

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**MARCIA I. HUNTER** : ORDER  
for Redetermination of a Deficiency or for Refund of : DTA NO. 823959  
New York State and New York City Personal Income Tax :  
under Article 22 of the Tax Law and the New York City :  
Administrative Code for the Year 2007. :  
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Petitioner, Marcia I. Hunter, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2007.

On November 19, 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 November 29, 2010 in support of dismissal. On December 6, 2010, petitioner, appearing by Waverly Lane, Jr., EA, submitted a letter dated December 3, 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 December 21, 2010. After due consideration of the documents submitted, Joseph W. Pinto, Jr., 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, Marcia I. Hunter, filed a petition with the Division of Tax Appeals dated November 2, 2010, protesting an asserted liability of \$1,866.68 in respect of her 2007 personal income taxes and referencing assessment number L-030156239-3. In the petition's allegation of errors and assertion of facts, petitioner claimed that she erroneously omitted City of New York tax for the year 2007 based on her move out of the state in June of that year. However, she claims the Division of Taxation did not properly calculate the tax due based on her part year residency status.

2. Petitioner attached to her petition a Response to Taxpayer Inquiry dated October 25, 2010, referencing assessment number L-030156239-3 and indicating a total amount due of \$2,900.43 in tax, penalty and interest for the year 2007. This document explains the assessment, in relevant part, as follows:

The information provided does not constitute reasonable cause for the cancellation of penalty.

The Federal Extension of Time to File is not valid for New York State purposes for the tax year 1983 and later.

The assessment(s) is sustained . . . .

This determination in the matter of the informal protest of the above assessment(s) is final.

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In the event that you wish to pursue additional reviews of this matter, the balance due must be paid in full. A Form IT-113-X, Claim for Credit or Refund

of Personal Income Tax, may then be filed to claim a refund of the amount under dispute. This application will be reviewed by our Audit Division and a determination will be made. If that determination is unsatisfactory, you may file either a request for a conference with the Bureau of Conciliation and Mediation Services or a petition for a hearing with the Division of Tax Appeals.

3. On November 19, 2010, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss the 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 November 2, 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 she was issued a notice giving her the right to a hearing before the Division of Tax Appeals. The October 25, 2010 Response to Taxpayer Inquiry was merely an informal, yet final, response to petitioner's informal request for abatement of penalty assessed as part of assessment number L-030156239-3, based on her failure to file a New York Application for Automatic Six-Month Extension of Time to File.

D. As noted in the Response to Taxpayer Inquiry, petitioner is not without recourse in this matter. She 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 Marcia I. Hunter is hereby dismissed.

DATED: Troy, New York  
March 10, 2011

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