

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
DAVID GEWIRTZ
for Redetermination of Deficiencies or for Refund of
New York State Personal Income Tax under Article 22
of the Tax Law for the Years 2010 through 2013 and for
Review of a Notice of Proposed Driver License
Suspension Referral under Tax Law § 171-v.

DETERMINATION
DTA NO. 828762

Petitioner, David Gewirtz, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2010 through 2013 and for review of a notice of proposed driver license suspension referral under Tax Law § 171-v.

The Division of Taxation, appearing by its representative, Amanda Hiller, Esq. (Karry L. Culihan, Esq., of counsel), filed a motion on February 28, 2020, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner, appearing by Yussie Steier, CPA, did not file a response. The 90-day period for issuance of this order commenced on March 30, 2020. Based upon the motion papers, the affirmation and documents submitted, and all pleadings and documents submitted in connection with this matter, James P. Connolly, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to consider petitioner's protest of a notice and demand.

STATEMENT OF FACTS

1. The petition in this matter protests: (i) three notices of a deficiency, dated November 7, 2017 (2017 notices) issued by the Division of Taxation (Division) to petitioner, David Gewirtz, asserting personal income tax due; (ii) a fourth notice, with assessment identification number L-035952336, imposing additional personal income tax due from petitioner for 2010 (2010 notice); and (iii) the validity of the Division's subsequent issuance of a notice of proposed driver license suspension referral (form DTF-454), collection case ID: E-012510819-CL01-4 (60-day notice), advising that petitioner must pay his New York State tax debts or face the possible suspension of his driver's license pursuant to Tax Law § 171-v. None of the notices asserting additional tax due were attached to the petition.

2. The Division filed a motion on October 16, 2019, seeking an order dismissing the petition or, in the alternative, granting summary determination in the above-referenced matter pursuant to sections 3000.5, and 3000.9 (a) and (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Copies of the 2017 notices were included in the motion papers, but no copy of the 2010 notice was included.

3. By order dated February 13, 2020, the undersigned granted the motion in part and denied it in part. The order granted the motion in part by (i) dismissing the portion of the petition protesting the 2017 notices of deficiency on the ground that the petition was untimely with respect to those notices, and (ii) denying the petition with respect to its protest of the Division's notice of proposed driver license suspension, dated April 18, 2018. The order denied

the motion with regard to the portion of the petition challenging the 2010 notice, on the ground that the Division's motion had not shown that petitioner's challenge of that notice was untimely. By this current motion, the Division now seeks to dismiss the petition with regard to the 2010 notice.

4. Attached to the Division's current motion is an affirmation of Karry Culihan, Esq., dated February 28, 2020. In the affirmation, Ms. Culihan asserts that petitioner electronically filed a joint personal income tax return (form IT-201) with his wife for 2010 and that, on line 80 of that return, petitioner showed \$5,730.00 in tax due, which was not paid with the return or at any time since the filing of the return. Attached to the affirmation is a copy of petitioner's form IT-201 for 2010, which showed a total of \$7,944.00 in tax due on line 62, total payments of \$2,449.00 on line 76, leading to a total tax due of \$5,730.00 (including an estimated tax penalty of \$235.00) on line 80. Also attached to the Culihan affirmation is a copy of the 2010 notice, dated May 26, 2011, and which is entitled, "New York State tax bill[,] notice and demand for payment of tax due." The 2010 notice advises petitioner that he is receiving this notice because he did not pay the amount due on his 2010 income tax return and that, as a result, he owes \$5,495.00, plus statutory penalty and interest.

5. The Culihan affirmation asserts that a notice and demand does not give rise to hearing rights in the Division of Tax Appeals and that, therefore, the petition should be dismissed with regard to the 2010 notice.

6. Petitioner did not respond to the Division's motion.

CONCLUSIONS OF LAW

A. 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]). Accordingly, this forum cannot hear matters not expressly delegated to it.

B. The Division of Tax Appeals is authorized 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” (Tax Law § 2006 [4]). Tax Law § 173-a (2) provides that a notice and demand for payment of tax due “shall be construed as specifically denying and modifying the right to a hearing with respect to any such notice and demand ... for purposes of [Tax Law § 2006 (4)].” That provision further provides that “any such notice and demand ... shall not be construed as a notice which gives a person the right to a hearing [in the Division of Tax Appeals].”

C. Accordingly, the Legislature has specifically denied the Division of Tax Appeals the authority to adjudicate protests of a notice and demand, such as the 2010 notice petitioner seeks to challenge here (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010). Because this is the sole portion of the petition that has not already been denied or dismissed, the petition now must be denied.

D. The Division's motion is granted, and the petition of petitioner David Gewirtz is denied.

DATED: Albany, New York
June 25, 2020

/s/ James P. Connolly
ADMINISTRATIVE LAW JUDGE

