

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARK A. ROTHBERG	:	DECISION
	:	DTA NO. 823318
for Redetermination of Deficiencies or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Years 1999 through 2009.	:	

Petitioner, Mark A. Rothberg, filed an exception to the determination of the Administrative Law Judge issued on March 29, 2012. Petitioner appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

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

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

ISSUE

I. Whether the Division of Tax Appeals has jurisdiction to address the merits of the petition filed in this matter.

FINDINGS OF FACT

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

Petitioner, Mark A. Rothberg, is a New York resident who is employed in New Jersey. According to Division of Taxation (Division) records, petitioner filed a New York State and City of New York Resident Income Tax Return for each of the years spanning the period 1994 through 2010. The Division reports no record of a return having been filed for 1993.¹

The following chart sets forth, for each of the years 1993 through 2010, the amount of tax reported due on petitioner's return for each such year, the amount of tax assessed by the Division for each such year, and the reason for the Division's issuance of the assessments, each of which was made by way of a Notice and Demand for Payment of Tax Due:²

TAX YEAR	TAX REPORTED PER RETURN	AMOUNT OF TAX ASSESSED	REASON FOR ASSESSMENT
1993	\$0.00	\$227.00	CP2000/no return filed
1994	\$1,468.00	\$1,468.00	timely filed/no remit
1995	\$2,055.00	\$2,055.00	timely filed/no remit
1996	\$2,488.00	\$2,488.00	timely filed/no remit
1997	\$3,056.00	\$3,056.00	timely filed/no remit
1997	\$0.00	\$293.00	CP2000/automated ³
1998	\$4,144.00	\$4,132.00	timely filed/part paid

¹ The record includes copies of petitioner's returns, or printouts of electronic transcripts thereof, for the years 1999 through 2008. At hearing, the Division's witness provided information from the Division's records, in table form, concerning petitioner's returns as filed for the foregoing years, as well as for 1994 through 1998, and for 2009 and 2010.

² Although this matter has been captioned as spanning the years 1999 through 2009, information for the other noted years is relevant to resolution of the issue presented. The dollar amounts set forth reflect tax only and do not include penalties or interest on the amounts assessed.

³ The Division's witness explained that the legend "CP2000" indicates an Internal Revenue Service (IRS) change was made to petitioner's federal income tax return, with that federal change (in turn) impacting petitioner's New York State return (e.g., presumably serving as the basis for the amount assessed in 1993 where no New York return was filed, and for the additional [second] assessment in 1997 following the Division's initial assessment of the amount set forth but not remitted with petitioner's return for that year).

1999	\$5,535.00	\$5,536.09	NYC/Yonkers resident tax discrepancy
2000	\$3,419.00	\$3,419.00	timely filed/part paid
2001	\$4,283.00	\$4,220.00	late filed/part paid
2002	\$5,364.00	\$5,301.00	timely filed/part paid
2003	\$6,084.00	\$6,021.00	late filed/part paid
2004	\$10,828.00	\$10,765.00	timely filed/part paid
2005	\$20,008.00	\$11,289.00	math error
2006	\$11,987.00	\$11,872.00	timely filed/part paid
2007	\$8,133.00	\$7,988.00	timely filed/part paid
2008	\$8,354.00	\$8,209.00	timely filed/part paid
2009	\$8,880.00	\$8,817.00	timely filed/part paid
2010	\$9,212.00	\$9,149.00	timely filed/part paid

On various dates between the years 2001 and 2009, the Division received certain portions of the federal income tax refunds owed to petitioner by the IRS as offsets against the various (foregoing) New York assessments outstanding against petitioner. The following chart sets forth these refund offset payments and certain other payments (including one New York State refund offset payment and three “manual” payments) made with respect to such outstanding assessments:⁴

⁴ The IRS refund offset payment amounts, denominated “N” payments in the Division’s records, do not include any other payments, such as estimated tax payments, W-2 withholdings or payments made with the filing of petitioner’s New York tax returns. Such other payments would be accounted for via the difference between the “tax reported per return” versus the “amount of tax assessed,” per the chart set forth in the finding of fact above, or as other “manual” payments, denominated “M” payments, such as direct payments made by a taxpayer or payments by levy or income execution.

Date Payment Received	Payment Amount	Tax Year To Which Payment Applied	Assessment To Which Payment Applied	Notes
08/03/01	\$300.00	1994	L-011036823	IRS refund offset
11/22/02	\$2,678.57	1994	L-011036823	IRS refund offset
11/22/02	\$3,925.29	1995	L-012036424	IRS refund offset
11/22/02	\$348.14	1996	L-013460952	IRS refund offset
06/13/03	\$145.42	1994	L-011036823	IRS refund offset
06/13/02	\$213.12	1995	L-012036424	IRS refund offset
06/13/03	\$511.62	1993	L-014180061	IRS refund offset
06/13/03	\$4,616.84	1997	L-014923792	IRS refund offset
07/15/05	\$950.70	1997	L-014923792	IRS refund offset
07/15/05	\$3,151.30	1998	L-016942663	IRS refund offset
07/25/08	\$5,917.50	1998	L-016942663	IRS refund offset
10/22/08	\$65.76	1997	L-018647571	IRS refund offset
07/25/08	\$3,771.50	1999	L-018832795	NYS refund offset
06/22/09	\$690.92	1997	L-018647571	M payment unspec.
06/22/09	\$19.66	1998	L-016942663	M payment unspec.
06/22/09	\$2,094.63	1999	L-018832795	M payment unspec.
08/28/09	\$9,402.85	1999	L-018832795	IRS refund offset
08/28/09	\$387.15	2000	L-019607720	IRS refund offset

The Division's witness also noted receipt of an IRS refund offset payment dated May 6, 2011 in the amount of \$6,921.00, and of another "M" (manual) payment dated March 9, 2011 in the amount of \$485.97.

The Division's witness explained that when payments are received, they are applied against the oldest outstanding assessment and, in order of application, first to tax, then to

penalties (if any), and then to interest, to the extent of the dollar amount of the payment. Any excess payment is, in turn, applied against the next oldest outstanding assessment, under the same order of payment application protocol.

This proceeding was commenced, ultimately, in response to petitioner's receipt of a June 1, 2009 Division notice of levy against his bank account and notice of garnishment sent to his employer. The amount shown as due and subject to payment via levy and garnishment, as of June 1, 2009, totaled \$103,778.53, and consisted of the original warranted amounts \$28,018.32 (Warrant ID E-010004455-W003-1 docketed 08/14/03) plus \$67,904.80 (Warrant ID E-010004455-W004-5 docketed 06/18/08), plus interest accrued on each of such original warranted amounts.

Petitioner, in turn, contacted the Division and alleged that in 2003, he had paid all outstanding New York taxes for all years prior to 2004, and had received a Notice of Warrant Satisfaction dated September 2, 2003 in connection with that payment. More specifically, petitioner maintained, and maintains herein, that in connection with refinancing his apartment in 2003, he paid \$4,159.76 on August 18, 2003 in satisfaction of Warrant ID E-010004455-W002 (docketed 12/13/96). Petitioner claims that this payment was a condition of closing on the refinancing, and was the only outstanding tax item of which he was made aware as the result of the title search performed by the real estate title company he utilized in connection with the closing. Petitioner maintains that he confirmed this understanding of his tax situation at the time (2003) via telephone conversation with Division personnel. No documentation to support petitioner's claim of full payment of all outstanding pre-2004 tax liabilities, other than the Warrant Satisfaction noted herein, was provided at hearing.

Petitioner further initially maintained that he has paid all New York taxes from 2004 forward by way of offsets against his annual federal income tax refunds as paid over to New York by the IRS. Petitioner notes that, since he is employed in New Jersey, his employment income is subject to tax by New Jersey, and since he is a resident of New York, his income from all sources is subject to tax by New York. Petitioner maintains, in turn, that his New Jersey liability is paid via withholding from his wages, that he receives from New York a resident credit for such New Jersey liability paid, and that any differential or remaining New York liability “should have been” (and allegedly was) paid each year via the application of his federal refund as an offset against any such New York liability. In this regard, petitioner obtained information from the IRS showing the amounts of refund offsets paid over to New York for the years 2004 through 2008.⁵

Petitioner commenced a special proceeding in Supreme Court, New York County, seeking, ultimately, vacatur of the levies filed, vacatur of the two warrants underlying the levies, and a temporary restraining order pending determination of the tax issue by the Court. The proceeding was transferred and refiled in Supreme Court, Albany County. By a Decision and Order dated August 6, 2009, Justice Joseph Teresi dismissed the petition upon petitioner’s failure to establish that he had exhausted his administrative remedies.

On or about August 24, 2009, petitioner filed a request for a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (BCMS). By a letter dated September 4, 2009, petitioner’s request for a conciliation conference was rejected upon the

⁵ In response to petitioner’s contacts with the Division following his receipt of the notice of levy (*see* the findings of fact above), the Division did not initially acknowledge receipt of any payments from petitioner. As this proceeding progressed, the Division provided petitioner with the information as to payments received (including the IRS refund offset payments) and the applications thereof against his outstanding liabilities as set forth in the charts provided herein.

premise that the assessments in question resulted from the issuance of notices and demands and that such documents did not confer the right to a conciliation conference or a hearing with respect to the assessments set forth thereon. Petitioner then filed a petition with the Division of Tax Appeals seeking a hearing on the assessments and a conclusion that all New York taxes due and owing had been paid for each of the years in question.

At hearing, the Division's witness provided a comparison of the amounts of tax assessed versus the amounts of payment credits for the years since 2003, as set forth below:⁶

Year	Tax Assessed	(Payment Credit)
2004	\$10,765.00	\$0.00
2005	\$11,289.00	(\$4,102.00)
2006	\$11,872.00	\$0.00
2007	\$7,988.00	\$0.00
2008	\$8,209.00	(\$9,754.76)
2009	\$8,817.00	(\$12,595.21)
2010	\$9,149.00	(\$6,921.00)
2011	-----	(\$485.97)
Total	\$68,089.00	(\$33,858.94)

The net difference between the foregoing amounts of tax assessed and tax payment credits totals \$34,230.06.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that neither Article 22 nor Article 40 of the Tax Law provides taxpayers with the right to a hearing to contest a Notice and Demand. The Administrative Law Judge pointed out that for the years in issue, the amounts assessed and the

⁶ As with the other tables presented in this determination, the dollar amounts set forth are exclusive of penalties and interest.

Division's issuance of Notices and Demands for such amounts, resulted from petitioner's filing of tax returns showing tax due, but without remittance of all of such tax, or from math errors. As such, the Division is not required to issue a Notice of Deficiency pursuant to Tax Law § 681 (g), but may instead, issue a Notice and Demand and warrants. As such, the Administrative Law Judge determined that petitioner was not entitled to a hearing, as he had not provided any document that confers jurisdiction or the right to a hearing in the Division of Tax Appeals.

Finally, the Administrative Law Judge rejected petitioner's argument that the Division waived challenging and consented to jurisdiction and should be estopped from contesting jurisdiction. The Administrative Law Judge determined that subject matter jurisdiction cannot be cured by waiver, consent, estoppel, laches or other voluntary action. As such, the Administrative Law Judge dismissed the petition for lack of jurisdiction.

ARGUMENTS ON EXCEPTION

On exception, petitioner raises the same arguments as he did below. Specifically, petitioner continues to argue that: 1) he should be granted a hearing to determine whether he received proper credit for his payments by IRS refund offsets, and if all outstanding tax liabilities should have been extinguished; and 2) the Division waived challenging and consented to jurisdiction and should be estopped from contesting the same. Therefore, petitioner requests that the Tribunal set the amount due and owing as of September 2, 2003, as current, and credit all funds received by the Division after September 2, 2003 to petitioner's account for years 2003 to present, without penalty or interest.

The Division argues that the Administrative Law Judge was correct in finding that the

petition be dismissed, or in the alternative, the outstanding Notice and Demand should not be cancelled.

OPINION

We affirm the determination of the Administrative Law Judge.

Tax Law § 173-a (2) provides, that:

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.

The Tax Appeals Tribunal has the power to provide a hearing as a matter of right to any petitioner pursuant to such rules and regulations as may be provided by the Tribunal, unless a right to a hearing is specifically provided for, modified or denied by another provision of law (*see* Tax Law § 2006 [4]).

Pursuant to § 173-a of the Tax Law, in cases of a mathematical or clerical error on a return or failure to timely pay the tax due shown on a return, any notice of additional tax due or notice and demand issued to a taxpayer without the issuance of a notice of deficiency shall not give that taxpayer a right to a hearing in the Division of Tax Appeals. As the Administrative Law Judge noted, the amounts assessed and the Division's issuance of the Notices and Demands resulted from petitioner's filing of tax returns showing tax due, but without remittance of all of such tax, or from mathematical errors. Accordingly, the Division is not required to issue a Notice of

Deficiency, but may instead proceed directly to the issuance of Notices and Demands (see Tax Law § § 681 [a] and 689 [b]).

In this case, petitioner sought to obtain a hearing with regard to notices and demands, for which a right to a hearing is specifically denied by Tax Law § 173-a (2) and (c). Consequently, the Division of Tax Appeals is without jurisdiction to hear and determine this matter (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010).

We also find petitioner's argument that the Division waived jurisdiction, to be unfounded. Contrary to petitioner's assertions, jurisdictional issues cannot be waived and may be raised at any time (*US v Wright*, 658 F Supp 1 [1986]; *see also Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [1991]).

We have considered the remaining arguments raised by petitioner and find them either without support in the record or rendered moot by the foregoing discussion.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mark A. Rothberg is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Mark A. Rothberg is dismissed, with prejudice.

DATED: Albany, New York
January 17, 2013

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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