STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **THE MORRIS A. HAZAN FAMILY FOUNDATION** for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the years 2007 through 2014.	: : : : : :	DETERMINATION DTA NO. 828843

Petitioner, The Morris A. Hazan Family Foundation, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under article 9-A of the Tax Law for the years 2007 through 2014.

A hearing was held before Jessica DiFiore, Administrative Law Judge, in New York, New York, on February 26, 2020, at 10:30 a.m., with briefs submitted by June 12, 2020, which date began the period for issuance of this determination. Petitioner appeared by Robert R. Pluth, Jr., Esq. and David Blickenstaff, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (James M. Passineau, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of taxes paid under the Voluntary Disclosure and Compliance Program offered by the Division of Taxation.

FINDINGS OF FACT

The parties entered into a stipulation of facts, which has been incorporated into the findings of facts below.

1. Petitioner, The Morris A. Hazan Family Foundation, was formed in 1967.

2. Petitioner is a tax-exempt private foundation under Internal Revenue Code (IRC) § 501 (c) (3).

3. Since its establishment, petitioner has made grants to public charities for education, health care, the performing arts, and other charitable purposes.

4. Petitioner retained The Northern Trust Company (Northern) to prepare its Federal and state tax returns for 2007 through 2014.

5. For each of the years in question, petitioner received Internal Revenue Service (IRS) schedules K-1, Partner's Share of Income, Deductions, Credits, etc., from partnerships in which it was an investor.

6. When Northern was preparing petitioner's Federal and state tax returns, it never advised petitioner regarding petitioner's unrelated business taxable income (UBTI).

7. For tax years 2007 through 2014, petitioner's timely filed state and Federal tax returns did not report UBTI or calculate the amount of unrelated business income tax due thereon.

8. At some point in 2013 and 2014, the California Attorney General notified Northern that petitioner was subject to California's independent CPA audit requirement. Northern did not inform petitioner of these communications until 2015. At that time, petitioner retained an independent accounting firm to conduct an audit of its books and records. As a result of the audit, petitioner discovered it owed tax on its UBTI to New York State for 2007 through 2014.

9. In 2015, petitioner retained Ernst & Young (EY) to prepare Federal and state income tax returns for 2007 through 2014 reporting the UBTI earned by petitioner.

10. Petitioner did not submit an application for the Division of Taxation's (Division's) Voluntary Disclosure and Compliance Program (VDCP). Petitioner did not learn of the VDCP

until after it filed the UBTI returns. The Division has also confirmed it never received an application for the VDCP from petitioner.

11. EY filed Unrelated Business Income Tax Returns, form CT-13, for 2007 through 2014 with the Division in November 2015, reporting petitioner's UBTI for the years 2007 through 2014. Petitioner also sent in a cover letter with these returns requesting the abatement of penalties for 2007 through 2013. In the letter, petitioner asserted it has a long history of compliance and has always made every effort to be in voluntary compliance with timely filing and other requirements. The letter stated that during the course of petitioner's audit, it was discovered that income had not been correctly reported as UBTI beginning in 2007, and that was why petitioner was filing the form CT-13 returns for 2007 through 2013. Petitioner requested an abatement of penalties because its intent was to file timely returns, its failure to file the forms CT-13 was not intentional, and it would remain in voluntary compliance in the future.

12. Based on the filed UBTI returns, the Division issued notice and demand letters to petitioner for each of the years 2007 through 2014, for the following amounts (rounded to the nearest dollar):

Year	Tax	Interest	Penalty	Date of Notice and Demand	Assessment ID
2007	$205,887	$162,771	$97,796	12/31/2015	L-044178641
2008	$6,523	$4,317	$3,098	12/31/2015	L-044178642
2009	$31,594	$16,850	$15,007	12/31/2015	L-044178643
2010	$14,396	$6,272	$6,838	03/03/2016	L-044478692
2011	$22,838	$7,127	$10,163	12/28/2015	L-044168676
2012	$18,923	$4,914	$7,758	06/08/2016	L-044963880
2013	$4,311	$558	$1,401	12/28/2015	L-044168677

2014	$0	$459	$3,067	12/08/2015	L-044072193
Total	$304,472	$203,268	$145,128		

The tax due in the notice and demand letters matched the tax due on petitioner's UBTI returns, except for 2014, where the UBTI showed that the tax due was $11,796.

13. Petitioner paid the tax and interest due on the notice and demand letters, along with additional accrued interest. Petitioner also paid penalties in the amount of $145,075.

14. By letters dated July 13, 2017 and July 18, 2017, petitioner, through counsel, requested a refund of all penalties incurred for 2007 through 2014 and all taxes and interest paid for 2007 through 2011.

15. The parties stipulated that by correspondence dated November 6, 2017, the Division denied petitioner's refund requests. However, upon review of such correspondence, the Division expressly denied only six of the eight refund requests, including assessment IDs L-044072193 for 2014, L-044168676 for 2011, L-044168677 for 2013, L-044178641 for 2007, L-044178642 for 2008 and L-044178643 for 2009. Assessment IDs L-044478692 for 2010 and L-044963880 for 2012 were not included in this denial. The record does not establish why only six of the eight assessments appealed were included in the denial letter.

16. By letter dated November 22, 2017, petitioner, through counsel, requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) appealing the Division's letter denying its refund request.

17. By conciliation order number 000300476 dated May 18, 2018, the BCMS conferee ordered the abatement of penalties in the amount of $145,075, representing the full amount of penalties for which petitioner otherwise would have been liable. The conciliation order states that the period at issue was January 1, 2007 through December 31, 2014.

18. The parties stipulated that the amounts still at issue are those paid by petitioner for taxes and interest for 2007 through 2010.

19. On August 15, 2018, petitioner filed a petition with the Division of Tax Appeals for 2007 through 2014, seeking a refund for the taxes and interest paid it asserts it would not have had to pay had it applied for the Division's VDCP.[1] Petitioner asserts that it was eligible for the Division's VDCP and, had it been advised to apply for such program, it would have had to pay tax and interest for as little as three years, instead of the eight years of tax and interest it paid. Petitioner asserts that it should not be placed in a worse position than similarly situated taxpayers, where it has exercised reasonable care and good faith and has proactively and voluntarily repaid the full amount of tax and interest owed for 2007 through 2014.

CONCLUSIONS OF LAW

A. The Division's VDCP was established to motivate taxpayers to address overdue tax liabilities and comply with the Tax Law (***see*** Technical Service Bulletin [TSB-M]-08[6]I, TSB-M-08[11]C, TSB-M-08[6]M, TSB-M-08[4]R, TSB-M-08[10]S, *Voluntary Disclosure and Compliance Program*, September 3, 2008 [TSB-M-08[6]I]).[2] The intent of the VDCP is to encourage eligible taxpayers who have outstanding tax liabilities to voluntarily disclose those liabilities that are not currently known by the Division (***see id.***).

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[1] As assessment IDs L-044478692 for 2010 and L-044963880 for 2012 were not included in the Division's letter denying petitioner's refund request, and six months had not expired since petitioner requested its refund, they were not within the jurisdiction of BCMS on appeal from that letter and accordingly, were not included in an appeal of the BCMS order (***see*** Tax Law § 170 [3-a]; Tax Law § 1089 [c]). However, petitioner did include these assessments in its petition for a refund to the Division of Tax Appeals, as evidenced by the period of its appeal and the relief sought (***see*** finding of fact 18). Petitioner's appeal of these two assessments to the Division of Tax Appeals was timely filed on August 15, 2018 (***see id.***), pursuant to Tax Law § 1089 (c). Accordingly, petitioner's refund claim for the entire period from 2007 through 2014 is properly before the Division of Tax Appeals.

[2] The Division has issued technical memoranda to advise and inform taxpayers, tax practitioners, personnel of the Division and the general public of the Division's existing interpretations of Tax Law § 1700 (***see*** 20 NYCRR 2375.6; TSB-08[6]I). While not legally binding, the information contained in technical memoranda is explanatory and serves to assist taxpayers and others in their understanding of the laws and regulations (***see id.***).

B. Tax Law § 1700 (4) provides "[t]o participate in the voluntary disclosure and compliance program, an eligible taxpayer must apply by submitting a disclosure statement in the form and manner prescribed by the commissioner." The Division has established an application that requires the taxpayer to provide identifying information, complete a disclosure statement describing the type of tax liability and the tax periods covered and provide any additional information the Division may require (***see*** TSB-08[6]I). Petitioner does not dispute that it did not submit an application or a disclosure statement, and the Division confirms it has never received such application (***see*** finding of fact 10). Petitioner asserts, however, that it substantially complied with the procedural requirement of completing such application when it filed its returns and sent in a cover letter setting forth why its returns were late. Petitioner contends that despite the fact that the cover letter specifically requested relief from penalties, it was essentially asking for relief in connection with petitioner's misunderstanding of its tax filing obligations and when considered in conjunction with petitioner's UBTI returns, the letter was a willing and complete disclosure of liability and request for relief.

C. Petitioner's argument is without merit. "The language of the statute 'is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning'" (***Matter of the Walt Disney Company and Consolidated Subsidiaries***, Tax Appeals Tribunal, August 6, 2020, quoting ***DaimlerChrysler Corp. v Spitzer***, 7 NY3d 653, 660 [2006]). "[W]hen the language of a tax statute is unambiguous, it should be construed so as to give effect to the plain meaning of the words used (citation omitted)" (***Matter of Watchtower Bible and TracDecision Society of New York, Inc.***, Tax Appeals Tribunal, July 16, 2020).

D. The statutory text of Tax Law § 1700 (4) is clear. To participate in the Division's VDCP, an eligible taxpayer is required to submit a disclosure statement through a process

established by the commissioner. Petitioner's cover letter and enclosed UBTI tax returns are not sufficient to meet this requirement. To find otherwise would put a burden on the Division that is beyond the unambiguous requirements of the statute.

E. The petition of The Morris A. Hazan Family Foundation is denied, and the refund denial dated November 6, 2017 is sustained.

DATED: Albany, New York
December 10, 2020

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE