

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH M. KWIT	:	DECISION
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 2022.	:	DTA NO. 831011

Petitioner, Joseph M. Kwit, filed an exception to the determination of the Administrative Law Judge issued on August 17, 2023. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Daniel Schneider, Esq., of counsel).

Petitioner did not file a brief in support of the exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for the issuance of this decision began on October 25, 2023, the due date for petitioner's reply brief.

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 over the petition.

FINDINGS OF FACT

We find the facts as determined by the Supervising Administrative Law Judge, except that we have modified findings of fact 3 and 5 to reflect the record more fully. As so modified, those facts appear below.

1. Petitioner, Joseph M. Kwit, filed a petition with the Division of Tax Appeals on June 30, 2022.

2. A statutory notice or conciliation order was not attached to the petition.

3. On September 19, 2022, the Division of Tax Appeals made a written request to petitioner for a copy of the statutory notice being protested. The letter advised petitioner that failure to provide a copy of the requested notice could result in a dismissal of the petition.

4. Petitioner did not provide any statutory notice.

5. On April 25, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice stated, in sum, that the Division of Tax Appeals lacked jurisdiction to review the merits of the petition as it was not in proper form because petitioner failed to provide a copy of the statutory notice being protested. The parties were granted 30 days to respond to the notice of intent.

6. On May 5, 2023, the Division of Taxation (Division) submitted a letter in response to the notice of intent to dismiss petition that stated:

“[t]he Division is in receipt of the Notice of Intent to Dismiss the petition in the above referenced matter. As the petition submitted was not in proper form, as required by 20 NYCRR 3000.3 and Tax Law § 2008 because the petitioner neglected to include a copy of the statutory notice or conciliation order issued to petitioner [sic] the Division is in agreement with the proposed dismissal.”

7. Petitioner did not submit a response to the notice of intent to dismiss petition.

THE DETERMINATION OF THE SUPERVISING ADMINISTRATIVE LAW JUDGE

The Supervising Administrative Law Judge dismissed the petition because petitioner did not provide a copy of the statutory notice under protest, contrary to our Rules of Practice and Procedure (Rules). Consequently, the Supervising Administrative Law Judge found that the Division of Tax Appeals lacks jurisdiction over the petition. The Supervising Administrative

Law Judge noted that, prior to the issuance of the determination, the Division of Tax Appeals advised petitioner of this defect in his petition and that failure to correct could result in dismissal.

ARGUMENTS ON EXCEPTION

Petitioner's exception offers no supporting argument. The Division would affirm the determination for the reasons stated therein.

OPINION

We affirm the determination of the Supervising Administrative Law Judge.

The Division of Tax Appeals is "responsible for providing the public with a just system of resolving controversies with [the Division of Taxation] and to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). This is done through the administrative hearing process, which begins with a taxpayer filing a petition, and includes the review of such petition and the providing of an administrative hearing regarding the issues raised in such petition (Tax Law § 2000).

A taxpayer may file 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 any other notice which gives a person the right to a hearing" (Tax Law § 2008 [1]). The Tax Appeals Tribunal must provide a petitioner "a hearing as a matter of right . . . unless a right to such a hearing is specifically provided for, modified or denied by another provision of [the Tax Law]" (Tax Law § 2006 [4]). The administrative hearing process is subject to "such rules, regulations, forms and instructions as the tribunal may prescribe" (*id.*).

The "rules, regulations, forms and instructions" at issue concern the form of a petition filed with the Division of Tax Appeals. As stated in the determination, the petition was dismissed because it did not include a copy of the protested statutory notice. The Rules require

that a legible copy of the statutory notice under protest be attached to the petition (20 NYCRR 3000.3 [b] [7, 8]).

Under our Rules, when a petition is not in proper form, the Supervising Administrative Law Judge must “promptly return it to the petitioner together with a statement indicating the requirements with which the petition does not comply, and extend to the petitioner an additional 30 days within which to file a corrected petition” (20 NYCRR 3000.3 [d] [1]). If the petitioner fails to make corrections as directed within the time prescribed, the Supervising Administrative Law Judge “will issue a determination dismissing the petition” (20 NYCRR 3000.3 [d] [2]).

Our Rules were followed in the present matter. Specifically, the September 19, 2022 letter requested a copy of the statutory notice being protested and advised petitioner that failure to provide a such copy could result in a dismissal of the petition (*see* finding of fact 3). Having received no response to the letter, the Division of Tax Appeals issued to petitioner the April 25, 2023 notice of intent to dismiss petition (*see* finding of fact 5). The notice of intent advised that the basis for the proposed dismissal was petitioner’s failure to provide a copy of the statutory notice (*id.*). Despite having been granted thirty days to respond to the notice of intent to dismiss, petitioner again did not respond (*see* finding of fact 7) and the Supervising Administrative Law Judge issued a determination dismissing the petition.

Consistent with our responsibility to provide the public with a fair system that comports with due process requirements (Tax Law § 2000), and recognizing that many petitioners appear pro se, we expect the Supervising Administrative Law Judge to exercise appropriate discretion in dismissing defective petitions pursuant to 20 NYCRR 3000.3 (d) (2) (*Matter of Leslie*, Tax Appeals Tribunal, April 22, 2015). However, where, as here, the failure to comport with the Rules and the instructions raises a substantial question as to the facial validity of the petition,

dismissal pursuant to 20 NYCRR 3000.3 (d) (2) is appropriate (*Matter of Richardson*, Tax Appeals Tribunal, November 17, 2022).

A petitioner's failure to provide a copy of the statutory notice under protest raises such a substantial question because such failure precludes the Division of Tax Appeals from making a facial determination of jurisdiction over the petition. Our jurisdiction is limited to that conferred by the Legislature and may not be extended (*Matter of Hooper*, Tax Appeals Tribunal, July 1, 2010). As a petition protesting a statutory notice must be filed within statutory time limits (Tax Law §§ 2006 [4], 2008 [2]), the date of the notice enables the Division of Tax Appeals to determine, facially, whether the petition is timely and thus within our jurisdiction. Additionally, some notices issued by the Division do not give rise to hearing rights in the Division of Tax Appeals (*see e.g.* Tax Law § 173-a). The requirement to provide a copy of the statutory notice under protest enables the Division of Tax Appeals to identify such non-jurisdictional petitions.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph M. Kwit is denied;
2. The determination of the Supervising Administrative Law Judge is affirmed; and
3. The petition of Joseph M. Kwit is dismissed, with prejudice.

DATED: Albany, New York
February 15, 2024

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner

/s/ Kevin A. Cahill
Kevin A. Cahill
Commissioner