

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DANIEL JEAN LIPSMAN	:	ORDER
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 823802
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2007.	:	

Petitioner, Daniel Jean Lipsman, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2007.

On September 28, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4)(i). The Division of Taxation, by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel), submitted a letter dated September 29, 2010 in support of dismissal. On October 4, 2010, petitioner, appearing pro se, submitted a letter dated October 1, 2010 in opposition to dismissal. Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced October 4, 2010. After due consideration of the documents submitted, Timothy Alston, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Daniel Jean Lipsman, filed a petition with the Division of Tax Appeals dated August 19, 2010, protesting an asserted liability of \$65.59 in respect of his 2007 personal income taxes and referencing assessment number L-034128291. In the petition's allegation of errors and assertion of facts, petitioner claimed that he paid his taxes "in full" and that "no valid basis has been proffered to the contrary."

2. Petitioner attached to his petition a Response to Taxpayer Inquiry dated August 9, 2010, referencing assessment number L-034128291 and indicating a total amount due of \$65.59 in penalty and interest for the year 2007. This document explains the assessment, in relevant part, as follows:

Since your prepayments (New York withholding and/or estimated tax payments) did not exceed 90% of the tax shown on your return, a penalty for underpayment of estimated tax has been imposed.

* * *

If you still wish to protest this assessment, your only recourse is to pay the assessment and file a Claim for Refund, Form IT-113-X, within two years of the date of payment.

3. On September 28, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss the August 19, 2010 petition. The notice of intent explained this action as follows:

Pursuant to § 2000 of the Tax Law, the administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due, a tax deficiency, a denial of a refund or credit application [*sic*] for a license, permit or registration or any other notice which gives a person the right to a hearing under this chapter.

Since the petition filed on August 20, 2010 did not contain a statutory notice or any other notice which gives a person a right to a hearing, the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction; its powers are limited to those conferred by its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326, 573 NYS2d 140 [1991]). Accordingly, a party to a proceeding cannot confer jurisdiction on the Division of Tax Appeals to decide matters outside the scope of its authority (*see Strina v. Troiano*, 119 AD2d 566, 500 NYS2d 736 [1986] [subject matter jurisdiction cannot be conferred by consent or stipulation of the parties, and a defect in subject matter jurisdiction cannot be waived]).

B. Tax Law § 2008(1) provides:

All proceedings in the division of tax appeals shall be commenced by the filing of a petition with the division of tax appeals protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application . . . or any other notice which gives a person the right to a hearing in the division of tax appeals under this chapter or other law.

C. Petitioner has failed to show that he was issued a notice giving him the right to a hearing before the Division of Tax Appeals. The August 9, 2010 Response to Taxpayer Inquiry indicates that the contested penalty assessment is based on petitioner's failure to meet the requirements for the prepayment of income taxes and his subsequent failure to report the resulting prepayment penalty on his return as required (*see* Tax Law §685[c]; 2007 IT-201, line 81, 2007 IT-150, line 55). This failure is clerical or mathematical in nature and the Tax Law

specifically denies prepayment hearing rights in respect of penalty assessments arising from such errors (*see* Tax Law § 173-a).

D. Petitioner is not without recourse in this matter. He may pay the disputed liability and file a claim for refund (Tax Law § 687). If the refund claim is disallowed, petitioner may then request a conciliation conference or petition the Division of Tax Appeals in order to contest such disallowance (Tax Law § 170[3-a][a]; § 689[c]).

E. The petition of Daniel Jean Lipsman is hereby dismissed.

DATED: Troy, New York
December 30, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE