STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEVEN AND NANCY MENDELOW	:	DETERMINATION DTA NO. 823320
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 2001 and 2002.	:	

Petitioners, Steven and Nancy Mendelow, 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 2001 and 2002.

The Division of Taxation, by its representative, Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel), brought a motion dated September 29, 2010 seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006(5) and section 3000.9(a) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners did not file a response to the motion. Accordingly, the 90-day period for the issuance of this determination began on October 29, 2010, the due date for petitioners' response. After due consideration of the motion papers and pleadings filed in this matter, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. On September 2, 2008, the Division of Taxation (Division) issued to petitioners, Steven and Nancy Mendelow, notices of deficiency asserting tax, penalties and interest for the years 2001 and 2002. The penalties asserted in the notices included negligence penalties and penalties applicable to tax liabilities attributable to the use of tax avoidance transactions imposed pursuant to Tax Law § 25 (as added by L 2005, ch 61, part N, § 11[l]).

2. On or about November 24, 2008, petitioners filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the September 2, 2008 notices of deficiency.

3. On January 30, 2009 petitioners filed an Election to Participate in the Tax Shelter Voluntary Compliance Initiative (VCI) for each of the years at issue. On forms DTF-672 petitioners elected the VCI option "With appeal rights," pursuant to which petitioners retained the right to file a claim for credit or refund for any amounts paid thereunder. The form also indicates that the election of this option is irrevocable.

4. Also on January 30, 2009, petitioners made payment of tax, negligence penalties and interest for the years at issue pursuant to their VCI election.

5. The Division cancelled the penalties asserted in the notices of deficiency applicable to tax liabilities attributable to the use of tax avoidance transactions pursuant to Tax Law § 25 (as added by L 2005, ch 61, part N, § 11[e][2][A]).

6. On July 9, 2009, petitioners withdrew their request for a conciliation conference in accordance with the VCI legislation (***see*** L 2005, ch, 61, part N, § 11[e][2][E][ii]).

7. On October 20, 2009, petitioners filed a petition with the Division of Tax Appeals in protest of the September 2, 2008 notices of deficiency.

8. Petitioners have not filed a claim for refund in respect of their January 30, 2009 payment of tax, negligence penalties and interest for the years at issue.

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. Petitioners did not respond to the Division's motion; they are therefore deemed to have conceded that no question of fact requiring a hearing exists (***see Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; ***John William Costello Assocs. v. Standard Metals***, 99 AD2d 227, 472 NYS2d 325 [1984], ***lv dismissed*** 62 NY2d 942 [1984]).

C. The Laws of 2005 (ch 61, part N, § 11) created a tax shelter voluntary compliance program, called the Voluntary Compliance Initiative (VCI), 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[e][l]). This VCI program ended on March 1, 2006 (L 2005, ch 61, part N, § 11[d]).

D. 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. Petitioners participated in the 2008-2009 VCI program and, as noted, elected the VCI option with appeal rights. Under this option, eligible taxpayers may file a claim for credit or refund with respect to the use of a tax avoidance transaction pursuant to Tax Law §§ 686 (overpayment) and 687 (limitations on credit or refund) (***see*** L 2005, ch 61, part N, § 11[e][2][C]).

F. Generally, under Article 22 of the Tax Law, a taxpayer may file a petition for a hearing with the Division of Tax Appeals under two circumstances: (1) for redetermination of a notice of deficiency; and (2) for the amounts asserted in a refund claim filed with the Division of Taxation (***see*** Tax Law § 689[b], [c]).

G. Such hearing rights are significantly modified, however, by the 2005 VCI legislation. Specifically, the VCI legislation provides that, notwithstanding Tax Law § 689(c)(3)(A) (petition may be filed six months after filing of refund claim), taxpayers, like petitioners, electing the VCI option with appeal rights 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 (L 2005, ch 61, part N, § 11[e][2][D]).

Additionally, the VCI legislation provides that, notwithstanding Article 40 (Division of Tax Appeals) or Tax Law § 681 (notice of deficiency), any notice issued to a taxpayer imposing penalties applicable to tax liabilities attributable to the use of tax avoidance transactions "shall not be construed as a notice which gives a taxpayer the right to a hearing" and that a taxpayer may file a petition only after payment of all amounts due and under the conditions noted above (***see*** L 2005, ch 61, part N, § 11[e][2][E][ii]).

H. Pursuant to the foregoing, petitioners' right to file a petition with the Division of Tax Appeals for redetermination of the September 2, 2008 notices of deficiency is expressly denied by the above-noted VCI legislation. Specifically, as such notices assessed penalty for the use of tax avoidance transactions, they may not "be construed as a notice which gives a taxpayer the right to a hearing" (***see*** L 2005, ch 61, part N, § 11[e][2][E][ii]).

In any event, if construed as a petition of the statutory notices, the subject petition would appear to be untimely and therefore properly denied pursuant to Tax Law § 170(3-a)(b). Specifically, petitioners' request to withdraw or discontinue the conciliation proceeding was made on July 9, 2009 and their petition was filed more than 90 days later on October 20, 2009.

I. By their election of the VCI option with appeal rights, petitioners did retain their right to file a petition with the Division of Tax Appeals for a hearing seeking a refund of amounts paid for the years at issue, although this right was subject to the conditions set forth in the VCI legislation. As noted, these conditions include the elimination of the six-month deemed denial provision of Tax Law § 689(c)(3)(A) and the creation of certain other deemed denial dates (***see*** L 2005, ch 61, part N, § 11[e][2][D]). Such conditions, however, do not obviate the fundamental requirement, expressly stated in Tax Law § 689(c) and implicit in Tax Law § 2008, that a

taxpayer first file a refund claim with the Division of Taxation and may file a petition with the Division of Tax Appeals only upon the denial or deemed denial of such claim (***see also Matter of Rand***, Tax Appeals Tribunal, May 10, 1990). Absent the filing of a refund claim and the denial (or deemed denial) thereof, there can be no issue or controversy between the taxpayer and the Division of Taxation and hence no basis for a hearing in the Division of Tax Appeals (***see*** Tax Law § 2000).

J. In the present matter, petitioners did not file a claim for refund for the tax, negligence penalties and interest paid for the years at issue. Accordingly, pursuant to Tax Law § 689(c), petitioners lack the right to file their petition, and the Division of Tax Appeals is without subject matter jurisdiction in this matter.

K. The petition of Steven and Nancy Mendelow is hereby dismissed.

DATED:Troy, New York
January 20, 2011

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE