

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ALEXEI MOSTOVOI : DECISION
DTA NO. 828628
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 2011. :

Petitioner, Alexei Mostovoi, filed an exception to the determination of the Administrative Law Judge issued on August 23, 2018. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele Milavec, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a brief in reply. Petitioner's request for oral argument was denied. The six-month period for issuance of this decision began on November 27, 2018, the date petitioner's reply brief was received.

ISSUE

Whether the Division of Tax Appeals has subject matter jurisdiction over the petition.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. Those facts are set forth below.

1. Petitioner, Alexei Mostovoi, filed a petition with the Division of Tax Appeals on March 15, 2017. The petition protests a consolidated statement of tax liabilities, notice of collection

case ID: E-042384146-CL04-6, dated February 27, 2018. The subject of the collection case is assessment number L-042384146 for personal income tax due for the tax year 2011.

2. On April 30, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition (notice of intent) to petitioner on the basis that the Division of Tax Appeals appears to lack jurisdiction over the petition. The notice of intent explained that the petition filed with respect to the consolidated statement of tax liabilities appears to be insufficient to confer jurisdiction upon the Division of Tax Appeals to address the merits of the petition.

3. In response to the issuance of the notice of intent, the Division noted that assessment number L-042384146, the assessment number listed on the consolidated statement of tax liabilities, was previously protested by the filing of a petition. The Division noted that the petition was dismissed by the Division of Tax Appeals and, after an exception was filed, such dismissal was upheld by the Tax Appeals Tribunal. The Division emphasizes that, as this notice was previously adjudicated and sustained, petitioner is barred from relitigating the validity of the notice.

4. Petitioner failed to respond to the notice of intent.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by noting the sections of the Tax Law describing commencement of a protest of a statutory notice by filing a petition with the Division of Tax Appeals. The Administrative Law Judge observed that a petition must include a copy of the statutory notice or refund denial.

The Administrative Law Judge found that petitioner's copy of a consolidated statement of tax liabilities attached to his petition did not qualify as a statutory notice. She also took notice of the fact that petitioner had previously filed a petition to protest the notice of deficiency for assessment number L-042384146, which was the same assessment number as that listed in the consolidated statement of tax liabilities. That petition was dismissed as untimely filed, which dismissal was sustained on exception to this Tribunal. The Administrative Law Judge concluded that because this assessment had been previously adjudicated, petitioner could not relitigate the validity of the notice of deficiency and dismissed the petition here.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Administrative Law Judge misapprehended the facts in this case and that the documentary evidence does not support the Division's assessment of tax and additions. Petitioner argues that the deficiency here at issue was resolved through the filing of an amended tax return for 2011. He also claims that the Division of Tax Appeals has jurisdiction over his petition notwithstanding the title of the document alerting him to past-due tax liabilities. He asks this Tribunal to order the Division to issue a refund of amounts offset from his 2017 tax return to satisfy the past-due tax liabilities, plus costs and interest.

The Division argues that the Division of Tax Appeals lacks jurisdiction over the petition here at issue because the assessment was the subject of a prior adjudicated petition. It claims that a consolidated statement of tax liabilities is insufficient to confer jurisdiction on the Division of Tax Appeals. It urges this Tribunal to affirm the determination of the Administrative Law Judge.

OPINION

Tax Law § 681 provides that if, upon examination of a taxpayer's return, the Division determines a deficiency, it may mail a notice of deficiency to the taxpayer (Tax Law § 681 [a]).

The assessment asserted in the notice of deficiency becomes fixed and final unless the taxpayer files a protest as provided for under Tax Law § 689 within 90 days of issuance of the notice (Tax Law § 681 [b]). The notice of deficiency is the jurisdictional document that provides a taxpayer with the opportunity to protest a determination of the Division and begins the time period within which to bring this protest (*id.*). Absent a timely protest, a notice of deficiency becomes a fixed and final assessment and the Division of Tax Appeals lacks jurisdiction to consider the substantive merits of the protest (*Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

The form of a petition “shall be governed by such rules as [this Tribunal] shall prescribe” (Tax Law § 689 [a]). According to our rules of practice and procedure, a proceeding is commenced with the filing of a petition, including a legible copy of the statutory notice under protest (20 NYCRR 3000.3 [a], [b][8]). A statutory notice is any written notice of the Division which advises a person of a tax deficiency, determination of tax due, assessment or denial of a refund which gives the person a right to a hearing in the Division of Tax Appeals (20 NYCRR 3000.1 [k]). We agree with the Administrative Law Judge that the notice that petitioner attached to the petition herein, the consolidated statement of tax liabilities, does not qualify as a statutory notice. This is because a consolidated statement of tax liabilities reports a taxpayer’s past-due tax liabilities. We have held that such a statement of consolidated tax liabilities does not confer jurisdiction on this Tribunal to consider the substantive merits of a taxpayer’s protest (*see e.g. Matter of Scott*, Tax Appeals Tribunal, May 29, 2008).

Furthermore, the validity of the statutory notice for the assessment listed on the consolidated statement of tax liabilities has already been adjudicated by a prior decision of this

Tribunal (*see Matter of Mostovoi*, Tax Appeals Tribunal, August 10, 2017). Thus, petitioner has exhausted his administrative remedies with respect to this assessment and cannot relitigate the validity of the notice (Tax Law § 2016; *see also Matter of Kyte*, Tax Appeals Tribunal, October 9, 2014; *Matter of Am. Home Assur. Co.*, Tax Appeals Tribunal, August 8, 2002).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alexei Mostovoi is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Alexei Mostovoi is dismissed.

DATED: Albany, New York
May 23, 2019

s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner