STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ARTHUR G., JR., AND AMANDA NEVINS	:	DECISION DTA NO. 827609
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 2008.	:	

Petitioners, Arthur G., Jr., and Amanda Nevins, filed an exception to the determination of the Administrative Law Judge issued on December 1, 2016. Petitioner, Arthur G. Nevins, Jr. appeared pro se and on behalf of his spouse, Amanda Nevins. The Division of Taxation appeared by Amanda Hiller, Esq. (Mary Hurteau, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Petitioners' request for oral argument was denied. By correspondence dated October 16, 2017, the parties were given an opportunity to brief additional issues identified by the Tribunal. Petitioners filed a letter brief in response to the Tribunal's correspondence. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. The six-month period for issuance of this decision began on February 27, 2018, the date that petitioners' reply brief on the additional issues was received.

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

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction to consider the merits of the petition.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. We have also made an additional finding of fact, numbered 5 herein, and have renumbered the Administrative Law Judge's finding of fact 5 as finding of fact 6. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

1. The Division of Taxation (Division) issued to petitioners, Arthur G., Jr., and Amanda Nevins, a notice of additional tax due (assessment ID# L-024124741-1), seeking payment of personal income tax due for the tax year 2008.

2. The notice, dated November 5, 2014, provides, in part, as follows:

> "Our records indicate that the Internal Revenue Service (IRS) made changes to your federal return. Section 659 of the New York State Tax Law requires that federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.
>
> A search of our files indicates that you did not report these changes to New York State.
>
> * * *
>
> Business income reported on your New York return has been corrected to include the IRS adjustment."

3. On April 28, 2016, petitioner filed a petition with the Division of Tax Appeals protesting the notice of additional tax due. Also attached to the petition was a notice and demand for payment of additional tax due dated January 7, 2016 bearing the same assessment identification number as that appearing on the notice of additional tax due.

4. On June 27, 2016, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice of intent provided, in relevant part, as follows:

> "Pursuant to §§ 681(b) and 689(b) of the Tax Law, the protest of a statutory notice that has been issued to a taxpayer under Article 22 of the Tax Law is commenced by the timely filing of a petition with the Division of Tax Appeals (20 NYCRR 3000.3[c]). Such petition must include a copy of the statutory notice under protest

> (***see*** 20 NYCRR 3000.3[b][8]). With respect to Article 22 of the Tax Law, this requirement will be satisfied by the petitioner's provision of a copy of either a notice of deficiency or a refund denial (***see*** Tax law § 681; 20 NYCRR 3000.1[k]). In addition, Tax Law § 173-a (2) specifically provides, inter alia, that a taxpayer is not entitled to a hearing before the Division of Tax Appeals with respect to a notice of additional tax due and a notice and demand.
>
> The petition in this matter appears to have been filed in protest of a Notice of Additional Tax Due, Assessment L-042124741-1, issued on November 5, 2014. The petition in this matter also appears to have been filed in protest of a Notice and Demand for Payment of Tax Due, issued January 7, 2016. These notices are insufficient to confer jurisdiction upon the Division of Tax Appeals to consider the merits of the petition."

5. The notice of intent informed petitioners that the parties would have 30 days to submit written comments on the proposed dismissal. In response to a request for additional time, the parties were granted until September 12, 2016 to respond to the proposed dismissal. On July 18, 2016, the Division of Taxation submitted a letter in support of dismissal. On September 9, 2016, petitioners submitted an affirmation and documents in opposition to the dismissal.

6. Petitioners' papers in opposition to dismissal allege that it was never necessary for petitioners to file a report of federal audit changes because although their income was increased, the change had no effect on their New York tax liability. Petitioners contend that Tax Law §§ 173-a, 659 and 681 were not intended to bar a taxpayer from filing a petition where the federal change has no effect on New York tax liability.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Division of Tax Appeals is a forum of limited jurisdiction and that its power to adjudicate disputes is exclusively statutory. He dismissed the petition, determining that since the documents being appealed from were a notice and demand and a notice of additional tax due, pursuant to Tax Law § 173-a (2), petitioners did

not have the right to a hearing and the Division of Tax Appeals lacked jurisdiction to decide the petition.

SUMMARY OF ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the Administrative Law Judge made no finding as to the substantive question of whether they owe any New York State income tax for the year 2008 and that he disregarded the factual evidence relating thereto. They assert that the additional income that resulted in the federal change was solely New Jersey source income and did not impact their New York tax liability. They argue, therefore, that they were not required to file an amended New York State return or a report of federal changes to their 2008 income because the change impacted only their federal and New Jersey taxes. Petitioners contend that the language in 20 NYCRR § 159.2 (a) modifies the reporting requirement in Tax Law § 659 for nonresident taxpayers. They argue that, since they were not required to file a report or an amended return, the Division's issuance of a notice of additional tax due pursuant to Tax Law § 681 (e) was not proper. They contend that Tax Law §173-a (2) cannot be construed to deny or modify their right to a hearing based upon a notice of additional tax due that was not properly authorized.

Finally, petitioners allege that Tax Law § 173-a violates their right to due process under the Fourteenth Amendment to the United States Constitution. Alternatively, they argue that the Administrative Law Judge incorrectly applied the law in this case, thereby resulting in a violation of their constitutional right to due process. They contend that the Due Process Clause of the US Constitution requires a full pre-deprivation evidentiary hearing in this matter.

The Division contends that the Administrative Law Judge correctly decided the relevant issues and that his determination should be affirmed. It argues that Tax Law § 173-a (2)

specifically denies or modifies a taxpayer's right to a hearing before the Division of Tax Appeals when a notice of additional tax due or a notice and demand for payment of tax due is issued. Further, it asserts that such notices may not be construed to confer jurisdiction on the Division of Tax Appeals and, thus, the exception should be denied and the Administrative Law Judge's dismissal of the petition and the notices should be sustained.

The Division argues that Tax Law § 659 unequivocally requires all taxpayers (residents and nonresidents) to report any changes or corrections to their federal income tax within 90 days after the final determination and that the language in 20 NYCRR § 159 (2) does not eliminate that reporting requirement. It argues that the notice of additional tax due established that the federal change increased petitioners' business income and changed their itemized deductions and, therefore, did, in fact, relate to their income tax liability, thus triggering the reporting requirement pursuant to the regulation. The Division asserts that the notice of additional tax due was properly and timely issued pursuant to Tax Law §§ 681 (e) and 683 [c] [1] [C]). That being the case, it argues that petitioners are precluded from obtaining a hearing on that notice pursuant to Tax Law § 173-a (2).

OPINION

We affirm the determination of the Administrative Law Judge.

The Division of Tax Appeals is a forum of limited jurisdiction (***see*** Tax Law § 2008; ***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 Trib***., 151 Misc 2d 326 [1991]). Our authority to adjudicate disputes is exclusively statutory (***id.***). Therefore, absent legislative action, we cannot extend our authority to areas not specifically delegated to us. The

Tribunal is authorized pursuant to Tax Law § 2006 (4) to "provide a hearing as a matter of right, to any petitioner upon such petitioner's request . . ., unless a right to such a hearing is specifically provided for, modified or denied by another provision of this chapter."

In this case, petitioners sought a hearing regarding a notice and demand, which had been issued subsequent to the issuance of a notice of additional tax due. According to the notice of additional tax due, federal adjustments were made to petitioners' reported income for tax year 2008. Tax Law § 659 requires taxpayers to report changes and corrections to federal taxable income, as corrected by the IRS, to the Division within 90 days after the final determination of such change or correction and either: (1) concede to the accuracy of the federal change or (2) state a basis for asserting that the change or correction is erroneous. If the federal change or correction is not reported, as is the case here, the Division is authorized by Tax Law § 681 (e) (1) to assess a deficiency by mailing to the taxpayer a notice of additional tax due. Such deficiency is deemed assessed on the date the notice is mailed, unless within 30 days after the mailing of the notice, the taxpayer files a report of federal changes or an amended return with a statement showing why the federal determination and such notice of additional tax due are erroneous (Tax Law § 681 [e] [1]). The Division may issue a notice of additional tax due at any time (Tax Law § 683 [c] [1] [C]; ***Matter of Mulderig v New York State Dept. of Taxation & Fin.***, 55 AD3d 1159 [3d Dept 1987]; ***Matter of Rodriguez***, Tax Appeals Tribunal, March 20, 2017; Tax Law § 659; ***see*** 20 NYCRR § 159.1). Article 22 of the Tax Law does not specifically provide the taxpayer with the right to petition a notice of additional tax due.

On exception, petitioners acknowledge that the IRS made a correction to their 2008 federal return that resulted in an addition to their 2008 federal taxable income and that they did

not file an amended New York State income tax return or a report of that correction with the Division. Petitioners do not contest that the additional income was subject to federal income tax. They assert that they had filed a nonresident income tax return (form IT-203) in New York for 2008 that reported no net income and no state income tax due. They contend that the change to their federal taxable income was from a legal case that was litigated by petitioner Arthur Nevins solely in New Jersey on behalf of a New Jersey client and had no relationship to New York. They further contend that petitioner Arthur Nevins is an attorney with a law office in New Jersey to service his New Jersey clients and an office in New York to service his New York clients. Petitioners argue that, since the federal change to their 2008 federal taxable income impacted only federal and New Jersey taxes and did not relate to an increase or decrease in their New York State income tax liability, they were not required to make the report required by Tax Law § 659. In support of their argument, they point to 20 NYCRR § 159.2 (a), which, they contend, modifies the requirement to file an amended return or report in Tax Law § 659 for nonresident taxpayers.

20 NYCRR § 159.2 (a) provides, in pertinent part:

> "The report referred to in section 159.1 of this Part must be made on the prescribed form with respect to a change or correction in Federal taxable income . . . . The report must be made regardless of whether the taxpayer believes any modification of such taxpayer's New York State income tax liability is required. *However, a nonresident taxpayer must make such report, and must file such amended New York State income tax return with the Tax Commission as required by section 159.3 of this Part, only if the Federal change, results of renegotiation or amended Federal income tax return relates to an increase or decrease in such nonresident taxpayer's New York State income tax liability*" (emphasis added).

Petitioners argue that the Division was not authorized to issue the notice of additional tax due in the first instance. They further argue that they cannot be denied a pre-deprivation hearing pursuant to Tax Law § 173-a (2) based upon an unauthorized notice that has no basis in fact. In

support of their exception, petitioners submitted an affirmation by petitioner Arthur Nevins, dated February 8, 2017, a certification in lieu of oath or affidavit by their authorized representative, Henry A. Meyer, E.A., dated September 7, 2016, and a copy of their State of New Jersey amended income tax return for 2008, on which they reported the additional income for 2008.

The Division, instead, argues that Tax Law § 659 is controlling and that it unequivocally requires all taxpayers, regardless of residency status, to report any changes or corrections to their federal taxable income within 90 days after the final determination. It contends that petitioners' interpretation of the regulation would nullify Tax Law § 659 by allowing taxpayers to unilaterally determine the statute's applicability. It argues that such interpretation subverts the clear meaning and legislative intent of the statute's reporting requirement. In attempting to explain the purpose of 20 NYCRR § 159.2, the Division proposes a strained reading of the regulation, but contends, nonetheless, that the notice of additional tax due was based upon information received from the IRS and did, in fact, relate to an increase in petitioners' New York income tax liability, thus triggering the reporting requirement under any construction of 20 NYCRR § 159.2 (a). It asserts that the notice established that the federal change increased petitioners' business income and changed their itemized deductions, evidence of which cannot be ascertained from the record of this summary proceeding.

The Division's argument relies primarily on the premise that Tax Law § 659 requires all taxpayers to report changes in federal taxable income. It is not necessary, however, to look beyond the plain reading of Tax Law § 659 to see that the Legislature gave the Commissioner of

Taxation and Finance explicit authority to make exceptions to the requirements of that section as he or she deems appropriate.

Tax Law § 659 provides in relevant part:

> "If the amount of a taxpayer's federal taxable income . . . reported on his federal income tax return for any taxable year . . . is changed or corrected by the United States internal revenue service or other competent authority . . . the taxpayer . . . shall report such change or correction . . . within ninety days after the final determination of such change, correction . . . and shall concede the accuracy of such determination or state wherein it is erroneous. Any taxpayer filing an amended federal income tax return . . . shall also file within ninety days thereafter an amended return under this article, and shall give such information as the commissioner may require. The commissioner may by regulation prescribe such exceptions to the requirements of this section as he or she deems appropriate."

By design, the statutory scheme contemplates the possibility that the Commissioner may make exceptions to the requirement that all taxpayers must report changes to federal taxable income which, in fact, appears to have been accomplished with the promulgation of 20 NYCRR § 159.2 (a) (***see Matter of General Electric Capital Corp. v Division of Tax Appeals***, 2 NY3d 249 [2004] [consistent with explicit grant of authority, Commissioner of Taxation and Finance promulgated regulation]).

Regardless of the merits of each party's claimed interpretation of Tax Law § 659 and its implementing regulation, neither a notice of additional tax due, nor a notice and demand may be construed to confer jurisdiction on the Division of Tax Appeals to review such notice in any manner. Tax Law § 173-a (2) provides that a notice and demand and a notice of additional tax due "shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand or notice of additional tax due for purposes of [Tax Law § 2006 (4)]." That statute also provides that "any such notice and demand or notice of additional tax due shall not be construed as a notice which gives a person the right to a hearing [in the Division of

Tax Appeals]" (***see Matter of Rodriguez; Matter of O'Csay***, Tax Appeals Tribunal, December 11, 2014; ***Matter of Kyte***, Tax Appeals Tribunal, June 9, 2011).

A review of the legislative history of Tax Law § 173-a (2) demonstrates clearly the Legislature's intention to eliminate formal prepayment hearing rights in the Division of Tax Appeals where changes are made to a taxpayer's federal return by the IRS or other competent federal authority. The memorandum in support of the legislation indicates that the statute was enacted specifically to address the effect of the New York court decision in ***Matter of Meyers v Tax Appeals Trib. of State of N.Y.***, 201 AD2d 185 (3d Dept 1994); ***lv denied*** 84 NY2d 810 (1994), and the subsequent Tax Appeals Tribunal decision in ***Matter of Jaffe***, Tax Appeals Tribunal, September 21, 1995, which had required the Division to provide taxpayers with formal prepayment hearings in certain circumstances, including when notices of additional tax due are issued (***see*** L 2004 Ch 60). Thus, the statute's plain language, supported by its clear legislative history, demonstrates that the present circumstances are precisely those that the Legislature intended the statute to reach.

As stated above, the Division of Tax Appeals is a forum of limited jurisdiction whose authority to adjudicate disputes is exclusively statutory. The language in Tax Law § 173-a (2) is unambiguous and no exception is provided for determining whether a notice of additional tax due is authorized and properly issued. Although petitioners have made an arguably valid claim that 20 NYCRR § 159.2 relieved them of the obligation to file an amended return or a report of changes to their federal taxable income, Tax Law § 173-a (2) precludes petitioners from bringing such a claim in the Division of Tax Appeals and precludes the Division of Tax Appeals from

hearing such a claim with respect to any such notice of additional tax due (Tax Law § 173-a [2]; ***see Matter of Rodriguez***; ***Matter of O'Csay***; ***Matter of Kyte***).

To the extent that petitioners claim that Tax Law § 173-a violates their due process rights under the Fourteenth Amendment to the US Constitution and is unconstitutional on its face, the jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass such constitutional challenges (***see Matter of Fourth Day Enter., Inc.***, Tax Appeals Tribunal, October 27, 1988; ***see also Matter of Jones***, Tax Appeals Tribunal June 29, 1983). Therefore, we presume that the statute is constitutionally valid (***id.***).

Petitioners, alternatively, claim that the Administrative Law Judge made an incorrect determination of law and that Tax Law § 173-a is unconstitutional as applied in this case. They make a generalized claim of financial hardship and inability to pay the tax. They assert that the failure to provide them with an opportunity to be heard at a predeprivation hearing is a violation of their due process rights under the Fourteenth Amendment to the US Constitution.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (***Mathews v Eldridge***, 424 US 319, 333 [1976], ***quoting, Armstrong v Manzo***, 380 US 545, 552 [1965]). To satisfy the requirements of due process, a taxing statute must provide taxpayers with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy" (***McKesson Corp. v Division of Alcoholic Beverages and Tobacco***, 496 US 18 [1990], ***quoting, Atchison, T. & S. F. R. Co. v O'Connor***, 223 US 280, 285 [1912]; ***see Brault v New York State Tax Appeals Trib.***, 265 AD2d 700 [3d Dept 1999]). States have wide latitude in employing various measures and remedies to protect the government's strong interest in financial stability,

and the constitutionality of tax collection without a predeprivation hearing has long been established (***see McKesson Corp. v Division of Alcoholic Beverages and Tobacco***; ***see also Phillips v Commr.***, 283 US 589 [1931]; ***Ames Volkswagen v State Tax Commn.***, 47 NY2d 345, [1979]).

Due process for petitioners is provided by the Division's post-payment procedures that include formal protest options. Once the tax is paid, a claim for credit or refund of an overpayment of personal income tax may be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever is later (Tax Law § 687 [a]). If the refund claim is denied, petitioners may request a conciliation conference in the Bureau of Conciliation and Mediation Services, file a petition with the Division of Tax Appeals, or both (Tax Law §§ 170 [3-a], 689 [c]). This statutory scheme provides petitioners both a fair opportunity to challenge the validity of the income taxes claimed to be due and a clear and certain remedy, a refund, in the event they prevail. Such potentially meaningful, backward looking relief to rectify any unconstitutional deprivation satisfies due process (***see McKesson Corp. v Division of Alcoholic Beverages and Tobacco***; ***Phillips v Commr.***; ***Ames Volkswagen v State Tax Commn.***). Thus, given these post-payment protest procedures, we find that the Administrative Law Judge's interpretation and application of Tax Law § 173-a in this proceeding did not result in a violation of petitioners' rights to due process under the Fourteenth Amendment.

Lastly, legislative enactments are not rendered invalid as a denial of due process under the law "because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business" (***Joseph E. Seagram & Sons v Hostetter***, 45 Misc 2d 956, 961 [1965], ***affd*** 23 AD2d 933 [3d Dept 1965], ***affd*** 16 NY2d 47 [1965], ***affd*** 384 US 35

[1966]). It bears repeating that petitioners had the opportunity to informally protest the determination of tax due by responding to the notice of additional tax due when it was first issued, which they apparently failed to do. Once the 30-day period had passed, petitioners were required to pay the tax claimed due. Their claims of financial hardship and inability to pay do not rise to a violation of due process (***cf. Matter of Jacobi v Tax Appeals Trib. of the State of N.Y.***, 156 AD3d 1154 [3d Dept 2017], ***lv denied*** ___ NE3d ___ [2018]).

Finally, petitioners have submitted additional documentary evidence along with their reply brief, well after the date by which all comments and evidence were to have been submitted and after the issuance of the determination by the Administrative Law Judge. We have held that to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties can submit additional evidence after the record is closed, there is neither definition nor finality to the process (***see Matter of Saddlemire***, Tax Appeals Tribunal, June 14, 2001; ***Matter of Emerson***, Tax Appeals Tribunal, May 10, 2001; ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). Petitioners had requested and received a 45-day extension of time to file their written comments and supporting documentation in response to the Administrative Law Judge's notice of intent to dismiss petition. The record in this matter closed on September 12, 2016, the deadline for submission of all documents after the extension. The Administrative Law Judge issued his determination on December 1, 2016. The notice of exception to the Administrative Law Judge's Determination was filed with the Tribunal on December 30, 2016. Petitioners submitted their reply brief with the additional documentation on March 27, 2017. Petitioners do not claim that the time in which to submit their comments and evidence was unreasonable, but that the additional documentation they submitted was only

recently received from the New Jersey Tax Court. Therefore, according to petitioners, it could not have been submitted earlier.

Notwithstanding the fact that a hearing was not held in the proceeding below, petitioners had the right to, and indeed did, submit comments and evidence before the closing of the record. The rules of the Tribunal do not provide for the submission of evidence or documents not included in the record below. The rules do provide for a motion to reopen the record or for reargument, but such motion must be made to the Administrative Law Judge who rendered the determination within 30 days after the determination has been served (***see Matter of Frenette***, Tax Appeals Tribunal, February 1, 2001; 20 NYCRR § 3000.16). Even if a timely motion to reopen had been filed with the Administrative Law Judge, however, petitioners have produced no facts that would constitute a basis for reopening the record. The Tribunal's rules provide that the administrative hearing record may be reopened only upon the grounds of:

> (1) Newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or
>
> (2) Fraud, misrepresentation, or other misconduct of an opposing party (20 NYCRR § 3000.16 [a]).

"Newly discovered evidence" means evidence that was in existence but undiscoverable with due diligence at the time of judgment (***Matter of Frenette***; ***see Evans v Monaghan***, 306 NY 312 [1954]). Based upon the assertion of petitioners in the instant matter, the documentation from the New Jersey Tax Court does not constitute newly discovered evidence in accordance with the regulation and case law. Therefore, in the interest of maintaining a process that is both defined and final, the additional documentation submitted by petitioners has not been considered by the Tribunal.

In any event, given our conclusion that we lack jurisdiction to review the subject notice and demand and notice of additional tax due, evidence regarding the specific federal changes that resulted in the issuance of such notices could have no impact on our decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Arthur G., Jr., and Amanda Nevins is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Arthur G., Jr., and Amanda Nevins is dismissed.

DATED: Albany, New York
June 7, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner