: Albany, New York
July 25, 2024

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE