

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
STUART KALINSKY : ORDER
DTA NO. 828296
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 and 2011. :

Petitioner, Stuart Kalinsky, 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 and 2011.

On April 30, 2018, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the ground that the petition did not appear to be timely filed. On May 16, 2018, the Division of Taxation, by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), submitted a letter in support of dismissal. On May 22, 2018, petitioner submitted a letter in opposition to dismissal. Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order commenced on May 30, 2018. After due consideration of the arguments submitted, Donna M. Gardiner, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a conciliation order.

FINDINGS OF FACT

1. Petitioner, Stuart Kalinsky, filed a petition with the Division of Tax Appeals on July 28, 2017. The petition protests a notice and demand, assessment number L-046069582, dated February 22, 2017 and a notice of deficiency, assessment number L-045315026, dated September 21, 2016.

2. On April 30, 2018, Supervising Administrative Law Judge Herbert M. Friedman, Jr., of the Division of Tax Appeals issued a notice of intent to dismiss petition (notice of intent) to petitioner on the basis that the petition did not appear to be timely filed. The notice of intent indicated that the notice of deficiency was issued on September 21, 2016, but that the petition was not filed until July 28, 2017, or 310 days later. Moreover, the notice of intent indicated that the notice and demand was issued on February 22, 2017, and the petition was filed 156 days later.

3. In response to the issuance of the notice of intent, the Division of Taxation (Division) argued that pursuant to Tax Law § 173-a, a notice and demand issued on or after December 1, 2004 does not provide for a right to a hearing prior to payment of the underlying assessment. Moreover, the Division conceded that it did not have proof of mailing for the notice of deficiency issued to petitioner.

4. Petitioner responded to the notice of intent with a letter conceding the lateness of his petition, but asserting that he failed to receive the notices at issue because they were sent to a previous address. Petitioner also argued the merits of the underlying assessments.

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 Trib.*, 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. In this matter, the petition, in part, challenges notice and demand number L-046069582, dated February 22, 2017. It is concluded that this proceeding must be dismissed with respect to this notice and demand because the Division of Tax Appeals lacks jurisdiction to review the document. 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]). In this instance, the right to a hearing is specifically denied. Tax Law § 173-a (2) provides that a notice and demand “shall not be construed as a notice which gives a person the right to a hearing.” Accordingly, the Division of Tax Appeals is without authority to proceed with respect to the notice and demand (*see Matter of Chait*, Tax Appeals Tribunal, April 22, 2010).

C. With respect to the notice of deficiency at issue, there is a 90-day statutory time limit for filing a petition following the issuance of a notice of deficiency (Tax Law §§ 681 [b]; 689 [b]). The Division of Tax Appeals lacks jurisdiction to consider the merits of any petition filed beyond the 90-day limit (*Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006).

D. Where, as here, the timeliness of a taxpayer's protest of a notice of deficiency is in question, the initial inquiry is on the mailing of the notice because a properly mailed notice 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 (*see id.*). As set forth in its response to the notice of intent, the Division did not submit any evidence regarding the mailing of the notice of deficiency and, thus, petitioner has a right to a hearing on the notice of deficiency.

E. The petition of Stuart Kalinsky is dismissed to the extent indicated in conclusion of law B, the notice of intent to dismiss is rescinded to the extent indicated in conclusion of law D, 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
August 23, 2018

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE