STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **ANNABELLE GONZAGA** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2010 through 2016.	DETERMINATION DTA NO. 828713

Petitioner, Annabelle Gonzaga, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2010 through 2016.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on June 2, 2021, with the final brief to be submitted by November 22, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared by Lance Levinstein, petitioner's spouse. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction with respect to notices of additional tax due issued to petitioner for the years 2010 and 2011.

II. Whether petitioner has established entitlement to itemized deductions claimed for the years 2012, 2013 and 2016.

III. Whether the Division of Tax Appeals has jurisdiction with respect to account adjustment notices issued to petitioner for the year 2014.

IV. Whether the Division of Tax Appeals has jurisdiction with respect to a notice and demand issued to petitioner for the year 2015.

FINDINGS OF FACT

1. Petitioner, Annabelle Gonzaga, filed a New York State resident income tax return for the year 2010, reporting federal adjusted gross income of $90,917.00, New York adjusted gross income of $91,543.00, itemized deductions of $36,193.00, and New York State tax of $3,160.00.

2. The Division of Taxation (Division) received information from the Internal Revenue Service (IRS) that it had made an adjustment to petitioner's 2010 itemized deductions, resulting in additional tax due.

3. Petitioner did not report the federal audit changes or file an amended return for 2010.

4. Based on the information received from the IRS, the Division issued to petitioner a notice of additional tax due for the year 2010, dated October 19, 2017, stating, in part:

> "This deficiency is based on your failure to report Federal audit changes to New York State. We have been notified of these changes by the Internal Revenue Service under authorization of the Internal Revenue Code. . . .
>
> * * *
>
> Our records indicate that the Internal Revenue Service (IRS) had 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. If you have reported the federal audit changes, please send a copy of the report and a copy of both sides of the canceled check showing our deposit serial number stamped on the front of or the back of the check or money order. For electronic or credit card payment, please provide confirmation number, date and amount of payment.
>
> When you do not report federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by section 683 (c) of the New York Tax Law.

> Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under section 684 (a) of the New York State Tax Law.
>
> Itemized deductions have been corrected to include the IRS adjustment(s)."

The 2010 notice of additional tax due assessed tax in the amount of $2,658.89 plus interest.

5. Petitioner did not respond to the 2010 notice of additional tax due, and on November 28, 2017, the Division issued a notice and demand for payment of tax due for the year 2010.

6. Petitioner filed a New York State resident income tax return for the year 2011, reporting federal adjusted gross income of $91,389.00, New York adjusted gross income of $92,921.00, itemized deductions of $46,058.00, and New York State tax of $2,579.00.

7. The Division received information from the IRS that it had made an adjustment to petitioner's 2011 itemized deductions, resulting in additional tax due.

8. Petitioner did not report the federal audit changes or file an amended return for 2011.

9. Based on the information received from the IRS, the Division issued to petitioner a notice of additional tax due for the year 2011, dated October 19, 2017, stating, in part, that "[t]his deficiency is based on your failure to report Federal audit changes to New York State. We have been notified of these changes by the Internal Revenue Service . . . ." The 2011 notice of additional tax due also contained, in part, the same explanation as the 2010 notice of additional tax due (***see*** finding of fact 4), but with reference to 2011. Based on the federal audit changes, the 2011 notice of additional tax due assessed tax of $1,665.40 plus interest for 2011.

10. Petitioner did not respond to the 2011 notice of additional tax due, and on November 28, 2017, the Division issued a notice and demand for payment of tax due for the year 2011.

11. Petitioner filed a New York State resident income tax return for 2012 reporting

federal adjusted gross income of $92,877.00, New York adjusted gross income of $94,360.00, itemized deductions of $53,512.00, and New York tax of $2,095.00.

12. Attached to petitioner's 2012 return was form IT-201-D, Resident Itemized Deduction Schedule, reporting total New York State itemized deductions of $53,512.00, consisting of the following:

Description	**Amount**
Taxes	$7,741.00
Interest	$9,862.00
Gifts to Charity	$5,218.00
Job Expenses/Miscellaneous Deductions	$34,669.00
Less state, local, and foreign income taxes	$3,978.00
Total New York State Itemized Deductions	$53,512.00

13. The Division selected petitioner's 2012 return for review. On December 30, 2013, the Division sent a request for additional information to petitioner (2012 audit inquiry letter), requesting that petitioner provide documentation supporting the claimed itemized deductions.

14. Petitioner initially failed to provide the requested information, and the Division issued a statement of proposed audit change for 2012 (2012 Statement), dated May 7, 2014, stating, in part:

> "You did not reply to our letter asking for copies of cancelled checks, receipts and other documentation to substantiate the itemized deductions claimed on your 2012 New York personal income tax return; therefore, the itemized deductions have been disallowed."

The 2012 Statement asserted tax due of $2,774.47, plus interest and penalty.

15. The Division issued to petitioner a notice of deficiency, dated June 25, 2014, asserting tax due in the amount of $2,774.47, plus interest and penalty for the year 2012.

16. Sometime subsequent to the issuance of the notice of deficiency for 2012, petitioner provided some information to the Division regarding mortgage interest, real estate taxes, and gifts to charity. Petitioner did not provide any information to substantiate the claimed job

expenses and miscellaneous deductions for 2012. Based on the information provided, the Division adjusted the amount of tax due for 2012, and issued a notice and demand for payment of tax due, dated October 10, 2014, reflecting the reduced amount of tax due of $2,236.35, plus interest and penalty for the year 2012.

17. Petitioner filed a New York State resident income tax return for 2013 reporting federal adjusted gross income of $92,277.00, New York adjusted gross income of $93,258.00, itemized deductions of $50,983.00, and New York tax of $2,173.00.

18. Attached to petitioner's 2013 return was form IT-201-D, Resident Itemized Deduction Schedule, reporting total New York State itemized deductions of $50,983.00, consisting of the following:

Description	**Amount**
Taxes	$11,617.00
Interest	$10,910.00
Gifts to Charity	$4,848.00
Job Expenses/Miscellaneous Deductions	$27,441.00
Less state, local, and foreign income taxes	$3,833.00
Total New York State itemized deductions	$50,983.00

19. The Division selected petitioner's 2013 return for review. On November 10, 2014, the Division sent a request for additional information to petitioner (2013 audit inquiry letter), requesting that petitioner provide documentation supporting the claimed itemized deductions.

20. Petitioner did not respond to the 2013 audit inquiry letter and failed to provide the requested information. The Division issued a statement of proposed audit change for 2013 (2013 Statement), dated March 20, 2015, stating, in part:

> "In a letter we sent to you dated 11/10/2014 we requested documentation to verify the job expenses and gifts to charity claimed on your 2013 tax return. You did not reply therefore we have disallowed these items. We allowed the remaining itemized deductions as claimed. This adjustment results in a bill.
>
> If you would like this adjustment reconsidered please provide the following

documentation:

> To verify gifts to charity we need canceled checks, credit card or bank statements containing the name of the charity, the date of the contribution, and the amount of the contribution. Also a written statement containing your name and address from the qualified charity that include [sic] the name of the charity and the amount and date of the contribution is needed. For noncash contributions we need any federal Form 8283 that you may have filed with the IRS. Receipts containing your name and address, and the name and address of the qualified charity or organization, and a detailed description of the donated items (acknowledged by the charitable organization), including their fair market value at the time of the donation is needed.
>
> To verify job expenses, we need a letter from your employer verifying the expenses that are necessary for your employment and an explanation of the company reimbursement policy. We also need a detailed explanation of the nature of each expense and how it relates to your employment. You also need to provide us with copies of receipts and/or canceled checks that show the items being purchased; we will not accept credit card statements without supporting receipts. For any travel being claimed we need to see a travel log for the year showing the dates, locations, and business purpose of each trip.
>
> For miscellaneous deductions, including gambling losses, legal fees, and tax preparation fees please include copies of any documentation that supports these claimed."

The 2013 Statement asserted tax due of $2,083.05, plus interest.

21. Petitioner did not respond to the 2013 Statement, and on May 6, 2015, the Division issued to petitioner a notice of deficiency, asserting tax due in the amount of $2,083.05, plus interest for the year 2013.

22. Petitioner filed a New York State resident income tax return for 2014 reporting federal adjusted gross income of $1,760.00, New York adjusted gross income of $101.00, and a standard deduction of $10,950.00. Petitioner reported no tax due and requested a refund of $3.00 for 2014.

23. The Division issued an account adjustment notice to petitioner, dated April 23, 2015, for the year 2014, applying the refund requested on petitioner's 2014 return in the amount of

$3.00 to an outstanding New York tax debt for the year 2012.

24. Petitioner filed an amended New York State resident income tax return for 2014 reporting federal adjusted gross income of $106,258.00, New York adjusted gross income of $107,846.00, itemized deductions of $31,830.00, and New York tax of $4,384.00. Petitioner subtracted credits, tax withheld and overpayment from the original return, and requested a refund of $358.00 for 2014.

25. The Division issued an account adjustment notice to petitioner, dated January 26, 2016, for the year 2014, applying the refund requested on petitioner's 2014 amended return in the amount of $358.00 to an outstanding New York tax debt for the year 2012.

26. Petitioner filed a New York State resident income tax return for 2015 reporting New York tax of $5,351.00 and Yonkers nonresident earnings tax of $26.00. Petitioner did not remit full payment of the amount reported due with the 2015 return. The payments and credits received from petitioner totaled $5,187.00 for 2015.

27. The Division issued a notice and demand for payment of tax due for 2015, dated November 3, 2016, assessing tax due of $190.00 for the amount of underpaid tax as reported on petitioner's return, plus interest and penalty.

28. Petitioner filed a New York State resident income tax return for 2016 reporting federal and New York adjusted gross income of $117,652.00 and claiming itemized deductions.[1]

29. On May 15, 2017, the Division sent a request for additional information to petitioner (2016 audit inquiry letter), requesting that petitioner provide documentation supporting the claimed itemized deductions for the year 2016.

30. Petitioner did not respond to the 2016 audit inquiry letter and failed to provide the

[1] The amount of itemized deductions claimed for 2016 is not contained in the record.

requested information. The Division issued a statement of proposed audit change for 2016 (2016 Statement), dated September 13, 2017, stating, in part:

> "We sent you a letter asking for information to substantiate the itemized deductions claimed on our 2016 New York personal income tax return. Since you did not respond to this letter, we have disallowed the itemized deductions.
>
> Because we disallowed your itemized deductions, we recomputed your tax using the appropriate standard deduction for your filing status. Therefore, you owe additional tax, interest, and any applicable penalty."

The 2016 Statement asserted tax due of $1,603.53 plus interest.

31. Petitioner did not respond to the 2016 Statement. The Division issued to petitioner a notice of deficiency, dated October 30, 2017, asserting tax due in the amount of $1,603.53, plus interest for the year 2016.

32. On May 15, 2018, petitioner filed a petition with the Division of Tax Appeals. The body of the petition did not list the years being protested and referenced only "e-030300432-e008-4" as the notice/assessment ID number being protested. The petition indicated that a conciliation conference was not requested. Attached to the petition was an income execution billing notice, identification number E-030300432-E008-4, dated May 4, 2018, showing a balance due of $8,988.28. The petition intake unit of the Division of Tax Appeals requested further information for petitioner to perfect the petition. On July 20, 2018, petitioner supplemented the petition with an attachment, stating, in part, "Tax Years at issue are 2010, 2011, 2012 and 2014." On February 15, 2019, Herbert M. Friedman, Jr., Supervising Administrative Law Judge, issued a notice of intent to dismiss petition on the grounds that the petition did not include the statutory notice under protest, and that Tax Law § 2000 does not provide jurisdiction to review income execution notices. Petitioner responded to the notice of intent to dismiss petition (response), stating, in part, that she received notices and demands and

consolidated statements for tax years 2010 through 2016 but did not receive the underlying statutory notices. On April 1, 2019, Supervising Administrative Law Judge Friedman rescinded the notice of intent to dismiss petition.

33. During the hearing, George Ryan, Audit Group Manager of the Division's Income/Franchise Desk Audit Bureau, testified for the Division. Petitioner did not appear in person at the hearing. Petitioner's spouse, Lance Levenstein, appeared at the hearing on her behalf, but no testimony or documentary evidence was offered in support of her case.

CONCLUSIONS OF LAW

A. For the years 2010 and 2011, the Division issued notices of additional tax due based on information received from the IRS regarding federal audit changes to petitioner's taxable income. Petitioner did not report the federal audit changes or file amended returns for 2010 and 2011.

Tax Law § 659 provides that where a taxpayer's federal taxable income is changed or corrected by the IRS the taxpayer must report such change or correction to the Division within 90 days after the final determination of such change or correction and either concede the accuracy of the federal change or state the taxpayer's basis for asserting that the change or correction is erroneous. If the federal change or correction is not reported within the 90-day period, the Division is authorized by Tax Law § 681 (e) to issue a notice of additional tax due.

Tax Law § 173-a, applicable to notices and demands and notices of additional tax due, specifically provides that a taxpayer shall not be entitled to a hearing before the Division of Tax Appeals with respect to, inter alia, the issuance of a notice of additional tax due or a notice and demand.

The Division of Tax Appeals is a forum of limited jurisdiction (Tax Law § 2008; ***Matter of***

Scharff, Tax Appeals Tribunal, October 4, 1990, ***revd on other grounds sub nom New York State Department of Taxation and Fin. v Tax Appeals Tribunal***, 151 Misc 2d 326 [Sup Ct, Albany County 1991, Keniry J.]). Its power to adjudicate disputes is exclusively statutory (***id.***). The Tax Appeals Tribunal has the power to provide a hearing as a matter of right to any petitioner pursuant to such rules and regulations as may be provided by it, unless a right to a hearing is specifically provided for, modified or denied by another provision of law (***see*** Tax Law § 2006 [4]). A proceeding in the Division of Tax Appeals is commenced by filing 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 notices of additional tax due in this matter are based upon petitioner's failure to report federal audit changes to New York State for the years in question. Tax Law § 173-a (2) specifically precludes petitioner from obtaining a hearing with respect to the subject notices of additional tax due. Petitioner has presented no evidence to show that she reported the federal audit changes for 2010 and 2011 within 90 days after the final determination of such changes. Petitioner's allegation that she failed to receive the notices of additional tax due, raised only by her representative's unsworn and unsupported argument at hearing, is of no consequence as a notice of additional tax due can be issued at any time where a taxpayer fails to file a report of final federal audit changes with the Division, as is the case here. The Division provided petitioner with a copy of its exhibits including the notices of additional tax due prior to the hearing in this matter, so there is no resulting prejudice to petitioner. Moreover, hearing rights do not attach to notices of additional tax due regardless of petitioner's unsupported argument.

B. For tax years 2012, 2013 and 2016, the Division issued notices of deficiency to

petitioner, assessing additional tax based on a disallowance of itemized deductions claimed by her.

Although not raised by either party, the question of jurisdiction of the Division of Tax Appeals must first be addressed, as it appears that petitioner did not timely file a request for conciliation conference or petition with the Division of Tax Appeals in protest of these notices of deficiency (***see Matter of Kayumi***, Tax Appeals Tribunal, July 14, 2017, citing ***Matter of Huang***, Tax Appeals Tribunal, April 27, 1995 [issue of whether a timely request for conciliation conference has been filed is jurisdictional in nature and may be raised by the Tribunal]; ***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990).

There is a 90-day statutory time limit for filing either a petition for hearing or a request for a conciliation conference following the issuance of a statutory notice, including the notices of deficiency at issue here (Tax Law §§ 170 [3-a] [a]; 689; 2006 [4]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day time limit (***see Matter of Voelker***, Tax Appeals Tribunal, August 31, 2006; ***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989).

Where the timeliness of a taxpayer's protest is in question, the initial inquiry is on the mailing of the statutory notice because a properly mailed notice or conciliation order creates a presumption that such document was delivered in the normal course of the mail (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced and the burden of demonstrating proper mailing rests with the Division (***id.***). To meet its burden, the Division must show proof of a standard procedure used for the issuance of statutory notices by one with knowledge of the relevant procedures and that the standard procedure was followed in this

particular instance (***see Matter of Katz***; ***Matter of Novar TV & Air Conditioner Sales & Serv***., Tax Appeals Tribunal, May 23, 1991).

Here, the Division presented no evidence with regard to its mailing procedures of the statutory notices. As such, it has not established that petitioner's protest of the notices of deficiency for the years 2012, 2013 and 2016 was untimely. The 90-day period for protesting those notices is accordingly tolled and the Division of Tax Appeals has jurisdiction with regard to those tax years.

Although petitioner contends, through her representative's unsworn statements at hearing, that she did not receive the notices of deficiency, she has presented no evidence to support such claim and does not assert the notices were improperly mailed. Whether petitioner received the subject notices is "immaterial" (***Matter of Townley***, Tax Appeals Tribunal, January 25, 2018; ***Matter of Kenning v Department of Taxation & Fin.***, 72 Misc 2d 929, 930 [Sup Ct, Albany County 1972, Casey, J.], ***affd*** 43 AD2d 815 [3rd Dept 1973], ***appeal dismissed*** 34 NY2d 667 [1974]) and there is no resulting prejudice to petitioner, as she was given a full hearing on the merits of her protest.

Moreover, petitioner has not raised a statute of limitations defense regarding the issuance of the notices of deficiency for 2012, 2013, and 2016 or offered any evidence in that regard. The Tax Appeals Tribunal has held that if not raised by the taxpayer, such defense is waived:

> "It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). To establish this defense, the party raising it must go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period (see, Amesbury Apts. v. Commr., 95 TC 18; Robinson v. Commr., 57 TC 735)" (***Matter of Jencon, Inc.***, Tax Appeals Tribunal, December 20, 1990; ***see***

also Matter of Huaquechula Restaurant Corp., Tax Appeals Tribunal, May 12, 2011; ***Matter of Lovler***, Tax Appeals Tribunal, January 6, 1994).

Accordingly, any such defense is waived by petitioner.

C. Having concluded that the Division of Tax Appeals has jurisdiction over the petition for the years 2012, 2013, and 2016, the substantive arguments regarding the notices of deficiency for those years will now be addressed. Determinations made in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish, by clear and convincing evidence, that those determinations are erroneous (***see Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***see also*** Tax Law § 689 [e]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (***see Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842 [3d Dept 1986]). Petitioner has the burden in this proceeding to show entitlement to all expenses and deductions claimed on her returns and to substantiate the amount of the expenses and deductions (***see*** Tax Law §§ 658 [a]; 689 [e]; 20 NYCRR 158.1; ***Matter of Macaluso***, Tax Appeals Tribunal, September 22, 1997, ***confirmed*** 259 AD2d 795 [3d Dept 1999]). Petitioner was required under the Tax Law to maintain adequate records of her items of expenses and deductions for the years in issue (Tax Law § 658 [a]; 20 NYCRR 158.1 [a]).

For the deductions claimed as business expenses, Internal Revenue Code (IRC) (26 USC) § 162 (a) permits deductions for "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." An ordinary expense is one that is "common and accepted," although not necessarily "habitual" (***Welch v Helvering***, 290 US 111, 114 [1933]). A necessary expense is one that is "appropriate and helpful in carrying on the trade or business" (***Heineman v Commr.***, 82 TC 538, 543 [1984]). The performance of services as an employee is considered a trade or business (***O'Malley v Commr.***, 91 TC 352, 363-364 [1988]).

Certain deductions from adjusted gross income, such as the claimed unreimbursed employee business expenses at issue, are considered miscellaneous itemized deductions and are allowed only to the extent that the aggregate of such deductions exceeds 2% of the taxpayer's adjusted gross income (IRC [26 USC] § 67 [a]).[1]

Regarding charitable contributions, IRC § 170 allows as a deduction any contribution made within the taxable year to a charitable organization (26 USCA § 170 [a] [1], [c]). Such deductions are allowable only if the taxpayer satisfies statutory and regulatory substantiation requirements (***see*** 26 USCA § 170 [a] [1]; 26 CFR 1.170A-13). The nature of the required substantiation depends on the size of the contribution and on whether it is a gift of cash or property. For monetary donations, the taxpayer must maintain the canceled check and receipt from the donee charitable organization showing the name of the donee and the date and amount of the contribution (26 CFR 1.170A-13 [a]). For noncash contributions, the taxpayer must maintain reliable written records that include the name and address of the donee, the date and location of the contribution, and a description of the property in detail reasonable under the circumstances (26 CFR 1.170A-13 [b]). The taxpayer must also maintain records to establish "the fair market value of the property at the time the contribution was made" and "the method utilized in determining the fair market value" (26 CFR 1.170A-13 [b] [2] [ii] [D]). For all contributions valued at $250.00 or more, the taxpayer must obtain a "contemporaneous written acknowledgment" from the donee including a description of the non-cash property contributed (26 USCA § 170 [f] [8]). Additional substantiation requirements are imposed for contributions of property with a claimed value exceeding $500.00 (26 USCA § 170 [f] [11] [B]). Still more

[1] Federal income tax law is determinative in the present matter because federal adjusted gross income is the starting point in determining an individual's New York adjusted gross income and federal itemized deductions provide the starting point for the calculation of New York itemized deductions (***see*** Tax Law §§ 612, 615 [a]).

rigorous substantiation requirements are imposed for contributions of property with a claimed value exceeding $5,000.00 (26 USCA § 170 [f] [11] [C]). In determining whether donations of property exceed these thresholds, "similar items of property" (other than cash and publicly traded securities) must be aggregated (26 USCA § 170 [f] [11] [F]). The term "similar items of property" is defined to mean "property of the same generic category or type," such as clothing (26 CFR 1.170A-13 [c] [7] [iii]). If property or similar items of property are valued in excess of $5,000.00, the taxpayer must complete section B of form 8283 and substantiate the value of the property with a "qualified appraisal of such property" (26 USCA § 170 [f] [11] [C]). She must also attach to her return a fully completed "appraisal summary" on form 8283 (***see Grainger v Commr. of Internal Revenue***, T.C. Memo 2018-11, 116 T.C.M. [CCH] 107; ***Costello v Commr***., T.C. Memo 2015-87, 109 T.C.M. [CCH] 1441, 1445; 26 CFR 1.170A-13 [c] [2] [I] [B]).

Petitioner claimed numerous itemized deductions for the years 2012, 2013, and 2016, including miscellaneous job expenses, gifts to charity, taxes, and interest. For each of the years, the Division requested that petitioner provide information substantiating the claimed deductions, but petitioner failed to provide the requested documentation.[2]

As part of this proceeding, petitioner has failed to submit any evidence or arguments in support of the claimed itemized deductions. The record is devoid of evidence showing the business purpose or supporting the amounts claimed as business expenses and petitioner has presented no evidence to support the claimed gifts to charity or other itemized deductions. As such, petitioner has failed to meet her burden of proving entitlement to itemized deductions claimed for the years 2012, 2013, and 2016.

[2] For tax year 2012, petitioner provided some information to the Division for the claimed mortgage interest, real estate taxes, and gifts to charity subsequent to the issuance of the notice of deficiency, and the Division properly adjusted the amount of tax assessed in the notice and demand issued for that year based on the information provided (***see*** finding of fact 16).

D. For 2014, the Division issued an account adjustment notice in response to petitioner's initially filed return, applying the claimed refund of $3.00 to a prior year's tax liability (***see*** finding of fact 23). The Division subsequently issued another account adjustment notice, following petitioner's filing of an amended return for 2014, applying the claimed refund of $358.00 to an outstanding New York tax debt for a prior year (***see*** finding of fact 25).

The overpayment amounts calculated on petitioner's 2014 return and 2014 amended return claimed by petitioner as refunds were not disallowed by the Division. Rather, such overpayments were applied by the Division as an offset in payment against a preexisting outstanding personal income tax liability owed by petitioner for a prior year instead of being issued to petitioner as a refund. The Division's authority to apply overpayments against outstanding liabilities is found in Tax Law § 686 (a), which provides, in part, that it

> "may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter . . . on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the commissioner of taxation and finance . . . ."

Petitioner has presented no evidence to show that the outstanding liability against which her claimed overpayment for the year 2014 was applied was not a fixed and final liability that was subject to collection. It is well established that the jurisdiction of the Division of Tax Appeals does not extend to collection activities (***Matter of Club Marakesh v Div. of Tax Appeals***, Sup Ct., Albany County, Nov 7, 1990, Keniry J.; ***Matter of Driscoll,*** Tax Appeals Tribunal, April 11, 1991; ***Matter of Barrier Oil***, Tax Appeals Tribunal, July 29, 1999). Thus, for the year 2014, the petition presents a collection challenge that is beyond the subject matter jurisdictional authority granted to the Division of Tax Appeals.

E. For 2015, the Division issued a notice and demand for failure to pay the tax due as

reported on petitioner's return. Tax Law § 173-a (2) provides, in part, that with respect to tax asserted under article 22 of the Tax Law:

> "provisions of law which authorize the issuance of a notice and demand for an amount without the issuance of a notice of deficiency for such amount, including any interest, additions to tax or penalties related thereto, in cases of mathematical or clerical errors or failure to pay tax shown on a return, or authorize the issuance of 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 subdivision four of section two thousand six of this chapter. 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 under article forty of this chapter."

As the right to a hearing based upon a notice and demand is specifically denied by Tax Law § 173-a (2) (***see Matter of Chait***, Tax Appeals Tribunal, April 22, 2010; ***see also Matter of PC Touch Services Inc.***, Tax Appeals Tribunal, August 23, 2012), the Division of Tax Appeals is without jurisdiction to determine the substantive issues in this matter regarding the notice and demand issued for tax year 2015.

F. The petition of Annabelle Gonzaga is denied.

DATED: Albany, New York
May 19, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE