

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BRIAN HOOPER** : DECISION  
 : DTA NO. 822880  
for Redetermination of Deficiency or for Refund of :  
New York State and City Personal Income Tax under :  
Article 22 of the Tax Law and the Administrative Code :  
of the City of New York for the Years 1993 and 1994. :

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Petitioner, Brian Hooper, filed an exception to the determination of the Administrative Law Judge issued on October 8, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation did not file a brief in opposition. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

***ISSUE***

Whether the Administrative Law Judge properly granted summary determination in favor of the Division of Taxation.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact "3," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

According to the records of the Division of Taxation (Division), Brian Hooper timely filed 1993 and 1994 New York State personal income tax returns.

Two notices of additional tax due (Assessment ID# L-015436373-2 and L-015436471-5), both dated August 3, 1998, were issued by the Division to petitioner. One notice asserted additional tax due in the amount of \$1,115.00, plus penalty and interest, for a total amount due of \$1,812.00 for the year 1993. The second notice asserted additional tax due in the amount of \$6,226.00, plus penalty and interest, for a total amount due of \$8,076.67 for the year 1994. The notices of additional tax due explained, in relevant part, as follows:

Under authorization of section 6103(d) of the Internal Revenue Code, we received notification of federal audit changes. The following deficiency is based on failure to report those changes.

Section 659 of the New York State Tax Law requires taxpayers to report federal changes to New York State within 90 days after final federal determination. This provision of the Tax Law is outlined in the instructions for preparation of New York State income tax forms.

Section 683(c) of the New York State Tax Law provides for assessment at any time when a taxpayer fails to comply with section 659.

The federal adjustment changed your filing status from head of household to single. Therefore, your New York filing status has been changed accordingly.

The allowance for exemptions on your New York return has been corrected to include the federal adjustment.

You have been allowed the appropriate New York standard deduction.

Business expenses have been corrected to included the federal adjustment.

We have modified finding of fact “3” of the Administrative Law Judge’s determination to read as follows:

Petitioner filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1993 and

1994. Subsequent to the timely filing of its Answer on April 16, 2009, the Division brought a motion, dated June 11, 2009, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. In its motion, the Division asserted that Tax Law § 681(e) does not provide a right to a hearing for notices of additional tax due and, as a result, the petition should be dismissed for failure to state a cause of action for which relief could be granted. Petitioner filed a response to the Division's motion on July 13, 2009.<sup>1</sup>

Petitioner maintains that he did not receive notice of the tax assessments at issue herein until 2006, having been incarcerated from a date not clearly established by the record to September 14, 2007, his date of release. His statement in support, responding to the Division's motion for summary judgment, asserts that the tax assessments were based on erroneous adjustments, and that petitioner was prejudiced by the Division when he was denied a chance to contest the accuracy of the IRS audit and, subsequently, the Division's tax adjustment. In none of the documentation submitted by petitioner is it alleged that he reported the federal changes to the Division in a timely manner.

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

In her determination, the Administrative Law Judge noted that a motion for summary determination may be granted if the Administrative Law Judge finds that no material and triable issue of fact is presented and that the Administrative Law Judge can, as a matter of law, issue a determination in favor of any party. The Administrative Law Judge observed that pursuant to Tax Law § 659, if the amount of a taxpayer's federal taxable income is changed or corrected by the Internal Revenue Service, the taxpayer must report such change or correction to the Division

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<sup>1</sup> We have modified this fact to more accurately reflect the record.

within 90 days after the final determination of such change or correction and must concede the accuracy of such determination or state where it is erroneous.

The Administrative Law Judge found no evidence in the record that petitioner ever complied with the provisions of Tax Law § 659.

The Administrative Law Judge pointed out that pursuant to Tax Law § 681(e)(1), a deficiency can be assessed based upon a federal change if the taxpayer fails to comply with the provisions of Tax Law § 659. The Administrative Law Judge found that notices of additional tax due, dated August 3, 1998, were issued by the Division pursuant to Tax Law § 681(e)(1) in response to unreported federal audit changes for the tax years 1993 and 1994. The Administrative Law Judge concluded that pursuant to Tax Law § 681(e)(2), such notices were an assessment as of the date of mailing and were not notices of deficiency for purposes of filing a petition with the Division of Tax Appeals.

The Administrative Law Judge noted that Tax Law § 689 restricts the right to petition the Division of Tax Appeals to a review of taxes asserted by notices of deficiency. The Administrative Law Judge concluded that taxpayers do not have the right to a hearing to review taxes assessed by notices of additional tax due issued in response to unreported federal changes. Accordingly, the Administrative Law Judge granted the Division's motion for summary determination and dismissed the petition for lack of jurisdiction.

The Administrative Law Judge pointed out that petitioner was not entirely without recourse, for he could pay the disputed tax and, within two years from the date of payment, apply for a refund. If his request for a refund was denied, petitioner could then proceed with another petition requesting a hearing or a conciliation conference.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the Administrative Law Judge's denial of his right to a hearing before the Division of Tax Appeals was fundamentally unfair. Petitioner maintains that he was never informed of the changes to his federal income taxes made by the IRS due to his incarceration since November 1995 and that the Division was aware of his incarceration prior to its issuance of the Notices of Additional Tax Due.

Petitioner also contends that the Division's motion for summary determination should be disallowed as it was untimely.

***OPINION***

We first note that contrary to petitioner's argument, the Division's motion for summary determination was timely filed. Pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal, a motion for summary determination can only be filed after issue has been joined (*see*, 20 NYCRR 3000.9[b]). In this case, the petition was filed on February 11, 2009 and was acknowledged to be in proper form by the Division of Tax Appeals by letter dated February 19, 2009. The Division was given until May 5, 2009 to file its answer. The Division timely filed its answer on April 16, 2009. Petitioner had 20 days thereafter to file a reply (*see*, 20 NYCRR 3000.4[c]). As petitioner did not file a reply to the Division's answer, at the expiration of 20 days from the date the answer was filed, issue was considered to be joined. Therefore, the Division's motion for summary determination, filed June 11, 2009, was timely.

As the Administrative Law Judge pointed out, pursuant to Tax Law §§ 681(e)(2) and 689, a Notice of Additional Tax Due issued pursuant to Tax Law § 659 is not an appealable notice that can be contested by filing a petition with the Division of Tax Appeals. The Division of Tax Appeals is a forum of limited jurisdiction (*see*, 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, we cannot extend our authority to areas not specifically delegated to us.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below and no argument on exception that demonstrates that the Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Brian Hooper is denied;
2. The determination of the Administrative Law Judge is sustained; and
3. The petition of Brian Hooper is dismissed with prejudice.

DATED:Troy, New York  
July 1, 2010

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

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner