

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**TERRY ALLEN JONES** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 822325  
New York State Personal Income Tax under Article 22 :  
of the Tax Law for the Year 2003. :

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Petitioner, Terry Allen Jones, 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 year 2003.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion dated October 1, 2008, 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 basis that the petition fails to state a cause of action for which relief could be granted and, as such, there is no material issue of fact or, in the alternative, that the facts herein mandate a determination in favor of the Division of Taxation. Petitioner, appearing pro se, filed a letter and other documents in response to the Division of Taxation's motion on October 6, 2008, which date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavit of the Division of Taxation's representative and the documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Tax Appeals has jurisdiction to consider petitioner's protest of a Notice of Additional Tax Due for the tax year 2003.

***FINDINGS OF FACT***

1. Petitioner filed his 2003 New York State personal income tax return, under the filing status married filing separate return, in October 2004 (the return was dated October 13, 2004).

2. A Notice of Additional Tax Due, dated February 16, 2007, was issued by the Division of Taxation (Division) to petitioner which asserted additional tax due in the amount of \$1,462.00, plus penalty and interest, for a total amount due of \$2,076.91 for the year 2003. The Notice of Additional Tax Due explained, in relevant part, as follows:

New York State has received information from the Internal Revenue Service (IRS) showing that they [sic] adjusted your 2003 federal income tax return.

\* \* \*

NYS Tax Law requires you to report any changes made to your federal income tax returns within ninety (90) days from the final IRS determination. We have no record that you reported the federal changes to NYS. Therefore, we have recomputed your New York tax(es) to include the federal changes.

\* \* \*

Because your original New York State return was late filed, a penalty for late filing has been applied at 5% per month up to a maximum of 25% (section 685[a][1] of the New York State Tax Law).

Since your return was filed more than 60 days after the due date, the minimum penalty under section 685(a)(1) for late filing is the lesser of \$100.00 or 100% of the amount required to be shown as tax due on your return.

3. Petitioner filed a letter along with other documents, including court orders and medical records, in opposition to the Division's motion. In none of the documentation submitted by petitioner is it alleged that he reported the federal changes to the Division in a timely manner.

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

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Section 3000.9(c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317 [1985], *citing Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177 [1989]). "To defeat a motion for summary judgment the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim,' and 'mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" (*Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173 [1992] *citing Zuckerman v. City of New York*).

C. Tax Law § 659 provides, in general, that 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 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.

D. This record contains no evidence that petitioner ever complied with the provisions of Tax Law § 659, nor is there any assertion by petitioner that he complied therewith.

E. Tax Law § 681(e)(1) provides that if a taxpayer fails to comply with the provisions of Tax Law § 659, a deficiency based upon such federal change may be assessed:

by mailing to the taxpayer a notice of additional tax due specifying the amount of the deficiency, and such deficiency, together with the interest, additions to tax and penalties stated in such notice, shall be deemed assessed on the date such notice is mailed . . . .

F. The Notice of Additional Tax Due, dated February 16, 2007, was issued by the Division pursuant to Tax Law § 681(e)(1) in response to unreported federal audit changes for the tax year 2003. Such notice is considered an assessment as of the date of mailing and is not a "notice of deficiency" for purposes of filing a petition with the Division of Tax Appeals (Tax Law § 681[e][2]). As pertains to this matter, Tax Law § 689 restricts the right to petition the Division of Tax Appeals to a review of taxes asserted by notices of deficiency. The combined operation of Tax Law § 681(e) and § 689 thus denies taxpayers the right to a hearing to review taxes assessed by notices of additional tax due issued in response to unreported federal changes. Accordingly, the Division of Tax Appeals has no authority to review the Notice of Additional Tax Due at issue herein and, with respect to such notice, the petition must be dismissed for lack of jurisdiction (*see* Tax Law § 2006[4]).

G. It must also be noted that for a Notice and Demand or Notice of Additional Tax Due issued on or after December 1, 2004, as is the case with the Notice of Additional Tax Due at issue herein, which was issued February 16, 2007, Tax Law § 173-a(2) provides that with respect to corporate and personal income taxes which authorize the issuance of a Notice and Demand or a Notice of Additional Tax Due, such notice “shall not be construed as a notice which gives a person the right to a hearing.”

H. Since jurisdiction is lacking, the Division of Tax Appeals is without the authority to modify the Notice of Additional Tax Due (*see Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

I. The Division of Taxation’s motion for summary determination is granted and the petition of Terry Allen Jones is dismissed with prejudice.

DATED: Troy, New York  
December 11, 2008

/s/ Brian L. Friedman  
ADMINISTRATIVE LAW JUDGE