

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARC S. SZNAJDERMAN AND	:	
JEANNETTE SZNAJDERMAN	:	DETERMINATION
	:	DTA NO. 823177
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law and	:	
the New York City Administrative Code for the Year 2001.	:	

Petitioners, Marc S. Sznajderman and Jeannette Sznajderman, filed a petition for redetermination of a deficiency or refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2001.

Petitioners, by their representative, Stuart A. Smith, Esq., brought a motion, filed July 27, 2010, seeking summary determination in the above-captioned matter pursuant to 20 NYCRR 3000.9(b). The Division of Taxation, appeared in opposition to the motion by its representative, Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel). The parties completed their submissions by October 15, 2010, which date began the 90-day period for issuance of this order.

After due consideration of petitioners' motion, the Memorandum in Support of the motion and exhibits attached thereto, the Division of Taxation's Memorandum of Law and the exhibits attached thereto, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals lacks jurisdiction over the subject matter of the petition filed in this matter.

FINDINGS OF FACT

1. Petitioners, Marc S. and Jeannette Sznajderman, were New York residents and filed a personal income tax return for the year 2001 (year in issue) pursuant to an extension, on June 19, 2002.
2. On March 14, 2008, the Division of Taxation (Division) issued to petitioners a Notice of Deficiency asserting tax, penalties and interest for the year 2001. The penalties asserted included negligence penalties, a penalty for substantial understatement of tax, and a penalty for failure to participate in the Voluntary Compliance Initiative (VCI) (L 2005, ch 61, part N, § 11).
3. On or about June 1, 2008, petitioners protested the Notice of Deficiency by filing a request for a conference in the Bureau of Conciliation and Mediation Services (BCMS).
4. Subsequently, on January 29, 2009, petitioners filed form DTF-672, Election to Participate in the Tax Shelter Voluntary Compliance Initiative with respect to the year 2001, in which they opted (Option 2) to participate in the VCI while retaining their right to file a claim for credit or refund for any amounts paid under the option. Petitioners paid \$98,035.00 at the time they made the election. The form stated that the election of Option 2 was irrevocable.
5. By letter dated March 27, 2009, the Division of Taxation informed petitioners that, in order for their application to participate in the VCI to be accepted, they could not have any open administrative proceedings relating to the tax that was the basis of the penalty for which relief was sought, including proceedings in BCMS.

6. By letter dated April 30, 2009, petitioners withdrew their request for a conciliation conference in BCMS contingent upon acceptance of their election to participate in the VCI. Thereafter, petitioners were accepted into the VCI for the year 2001.

7. On July 28, 2009, petitioners filed a petition for hearing in the Division of Tax Appeals protesting the Notice of Deficiency, dated March 14, 2008.

8. Petitioners have not filed a request for refund of the amounts paid with their election to participate in the VCI.

CONCLUSIONS OF LAW

A. Initially, it must be determined whether the Division of Tax Appeals has jurisdiction over the petition in this matter, since the Laws of 2005 (ch 61, part N, § 11[e][2][E][ii]) appears to prohibit petitioners from petitioning the notice issued to them on March 14, 2008. If the Division of Tax Appeals lacks jurisdiction over the petition filed, petitioners' motion must be denied.

B. When the Division of Taxation issued the Notice of Deficiency to petitioners on or about March 14, 2008, they responded by filing a request for conciliation conference in BCMS on June 1, 2008. Shortly thereafter, the Legislature enacted the Laws of 2008 (ch 57, part CC-1, § 2), which extended the Tax Shelter Voluntary Compliance Initiative to eligible taxpayers for a limited period.

C. The Laws of 2005 (ch 61, part N, § 11) created a tax shelter voluntary compliance program, called a Voluntary Compliance Initiative, applicable to tax liabilities attributable to the use of tax avoidance transactions for taxable years beginning before January 1, 2005. The VCI applied to taxes arising under various articles of the Tax Law, including Article 22. Eligible participants in this program could avoid special penalties applicable to tax liabilities attributable

to such tax avoidance transactions (L 2005, ch 61, part N, § 11[1]). This VCI program ended on March 1, 2006 (L 2005, ch 61, part N, § 11[d]).

D. As mentioned above, pursuant to the Laws of 2008 (ch 57, part CC-1, § 2) the Legislature created another, similar VCI program for taxable years beginning before January 1, 2005, effective for the limited period November 1, 2008 through January 31, 2009. This program allowed taxpayers to avail themselves of the tax shelter VCI program provided by the Laws of 2005 (ch 61, part N, § 11). Accordingly, the rules governing eligibility and participation in the 2005-2006 program are applicable to the 2008-2009 program.

E. Having been assessed a penalty for failing to participate in the earlier (2005) VCI, petitioners chose to pay the tax, penalty and interest attributable to the loss claimed with respect to the tax shelter in issue and participate in the 2008-2009 VCI program. However, before they were accepted in to the VCI, they were required to withdraw their request for a conference, and did so by letter dated April 30, 2009.

Petitioners elected the VCI option 2 with appeal rights. The Laws of 2005 (ch 61, part N, § 11[e][2][D]) provided that eligible taxpayers electing this option may not file a petition with the Division of Tax Appeals until after either of the following:

- (i) the date the commissioner of taxation and finance takes action on the claim for refund for the tax year to which this section applies and has notified the taxpayer pursuant to [Tax Law § 689(c)(3)] . . . ; or

- (ii) the earlier of the following dates:

- (I) the date that is 180 days after the date of a final determination by the Internal Revenue Service with respect to the transaction or transactions to which this section applies; or

- (II) the earlier of the date that is three years after the date the claim for refund was filed or two years after full payment of all tax, including penalty and interest was made.

The facts in the record of this matter indicate that the petition was filed prematurely and was clearly prohibited by the statutory language cited above. (L 2005, ch 61, part N, § 11[e][2][D].)

The VCI was enacted to allow taxpayers to pay the tax owed and have the Division of Taxation waive penalties applicable to the underreporting or underpayment of tax liabilities attributable to the use of tax avoidance transactions for a specified taxable year. Under the VCI, the Division of Taxation was precluded from seeking civil, administrative or criminal action against the taxpayer, and the taxpayer was permitted to file a claim for credit or refund for such taxable year with respect to any tax avoidance transactions. (L 2005, ch 61, part N, § 11[e][2].)

Since petitioners never filed a claim for refund for the tax paid with respect to the tax avoidance transaction for the year 2001 or met the requirements of the Laws of 2005 (ch 61, part N, § 11[e][2][D]), the petition was premature, at best, and this forum is without jurisdiction to consider it.

F. Further, the Laws 2005 (ch 61, part N, § 11[e][2][E][ii]) provides:

notwithstanding article 40 or sections 681 or 1081 of the tax law, any notice issued to the taxpayer imposing a penalty under this subsection shall not be construed as a notice which gives a taxpayer the right to a hearing, and the taxpayer shall be allowed to file a petition under subparagraph (D) of this paragraph only after the taxpayer has paid all amounts due, including any penalty,

This section articulates the legislative intent to permit petitions in the context of the VCI only after the tax and all penalties have been paid in full, a refund claim filed and a denial of that refund claim by the Division.

G. It cannot be discerned if petitioners' insistence on filing a petition in response to the Notice of Deficiency, dated March 14, 2008, constitutes an attempt to withdraw from the VCI program, but their execution of the election to participate in the Tax Shelter Voluntary

Compliance Initiative with respect to the year 2001 on January 29, 2009 was irrevocable. However, in the same sentence of Option 2 that informed petitioners that the election was irrevocable, it provided that petitioners retained the right to file for credit or refund for any amounts paid pursuant to the election. Therefore, petitioners were provided with an avenue to protest the Division of Taxation's determination regarding the alleged tax avoidance transaction identified for 2001.

H. Although the Division of Taxation agreed to withdraw its argument that the Division of Tax Appeals lacks jurisdiction in this matter, such a concession is not binding on this forum. Parties to a proceeding cannot stipulate to confer jurisdiction on the Division of Tax Appeals to decide matters outside the scope of its authority (*see Strina v. Troiano*, 119 AD2d 566, 567, 500 NYS2d 736, 737 [1986] [subject matter jurisdiction cannot be conferred by consent or stipulation of the parties, and a defect in subject matter jurisdiction cannot be waived]).

I. Since it has been determined that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition, petitioners' motion for summary determination is denied and the petition of Marc S. and Jeannette Sznajderman is hereby dismissed.

DATED: Troy, New York
January 6, 2011

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE