

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRUCE T. REITER	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 816194
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1981.	:	

Petitioner, Bruce T. Reiter, P.O. Box 2108, Albany, New York 12220-0108, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1981.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated March 18, 1998 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that petitioner's pleading fails to state a cause for relief. Petitioner was granted extensions of time until July 29, 1988 to respond to the Division of Taxation's motion, but did not do so. Accordingly, the 90-day period for the issuance of this determination began on July 29, 1998. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Tax Appeals has subject matter jurisdiction to determine whether a warrant docketed against petitioner by the Division of Taxation must be removed.

II. If so, whether a warrant docketed against petitioner by the Division of Taxation must be removed.

FINDINGS OF FACT

1. On November 15, 1988, the Division of Taxation (“Division”) issued to petitioner, Bruce T. Reiter, and his wife a Notice of Additional Tax Due (Assessment No. F8811151320) for the years 1981 and 1982. This notice was issued as a result of unreported Federal changes to petitioner’s income for those years. The notice asserted \$5,848.02 in personal income tax due for 1981, plus penalty and interest. For 1982, the notice asserted \$4,307.42 in personal income tax due, plus penalty and interest.

2. On January 6, 1989, the Division issued to petitioner a Notice and Demand for Payment of Income Tax Due (Assessment No. F8811151321) for the year 1981. This notice asserted \$5,848.02 in income tax due for the year 1981, plus penalty and interest.

3. By letter dated May 23, 1989 addressed to petitioner from Louis N. Guertin, Tax Technician II, Audit Group 5, the Division recomputed petitioner’s income tax liability for the years 1981 and 1982. This letter indicates 1981 income tax due of \$5,157.57, plus penalty and interest, and 1982 income tax due of \$775.50, plus penalty and interest. The letter also states that “the amount due for 1978 is \$522.90.”

4. On June 5, 1992 the Division docketed a warrant (Warrant ID E-000332430-W002-4) against petitioner in respect of his outstanding income tax liability for 1981. The warrant indicates tax due of \$5,157.57, plus penalty and interest. The warrant lists assessment identification number of L-000459636-1 in respect of the 1981 liability. The affidavit of

Christina L. Seifert submitted in support of the Division's motion states that assessment L-000459636 was converted from notice number F8811151321, which was issued to petitioner for the year 1981.

5. On October 27, 1988, a warrant was docketed against petitioner for assessment F8211011561. This assessment was issued to petitioner and his spouse for the year 1978. This warrant was satisfied pursuant to a Satisfaction of Judgement dated July 3, 1991 and filed in the Office of the Albany County Clerk on July 11, 1991. The satisfaction lists warrant identification number E-000332430-W001-9.

6. On October 17, 1997 petitioner filed his petition in the instant matter. The petition indicates that the period at issue is 1981 and lists a notice/assessment number of E000332430. The petition claims that the assessment in question was made before October 27, 1988 and that a tax warrant was issued on this assessment on October 27, 1988. Attached to the petition is a letter dated September 29, 1997 addressed to petitioner from a Tax Compliance Representative of the Division's Tax Compliance Division. The letter states:

A Tax Warrant was issued [filed] on assessment L000332430 on 10/27/88. This extended the statute of limitations to collect on the amount due. The assessment is valid and the payments will remain applied as they are.¹

CONCLUSIONS OF LAW

A. In his petition, petitioner refers to his outstanding 1981 income tax liability and erroneously notes that this assessment was made before October 27, 1988 and that a warrant in

¹ This letter is clearly in error to the extent that the warrant filed on October 27, 1988 was satisfied in July 1991 (*see*, Finding of Fact "5").

respect of this assessment was issued on October 27, 1988. Petitioner asserts that the Tax Law states that an assessment and warrant may only be claimed and collected for six years. Petitioner contends that this six-year period has passed and that the assessment and warrant must be removed immediately. Petitioner does not contest his liability for the tax assessed against him. Petitioner's argument raises an issue of subject matter jurisdiction. Although neither party addressed this issue (either in pleadings or in motion papers), the Administrative Law Judge may raise the issue of subject matter jurisdiction on his own motion, *sua sponte* (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, **annulled on other grounds sub nom, New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal**, 151 Misc 2d 326, 573 NYS2d 140; *United States v. Wright*, 658 F Supp 1, 86-1 US Tax Cas ¶ 9457). Accordingly, this determination shall address the issue of subject matter jurisdiction.

B. “[T]he Division of Tax Appeals has no authority to review activities undertaken by the Division [of Taxation] to collect unpaid sales tax after assessments become fixed and final [*Matter of Driscoll*, Tax Appeals Tribunal, April 11, 1991, *citing Matter of Club Marakesh v. New York State Div. of Tax Appeals*, Sup Ct, Albany County, Nov. 7, 1990, Keniry, J.]” (*Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998.) The filing of the warrant in respect of petitioner's 1981 income tax liability was clearly a collection activity undertaken after the assessment against petitioner became fixed and final. The only distinction between the instant matter and the above-cited cases which have previously addressed this issue is that this is an income tax case while the previous cases involved sales tax. This difference does not justify a different result, however, for neither Article 40 of the Tax Law, Tax Law § 692 nor Tax Law § 1141 provides any statutory basis for such a result. The Division of Tax Appeals thus has no authority to review activities undertaken by the Division of Taxation to collect unpaid income tax

after such assessments become fixed and final. Accordingly, the Division of Tax Appeals has no authority to determine whether the warrant in question must be removed.

C. Issue II is moot.²

D. The petition of Bruce T. Reiter is dismissed.

DATED: Troy, New York
September 24, 1998

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE

² Even if the Division of Tax Appeals had authority to review the Division's collection activities in this case it appears that there is no basis to petitioner's claim that the warrant should be removed. Specifically, contrary to the dates set forth in the petition, the income tax assessment against petitioner for the year 1981 is dated January 6, 1989 (*see*, Finding of Fact "2") and the warrant issued in connection with that assessment was docketed on June 5, 1992 (*see*, Finding of Fact "4"). The warrant was therefore issued within the six-year period as required under Tax Law § 692(c). Moreover, pursuant to Tax Law § 174-a and Civil Practice Law and Rules (CPLR) § 5203(a), the duration of the Commissioner's lien on petitioner's real property arising from this warrant is ten years from the date the warrant was docketed. Since the warrant was docketed on June 5, 1992, and the assessment remains outstanding, the Commissioner's lien properly remains in effect. Moreover, even if the Division had failed to file a warrant within the six-year period such failure would not extinguish the underlying tax liability (*see, Matter of Castellana v. New York State Dept. of Taxation & Fin.*, 239 AD2d 749, 657 NYS2d 475).