

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RICHARD PERSICO : ORDER
 : DTA NO. 825138
for Redetermination of Deficiencies or for Refund of :
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Period October 1, 2008 through :
September 30, 2011. :
:

Petitioner, Richard Persico, 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 period October 1, 2008 through September 30, 2011.

On August 23, 2012, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On September 21, 2012, petitioner, appearing by Castellano, Korenberg & Co. (Robert J. Schaffer, CPA) submitted a letter in opposition to dismissal. On October 16, 2012, the Division of Taxation, by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel) submitted an affidavit and other documents in support of dismissal.¹ Pursuant to 20 NYCRR 3000.5(d) and 3000.9(a)(4), the 90-day period for issuance of this order commenced October 24, 2012. After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following order.

¹ By a letter dated September 21, 2012, the due date for the Division's response to the Notice of Intent to Dismiss was extended until October 24, 2012.

ISSUE

Whether the petition in this matter is properly subject to dismissal.

FINDINGS OF FACT

1. Petitioner, Richard Persico, filed a petition with the Division of Tax Appeals, dated as signed on July 25, 2012 and stamped as received by the Division of Tax Appeals on July 26, 2012, attached to which were four notices of deficiency and one notice and demand as follows:

a) Notice of Deficiency, Assessment ID Number L-032591840-1, dated October 29, 2009, against petitioner as an officer or responsible person of Persico Contracting and Trucking, Inc., asserting a penalty in the amount of \$162,172.12, based on the unpaid taxes owed by such entity for the period ended June 30, 2009.

b) Notice of Deficiency, Assessment ID Number L-032591841-9, dated October 9, 2009, against petitioner as an officer or responsible person of Persico Contracting and Trucking, Inc., asserting a penalty in the amount of \$121,779.52, based on the unpaid taxes owed by such entity for the period ended March 31, 2009.

c) Notice of Deficiency, Assessment ID Number L-034153024-2, dated June 18, 2010, against petitioner as an officer or responsible person of Persico Contracting and Trucking, Inc., asserting a penalty in the amount of \$76,887.91, based on the unpaid taxes owed by such entity for the period ended September 30, 2009.²

d) Notice of Deficiency, Assessment ID Number L-034153023-3, dated June 18, 2010, against petitioner as an officer or responsible person of Persico Contracting and Trucking, Inc., asserting a penalty in the amount of \$159,132.96, based on the unpaid taxes owed by such entity for the period ended December 31, 2009.

e) Notice and Demand, Assessment ID Number L-031943005-6, dated September 8, 2009, against petitioner as an officer or responsible person of Persico Contracting and Trucking, Inc., asserting a penalty in the amount of \$147,987.80, based on the unpaid taxes owed by such entity for the period ended December 31, 2008.

2. Also attached to the petition was a Consolidated Statement of Tax Liabilities, dated July 24, 2012, concerning some 12 outstanding assessments against petitioner covering quarterly

² The amount set forth on the Notice of Deficiency (\$76,887.91) reflects the amount of penalty initially assessed (\$185,776.04), less payments or credits applied against such amount (\$108,888.13).

periods spanning the period ended December 31, 2009 through that ended June 30, 2011.

Notices of deficiency for the assessments set forth on this statement were not included with the petition, with the exception of the Notice of Deficiency for the quarterly period ended December 31, 2009 (*see* Finding of Fact 1[d]). The statement provides that the liabilities set forth thereon “are subject to collection action and the accrual of additional penalty and/or interest,” and sets forth a current balance due, consisting of penalties and interest, in the amount of \$956,492.27.

3. The petition states the “tax in question” to be “civil penalties assessed for withholding from a bankrupt business; sales tax credits were not applied; request installment agreement based on what [petitioner] is able to pay due to hardship.” The petition lists the amount of tax determined as \$956,492.00, and lists the amount of tax contested as \$143,737.00. The “amount of tax determined” (\$956,492.00) matches the current balance set forth on the consolidated statement. However, the manner of calculation of the “amount of tax contested” (\$143,737.00) is not specified and is not apparent from any of the documents attached to the petition. Finally, the petition sets forth the following statement:

Credits for sales tax refunds in the amounts of \$114,777.66 and \$28,959.48 have been approved but have not been applied to reduce the balance due. In addition, amounts have been levied and paid with no indication of where they were applied. The taxpayer is being assessed as a responsible party due to the bankruptcy of his company. He would like some consideration of this [*sic*] is giving him the lowest payment amount possible based on what he can afford when considering his current personal income and expenses and considering his health issues (. . .) and economic hardship.³

4. The Notice of Intent to Dismiss Petition advised that the petition was subject to dismissal on the bases that:

³The total of the sales tax refund amounts referenced by petitioner equals the “amount of tax contested.”

a) the petition had not been filed within 90 days after the date of issuance of the notices of deficiency attached to the petition and was thus not timely with respect thereto, and

b) the Notice and Demand (and presumably the Consolidated Statement of Tax Liabilities) is not a statutory document giving rise to the right to a hearing.

5. Petitioner's September 19, 2012 letter in response to the Notice of Intent provides, in relevant part, as follows:

We understand the issue regarding jurisdiction in the case of a Notice and Demand. We respectfully request your assistance specifically regarding the Notices of Deficiency previously submitted [with the petition] . . .

In addition, with regard to the timeliness of the filing, the taxpayer had relied upon an attorney to timely file his petition but unfortunately he did not do so. We respectfully request that you consider accepting the taxpayer's Petition so he is not deprived of his rights due to an attorney he had every reason to believe he could rely on but was negligent in not timely filing his Petition.

The taxpayer's company went bankrupt. Notices of Deficiency are in excess of the amount owed. We respectfully request that you review the amounts assessed.

6. The Division of Taxation (Division) submitted an affidavit and attached documents in response to the Notice of Intent, pointing out that petitioner seeks an accounting of payments made on behalf of an associated corporation and a deferred payment arrangement regarding the assessments in question. The Division maintains that the Division of Tax Appeals is without authority to grant either of these requests and seeks dismissal of the petition for failure to state a cause of action upon which relief could be granted.⁴

⁴ The Division's response includes a computer record showing the application of the refund amounts noted by petitioner (*see* Finding of Fact 3) and noting that the same were applied against Assessment ID No. L-034153023.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (*Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal*, 151 Misc 2d 326 [1991]). In the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010).

B. Section 2006(4) of the Tax Law requires the Tax Appeals Tribunal:

[t]o 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).

C. Tax Law § 2008(1), in turn, 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 notice of 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 (emphasis added).

D. Tax Law § 681(a) and § 685(g), (l) and (n) provide, together, for the issuance of a notice of deficiency imposing a penalty against a person under an obligation to collect, account for and pay over tax where that person fails to carry out such obligation. The penalty imposed is equal to the amount of tax not collected, accounted for or paid over. Here, the four notices of deficiency accompanying the petition were issued against petitioner as a person who failed to carry out such obligation to collect, account for and pay over taxes on behalf of Persico Contracting and Trucking, Inc.

E. Article 22 of the Tax Law, which imposes the state personal income tax, contains provisions that provide for, modify or deny the right to a hearing with respect to personal income tax (*see Matter of Dreisinger*, Tax Appeals Tribunal, July 20, 1989). Accordingly, it is necessary to look to the provisions of Article 22 of the Tax Law to determine petitioner's right to a hearing. Under Article 22 of the Tax Law, there is a strict 90-day statutory time limit for filing a petition for a hearing with the Division of Tax Appeals (Tax Law § 689(b); § 170[3-a][e]; 20 NYCRR 4000.5[c][4]), and the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition filed beyond such 90-day time limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

F. In view of the foregoing, petitioner is not entitled to a hearing before the Division of Tax Appeals. First, and with respect to the four notices of deficiency accompanying the petition, petitioner has specifically admitted in response to the Notice of Intent to Dismiss Petition that he did not file a timely petition challenging any of such notices (*see* Finding of Fact 5). In light of this admission, the Division of Tax Appeals is without jurisdiction to address the merits of such notices. Furthermore, and with respect to the Notice and Demand accompanying the petition, neither Article 22 nor Article 40 of the Tax Law provides taxpayers with the right to a hearing to contest a Notice and Demand. In fact, the right to such a hearing, including a hearing to address the protocol pursuant to which the Division applies payments on outstanding assessments, is specifically denied by operation of law (Tax Law § 173-a[2]; *see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010; *Matter of Brodmerkel*, Tax Appeals Tribunal, August 9, 2001). Finally, and in the same manner, the authority of the Division of Tax Appeals does not extend to ordering the Division of Taxation to enter into deferred payment arrangements with taxpayers or to setting the terms thereof. Thus, to the extent the petition requests such an arrangement, the

same is beyond the jurisdictional grant of authority of the Division of Tax Appeals and that portion of the petition is properly subject to dismissal for failure to state a cause for which relief may be granted in this forum (Tax Law § 2006[5][vi]; 20 NYCRR 3000.9[a][1]vi).

G. The petition of Richard Persico is hereby dismissed.

DATED:Albany, New York
December 6, 2012

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE