STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT STANTON	:	DECISION DTA NO. 827970
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2012 and 2013.	:	

Petitioner, Robert Stanton, filed an exception to the determination of the Administrative Law Judge issued on April 4, 2019. Petitioner appeared by Thaney & Associates (David T. Nameniuk, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a letter brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was heard in Albany, New York on September 26, 2019, which date began the six-month period for the issuance of this decision.

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

ISSUES

I. Whether the Division of Taxation properly disallowed a portion of petitioner's claimed investment tax credit, where property had been expensed under Internal Revenue Code (26 USC) § 179 (a) and had a useful life of less than four years.

II. Whether petitioner's "Motion to Reopen Record for Reargument" should be granted.

III. Whether this matter should be remanded to the Administrative Law Judge to address an issue first raised after the issuance of the determination

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 9 and have made additional findings of fact, numbered 10 through 14. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional findings of fact appear below.

1. Refractron Technologies Corp. (Refractron), is an S corporation and a pass-through entity. Refractron is certified as an Empire Zone (EZ) enterprise for its facilities located in Wayne County. Its certificate of eligibility was effective as of December 4, 2003.

2. Petitioner, Robert Stanton, owned 81.8% of Refractron's shares in 2012 and 2013.

3. Petitioner claimed an investment tax credit (ITC) via the pass-through entity Refractron on his New York State resident income tax returns form IT-201 for 2012 and 2013.

4. The Division of Taxation (Division) conducted an audit of petitioner's personal income tax returns and Refractron's S corporation franchise tax returns and reviewed the list of properties claimed for the ITCs for the tax years 2012 and 2013.

5. Refractron claimed Internal Revenue Code (IRC) (26 USC) § 179 expenses as well as ITCs on its New York tax returns for 2012 and 2013.

6. Refractron claimed ITCs on its returns for 2012 and 2013 for properties with a useful life of less than four years.

7. The auditor reviewed the returns and noted that Refractron did not reduce the cost basis of the ITC property by the amount of the property expensed under IRC (26 USC) § 179 (a). The auditor concluded that this was in error and an adjustment was made to the cost basis, which in

turn resulted in an adjustment to the ITC claimed. The auditor further determined that Refractron improperly claimed ITCs for properties listed with a useful life of less than four years and disallowed the ITCs claimed for those properties.

8. The Division issued two notices of deficiency to petitioner for additional tax due. Notice of deficiency, assessment ID #L-044298552, dated March 18, 2016, asserted tax due in the amount of $80,746.00, plus interest, for tax year 2012. Notice of deficiency, assessment ID #L-044798764, dated November 4, 2016, asserted tax due in the amount of $5,229.00, plus interest, for tax year 2013.

9. The petition argues that petitioner properly claimed both IRC (26 USC) § 179 (a) deductions and ITCs with respect to the same property during the years at issue. The petition thus contends that the notices of deficiency should be canceled. The parties agreed to proceed on a submission basis before the Administrative Law Judge, who provided the parties with a schedule for the submission of documents and briefs. Petitioner did not submit any evidence into the record and did not file an initial brief under the schedule. The Division submitted documents and a letter brief in accordance with the schedule. Petitioner's brief in reply to the Division's brief was due by October 11, 2018. Petitioner attempted to file a reply letter brief dated November 1, 2018 and received by the Division of Tax Appeals on November 5, 2018. The Administrative Law Judge rejected petitioner's reply letter brief as late-filed. In a February 22, 2019 letter, petitioner requested that the Administrative Law Judge reconsider her rejection of his reply brief. That request was denied. The Administrative Law Judge thus did not consider petitioner's reply letter brief in reaching her determination.

10. Petitioner's November 1, 2018 reply letter brief acknowledges that petitioner's 2012 and 2013 returns were erroneous to the extent that those returns claim both IRC (26 USC) § 179

expense deductions and ITCs with respect to the same property. In contrast to his position in the petition, petitioner's reply letter brief concedes that the Division properly recomputed his income tax liability for those years. The reply letter brief also sought to raise a new issue in this matter. Specifically, petitioner requested an opportunity to file amended returns to correct the errors therein.

11. On April 30, 2019, petitioner filed a timely exception to the Administrative Law Judge's April 4, 2019 determination with the Tax Appeals Tribunal.

12. On July 3, 2019, petitioner brought a "Motion to Reopen Record for Reargument" by which he requested that the April 4, 2019 determination "be reopened for argument . . . for an issue that was not addressed [therein]." Petitioner filed his motion simultaneously with both the Administrative Law Judge and the Tax Appeals Tribunal.

13. In a letter dated July 9, 2019, the Supervising Administrative Law Judge responded to petitioner's motion to the Administrative Law Judge. The letter advised petitioner that, as the motion was filed after petitioner's exception, the Administrative Law Judge was without authority under the Tax Appeal Tribunal's Rules of Practice and Procedure (20 NYCRR Part 3000) to address the motion.

14. In a letter dated July 9, 2019, the Secretary to the Tax Appeals Tribunal advised petitioner that the motion would be addressed in the Tribunal's decision.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge addressed the sole issue raised in the petition. That is, whether the Division properly disallowed New York investment tax credits claimed by petitioner through Refractron during the years at issue.

The Administrative Law Judge agreed with the Division's audit finding that petitioner improperly claimed investment tax credits where he also claimed Internal Revenue Code (IRC) (26 USC) § 179 expenses on the same property. The Administrative Law Judge found that petitioner reduced his cost basis in the property to zero by claiming the expense deduction. The Administrative Law Judge noted that the relevant investment tax credit provision, Tax Law former § 210.12 (b) (i) (renumbered § 210-B [1] [b] [i]), states that the property upon which the credit is claimed must be depreciable pursuant to IRC (26 USC) § 167. The Administrative Law Judge reasoned that, where, as here, the cost basis of property has been reduced to zero by the expense deduction, such property is no longer depreciable under IRC (26 USC) § 167. Accordingly, an investment tax credit is not allowed with respect to that property.

The Administrative Law Judge also found that the Division properly disallowed the claimed ITCs where the subject property had a useful life of less than four years. The Administrative Law Judge noted that the relevant statute states that, for the credit to be allowed, the property must "have a useful life of four years or more" (Tax Law former § 210.12 [b]). The Administrative Law Judge noted that the Division made this audit determination after reviewing Refractron's own records.

ARGUMENTS ON EXCEPTION

Petitioner does not take issue with the Administrative Law Judge's conclusion that the Division properly disallowed his claimed investment tax credit for the years at issue. Hence, he no longer contests the notices of deficiency. Rather, in his exception and his "Motion to Reopen Record for Reargument," as well as his rejected November 1, 2018 reply letter brief, petitioner takes the position that he mistakenly claimed IRC (26 USC) § 179 expense deductions during the years at issue and acknowledges that, accordingly, those returns were erroneous. Petitioner

seeks to file amended returns for those years to meet his "duty of consistency" in tax reporting and to thereby properly claim ITC benefits for later years. Petitioner contends that he was not aware of the October 11, 2018 due date for his reply brief in which he first attempted to raise this issue. Petitioner requests that this Tribunal remand the present matter to the Administrative Law Judge to address this new issue. He further requests that the record be reopened to submit the amended returns for 2012 and 2013. At oral argument, petitioner's representative asserted that the Division agreed to accept such amended returns at the conciliation conference held in this matter. Petitioner requests the opportunity to submit evidence of such an agreement if the record is reopened.

The Division contends that the Administrative Law Judge correctly decided that petitioner was ineligible for the claimed ITCs. The Division also contends that this Tribunal should not consider arguments and evidence filed after the record has been closed and notes that the issues raised in petitioner's November 1, 2018 reply letter brief were not raised before the Administrative Law Judge.

OPINION

Given petitioner's concession that the Administrative Law Judge correctly addressed the substantive issue before her, that issue is not before us on this exception. Rather, the present matter involves whether petitioner may raise a new issue and submit evidence after the time for the submission of evidence and arguments has expired.

As noted, petitioner first attempted to raise the issue of whether he may file amended returns in his reply letter brief to the Administrative Law Judge, dated November 1, 2018, which was rejected by the Administrative Law Judge as late-filed. "[A]dministrative law judges have wide discretion in fixing the time for the filing of documents [not required to be filed under the

Tax Law or regulations] pursuant to a proceeding before the Division of Tax Appeals" (***Matter of Greenfeld***, Tax Appeals Tribunal, March 7, 2019; 20 NYCRR 3000.15 [c] [3]; ***see also*** State Administrative Procedure Act § 304 [4]). The circumstances of each case determine whether a late-filed brief should be excluded from the record and not considered in rendering a determination or decision (***Matter of O'Keh Caterers***, Tax Appeals Tribunal, November 5, 1992). Here, petitioner's November 1, 2018 reply letter brief was received by the Division of Tax Appeals more than three weeks after it was due and there is no support in the record for petitioner's claim on exception that he was not aware of the reply brief's due date. Under these circumstances, the Administrative Law Judge's decision to reject the reply letter brief was within her discretionary authority under 20 NYCRR 3000.15 (c) (4).

Petitioner also sought to raise this issue through his "Motion to Reopen Record for Reargument," made to the Administrative Law Judge after petitioner had filed his exception in this matter. As the Supervising Administrative Law Judge's letter to petitioner noted, an administrative law judge has no power to grant such a motion after an exception has been filed (***see*** 20 NYCRR 3000.16 [b]). Additionally, the Rules of Practice and Procedure provide that such a motion must be made to the Administrative Law Judge who rendered the determination within thirty days after the issuance of the determination (***id.***). Petitioner's motion to the Administrative Law Judge was thus procedurally improper under our rules and was dismissed accordingly. We note that these procedures are necessary to maintain an administrative hearing process that is "defined and final" and, thus, "fair and efficient" (***Matter of Zheng***, Tax Appeals Tribunal, October 10, 2019 quoting ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). For purposes of this exception, we deem the Supervising Administrative Law Judge's

July 9, 2019 letter to petitioner as an order dismissing petitioner's motion to the Administrative Law Judge. We affirm that order here.

Petitioner's "Motion to Reopen Record for Reargument" to this Tribunal is also properly dismissed. Although our rules do provide for a motion for reargument to the Tribunal, such a motion is properly made *after* the Tribunal's decision has been issued (20 NYCRR 3000.16 [c]). A motion for reargument to the Tribunal is analogous to a motion brought under CPLR 2221 (d) and is "designed to afford a party an opportunity to establish that the [Tribunal] overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (***Matter of Sungard Sec. Fin., LLC***, Tax Appeals Tribunal, September 25, 2015 quoting ***Foley v Roche***, 68 AD2d 558, 567 [1st Dept 1979], ***lv denied*** 56 NY2d 507 [1982]). Such circumstances are not present, where, as here, a Tribunal decision is pending.

We next consider petitioner's request, made in his exception, to remand this matter to the Administrative Law Judge to address the issue of whether petitioner may file amended returns for 2012 and 2013 and to re-open the record to receive such amended returns in evidence, as well as evidence of a purported agreement between petitioner and the Division for the submission of such returns. We decline petitioner's request. The Administrative Law Judge addressed the sole issue before her and petitioner concedes that her analysis was correct. Furthermore, the Administrative Law Judge properly did not consider petitioner's late-filed letter reply brief and petitioner's post-determination motion was properly dismissed. There is no basis for a remand under these circumstances. As noted previously, definition and finality are necessary elements of a fair and efficient hearing system (***Matter of Schoonover***). A remand under the present circumstances would tend to render our system undefined and inconclusive by permitting a second hearing where, as here, a petitioner simply failed to raise an issue the first time around.

We note also that this Tribunal shall not consider petitioner's new issue and will not consider any new evidence on exception. Pursuant to the principles of definition and finality in our hearing system, as discussed, we have a longstanding policy against considering evidence that was not made part of the record below (***see e.g. Matter of Sacko***, Tax Appeals Tribunal, June 7, 2018). The same principles have also compelled us to decline to consider new issues on exception that require additional factual foundation, such as the issue that petitioner seeks to raise here (***see e.g. Matter of Coram Diner Corp.***, Tax Appeals Tribunal, March 12, 2015).

Finally, we note that even absent these procedural impediments, the issue of petitioner's request to be permitted to file amended 2012 and 2013 returns would be inappropriate to consider because we lack subject matter jurisdiction to do so. Our jurisdiction is limited (***Matter of Scharff***, Tax Appeals Tribunal, October 4, 1990, ***vacated on other grounds sub nom Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.***, 151 Misc 2d 326, 332-333 [Sup Ct Alb Cty 1991]). We cannot extend our authority to areas not specifically delegated to us (***Matter of Meltzer***, Tax Appeals Tribunal, March 29, 2018). Additionally, a defect in subject matter jurisdiction cannot be waived (***Strina v Troiano***, 119 AD2d 566, 567 [2nd Dept 1986]; ***see also*** Siegel and Connors, NY Prac § 8 [6th Ed 2019]). We note also that the question of subject matter jurisdiction in the present matter was properly raised by this Tribunal at oral argument and petitioner's representative was given an opportunity to respond at that time (***see Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.***; Tax Law § 2006 [5]; 20 NYCRR 3000.9 [a] [6]).

All proceedings in the Division of Tax Appeals "shall be commenced by the filing of a petition . . . 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 a right to a hearing" (Tax Law § 2008 [1]; emphasis added). There is no written notice of the Division in the record regarding whether petitioner may file amended returns.[1] Hence, no right to a hearing ever arose with respect to this question.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Stanton is denied;

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

3. The Supervising Administrative Law Judge's denial of petitioner's "Motion to Reopen Record for Reargument" made to the Administrative Law Judge is affirmed;

4. Petitioner's "Motion to Reopen Record for Reargument" made to this Tribunal is denied;

5. The petition of Robert Stanton is denied; and

6. The notices of deficiency, dated March 18, 2016 and November 4, 2016, are sustained.

[1] Indeed, there is no evidence in the record that the Division has even considered this question. On this point, we observe that petitioner's claim made at oral argument that the Division agreed to accept amended returns during the conciliation conference is dubious, considering that it is unsubstantiated and that the petition makes no reference to any such agreement.

DATED: Albany, New York
March 12, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner