

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
DIANE HAMEL : DETERMINATION
for Redetermination of a Deficiency or for : DTA NO. 822808
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 Year 1982. :

Petitioner, Diane Hamel, filed a petition for redetermination of a deficiency 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 year 1982.

The Division of Taxation by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), brought a motion filed June 8, 2009 seeking dismissal of the petition or, in the alternative, summary determination in its favor in the above referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(1) and 3000.9(b). Accompanying the motion was the affidavit of John E. Matthews, Esq., dated June 3, 2009, and annexed exhibits supporting the motion. Petitioner did not respond to the motion. Accordingly, the 90-day period for issuance of this determination commenced on July 8, 2009, i.e., the date on which petitioner's time to serve a response to the motion expired. After due consideration of the affidavit and annexed exhibits, and all pleadings filed in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider the issue raised in the petition.

FINDINGS OF FACT

1. On January 12, 2009 petitioner, Diane Hamel, filed a petition with the Division of Tax Appeals seeking relief from personal income tax liability for the year 1982 as an innocent spouse. The petition specifically states, on page one, that petitioner petitions for “innocent spouse” and goes on to specify, at page two, the following:

Petitioner was not involved in preparing tax returns while married to Michael Hamel. Furthermore, petitioner had no income during her marriage. Petitioner has not received any notice till 2007 when she filed her own return. She has been widowed from Michael since his demise on 12/29/83. In view of time reconsideration is requested to recognize petitioner as an innocent spouse, consequently relieving her of any liability.

2. The petition indicates that a conciliation conference with the Division of Taxation’s (Division) Bureau of Conciliation and Mediation Services (BCMS) was requested by petitioner. In turn, that request was denied by BCMS Order (CMS No 226818) dated November 14, 2008, as untimely because the same had not been filed within 90 days of the issuance of the statutory notice of deficiency addressed to petitioner and her late husband and dated June 27, 1986.

3. Consistent with the Division’s answer to the petition, the subject motion seeks summary determination and dismissal of the petition without prejudice. The Division’s position is that the petition filed with the Division of Tax Appeals is premature in that petitioner did not file a Request for Innocent Spouse Relief with the Division of Taxation prior to filing her petition.

4. With its motion papers, the Division included Form IT-285 (Request for Innocent Spouse Relief [and Separation of Liability and Equitable Relief]), together with the instructions thereto (Form IT-285-I). The Division relies upon Tax Law former § 651(b)(5), the relevant regulation set forth at 20 NYCRR 151, and Division Publication 89, setting forth together the basis and method by which a person may apply for innocent spouse relief. Page one of Form IT-285-I sets forth the particular address to be used when filing Form IT-285 with the Division under various circumstances, including circumstances where the time limit within which to challenge a notice of deficiency by filing either a BCMS Request for Conference or a petition with the Division of Tax Appeals has expired.

5. Petitioner did not respond to the Division's motion.

CONCLUSIONS OF LAW

A. The petition herein was filed within 90 days after issuance of the BCMS Conciliation Order and therefore was timely filed (*see* Findings of Fact 1 and 2). However, the petition does not challenge the BCMS Order dismissing petitioner's conference request as untimely, but rather clearly seeks innocent spouse relief. Hence, the more typical issue of the timeliness of a taxpayer's challenge to a statutory notice is not presented herein. Rather, the issue as set forth in the petition and as addressed in the Division's answer and its subsequent motion, is whether the Division of Tax Appeals has jurisdiction at this juncture to address petitioner's substantive request for innocent spouse relief.

B. 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]).

C. Petitioner did not respond to the Division's motion, and thus the facts set forth in the Matthews affidavit, as supported by the documents accompanying the motion and by the pleadings, may be deemed admitted (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NYS2d 942 [1984]). These documents establish that petitioner seeks relief from personal income tax liability as an innocent spouse, but that petitioner has not filed such a request with the Division as required pursuant to Tax Law former § 651(b)((5) and 20 NYCRR 151. Hence, there has been no denial action on such a request by the Division, and in turn, there is no resulting basis upon which to bring an action before the Division of Tax Appeals to challenge such a denial. In view of these facts, the petition filed herein is premature, the Division of Tax Appeals has no jurisdiction to act upon such petition, and the Division of Taxation is entitled to a dismissal determination in its favor. Accordingly, the motion for summary determination and dismissal of the petition as premature will be granted.

D. The Division of Taxation's motion for Summary Determination dated June 2, 2009 is granted and the petition of Diane Hamel is hereby dismissed.¹

DATED: Troy, New York
September 24, 2009

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

¹ It would appear that petitioner may still seek innocent spouse relief by filing a request therefor with the Division in the manner described in Finding of Fact 4. It would appear further that if such request is denied, petitioner could then challenge such denial by filing a timely protest (i.e., a request for a BCMS conference or a petition) with respect thereto.