STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN SHIELDS	:	ORDER DTA NO. 826294
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2009.	:	

Petitioner, John Shields, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the year 2009.

Pursuant to 20 NYCRR 3000.9(a)(4), the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, dated July 29, 2014, on the grounds that the Division of Tax Appeals lacks jurisdiction of the subject matter of the petition because the petition was not filed in protest of a statutory notice. The Division of Taxation, by its representative, Amanda Hiller, Esq., (Leo Gabovich) submitted a letter, dated August 14, 2014, in support of the proposed dismissal. Petitioner, appearing by Richard J. Wright, Jr., CPA, filed a response on August 27, 2014, which commenced the 90-day period to issue this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

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

FINDINGS OF FACT

1. On May 20, 2014, petitioner, John Shields, filed a petition with the Division of Tax Appeals seeking an administrative hearing to review a Notice and Demand for Payment of Tax Due (Notice and Demand), dated March 14, 2013, which was attached to the petition.

2. On July 29, 2014, the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition, which stated, in pertinent part:

> Pursuant to § 173-a(2) of the Tax Law, the Division of Tax Appeals lacks jurisdiction to consider the merits of a petition that is filed in protest of a Notice and Demand for Payment of Tax Due.
>
> In this case, petitioner filed a petition in protest of a Notice and Demand (Assessment No. L-039131978). No hearing rights exist to protest a Notice and Demand, therefore, the Division of Tax Appeals lacks jurisdiction to consider the merits of this petition.

3. The Notice and Demand at issue asserts tax due in the amount of $1,796.00 plus interest and states, in part:

> You received this bill because: A review of your return has resulted in additional tax, penalty and/or interest due.
>
> * * *
>
> We have adjusted the allowed amount of pass-through of QEZE Tax Reduction Credit to reflect the business allocation percentage of KIMSAM I, LLC (fka Graphic Controls, LLC.) The credit has also been recomputed using an adjusted gross income figure that itself has been recomputed without regard to losses. Under separate cover, you will be receiving, or have already received, correspondence dated March 6, 2013, which more fully describes these adjustments and includes schedules detailing the computation of the adjustments.

4. The petition filed in this matter argues, in part, that the Division of Taxation (Division) made the following errors in the issuance of the Notice and Demand:

> The calculation of the Empire Zone QEZE Tax Reduction Credit was improperly computed by New York State Department of Taxation and Finance Audit

Division ("The Division"). The Division calculated the taxpayer's tax factor by multiplying the QEZE income by the QEZE's business allocation percentage.

The Petitioner is a resident of New York State; all of their income from the QEZE should be allocated within New York State and used to calculate the tax factor. The Division is erroneously applying Article 9-A principles discussed in Tax Law section 16(f)(1) to an Article 22 taxpayer. The Petitioner calculated the tax reduction credit in a manner consistent with the instructions to Form IT-604 and the clear language of Tax Law Section 16.

In addition, the Division included losses that were netted against gains and reported on federal Schedule D, Capital Gains and Losses, and losses netted against income reported on federal Schedule E, Supplemental Income and Loss and included these losses and add-back to the Petitioners (sic) New York State adjusted gross income used to calculated the QEZE tax factor.

The Division erroneously added back losses netted against income from federal schedule D and federal schedule E to New York State adjusted gross income to calculate the QEZE tax factor. The inclusion of these types of loss transactions artificially distorts the calculation of the QEZE Tax Reduction Credit since all of the net income reported is subject to income tax. Artificially distorting the denominator to reduce the benefits of the QEZE credits against QEZE income is not what was intended by Technical Services Division's Memorandum TSB-M-06(2)I.

Similar cases have been appealed contesting the inclusion of the business allocation percentage in calculating the QEZE tax factor; see *Batty*, New York Division of Tax Appeals, Administrative Law Judge Unit, DTA Nos. 824061 and 824063, April 4, 2013; also *Henson*, New York Division of Tax Appeals, Administrative Law Judge Unit, DTA Nos. 825068, 825254, 825255, 825256, 825257, April 10, 2014.

5. The Division submitted a letter in response to the Notice of Intent to Dismiss Petition stating that it agreed with the proposed dismissal.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is an adjudicatory body of limited jurisdiction whose powers are confined to those expressly conferred in its authorizing statute (***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 Tribunal***, 151 Misc 2d 326 [1991]). Therefore,

in the absence of legislative action, this forum cannot extend its authority to disputes that have not been specifically delegated to it (***Matter of Hooper***, Tax Appeals Tribunal, July 1, 2010).

B. The Tax Appeals Tribunal 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]).

C. 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. (Emphasis added.)

Tax Law § 681, in turn, provides that, "If upon examination of a taxpayer's return . . . the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer . . ." (Tax Law § 681[a]) and provides an exception to the issuance of a notice of deficiency for mathematical or clerical errors, stating:

> If a mathematical or clerical error appears on a return (including an overstatement of the credit for income tax withheld at the source, or of the amount paid as estimated income tax), the commissioner shall notify the taxpayer that an amount of tax in excess of that shown upon the return is due, and that such excess has been assessed. Such notice shall not be considered as a notice of deficiency for the purposes of . . . section six hundred eighty-nine (authorizing the filing of a petition with the division of tax appeals based on a notice of deficiency), or article forty of this chapter . . . . (Tax Law § 681[d]).

D. The plain language of sections 173-a(2) and 681(d), preventing hearing rights for notices and demands, is clearly limited to such notices that are based on mathematical or clerical errors or failure to pay the tax shown on the return. The notice and demand issued here was not issued on any of those bases. Rather, it was based on the Division's adjustment of a QEZE credit, based on the Division's determination of the business allocation percentage and a recomputation of an adjusted gross income figure that the Division determined without regard to losses. Such adjustments to the QEZE credit are rife with controversy and not a simple mathematical or clerical adjustment.[1]

Since the notice at issue was not based on "mathematical or clerical errors or failure to pay tax shown on a return," the provision of Tax Law § 173-a(2) denying the right to a hearing does not apply here. Because the right to a prepayment hearing challenging a notice and demand that is not based merely on mathematical or clerical errors or failure to pay tax shown on a return is not specifically provided for, modified or denied by any other provision of the Tax Law, petitioner has the right to such a hearing pursuant to Tax Law § 2006(4) (***see Matter of Meyers v. Tax Appeals Tribunal*** 201 AD2d 185, 188 [1994], ***lv denied*** 84 NY2d 810 [1994]).

I. The Notice of Intent to Dismiss is rescinded and the Division of Taxation shall have 75 days from the date of this order to file its answer in this matter.

DATED: Albany, New York
October 30, 2014

/s/ Barbara J. Russo
Administrative Law Judge

[1] Indeed, as petitioner points out, cases with a similar QEZE credit issue have been the subject of previous Division of Tax Appeals determinations. While it is noted that administrative law judge determinations are not considered precedent (20 NYCRR 3000.15[e][2]), the Division may not avoid additional determinations addressing the issue by simply issuing a notice and demand instead of a notice of deficiency thereby eliminating hearing rights.

ADMINISTRATIVE LAW JUDGE