

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ARTHUR SCHULKIN</b>	:	DECISION
<b>D/B/A SCHULKIN'S NEWSSTAND</b>	:	DTA No. 814744
	:	
for Review of the Revocation of his License as a Lottery Sales Agent under Article 34 of the Tax Law for the Year Year 1995.	:	

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Petitioner Arthur Schulkin, d/b/a Schulkin's Newsstand, 76 Broad Street, New York, New York 10004, filed an exception to the order of the Administrative Law Judge issued on June 27, 1996. Petitioner appeared by Goldberg, Gonciarz and Scudieri, P.C. (Edward F. Gonciarz, Esq., of counsel). The Division of the Lottery appeared by William J. Murray, Counsel.

Petitioner did not file a brief on exception. The Division of the Lottery filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Pinto concurs. Commissioner Jenkins took no part in the consideration of this decision.

***ISSUE***

Whether the Administrative Law Judge was correct in dismissing the petition of Arthur Schulkin d/b/a Schulkin's Newsstand for lack of subject matter jurisdiction.

***FINDINGS OF FACT***

We find the following facts.

On February 21, 1996, petitioner filed a petition with the Division of Tax Appeals seeking a hearing to review the revocation of his license as a State lottery sales agent by the Director of the Division of the Lottery.

On March 13, 1996, a Notice of Intent to Dismiss Petition signed by Frank A. Landers of the Petition Intake, Review and Exception Unit was issued pursuant to the provisions of section

2006(5) of the Tax Law and section 3000.9(4) of the Tax Appeals Tribunal Rules of Practice and Procedure (20 NYCRR 3000.9[4]). The March 13, 1996 Notice of Intent to Dismiss Petition set forth the following:

"[s]ince petitioner was afforded an opportunity for a hearing (and in fact had a hearing) under section 1607 of the Tax Law, he is not also entitled to a hearing under section 2006 of the Tax Law. Hence, the Tax Appeals Tribunal lacks jurisdiction of the subject matter of the petition."

On April 4, 1996, the Division of the Lottery (appearing by William J. Murray, Esq.) filed a motion seeking permission to appear in the instant proceeding, dismissal of the Division of Taxation from this proceeding and substitution of the Division of the Lottery as the respondent party, and dismissal of the petition. In its affirmation, the Division of the Lottery argued at paragraph eleven that "[t]here is no provision in any statute, regulation, policy or procedure which permits a license revocation decision by the Director of the Lottery to be reviewed by any authority except the New York State Supreme Court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules" and additionally that the Division of the Lottery "has never requested or consented to the Division of Tax Appeals conducting any proceeding relating to the revocation of a Lottery Sales Agent License . . . ."

On April 11, 1996, petitioner filed an affirmation in opposition to the Notice of Intent to Dismiss and in reply to the Lottery Division's motion. In its affirmation, petitioner opposes the Notice of Intent to Dismiss and the Lottery Division's motion to dismiss but "neither consents to nor contests the inclusion of the Lottery Division as a Respondent to this proceeding."

On April 17, 1996, by a letter dated April 3, 1996, the Division of Taxation by Steven U. Teitelbaum, Deputy Commissioner and Counsel (Carroll R. Jenkins, Esq., of counsel) indicated that it would not be filing papers opposing the Lottery Division's motion to be substituted as a party.

On June 27, 1996, Chief Administrative Law Judge Andrew F. Marchese issued an order joining the Division of the Lottery to this proceeding as a necessary party, dismissing the

Division of Taxation as a party and dismissing the petition for lack of subject matter jurisdiction.

Petitioner has taken exception to so much of the Administrative Law Judge's order as concludes that the Division of Tax Appeals does not have jurisdiction over this matter.

The essential facts of this matter are not in dispute. Petitioner was a licensed lottery sales agent. During September of 1995, the Security Director of the Division of the Lottery commenced an investigation of petitioner due to an allegation that lottery tickets for an out-of-state game known as "Powerball" were being unlawfully sold at the location where petitioner was licensed to sell New York State Lottery tickets. Based upon the Security Director's investigation, the Director of Lottery Operations temporarily suspended petitioner's Lottery Sales Agent license and commenced a license revocation proceeding on September 26, 1995.

A hearing on the proposed license revocation was held by the Division of the Lottery on November 8, 1995. The hearing was conducted by Russell V. Gladieux, Executive Deputy Director of the Division of the Lottery, as hearing officer. Petitioner Arthur Schulkin appeared at the hearing. The Hearing Officer submitted to the Director of the Lottery a hearing report dated November 10, 1995 including findings of fact, conclusions of law and a recommended decision. A copy of the hearing report was also sent to petitioner.

The hearing report found that the agent had sold illegal lottery tickets and recommended revocation of the agent's license. On or about November 18, 1995, petitioner by his attorney, Alan J. Goldberg, submitted to the Director of the Lottery an "Administrative Appeal" setting forth exceptions, objections and replies to the hearing report. Jeff Perlee, the Director of the Division of the Lottery, issued a Decision and Order dated November 29, 1995 which accepted the Hearing Officer's recommended decision and revoked petitioner's Lottery Sales Agent license as of that date.

### ***OPINION***

In his exception, petitioner requests that this matter be remanded to the Division of Tax Appeals for review of the propriety of the revocation of petitioner's license. Petitioner argues

that the Division of the Lottery is not a separate agency but one of four divisions of the Department of Taxation and Finance and is established and governed by the Tax Law. As such, he contends that the Division of Tax Appeals has jurisdiction over a petition protesting a revocation of a license pursuant to a provision of the Tax Law. He argues that he should have a full and fair opportunity to have his license revocation reviewed by an administrative law judge. Where there are specific and general statutes, the specific statutes, he argues, must govern and be given effect.

The respondent Division of the Lottery argues that the Division of Tax Appeals may only consider notices issued by the Commissioner of Taxation and Finance (Tax Law § 2000); that the Division of Tax Appeals is explicitly prohibited from holding a hearing if a right to such a hearing is specifically provided for by another provision of the Tax Law (Tax Law § 2004[6]); and a proceeding in the Division of Tax Appeals may only be commenced by filing a petition protesting a written notice issued by the Division of Taxation of the Department of Taxation and Finance. It argues that Tax Law § 1607 "requires a hearing on the revocation of a Lottery Sales Agent License to be held by the Division of the Lottery (not by the Division of Taxation or the Division of Tax Appeals), and section 1603(2) of the Tax Law provides that the Director of the Division of the Lottery (not the Commissioner of Taxation and Finance) is the 'chief executive officer of and in sole charge of the administration of the division' of the Lottery" and that such a hearing having already been held, there is no procedure to authorize further administrative review. The respondent then argues that the administrative hearing held for petitioner was in accord with the provisions of the State Administrative Procedure Act and that no denial of due process has been alleged.

There are two issues for our determination in this matter. First, we must determine if the Division of Tax Appeals has jurisdiction to provide a hearing for review of a decision by the Director of the Lottery to suspend or revoke a license issued pursuant to Article 34 of the Tax Law. If we decide that such jurisdiction exists, then we must decide if we have jurisdiction to

provide petitioner in this proceeding with a hearing de novo to review the decision of the Director of the Lottery to revoke petitioner's license.

As the Administrative Law Judge concluded in his order:

"[t]his case is one of first impression. There is no precedent either from the Tax Appeals Tribunal or from the courts which deals with the authority of the Division of Tax Appeals to review the actions of the Division of the Lottery or of any entity other than the Division of Taxation. Thus, we must look to the statute itself to determine the boundaries of the jurisdiction of the Division of Tax Appeals" (Order, pp. 5-6).

The Administrative Law Judge noted that at the creation of the Division of Tax Appeals:

"all of the adjudicatory functions of the former State Tax Commission were transferred to the Division of Tax Appeals and the Tax Appeals Tribunal. I can find no instance where the former State Tax Commission exercised jurisdiction over the licensing of state lottery agents. To the contrary, it is clear that the Director of the Division of the Lottery exercised such jurisdiction (see, Neidich v. Quinn, 90 AD2d 614, 456 NYS2d 164). Nothing in section 18 [of chapter 282 of the Laws of 1986] or any other provision of chapter 282 indicates the intention of the Legislature to expand the jurisdiction of the Division of Tax Appeals to include matters formerly within the jurisdiction of the Director of the Lottery. One would think that if such were the Legislature's intention, it would have stated so explicitly" (Order, pp. 6-7).

Unfortunately, this analysis does not provide the answer to the question now before us. While it is true that the former State Tax Commission had no jurisdiction over the licensing of State lottery agents, that is not pertinent to this proceeding. As the Administrative Law Judge noted, it was only the adjudicatory functions of the former State Tax Commission that were transferred to the Division of Tax Appeals and the Tax Appeals Tribunal. The adjudicatory functions of the former State Tax Commission were provided in subdivisions Twenty-first, Twenty-second and Twenty-third of former Tax Law § 171. While those powers were clearly transferred to the Division of Tax Appeals, there is no indication in Chapter 282 that the Division of Tax Appeals was limited to these powers. Further, as the Administrative Law Judge concludes, the Court in Neidich v. Quinn (supra) did confirm a determination by the Director of

the Lottery to revoke the license of a ticket distributor. However, that case was decided in 1982, five years before the provisions of Chapter 282 of the Laws of 1986, creating the Division of Tax Appeals, became effective.

The issue before us is not, as framed by the Administrative Law Judge, whether the Division of Tax Appeals has jurisdiction over the licensing of State lottery agents. Rather, the issue is whether the Legislature has given the Division of Tax Appeals the authority to hear and adjudicate a challenge to a determination made by the Director of the Lottery to suspend or revoke a license issued pursuant to Article 34 of the Tax Law. We conclude that the Division of Tax Appeals has such jurisdiction.

The New York State Department of Taxation and Finance is comprised of four divisions: the Division of the Lottery, the Division of Taxation, the Division of the Treasury and the Division of Tax Appeals. The head of the Division of Taxation (the Commissioner of Taxation and Finance) and the three Commissioners of the Tax Appeals Tribunal (which operates and administers the Division of Tax Appeals) are appointed by the Governor by and with the advice and consent of the Senate. The head of the Division of the Treasury and the head of the Division of the Lottery are each appointed by and hold office at the pleasure of the Commissioner of Taxation and Finance.

By way of general background, we note that the Division of Tax Appeals was created to promote and evince impartiality in the New York State tax appeals system by removing any perception of unfairness or inequity which may have existed on the part of the public or tax practitioners with regard to the system of resolution of disputes between the public and the Department of Taxation and Finance (Mem of Executive Dept., 1986 McKinney's Session Laws of NY, at 2894). The former system had been criticized because the same body (the State Tax Commission) was responsible for both the administration of taxes and the adjudication of controversies arising from such administration (Governor's Approval Mem., 1986 McKinney's Session Laws of NY, at 3162).

Article 34 of the Tax Law, enacted pursuant to Chapter 92 of the Laws of 1976, abolished the State lottery operated by the New York State Racing and Wagering Board and created the Division of the Lottery as an independent division within the Department of Taxation and Finance. Section 1607 of the Tax Law provides that the Division of the Lottery "may suspend or revoke, after notice and an opportunity for a hearing pursuant to the state administrative procedure act, any license issued pursuant to this article." There is no procedure provided in Article 34 which designates who should conduct such a hearing or the manner in which it is to be conducted. The Division of the Lottery, in creating a system much like the one replaced by the Division of Tax Appeals, has adopted rules which provide that such a hearing shall be held before a hearing officer designated by the Director, and the Director shall adopt, modify or reverse the report of the hearing officer (21 NYCRR 2807). However, it is a well-established rule of law that:

"in exercising its rule-making authority an administrative agency cannot extend the meaning of the statutory language to apply to situations not intended to be embraced within the statute" (Matter of Trump-Equitable Fifth Ave. Co. v. Gliedman, 57 NY2d 588, 457 NYS2d 466).

Further, "[u]nder its power to make rules and regulations, an agency may not adopt any which contravene or conflict the statute [citations omitted]; which are inconsistent with the design and purpose of the statute [citations omitted]; which alter the statute [citations omitted]; add to the statute [citations omitted]; or extend . . . the statute [citations omitted]" (Matter of Levine v. New York State Dept. of Social Servs., 106 Misc 2d 496, 434 NYS2d 572).

Ten years subsequent to the establishment of the Division of the Lottery, Chapter 282 of the Laws of 1986 established the Division of Tax Appeals as a separate and independent division within the Department of Taxation and Finance. The Division of Tax Appeals is operated and administered by the Tax Appeals Tribunal. The Division of Tax Appeals' responsibility, pursuant to Tax Law § 2000, is to provide:

"the public with a just system of resolving controversies with such department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies. The division shall be responsible for processing and reviewing petitions, providing hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter, rendering determinations and decisions and all other matters relating to the administration of the administrative hearing process. The administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due, a tax deficiency, 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 a right to a hearing under this chapter" (Tax Law § 2000, emphasis added).

When a statute's language is plain and there is no ambiguity on its face, resort to legislative history is inappropriate (Matter of Friesch-Groningsche Hypotheekbank Realty Credit Corp. v. Tax Appeals Tribunal, 185 AD2d 466, 585 NYS2d 867, lv denied 80 NY2d 761, 592 NYS2d 670; see also, Sega v. State, 60 NY2d 183, 469 NYS2d 51, and Matter of Allen v. State Tax Commn., 126 AD2d 51, 512 NYS2d 916; see also, McKinney's Cons Laws of NY, Book 1, Statutes, § 76).

The Court of Appeals stated in Finger Lakes Racing Assn. v. New York State Racing & Wagering Bd. (45 NY2d 471, 410 NYS2d 268) that:

"[i]t is an elementary principle of statutory construction that courts may only look behind the words of a statute when the law itself is doubtful or ambiguous [cite omitted]. If . . . the terms of a statute are plain and within the scope of legislative power, it declares itself and there is nothing left for interpretation. To permit a court to say that the law must mean something different than the common import of its language would make the judicial superior to the legislative branch of the government and practically invest it with lawmaking power" (Finger Lakes Racing Assn. v. New York State Racing & Wagering Bd., supra, 410 NYS2d 268, 273).

We think that the language of Chapter 282 is plain on its face. The Legislature has made the Division of Tax Appeals solely responsible for providing a system for resolving controversies between the public and the Department of Taxation and Finance, ensuring that the elements of



due process are present by providing hearings either as prescribed by the Tax Law or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of the Tax Law. Nothing contained in Chapter 282 of the Laws of 1986 or in Article 34 of the Tax Law provides an exception to the exclusive authority and responsibility of the Division of Tax Appeals for hearings authorized pursuant to Tax Law § 1607 nor is there any indication that the Legislature intended that the Division of Tax Appeals and the Division of the Lottery would have concurrent jurisdiction to hold such hearings. In fact, such an interpretation would be contrary to the Governor's goal of making government more efficient and more responsive (Governor George E. Pataki, State of the State Address, Roaring Into the 21st Century, January 1997).

The respondent argues that a proceeding in the Division of Tax Appeals may only be commenced by a petition filed to review a written notice issued by the Division of Taxation. In this regard, Tax Law § 2008 provides that:

"[a]ll 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" (emphasis added).

This section does not restrict our jurisdiction to protests of notices issued by the Division of Taxation, but clearly provides for proceedings protesting any other notice, besides those issued by the Division of Taxation, which provides the right to a hearing before us under the Tax Law or any other law. Similarly, the respondent argues that neither the Commissioner of Taxation and Finance nor any other officer of the Department of Taxation and Finance has any direct authority over or responsibility for the operations of the Division of the Lottery. While this is correct insofar as Tax Law § 1603(2) provides that the Director of the Lottery is the chief

executive officer of and in sole charge of the administration of the Division of the Lottery, it cannot be gainsaid that the Director of the Division of the Lottery is appointed by, holds office at the pleasure of and receives a salary in an amount fixed by the Commissioner of Taxation and Finance (Tax Law § 1603[2]).

Section 2006 provides that the powers, functions and duties of the Tax Appeals Tribunal include:

"4. To provide a hearing as a matter of right, to any petitioner upon such petitioners 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 . . . .

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"15. To have all other powers and perform such other duties as are necessary and proper to operate and administer the division of tax appeals consistent with the purposes of such division described in this article."

The respondent argues that § 2006(4) "explicitly prohibits the Division of Tax Appeals from holding . . . a hearing if 'a right to such a hearing is specifically provided for . . . by another provision of [the Tax Law]'" (Brief in opposition, p. 4, emphasis omitted). We disagree.

The Administrative Law Judge considered the provisions of § 2006(4) in relation to the decision of the Appellate Division in Matter of Meyers v. Tax Appeals Tribunal (201 AD2d 185, 615 NYS2d 90, lv denied 84 NY2d 810, 621 NYS2d 519). He stated:

"[a]side from any analysis of the Legislature's intentions, it is clear that the provisions of the Tax Law preclude review of Division of the Lottery's licensing actions by the Division of Tax Appeals . . . . While this provision has not been the subject of extensive litigation defining the scope of the Tax Appeals Tribunal's jurisdiction, there is nevertheless some guidance to be found in the matter of Meyers v. Tax Appeals Tribunal (*supra*). In this matter, the Court annulled the determination of the Tax Appeals Tribunal that the taxpayer was not entitled to a prepayment hearing to protest additions to tax imposed under section 685(c) of the Tax Law. The Court found the provisions of section 2006(4) of the Tax Law to be controlling in determining that the Tribunal had jurisdiction in that case. Central to the Court's analysis was the fact that no other provision of the Tax Law

provided for, modified or denied the taxpayer the right to a hearing with respect to additions to tax imposed under section 685(c) of the Tax Law.

"In applying the Court's analysis to the facts of the instant matter, it is clear that there is another provision of the Tax Law which provides petitioner with the right to a hearing. Section 1607 of the Tax Law provides that the Division of the Lottery 'may suspend or revoke, after notice and an opportunity for a hearing pursuant to the state administrative procedure act, any license issued pursuant to this article.' In fact, petitioner has already taken advantage of his right to a hearing under section 1607 of the Tax Law. What petitioner is seeking is a second opportunity for a hearing, presumably because he is unhappy with the outcome of the first hearing. Since petitioner has already had a hearing pursuant to the provisions of section 1607 of the Tax Law, he is not also entitled to a hearing under section 2006 of the Tax Law" (Order, pp. 7-8).

We disagree with the Administrative Law Judge's conclusion and we find no support in either the Tax Law or in the Meyers decision for the respondent's argument. In Meyers, the Court found that because no provision of the Tax Law provided for, modified or denied the right of the taxpayer to a hearing in the circumstances of that case, the taxpayer was entitled to a hearing as a matter of right. However, the fact that a particular section of the Tax Law provides that a right to a hearing exists does not thereby prohibit the Division of Tax Appeals from providing that hearing. Rather, Tax Law § 2006(4) must be read in conjunction with Tax Law § 2000 which provides:

"[t]he division shall be responsible for processing and reviewing petitions, providing hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter" (emphasis added).

If the respondent were correct, the Division of Tax Appeals would be precluded from holding a hearing concerning every section of the Tax Law which provides that a right to a hearing exists for review of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, or a

denial of an application for a license, permit or registration. This is simply not a correct interpretation of the scope of the jurisdiction of the Division of Tax Appeals.

Having concluded that the Division of Tax Appeals has exclusive, original jurisdiction to hear a petition timely filed with it to review a determination of the Director of the Lottery to revoke a lottery agent's license, we must decide whether we have jurisdiction to hear the petition of petitioner in the instant matter. In order for us to have jurisdiction to hear a petition, it must be timely filed (Matter of Batavia Coal & Oil, Tax Appeals Tribunal, February 2, 1995). Tax Law § 2006(4) provides, in applicable part, that a petition for a hearing to review taxes determined or claimed to be due under the Tax Law must be filed with the Division of Tax Appeals within 90 days after the tax liability is assessed. However, this proceeding does not involve the review of a determination of tax liability. Other statutory sections provide different time limits for filing a petition for review such as for an increase in the amount of a security bond (Tax Law §§ 283[6][b][ii], 302[c] - 7 days). The Tribunal's Rules of Practice and Procedure (20 NYCRR 3000, et seq.) provide, in section 3000.3(c), that a petition "must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extension of those time limitations." There is no time limit specified in the Tax Law for requesting a hearing pursuant to section 1607. However, the rules of the Division of the Lottery provide that "[a] lottery sales agent is entitled to notice and an opportunity to be heard before suspension or revocation of the license provided that the lottery sales agent requests such a hearing within 20 days from the date of notice of the suspension or revocation" (21 NYCRR 2800.7[a]).

It appears from the record herein that petitioner was notified that his license was being suspended on September 26, 1995. Petitioner did not file a petition with the Division of Tax Appeals until February 21, 1996. It was the notice of suspension or revocation which gave rise to petitioner's right to a hearing in this case. Whether measured by the 20-day period of the regulation or the 90-day period applicable to the review of most determinations under the Tax Law, that request was not timely filed with the Division of Tax Appeals. Therefore, we have no

jurisdiction to consider the merits of the petition in this matter (Matter of Batavia Coal & Oil, supra)

For the reasons set forth hereinabove, we affirm the order of the Administrative Law Judge insofar as it dismisses the petition of Arthur Schulkin d/b/a Schulkin's Newsstand.

DATED: Troy, New York  
April 10, 1997

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner