

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of : ORDER
SAUL AND ROSLYN ASCHKENASY : DTA NO. 822900
for Redetermination of Deficiencies or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 2004. :

Petitioners, Saul and Roslyn Aschkenasy, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2004.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intention to Dismiss Petition, dated March 12, 2009, on the grounds that the Division of Tax Appeals lacks jurisdiction over this matter. The notice advised that each party was afforded a period of 30 days, or until April 11, 2009, within which to file written responses to the notice. Petitioners submitted a response dated April 2, 2009 in opposition to the proposed dismissal. The Division of Taxation, by its representative, Daniel Smirlock, Esq., (John E. Matthews, Esq., of counsel) submitted papers dated April 7, 2009 in support of the proposed dismissal, which date commenced the 90-day period for issuance of this order (20 NYCRR 3000.5[d]; 3000.9[a][4]). Based upon the pleadings in this matter and the documents included in the Division's and petitioners' responses, Thomas C. Sacca, Administrative Law Judge, renders the following order.

ISSUES

I. Whether petitioners are entitled to an administrative hearing with respect to a certain Notice of Additional Tax Due issued by the Division of Taxation on June 30, 2008.

II. Whether petitioners are entitled to a hearing in the Division of Tax Appeals after signing a Bureau of Conciliation and Mediation Services Consent.

FINDINGS OF FACT

1. The Division of Taxation (Division) issued to petitioners, Saul and Roslyn Ashkenasy, a Notice of Additional Tax Due (Assessment ID# L-030329999), seeking payment of personal income tax due for the tax year 2004.

2. The notice, dated June 30, 2008, provides, in part, as follows:

New York State has received information from the Internal Revenue Service (IRS) showing they adjusted your 2004 federal income tax return.

NYS Tax Law requires you to report any changes made to your federal income tax return 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.

The IRA deduction claimed on your New York return has been corrected or disallowed based on the federal adjustment.

The itemized deduction for Other Miscellaneous Deductions has been corrected based on the change to federal adjusted gross income.

The notice of additional tax due assessed tax due of \$154.00, plus interest.

3. On June 5, 2008, petitioners signed a Bureau of Conciliation and Mediation Services consent form, dated November 13, 2007, relating to notice/assessment number L-029086485.

This notice was based upon an adjustment to petitioners' 2004 personal income tax return in which the Division reduced petitioners' claimed pension exclusion from \$40,000.00 to

\$20,000.00. The consent form indicated the amount of tax due to be \$820.00, plus interest, and the date of the notice to be November 13, 2007. The consent form provides as follows:

The final disposition of the notice of deficiency at issue, as described above, is acceptable to me as follows:

	L029086485-8
Tax	\$820.00
Penalty	000.00
Interest	243.04
TOTAL	\$1,063.04
Less: Payment(s)	(000.91)
BALANCE DUE	\$1,062.13

I hereby agree to waive any right to a hearing in the Division of Tax Appeals concerning the above notice(s).

4. On February 16, 2009, petitioners filed a petition with the Division of Tax Appeals protesting the Notice of Additional Tax Due and the BCMS Consent.

5. On March 12, 2009, the Division of Tax Appeals issued to petitioners a Notice of Intent to Dismiss Petition. The notice of intent provided, in relevant part, as follows:

Pursuant to § 173-a of the Tax Law, any notice of additional tax due or any notice and demand issued to a taxpayer without the issuance of a notice of determination or a notice of deficiency because of a mathematical or clerical error on a return or for failure to timely pay the tax due shown on a return shall not give that taxpayer a right to a hearing in the Division of Tax Appeals. The only option for such a taxpayer, is to pay the tax, apply for a refund and then petition for a hearing if the refund claim is denied.

CONCLUSIONS OF LAW

A. Tax Law § 2006 sets forth the functions, powers and duties of the Tax Appeals Tribunal including, in relevant part at subsection four thereof, as follows:

To provide a hearing as a matter of right, to any petitioner upon such petitioner's request, pursuant to such rules, regulations, forms and instructions as the tribunal may prescribe, *unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter.* (Emphasis added.)

B. Tax Law § 659 provides that where 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 of Taxation within 90 days after the final determination of such change or correction and either concede the accuracy of the federal change or state the taxpayer's basis for asserting that the change or correction is erroneous. If the federal change or correction is not reported within the 90-day period, the Division is authorized by Tax Law § 681(e) to issue a notice of additional tax due. Furthermore, where a taxpayer fails to report the federal change or correction as required, such a notice may be issued at any time. (*See* Tax Law § 683[c][1][C].)

C. Tax Law § 173-a (L 2004, ch 60, eff August 20, 2004), applying to notices and demands and notices of additional tax due issued on or after December 1, 2004, amended the Tax Law to specifically state that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, inter alia, the issuance of a notice of additional tax due.

D. The Notice of Additional Tax Due in this matter, based upon petitioners' failure to report federal audit changes to New York State for the year in question, was issued against petitioners on June 30, 2008. Tax Law § 173-a applies to notices of additional tax due issued on or after December 1, 2004. Accordingly, such provision serves, as a matter of law, to preclude petitioners from obtaining a hearing with respect to the subject Notice of Additional Tax Due,

which was issued after December 1, 2004 (*Matter of Held*, Tax Appeals Tribunal, February 22, 2007).

E. Tax Law § 170(c) provides the following with respect to the powers and authority vested in the conciliation conferee:

A conciliation conferee, all of whom, unless otherwise provided by law, shall be in the classified civil service, shall conduct the conciliation conference in an informal manner and shall hear or receive testimony and evidence deemed necessary or desirable for a just and equitable result. The commissioner of taxation and finance shall have the power to delegate authority to a conferee to waive or modify penalty, interest and additions to tax to the same extent as such commissioner is permitted under this chapter.

The regulations promulgated thereunder specifically address the situation where, after the conferee has reviewed all the evidence, a proposed settlement is made and forwarded to the party requesting the conference for his approval or disapproval. The regulation at 20 NYCRR 4000.5(c)(3) provides, in part, as follows:

(i) After reviewing the testimony, evidence and comments, the conciliation conferee will serve on the requester a proposed resolution in the form of a consent. In developing this proposed resolution, the conciliation conferee may contact either party to clarify any issues or facts in dispute.

(ii) Where the proposal is acceptable to the requester, the requester shall have 15 days to execute the consent and agree to waive any right to petition for hearing in the Division of Tax Appeals concerning the statutory notice.

As set forth in the facts, the consent form included language consistent with the regulation which called for the requesters to waive any rights they might otherwise have to a hearing in the Division of Tax Appeals “concerning the above notice.” In this case, the statutory notice was Notice of Deficiency L-029086485, dated November 13, 2007.

By signing the consent, petitioners voluntarily discontinued proceedings before the Bureau of Conciliation and Mediation Services (BCMS) prior to the issuance of an order and, by

the consent's own terms, waived any rights to a hearing before the Division of Tax Appeals concerning all aspects of the Notice of Deficiency dated November 13, 2007.

F. Pursuant to Tax Law § 171(18), the Division was authorized to enter into a written agreement with petitioners concerning the Notice of Deficiency. The consent in this matter was issued in accordance with BCMS procedures (*see* 20 NYCRR 4000.5[c][3]). By their execution of the consent, petitioners knowingly and voluntarily¹ waived their right to a hearing in the Division of Tax Appeals on issues related to the Notice of Deficiency, and agreed to the amount of tax plus interest due as indicated in the BCMS consent (*see Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992).

G. Although both the notice of additional tax due and the BCMS consent relate to the tax year 2004, they address separate issues. The notice of additional tax due concerns an IRA contribution claimed by petitioners and corrected or disallowed by the Internal Revenue Service. Petitioners failed to notify New York State of such correction or disallowance and the notice of additional tax due was issued. The BCMS consent relates to a notice of deficiency issued as a result of petitioners claiming a pension exclusion in excess of that allowed by statute. Petitioners consented to such adjustment, and there is nothing in the executed consent which indicates it was intended to also address the claimed and adjusted IRA contribution amount which was the subject of the notice of additional tax due.

¹ It is noted that there is neither evidence nor allegation that petitioner's execution of the consent was anything other than knowing and voluntary, nor has the question been raised as to the authenticity of the signature on the consent.

H. The petition of Saul and Roslyn Aschkenasy is hereby dismissed.

DATED: Troy, New York
June 25, 2009

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE