STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MYRA MAYO	:	DECISION DTA NO. 826259
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 Years 2009 through 2011.	: :	

Petitioner, Myra Mayo, filed an exception to the determination of the Administrative Law Judge issued on April 21, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian J. McCann, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for the issuance of this decision began on September 9, 2016, the date petitioner's reply brief was received.

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

ISSUE

Whether it was proper for the Division of Taxation to assert a deficiency of personal income tax without first performing certain steps, including sending an inquiry letter or conducting an audit.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified findings of fact 4 and 6 through 10. We have also added an additional finding of fact, numbered 14 herein. We make these changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact appear below.

1. Petitioner, Myra Mayo, filed a New York State resident income tax return for the year 2009 wherein she reported wage income of $63,426.78. Petitioner's tax return included a federal schedule C, profit or loss from business, that reported a loss from the business of "[p]hotography products and services" (the photography business) in the amount of $50,692.00.

2. Petitioner filed a New York State resident income tax return for the year 2010 wherein she reported wage income of $66,210.29. Petitioner's tax return included a federal Schedule C that reported a loss from the photography business in the amount of $45,848.00.

3. Petitioner filed a New York State resident income tax return for the year 2011 wherein she reported wages in the amount of $71,461.38. As in the prior years, petitioner's return included a federal Schedule C that reported a loss from the photography business in the amount of $48,718.21.

4. In the course of its activities, the Division of Taxation (Division) determined that certain New York taxpayers were filing returns with false business losses on federal schedule Cs in order to eliminate their taxable income. In order to better identify taxpayers engaged in this activity, the Division generated computer reports listing taxpayers who claimed business losses

that appeared, in the Division's estimation, to be excessive. More than one thousand taxpayers appeared on such reports, including petitioner.

5. It was the Division's opinion that petitioner was not carrying on a business for profit. In particular, the Division considered it questionable that an individual would engage in a business, year after year, that incurred substantial losses.

6. The Division issued a document (form DTF-960-E) to petitioner dated January 24, 2013 and captioned as follows:

> "New York State tax bill
> Statement of proposed audit change."

Directly below the caption, the form lists a "total amount due," along with other information, including an assessment number. The form also contains a "consent to amount due" and a payment voucher. Page 1 of the form advises the recipient: "You received this bill because: We reviewed your income tax return and any response to our inquiry letter and found that you have a balance due." Page 3 of the form provides the following additional explanation:

> "We are unable to verify the business loss claimed on the 2009 New York State tax return.
>
> As a result, we have disallowed the business loss claimed.
>
> If you disagree with our determination, please submit documentation, including canceled checks, receipts, business bank account records, etc. to substantiate the business loss claimed on your return and a detailed description of the income and expenses."

The form also explains that negligence penalties pursuant to Tax Law § 685 (b) (1) and (2) were being imposed because "[w]e have determined that all or part of the deficiency is attributable to negligence or intentional disregard of the . . . Tax Law." The form further advises that an additional penalty for substantial understatement of tax liability was being imposed pursuant to

Tax Law § 685 (p). The form DTF-960-E gave petitioner three weeks to either pay the amount asserted as due or to respond as indicated.

7. On January 23, 2013 and January 16, 2013, the Division issued similar forms DTF-963-E to petitioner for the tax years 2010 and 2011, respectively. In each instance, the documents were captioned "New York State tax bill statement of proposed audit change" as indicated above and each similarly explained that the Division was unable to verify the business losses reported on the respective returns. For the year 2011, the form DTF-963-E also stated that the Division was unable to verify the federal adjustments to income for student loan interest. For the year 2010, penalties were imposed pursuant to Tax Law § 685 (b) (1) and (2) for negligence and Tax Law § 685 (p) for substantial understatement of tax liability. For the year 2011, a penalty was imposed pursuant to Tax Law § 685 (p) for substantial understatement of tax liability. As with the form DTF-963-E for 2009, the forms pertaining to the 2010 and 2011 tax years also advised petitioner that if she disagreed, she should submit documentation to substantiate the business loss claimed on her return along with a detailed description of the income and expenses. Also consistent with the form DTF-963-E for 2009, the forms for the 2010 and 2011 tax years gave petitioner three weeks to respond.

8. Contrary to the statements contained on the forms DTF-963-E, petitioner received no inquiry letter from the Division and thus was unaware of any audit of or action to be taken with respect to her returns until she received such forms. As she had not received any such inquiry letter, she had not submitted any response thereto. Because of health concerns, petitioner found it difficult to respond to the forms DTF-963-E by providing any substantiation of her business losses within the time indicated.

9. By letter dated February 10, 2013, petitioner advised the Division that she had supporting documentation for every year she filed taxes and that she found it puzzling that the Division made a determination without asking to examine her documentation before making a decision. Petitioner stated that she believed that every audit first requires a request for back-up documentation prior to making a determination. The letter also stated that she is a very busy mother of two and that she had the flu for a week during this period. She also stated that she works, operates a business and manages a household. Therefore, she requested more time to respond. Petitioner also pointed out that many businesses are not successful in their first year and that photographers need time to develop their work and market themselves to become known. She further stated that she had wanted a photography business for a long time and the process is not quick or easy. Petitioner noted that there had been a growth in revenues during the years 2009 through 2012 and that, as a result of cutting costs, she expected profitability in 2014, if not in 2013. With respect to the Division's request for canceled checks and business bank account records, petitioner explained that she experienced a number of difficulties with banks in the past and that, as a result, she prefers using cash for revenues and expense transactions. She finds that operating with cash is simple, reliable, free of fees and offers ease of use. Petitioner's letter stated that annual summaries of her expenses, prepared by her accounting firm, were included. However, the exhibit in the record does not include these summaries.

10. The Division responded to petitioner's February 10, 2013 letter by correspondence dated April 25, 2013 (but mailed on April 23, 2013). In its letter, the Division advised petitioner of its conclusion that, based upon the photography business' substantial losses since 2005, the business was not carried on for profit. After reciting some of the factors that are taken into

account in determining whether petitioner was carrying on an activity for profit, the Division noted that petitioner did not provide any evidence of sales tax collection or any invoices or receipts that corresponded to the reported sales. The Division further noted that it could not verify the cash payments of any of petitioner's expenses. Consequently, the Division considered the proposed assessments to be correct.

11. On the basis of the statements of proposed audit changes, the Division issued to petitioner a series of notices of deficiency each asserting a deficiency of tax, penalty and interest as follows:

Year	Date Issued	Tax	Interest	Penalty	Balance Due
2009	04/02/13	$6,200.28	$1,543.58	$1,490.30	$9,234.16
2010	05/22/13	$7,510.95	$1,276.57	$1,408.22	$10,195.74
2011	03/04/13	$6,238.35	$425.30	$623.80	$7,287.45

12. The Division did not conduct an examination of petitioner's books and records prior to the issuance of the notices of deficiency.

13. The Division conducts audits in a number of different ways depending on the situation and the information presented. When the Division issued the statements of proposed audit changes herein, it was in the process of conducting an audit and offering petitioner an opportunity to submit documentation.

14. Petitioner submitted in evidence a 2011 student loan interest statement (form 1098-E) listing petitioner as the borrower and the U.S. Department of Education as the lender and reporting $1,216.93 in student loan interest received by the lender.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected all of petitioner's arguments regarding asserted failures in the audit procedure employed in the present matter. First, the Administrative Law Judge found that petitioner's reliance upon the Division's website as to the manner in which an audit must be conducted was misplaced. He found that the information on the website was generic and not intended to cover all situations. He agreed with the auditor's testimony that an audit may be conducted in various ways depending upon the circumstances. The Administrative Law Judge specifically found that there is no requirement that an audit or inquiry letter must precede a notice of deficiency of income tax or that the Division must request and examine books and records before the issuance of such a notice. The Administrative Law Judge further determined that neither Tax Law § 681 nor Tax Law § 697 (b) (1) precluded the Division from proceeding in the manner that it did in this case. The Administrative Law Judge also rejected petitioner's argument that the Division's determination of tax due in this matter was concluded without giving petitioner an opportunity to be heard. While acknowledging that the first documents mailed to petitioner in connection with this matter are captioned, in part, as tax bills, he observed that such documents are also captioned as statements of *proposed* audit change and that such documents expressly gave petitioner the opportunity to submit substantiation of claimed losses and a description of income and expenses. The Administrative Law Judge also rejected as meritless petitioner's contention that the audit was flawed because she did not receive 30 days to respond to the forms DTF-960-E. The Administrative Law Judge found that the Tax Law contains no such requirement. He determined that Tax Law § 3003, upon which petitioner relies for this proposition, does not require that a taxpayer be given any particular period of time

for responding to a statement of proposed audit changes. The Administrative Law Judge also determined that the Division did not violate the requirement under Tax Law § 3004 that the Division describe the rights of the taxpayer and the obligations of the Division. He found that the forms DTF-960-E satisfy this requirement by stating what action a taxpayer should take if she disagrees with the proposed audit changes. The Administrative Law Judge determined that the only prerequisite to a notice of deficiency of income tax is the existence of a rational basis for its issuance. The Administrative Law Judge found such a rational basis here in the Division's initial finding that petitioner's returns merited further review because of a repeated reporting of losses and petitioner's subsequent failure to document her income and expenses. Next, the Administrative Law Judge determined that petitioner had the burden of proof to establish error in the notices of deficiency and that she failed to do so here by her failure to submit any documentation supporting her claimed income and expenses. In reaching this conclusion, the Administrative Law Judge rejected petitioner's contention that she did not have the burden of proof because of the Division's asserted failure to issue an inquiry letter and to conduct an audit.

The Administrative Law Judge also rejected petitioner's contention that the lack of profit motive was not at issue here because it was not mentioned in the statements of proposed audit changes, the notices of deficiency or the answer. The Administrative Law Judge noted that the Division properly requested substantiation of petitioner's income and expenses in the statements of proposed audit changes. According to the Administrative Law Judge, if petitioner had responded to such requests, then the Division could have explored whether petitioner was operating her business for profit. However, since petitioner did not produce any books or

records, the Administrative Law Judge found that the question of whether petitioner was operating for profit was never reached.

The Administrative Law Judge also rejected petitioner's complaints regarding the conciliation conference and the Division's premature (and subsequently halted) collection activities in this matter because such matters are beyond the review and jurisdiction of the Division of Tax Appeals.

Finally, the Administrative Law Judge sustained the imposition of penalties in this matter, noting petitioner's failure to produce any documentation of her income or expenses. The Administrative Law Judge found that petitioner's complaint that the interest and penalties were excessive to be a facial challenge to the relevant statutes and beyond the jurisdiction of the Division of Tax Appeals.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner makes the same arguments as she made below. At its core, her primary argument is straightforward. Petitioner contends that the Division failed to follow the required audit procedure and that, accordingly, the notices of deficiency herein must be canceled. More specifically, petitioner argues that the Division's use of the forms DTF-960-E to contact her regarding her liability for the years at issue was improper because those forms purport to be tax bills, and thereby indicate that the Division had already concluded that petitioner owed additional tax, penalties and interest. Since, at the time the forms DTF-960-E were issued, petitioner had not been given an opportunity to respond to the Division's assertion of liability, petitioner argues that the process employed by the Division violated her due process rights.

In support of this argument, petitioner contends that the term examination as used in Tax Law § 681 (a) means that the Division must audit a return before making a determination of tax liability and that audit in this context means that the Division must first send a letter of inquiry and thereby give a taxpayer an opportunity to respond before sending a tax bill or a statement of proposed audit changes. It is petitioner's contention that a taxpayer must be given an opportunity to respond before any such changes to a taxpayer's liability are proposed. Petitioner contends that the Division did not follow such a course of action in the present matter.

Also in support of this argument, petitioner asserts that the Division's own published guidance for taxpayers regarding the audit process provides that an income tax audit begins with a letter of inquiry to the taxpayer and notes that no such letters were sent here. Petitioner further asserts that the Division's actions in the present matter are inconsistent with Taxpayer Bill of Rights provisions in Tax Law §§ 3003 and 3004.

Apparently in the alternative, petitioner contends that the Division's failure to follow proper audit procedure in the present matter means that she did not have the burden to prove entitlement to her claimed business losses at the hearing.

Petitioner also alleges bad faith, corruption and conspiracy on the part of all individuals involved in this matter with an intent to deprive her of her rights. Petitioner contends that form DTF-960-E was used as a means to railroad her into paying the asserted deficiencies and to discourage her from exercising her protest rights. Related to this contention, petitioner attacks the credibility of the auditor who testified in this matter.

Petitioner also continues to protest the imposition of penalties and argues that such penalties and the interest imposed herein are excessive. Petitioner acknowledges that this latter claim is a facial challenge to the relevant statutes.

Additionally, petitioner requests that this Tribunal remove the Administrative Law Judge's determination from the Division of Tax Appeals website, where it has been posted among all issued Administrative Law Judge determinations.

The Division argues that the Administrative Law Judge properly determined that the process it used in the present matter was adequate; that the notices of deficiency had a rational basis; and that petitioner failed to meet her burden to prove that such notices were erroneous.

OPINION

Tax Law § 681 (a) provides that "[i]f upon examination of a taxpayer's return . . . [the Division] determines that there is a deficiency of income tax," it may issue a notice of deficiency to the taxpayer. The Division is not required to request and examine a taxpayer's books and records before issuing a notice of deficiency (***see Matter of Ragozin***, Tax Appeals Tribunal, July 22, 1993; ***see also Matter of Giuliano v Chu***, 135 AD2d 893, 895 [1987]). Nor is the Division required to issue a statement of proposed audit changes before issuing such a notice (***see Matter of Houser***, Tax Appeals Tribunal, May 5, 1988). The Division is required, however, to have a rational basis for the deficiency asserted in such a notice (***see e.g***. ***Matter of Estate of Gucci***, Tax Appeals Tribunal, July 10, 1997 citing ***Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992).

Here, the Division examined petitioner's returns for the years at issue and observed what it considered to be significant losses claimed with respect to petitioner's schedule C business for

each of those years. This prompted the Division to propose deficiencies based on the disallowance of such losses and to advise petitioner to substantiate such losses in order to refute the proposed deficiencies. Petitioner was required to maintain records of her items of income and expense pursuant to Tax Law § 658 (a) and 20 NYCRR 158.1 (a). Petitioner's response to the forms DTF-960-E was deemed insufficient by the Division. Under such circumstances, we find, as did the Administrative Law Judge, that the subsequently issued notices of deficiency herein had a rational basis.

A presumption of correctness attaches to a properly issued notice of deficiency and the petitioner bears the burden of proving that the deficiency is erroneous (***see Matter of Gilmartin v Tax Appeals Trib.***, 31 AD3d 1008 [2006]; Tax Law § 689 [e]).[1]

Here, petitioner failed to meet her burden of proof as she has offered no specific evidence of her income or expenses with respect to her photography business during the years at issue.

We reject petitioner's contention that the manner in which the Division proceeded in this matter violated her rights to due process. The hallmarks of due process are notice and an opportunity to be heard (***see e.g. Matter of Balkin***, Tax Appeals Tribunal, February 10, 2016). The forms DTF-960-E that were mailed to petitioner expressly gave her an opportunity to respond with evidence of her income and expenses (***see*** finding of fact 6). Petitioner also exercised her protest rights following the issuance of the notices of deficiency by requesting a conciliation conference in the Bureau of Conciliation and Mediation Services and by filing a petition for a hearing in the Division of Tax Appeals. Both the conciliation conference and the hearing were opportunities for petitioner to submit evidence in support of her protest. It is thus

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[1] We note that petitioner's contention that the Division had the burden of proof in this matter is without merit.

clear that petitioner received the due process to which she was entitled in the present matter (***see Matter of Balkin*** ["There . . . could . . . be [no] successful argument that the statutory provisions for contesting assessments in New York do not provide the necessary elements of notice and opportunity to be heard required by due process."]).

Contrary to petitioner's contention, Tax Law § 681 (a) does not require the Division to commence an income tax audit with an inquiry letter. As noted previously, the Division is not required to request and examine a taxpayer's books and records before issuing a notice of deficiency (***Matter of Ragozin***). Additionally, and as also noted previously, the Division is not required to issue a statement of proposed audit changes before issuing a notice of deficiency (***Matter of Houser***). Accordingly, there is plainly no requirement in the Tax Law that a taxpayer have 30 days to respond to a statement of proposed audit changes.

We also reject petitioner's contention that Division's website and publications indicate that the Division is required to conduct an income tax audit by first sending an inquiry letter to the taxpayer. The Division's website provides that an income tax audit begins "in most cases" with a letter requesting information (***see*** http://www.tax.ny.gov/enforcement/criminal_enforcement/audit_expectations.htm). Obviously, the quoted phrase, like the record herein, indicates that the audit method used by the Division may vary depending on the situation and the information presented (***see*** finding of fact 13). Additionally, we observe that neither the Division's Publication 131 (Your Rights and Obligations under the Tax Law) nor Publication 130-D (The New York State Tax Audit - Your Rights and Responsibilities) provides that an audit must commence with a 30-day letter of inquiry as petitioner asserts.

Petitioner's assertion that the Division's actions in the present matter are inconsistent with Tax Law §§ 3003 and 3004 is unsupported by the language of those provisions. Tax Law § 3003 requires the Division to describe the basis for an asserted deficiency of tax. The forms DTF-960-E in the present matter complied with this requirement. Tax Law § 3004 requires that the Division describe the rights of taxpayers and the obligations of the Division and to advise taxpayers of such rights and obligations. Here, the forms DTF-960-E clearly state what petitioner should have done if she disagreed with the proposed audit changes. The requirements of this section were thus satisfied in the present matter.

While we find for the Division with respect to petitioner's audit procedure argument, we concur in petitioner's critique of form DTF-960-E to the extent that its designation, in part, as a "tax bill" is inaccurate. Such a designation implies the existence of a liability against the taxpayer and in favor of the Division. Yet, at the time such forms were issued to petitioner, no such liability existed. We note, however, that petitioner was not prejudiced by any such inaccuracy, as she responded to the forms DTF-960-E with her February 10, 2013 letter and, as noted, she exercised her rights to protest the notices of deficiency.

We agree with the Administrative Law Judge's conclusion that penalties imposed herein pursuant to Tax Law §§ 685 (b) (1), (2) and 685 (p) are properly sustained. Pursuant to Tax Law § 689 (e), petitioner had the burden of proof to show that the deficiency herein did not result from negligence or an intentional disregard of the Tax Law (Tax Law §§ 685 [b] [1] and [2]) or that the substantial understatement of tax was due to reasonable cause and not willful neglect (20 NYCRR 2392.1 [g] [1]). We agree with the Administrative Law Judge's conclusion that petitioner's failure to produce documentation to substantiate her claimed schedule C income and

expenses supports the imposition of negligence penalties (***see Matter of Eisner***, Tax Appeals Tribunal, March 22, 1990). Petitioner's contention that she was not obligated to substantiate her income and expenses at the hearing because of the Division's assertedly improper audit procedure is unreasonable and thus not a basis for penalty abatement.

As petitioner acknowledged, her claim that the penalties and interest asserted in the notices of deficiency are excessive is a challenge to the facial constitutionality of the relevant statutes. As the Administrative Law Judge correctly noted, such a claim is beyond our jurisdiction (***see Matter of Eisenstein***, Tax Appeals Tribunal, March 27, 2003).

We find no evidence in the record to support petitioner's contention that the Division employees involved in this matter acted in bad faith by conspiring to deprive her of her protest rights and to coerce her into paying the asserted liabilities. Related to this point, we also find that the Administrative Law Judge properly addressed petitioner's complaints regarding the conciliation conference and the Division's premature collection activities in this matter.

Petitioner's request to remove the Administrative Law Judge's determination in this matter from the Division of Tax Appeals' website runs contrary to our statutory duty to publish and make available to the public all Administrative Law Judge determinations and Tribunal decisions (Tax Law § 2006 [9]).

Finally, we find that petitioner has established that she incurred $1,216.93 in student loan interest in 2011 (***see*** finding of fact 14). Accordingly, the Division's disallowance of this adjustment to her income for that year was improper.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. Except as indicated in paragraph 4 below, the exception of Myra Mayo is denied;

2. Except as indicated in paragraph 4 below, the determination of the Administrative Law Judge is affirmed;

3. Except as indicated in paragraph 4 below, the petition of Myra Mayo is denied; and

4. The notice of deficiency for the tax year 2009, dated April 2, 2013, is sustained; the notice of deficiency for the tax year 2010, dated May 22, 2013, is sustained; and the notice of deficiency for the tax year 2011, dated March 4, 2013, is modified to the extent that the Division is directed to recalculate the deficiency by permitting the claimed federal adjustment to income for student loan interest in the amount of $1,216.93, and, as so modified, such notice is sustained.

DATED: Albany, New York
March 9, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner