

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**RAYMOND HOGAN** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 822304  
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 a petition 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.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel), brought a motion dated September 23, 2008 seeking dismissal of the petition pursuant to Tax Law § 2006(5). Petitioner's response to the motion was due by October 23, 2008, which date commenced the 90-day period for issuance of this determination. Petitioner filed a response to the motion on February 2, 2009. Based upon the motion papers, the affirmation and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider petitioner's claim that the Department of Taxation and Finance improperly levied upon his assets.

***FINDINGS OF FACT***

1. 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.

2. 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.

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

4. 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 Veteran's 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.

***SUMMARY OF THE PARTIES' POSITIONS***

5. The Division moves 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.

6. In response to the Division's motion, petitioner again argues that the funds which were levied upon in his bank account were unlawfully taken. Petitioner also asserts that when the funds were taken, it was too late to file to challenge the merits of 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 contends 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 refers 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 Tax Appeals to provide a hearing as a matter of right. On the basis of the forgoing, petitioner submits that the Division of Tax Appeals has jurisdiction over the matter in controversy.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 2006(5)(ii) provides that, pursuant to such rules as the Tax Appeals Tribunal may prescribe, 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).

B. 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 Department of Taxation and Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140). Its power to adjudicate disputes is exclusively statutory (*id*).

Here, petitioner seeks a refund on the ground that the Division improperly levied upon exempt assets. The Division correctly pointed out 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 (*Matter of Driscoll*, Tax Appeals Tribunal, April 11, 1991; *Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998). Since jurisdiction is lacking, the Division of Tax Appeals is without authority to consider the claim for refund and the petition must be dismissed.<sup>1</sup>

C. The Division of Taxation's motion for summary determination is granted, and the petition of Raymond Hogan is dismissed.

DATED: Troy, New York  
March 5, 2009

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE

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<sup>1</sup> Petitioner correctly notes that the Division's reliance upon *Matter of Club Marakesh v. Tax Commn. of State of New York* (151 AD2d 908, 542 NYS2d 881, *lv denied* 74 NY2d 616, 550 NYS2d 276) to show that jurisdiction is lacking is misplaced. However, *Matter of Driscoll* and *Matter of Pavlak* do support the Division's position. These cases are reported on the website of the Tax Appeals Tribunal which is [www.NYSDTA.org](http://www.NYSDTA.org).