

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ANDREW WALZER : ORDER
for Redetermination of a Deficiency or for Refund of : DTA NO. 827327
New York State Personal Income Tax under Article 22 of :
the Tax Law for the Year 2008. :

Petitioner, Andrew Walzer, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2008. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel). The parties waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by December 18, 2017. On November 20, 2017, the Division of Taxation brought a motion seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006 (6) and 20 NYCRR 3000.9 (b). Petitioner did not timely respond to the Division of Taxation's motion, but previously submitted documents dated August 21, 2017 and September 22, 2017 in accordance with the established submission schedule, which were considered in the issuance of the determination on the Division of Taxation's motion.

The Division of Tax Appeals issued a determination on May 31, 2018, granting the Division of Taxation's motion for summary determination and denying the petition.

Petitioner filed a motion for reargument on July 2, 2018.¹ The Division of Taxation's response was due by August 20, 2018, which date began the 90-day period for the issuance of this order. Upon review of petitioner's motion, the Division of Taxation's response, and the entire record herein, Barbara J. Russo, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's motion for reargument should be granted.

FINDINGS OF FACT

The facts as determined in *Matter of Walzer*, Division of Tax Appeals, May 31, 2018, are fully incorporated herein by reference.

The following additional findings of fact are made:

1. On June 6, 2017 and June 7, 2017, respectively, petitioner, Andrew Walzer, and the Division of Taxation (Division) signed consents to have the matter determined on submission and waived a hearing.
2. Upon receipt of the parties' consent to submission and waiver of hearing, the Division of Tax Appeals established a schedule for the parties to submit documents and briefs as follows: documents from the Division were to be filed by July 17, 2017; petitioner's documents and brief were to be filed by August 21, 2017; the Division's brief was to be filed by September 25, 2017; and petitioner's reply brief was to be filed by October 16, 2017.
3. On July 13, 2017, the Division filed documents in relation to this matter in accordance with the submission schedule.

¹ Petitioner titled his request a "motion for reconsideration." The Tax Appeals Tribunal's Rules of Practice and Procedure have no provision for a motion for reconsideration. As such, petitioner's motion will be treated as a motion for reargument pursuant to 20 NYCRR 3000.16.

4. On August 21, 2017, petitioner filed documents consisting of a copy of an amended federal income tax return for the year 2008, dated August 21, 2017; correspondence to the New York State Tax Department dated August 21, 2017; a copy of portions of a 2008 federal income tax return and check to the U.S. Treasury dated October 15, 2015; and a copy of a statement of proposed audit change for tax year 2008, dated September 24, 2014. Along with his documents, petitioner included a cover letter requesting more time to submit additional documents and a “legal memo.” Petitioner handwrote “Motion” at the top of the cover letter. Petitioner’s letter did not comply with the Tax Appeals Tribunal Rules of Practice and Procedure for motion practice, did not include a notice of motion and did not include a supporting affidavit.

5. As petitioner’s August 21, 2017 correspondence was not a proper motion, the Division of Tax Appeals treated it as a partial submission in accordance with the submission schedule, and a request for an extension of time to submit additional documents and a brief. By letter, dated August 22, 2017, the administrative law judge responded to petitioner’s request, and granted petitioner an extension until September 22, 2017 to submit additional documents and a brief, and extended petitioner’s time to file a reply brief to November 17, 2017.

6. Petitioner sent correspondence, dated September 22, 2017, together with copies of the same documents included with his August 21, 2017 correspondence, an illegible copy of a purported medical image, a copy of a 2008 form IT-201-D resident itemized deduction schedule, a copy of a 2008 form IT-112-C resident credit for taxes paid to a province of Canada, unsigned correspondence dated September 22, 2017 from Robbin J. Williams, and a certificate of naturalization for Mingye Niu. At the top of petitioner’s correspondence, he handwrote “Motions” and requested a further extension of time due to health problems, and/or a stay, and/or remand of the matter to the audit division. Again, petitioner’s correspondence did not comply

with the Tax Appeals Tribunal Rules of Practice and Procedure for motion practice, did not include a notice of motion and did not include a supporting affidavit.

7. As petitioner's September 22, 2017 correspondence was not a proper motion, the Division of Tax Appeals treated it as an additional partial submission and a request for an additional extension of time to submit additional documents and a brief, as well as a request for a stay or remand to the audit division. By letter dated September 27, 2017, petitioner's request for additional time to submit documents and a brief was granted, and petitioner was given until October 23, 2017 to submit additional documents and a brief, and December 18, 2017 to submit a reply brief. Petitioner's request for a stay and/or remand to audit was denied.

8. Petitioner did not file any additional documents or a brief within the extended period granted for submission and on November 20, 2017, the Division filed a motion for summary determination. Petitioner did not timely respond to the Division's motion or file a request within thirty days of the motion for additional time to respond.

9. On May 8, 2018, petitioner faxed to the Division of Tax Appeals a request for an extension of time to respond to the Division's motion. By letter dated May 20, 2018, petitioner's request for an extension of time to respond to the Division's motion was denied.

CONCLUSIONS OF LAW

A motion to reargue a prior determination "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]; *see Matter of Barker*, Tax Appeals Tribunal, June 23, 2011; *see also* CPLR 2221 [d] [2]).

Petitioner contends that the administrative law judge “never responded approving or denying my two filed and served motions for extensions of time on August 21 and Sept 22/24/2017.” Contrary to petitioner’s allegations, the administrative law judge responded to petitioner’s requests dated August 21, 2017 and September 22, 2017.² Specifically, by letter dated August 22, 2017, the administrative law judge responded to petitioner’s August 21, 2017 correspondence and granted petitioner an extension of time until September 22, 2017 to submit additional documents and a brief. Additionally, by letter dated September 27, 2017, the administrative law judge responded to petitioner’s correspondence dated September 22, 2017, granted petitioner an additional extension of time until October 23, 2017 to submit documents and a brief, and denied petitioner’s request for a stay and/or remand. Accordingly, petitioner’s claim that the administrative law judge failed to respond to his correspondence dated August 21 and September 22, 2017 is without merit.

Petitioner further argues that his motion for reargument should be granted because his poor health warrants allowing him additional time to respond to the Division’s motion for summary determination. As noted above, petitioner was granted extensions to submit documents in response to his August 21 and September 22, 2017 correspondence. However, petitioner did not comply with the extended deadline for submission. Following the Division’s filing of the motion for summary determination, petitioner did not file a response nor request an extension of time to respond to the motion within thirty days from the date of the motion. Pursuant to the Tribunal’s Rules of Practice and Procedure, the adverse party shall have thirty days after the date of service of the motion to file a response and to serve a copy on the moving party (20 NYCRR

² While petitioner calls his correspondence “motions,” they were not proper motions in accordance with the Tax Appeals Tribunal’s Rules of Practice and Procedure and were not treated as such (*see* 20 NYCRR 3000.5; CPLR 2214).

3000.5 [b]). The Division's motion was filed on November 20, 2017. On May 8, 2018, petitioner faxed a request for an extension of time to respond to the Division's motion. Said request was well beyond the thirty-day time limit set forth in the regulations and was properly denied.

Petitioner has failed to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law.

Accordingly, it is hereby ORDERED that petitioner's motion for reargument is denied.

DATED: Albany, New York
November 15, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE