

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
CHARLES L. KYTE	:	DECISION
for Redetermination of Deficiencies or for Refund	:	DTA Nos. 825337
of New York State and New York City Personal	:	and 825338
Income Tax under Article 22 of the Tax Law and	:	
the Administrative Code of the City of New York	:	
for the Years 2004 and 2006.	:	

Petitioner, Charles L. Kyte, filed an exception to the order dismissing petitions issued by the Administrative Law Judge on January 27, 2014. Petitioner appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (Michelle W. Milavec, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider these matters.

FINDINGS OF FACT

We find the following facts.

1. On November 20, 2012, two copies of a petition protesting notice or assessment numbers L029090305 and L028891241 were received by the Division of Tax Appeals from

petitioner by facsimile transmission.¹

2. On November 21, 2012, a letter was sent by the Petition Intake Unit of the Division of Tax Appeals to petitioner, advising him that the petition was not complete because, among other reasons, the Division of Tax Appeals could not accept petitions submitted by facsimile.

Petitioner was given ten days to respond, but failed to do so.

3. On January 9, 2013, a Notice of Intent to Dismiss Petition (Original Notice of Intent) was issued, giving both parties 30 days to respond to the proposed dismissal. The Original Notice of Intent stated that, “[T]he petitions in this matter appear to have been filed on December 10, 2012 and December 11, 2012, respectively, by facsimile.” Petitioner did not respond to the Original Notice of Intent.

4. On April 8, 2013, the Administrative Law Judge issued an Order Dismissing Petition because the petitions were not properly filed. Petitioner filed an exception to that order. By decision dated October 17, 2013, this Tribunal rescinded the order of the Administrative Law Judge dismissing the petitions and remanded this matter for the issuance of an amended Notice of Intent reflecting the facts as found by the Tribunal, i.e., that the attempt to file the petitions by facsimile was made on November 20, 2012, not December 10, 2012 and December 11, 2012 as set forth in the Original Notice of Intent.

5. On November 6, 2013, an amended Notice of Intent to Dismiss Petition was issued, giving both parties 30 days to respond to the proposed dismissal. Petitioner did not respond to this Notice of Intent to Dismiss Petition. The Division of Taxation (Division) did respond and

¹ Although two copies of the same petition were received by the Division of Tax Appeals, two separate DTA numbers were assigned to the petition, as the petition protested two separate Division of Taxation notices or assessments. References herein to “petition” or “petitions” both refer to the two copies of the same petition.

explained that it agreed that petitioner had not filed his petitions as required by the regulations, and furthermore that the Division of Tax Appeals did not have jurisdiction to consider these petitions, in any event, because the notices that were the subject of the petitions had previously been adjudicated by the Division of Tax Appeals.

6. On January 27, 2014, the Administrative Law Judge issued an Order Dismissing Petitions because the faxed petitions were not properly filed. Petitioner filed an exception to that order, listing DTA Nos. 825337, 825338 and 822518, and notice numbers L029090305 and L028891241, as being the subjects of the exception.

7. In the February 13, 2014 letter to petitioner acknowledging receipt of his exception, the Secretary to the Tribunal informed the petitioner “that the Tax Appeals Tribunal no longer has jurisdiction over DTA# 822518 . . . as the Tribunal issued a final decision in that matter on February 4, 2011.”

8. Petitioner’s exception objected to a refund offset exercised by the Division allegedly based upon taxes due for 2004 and 2006. Petitioner did not file a brief in support or a reply brief in regard to his exception.

9. The Division filed a letter brief in lieu of a formal brief in opposition to the exception reiterating its position that the Division of Tax Appeals was without jurisdiction both because the petitions in this matter had been improperly filed, and because the notices that were the subject of the petitions had been previously and finally adjudicated before the Division of Tax Appeals.

10. Division notice number L029090305 regarding tax year 2004 was sustained by decision of this Tribunal issued on February 4, 2011 (DTA No. 822518). No Article 78 proceeding was filed regarding this matter.

11. Division notice number L028891241 regarding tax year 2006 was sustained by the determination of an Administrative Law Judge issued on July 12, 2012 (DTA No. 824871). No exception was filed regarding this matter.

OPINION

A proceeding in the Division of Tax Appeals is commenced by filing a petition with the Division of Tax Appeals (Tax Law § 2008). The Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.3 [c]) require that petitions must be filed either in person or by mail. There is no provision for filing by facsimile.

In this matter, the petitions were received by facsimile transmission. Petitioner was notified on several occasions that the petitions were not in the proper form in that they were transmitted to the Division of Tax Appeals by facsimile and not delivered in person or by mail as required by section 3000.3 (c) of the Tribunal's regulations. Petitioner was also informed that failure to cure the defect could result in dismissal of the petitions. Despite being presented with multiple opportunities to comment upon the issue of the method of filing, petitioner repeatedly chose not to respond.

While the defective filing alone is cause to dismiss the petitions and sustain the notices issued by the Division, we must also review the Division's argument that there are no notices to sustain, in that both notices have already been the subject of a final adjudication before the Division of Tax Appeals.

Petitioner in this matter protested Division notice numbers L029090305 and L028891241. Both of these notices were previously sustained in separate final adjudications; the first was sustained by this Tribunal (*Matter of Kyte*, Tax Appeals Tribunal, February 4, 2011)

and the second by an Administrative Law Judge (*Matter of Kyte*, [Division of Tax Appeals, July 12, 2012) whose determination petitioner chose not to appeal to this Tribunal. Petitioner cannot relitigate the validity of these notices (*see Matter of American Home Assurance Co.* [Tax Appeals Tribunal, August 8, 2002] [“petitioner cannot now attempt to relitigate the matters finally resolved in that previous litigation”]).² Based upon the reasons set forth above, the order of the Administrative Law Judge is affirmed.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Charles L. Kyte is denied;
2. The order of the Administrative Law Judge is affirmed; and
3. The petitions of Charles L. Kyte are dismissed.

DATED: Albany, New York
October 9, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner

² Indeed, although we are choosing not to impose the penalty for filing frivolous petitions allowed under 20 NYCRR 3000.21, petitioner’s conduct in filing these petitions, knowing that he had previously litigated the validity of the exact same notices, could be considered to rise to an abuse of the system that would merit such a penalty.