

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CHRISTINE HELD	:	DECISION
	:	DTA NO. 821036
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2002.	:	

Petitioner Christine Held, 5 Soundview Drive, Eastchester, NY 10709, filed an exception to the order of the Administrative Law Judge issued on July 27, 2006. Petitioner appeared by Ramon D. Held, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation did not file a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner is entitled to an administrative hearing with respect to a certain Notice of Additional Tax Due issued by the Division of Taxation against her on December 5, 2005.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation (“Division”) issued to petitioner, Christine Held, a Notice of Additional Tax Due (Assessment ID# L-026420506-6), seeking payment of personal income tax due for the tax year 2002.

The notice, dated December 5, 2005, provides, in part, as follows:

New York State has received information from the Internal Revenue Service (IRS) showing they adjusted your 2002 federal income tax return.

NYS Tax Law requires you to report any changes made to your federal income tax return within ninety (90) days from the final IRS determination. We have no record that you reported the federal changes to NYS. Therefore, we have recomputed your New York tax(es) to include the federal changes.

Interest and/or dividend income on your New York return has been corrected to include the federal adjustment.

The itemized deduction for Other Miscellaneous Deductions has been corrected based on the change to federal adjusted gross income.

On March 14, 2006, petitioner filed a petition with the Division of Tax Appeals protesting the Notice of Additional Tax Due.

On April 11, 2006, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition. The notice of intent provided, in relevant part, as follows:

Pursuant to § 173-a of the Tax Law, any notice of additional tax due or any notice and demand issued to a taxpayer without the issuance of a notice of determination or a notice of deficiency because of a mathematical or clerical error on a return or for failure to timely pay the tax due shown on a return shall not give that taxpayer a right to a hearing in the Division of Tax Appeals. The only option for such a taxpayer, is to pay the tax, apply for a refund and then petition for a hearing if the refund claim is denied.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner was issued a Notice of Additional Tax Due for failure to report Federal audit changes to New York State for the year

2002. As the notice was issued on December 5, 2005, the Administrative Law Judge noted that Tax Law § 173-a specifically states that a taxpayer is not entitled to a hearing before the Division of Tax Appeals with respect to a notice of additional tax due issued on or before December 1, 2004 and, thus, the petition was dismissed for lack of jurisdiction.

However, in a footnote, the Administrative Law Judge pointed out that if petitioner paid the amount of the notice issued to her, petitioner could then proceed by filing a claim for refund in the amount set forth in the notice of additional tax due. If such claim were to be denied by the Division of Taxation, the Administrative Law Judge noted that petitioner could, at that point, file a timely petition for a hearing to contest the refund denial.

ARGUMENTS ON EXCEPTION

Petitioner states in her exception that the disputed tax has been paid. Therefore, petitioner asserts that the order of the Administrative Law Judge should be vacated and the matter remanded for a hearing on the merits.

OPINION

As noted by the Administrative Law Judge, pursuant to Tax Law § 173-a, any notice of additional tax due or any notice and demand issued to a taxpayer without the issuance of a notice of determination or a notice of deficiency because of a mathematical or clerical error on a return or for failure to timely pay the tax due shown on a return shall not give that taxpayer a right to a hearing in the Division of Tax Appeals (*see*, L 2004, ch 60, eff August 20, 2004). The only option for such a taxpayer is to pay the tax in dispute, apply for a refund and then petition for a hearing before the Division of Tax Appeals if the refund claim is denied.

In this case, petitioner alleges that the refund amount has been paid. However, she does not allege to have filed a claim for refund with the Division of Taxation. Once her refund claim is denied, then petitioner can file a timely petition with the Division of Tax Appeals to contest the refund denial. At this point in the proceeding, her exception before the Tax Appeals Tribunal is premature and we do not have jurisdiction to entertain it.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Christine Held is denied;
2. The order of the Administrative Law Judge is sustained; and
3. The petition of Christine Held is dismissed.

DATED: Troy, New York
February 22, 2007

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner