

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
BRIAN HOOPER	:	DETERMINATION
	:	DTA NO. 822880
for Redetermination of Deficiency or for Refund of	:	
New York State and City Personal Income Tax under	:	
Article 22 of the Tax Law and the Administrative Code	:	
of the City of New York for the Years 1993 and 1994.	:	

Petitioner, Brian Hooper, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1993 and 1994.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel) brought a motion dated June 11, 2009, seeking dismissal of the petition or, in the alternative, summary determination in the above-referenced matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. The Division of Taxation submitted the affidavit of John E. Matthews, Esq., together with other exhibits and pleadings in support of the motion. Petitioner, appearing pro se, filed a response to the Division of Taxation's motion on July 13, 2009, which date commenced the 90-day period for issuance of this order. Based upon the motion papers, the affidavit and documents submitted therewith and all pleadings in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation should prevail on its motion for Summary Determination that petitioner, Brian Hooper, is not entitled to an administrative hearing with respect to a certain notices of additional tax due issued by the Division of Taxation on August 3, 1998.

FINDINGS OF FACT

1. According to the records of the Division of Taxation (Division), Brian Hooper (petitioner) timely filed 1993 and 1994 New York State personal income tax returns.
2. Two notices of additional tax due (Assessment ID# L-015436373-2 and L-015436471-5), both dated August 3, 1998, were issued by the Division to petitioner. One asserted additional tax due in the amount of \$1,115.00, plus penalty and interest, for a total amount due of \$1,812.00 for the year 1993, and the second asserted additional tax due in the amount of \$6,226.00, plus penalty and interest, for a total amount due of \$8,076.67 for the year 1994. The notices of additional tax due explained, in relevant part, as follows:

Under authorization of section 6103(d) of the Internal Revenue Code, we received notification of federal audit changes. The following deficiency is based on failure to report those changes.

Section 659 of the New York State Tax Law requires taxpayers to report federal changes to New York State within 90 days after final federal determination. This provision of the Tax Law is outlined in the instructions for preparation of New York State income tax forms.

Section 683(c) of the New York State Tax Law provides for assessment at any time when a taxpayer fails to comply with section 659.

The federal adjustment changed your filing status from head of household to single. Therefore, your New York filing status has been changed accordingly.

The allowance for exemption on your New York return has been corrected to include the federal adjustment.

You have been allowed the appropriate New York standard deduction .

Business expenses have been corrected to included the federal adjustment.

3. On June 11, 2009, the Division filed this motion for summary determination, with various attachments, asserting that Tax Law § 681(e) does not provide a right to a hearing for notices of additional tax due and that, as a result, the petition should be dismissed for failure to state a cause of action for which relief could be granted.

4. Petitioner maintains that he did not receive notice of the tax assessments at issue herein until 2006, having been incarcerated from a date not clearly established by the record to September 14, 2007, his date of release. His statement in support, responding to the Division's motion for summary judgment asserts that the tax assessments were based on erroneous adjustments, and that petitioner was prejudiced by the Division when he was denied a chance to contest the accuracy of the IRS audit, and subsequently the Division's tax adjustment. 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. 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.

C. 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.

D. 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 unless within thirty days after the mailing of such notice a report of the federal change, correction or disallowance or an amended return, where such return was required by section six hundred fifty-nine, is filed accompanied by a statement showing wherein such federal determination and such notice of additional tax due are erroneous.

E. The notices of additional tax due, dated August 3, 1998, were issued by the Division pursuant to Tax Law § 681(e)(1) in response to unreported federal audit changes for the tax year 1993 and 1994. Such notices are considered an assessment as of the date of mailing and are 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]).¹

¹ It should be noted, however, that petitioner is not entirely without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

F. The Division of Taxation's motion for summary determination is granted and the petition of Brian Hooper is hereby dismissed.

DATED: Troy, New York
October 8, 2009

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE