

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>RAYMOND HOGAN</b>	:	DECISION
	:	DTA NO. 822304
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1988 through 1991.	:	

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Petitioner Raymond Hogan filed an exception to the determination of the Administrative Law Judge issued on March 5, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin Law, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

***ISSUE***

Whether the Administrative Law Judge appropriately dismissed the petition in this matter on the ground that the Division of Tax Appeals has no jurisdiction to consider petitioner's claim that the Department of Taxation and Finance improperly levied upon his assets.

***FINDINGS OF FACT***

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

In May 2006, the Division of Taxation (Division) received a Claim for Credit or Refund of Personal Income Tax from petitioner, Raymond S. Hogan. The claim alleged that the Division had improperly seized social security and disability benefits and sought a refund in the amount of \$360,168.21.

On January 5, 2007, the Division issued a Notice of Disallowance, which stated that petitioner's claim for refund was denied because it received no documentation showing that its assessment (No. L 016101062) of tax, penalties and interest for the years 1988 through 1991 was incorrect. The Division also explained that it received no documentation showing that the funds received to pay this assessment were collected in error.

Petitioner filed a Request for a Conciliation Conference, which was subsequently denied in a conciliation order, CMS No. 218555, dated March 14, 2008.

On May 30, 2008, the Division of Tax Appeals received the petition in this matter, which stated that the funds levied upon were exempt because they were social security benefits or disability benefits received from the Department of Veterans Affairs (formerly the Veterans Administration) for service-connected injuries during World War II. According to petitioner, the funds in question were taken in error and should be returned to him with interest. In response, the Division filed an answer, which stated, among other things, that the petition failed to state a claim upon which relief can be granted.

The Division then moved to dismiss the petition pursuant to Tax Law § 2006(5)(ii) and 20 NYCRR 3000.9(a)(ii) on the ground that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition.

In response to the Division's motion, petitioner again argued that the funds that were levied upon in his bank account were unlawfully taken. Petitioner also asserted that when the funds

were taken, it was too late to file a challenge on the merits of the Division's determination that amounts were due. According to petitioner, he had engaged the services of an attorney who did no work on his behalf.

Petitioner contended that after his funds were levied upon, he filed a claim for refund on Form IT-113X. According to petitioner, he is permitted to file a petition when a claim for refund is denied. Petitioner then referred to the purpose of the Division of Tax Appeals, as set forth in the Tax Law, to provide the public with a just system of resolving controversies and that the law calls upon the Division of Tax Appeals to provide a hearing as a matter of right. On the basis of the forgoing, petitioner submitted that the Division of Tax Appeals had jurisdiction over the matter in controversy.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 2006(5)(ii), the Tax Appeals Tribunal may prescribe by rule that any party may make a motion to dismiss the petition on the ground that the Tribunal lacks jurisdiction of the subject matter of the petition. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide for such motion at 20 NYCRR 3000.9(a)(ii).

The Administrative Law Judge also noted applicable case law that provided that the Division of Tax Appeals is a forum of limited jurisdiction and its power to adjudicate disputes is exclusively statutory. The Administrative Law Judge found that the Division of Tax Appeals has no authority to review activities conducted by the Division to collect unpaid taxes after the assessments have become fixed and final, relying on prior decisions of this Tribunal in *Matter of Driscoll* (Tax Appeals Tribunal, April 11, 1991) and *Matter of Pavlak* (Tax Appeals Tribunal, February 12, 1998). Since jurisdiction is lacking, the Administrative Law Judge concluded that

the Division of Tax Appeals was without authority to consider the claim for refund and dismissed the petition.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that funds were unlawfully taken from his bank account to satisfy an unpaid assessment. Petitioner does not dispute that the assessment went unchallenged when it was issued. Petitioner states that the funds in the levied bank account were from a service-related disability and Social Security benefits.

Petitioner contends that the Division of Tax Appeals has jurisdiction to hear his claim because he had a right to file a refund claim to protect his rights. Further, petitioner argues that Tax Law § 2000 provides that the Division of Tax Appeals has jurisdiction to provide a hearing to consider the denial of a refund application. Further, petitioner argues that pursuant to Tax Law § 171 Fifth, the Division of Tax Appeals has jurisdiction concerning the “review, readjustment and collection of taxes upon and with respect to personal income.” Petitioner posits that pursuant to Tax Law § 3022, the Division of Tax Appeals has jurisdiction to release a levy and return property that was wrongfully or mistakenly taken.

Petitioner maintains that he has followed the required procedures subsequent to the Division’s refusal to refund his levied funds. Petitioner disputes the applicability of the legal precedents relied on by the Administrative Law Judge and contends that the Division of Tax Appeals has jurisdiction as a matter of public policy, as he was advised by employees of the Division’s Bureau of Conciliation and Mediation Services that he had the right to proceed in the Division of Tax Appeals.

In opposition, the Division asserts that the Administrative Law Judge correctly dismissed the petition in this matter for lack of subject matter jurisdiction; i.e., the Division of Tax Appeals

has no jurisdiction over collection actions taken by the Division. The Division points out that although the Division of Tax Appeals would have jurisdiction to consider petitioner's denial of refund if the matter at issue was a disputed liability for the underlying tax, petitioner has not disputed that he owed the tax. Rather, he claimed that the funds that were levied upon by the Division were exempt from collection proceedings.

In reply, petitioner argues that he filed a petition with the Division of Tax Appeals on the specific advice of employees of the Division's Bureau of Conciliation and Mediation Services, and he now claims that he does not owe the underlying tax that formed the basis of the Division's levy, thus, entitling him to a refund.

#### ***OPINION***

Petitioner filed a claim for refund of personal income tax, which was denied by the Division. Petitioner is correct that the Division of Tax Appeals has jurisdiction to review a denial of a timely-filed refund claim by the Division, but only insofar as it relates to a dispute of the liability for tax that has been paid or collected. Petitioner made no claim to the Division or to the Division of Tax Appeals that he was not liable for the tax that had been collected in this matter.

Petitioner asserts for the first time in his reply brief that he disputes his liability for the tax assessment underlying the levy that he has challenged. Although the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.4[d]) allow the amendment of a pleading in certain circumstances, that section provides that:

No amendment shall be allowed under this subdivision after the expiration of the time for filing the petition, if such amendment would have the effect of conferring jurisdiction on the division of tax appeals over a matter which otherwise would not come within its jurisdiction under the petition as then on file.

Clearly, petitioner is beyond the time frame that would allow the amendment of his petition to assert a new claim before the Division of Tax Appeals in this matter. As a result, the assessment underlying the levy at issue remains fixed and final and is not a matter for consideration in this proceeding.

Petitioner is mistaken as to the extent of jurisdiction afforded the Division of Tax Appeals by the Tax Law. Specifically, he has misconstrued §§ 171 Fifth and 3022(b) of the Tax Law as giving authority to the Division of Tax Appeals to affect the collection and levy of taxes. Instead, those sections provide such authority solely to the Commissioner of the Department of Taxation and Finance.

As stated by the Administrative Law Judge, “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 Tribunal*, 151 Misc 2d 326 [1991]). Its power to adjudicate disputes is exclusively statutory (*id*). Therefore, absent legislative action to provide such jurisdiction as the petitioner believes that we possess, we cannot extend our authority to areas not specifically delegated to us. As we stated in *Matter of Brodmerkel* (Tax Appeals Tribunal, August 9, 2001): “[t]he Division of Tax Appeals had no jurisdiction to review the collection activities undertaken by the Division with regard to fixed and final assessments (*citing Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *Matter of Driscoll*, Tax Appeals Tribunal, April 11, 1991).” As the assessment underlying the levy at issue in this matter is fixed and final, we are without the authority to entertain petitioner’s claim.

As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Raymond Hogan is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Raymond Hogan is dismissed with prejudice.

DATED: Troy, New York  
November 25, 2009

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

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