

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JUAN AND YOCAIRA BRUNO : ORDER
DTA NO. 828844
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 2009 and 2014. :

Petitioners, Juan and Yocaira Bruno, 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 2009 and 2014.

On March 8, 2019, the Division of Tax Appeals issued to petitioners a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4) on the grounds that the petition did not appear to be timely filed and that the Division of Tax Appeals lacked jurisdiction to hear the merits of the petition. The 30-day period for both parties to respond to the notice of intent to dismiss petition was extended to May 23, 2019. Neither petitioners, appearing pro se, nor the Division of Taxation, by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel), responded to the notice by that date.¹ Pursuant to 20 NYCRR 3000.5 (d) and 3000.9 (a) (4), the 90-day period for issuance of this order commenced on May 23, 2019. After due consideration of the documents submitted, Jessica DiFiore, Administrative Law Judge, renders the following order.

¹The Division of Taxation's response was sent to the Division of Tax Appeals by courier and was received by the Division of Tax Appeals on May 24, 2019. Pursuant to 20 NYCRR 3000.22(a), when delivery is made by courier, the date of delivery is deemed the date of filing. As the deadline to respond to the notice was May 23, 2019 but the Division's response was not filed until May 24, 2019, such response is untimely and will not be considered.

ISSUES

I. Whether petitioners filed a timely petition with the Division of Tax Appeals following the issuance of a notice of deficiency.

II. Whether petitioners are entitled to a hearing in the Division of Tax Appeals with respect to a notice and demand or a notice of additional tax due.

FINDINGS OF FACT

1. Petitioners, Juan and Yocaira Bruno, filed a petition with the Division of Tax Appeals on August 8, 2018. The petition protested a notice of deficiency, assessment number L-040614127, dated February 24, 2014, that was issued to Juan Bruno, a notice of additional tax due, assessment L-047684066, dated January 31, 2018, that was issued to Juan and Yocaira Bruno, and a notice and demand for payment of tax due (notice and demand) dated March 12, 2018, bearing the same assessment identification number as that appearing on the notice of additional tax due, that was also issued to Juan and Yocaira Bruno.

2. On March 8, 2019, 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 petitioners on the basis that the petition did not appear to be timely filed and that the Division of Tax Appeals lacked jurisdiction. The notice of intent indicated that the notice of deficiency was issued on February 24, 2014, but that the petition was not filed until August 8, 2018, or in excess of 90 days later, and that the notice and demand and notice of additional tax due were not statutory notices that provided a right to a hearing.

3. The Division of Taxation (Division) did not submit timely proof of mailing of any of the notices at issue.

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

B. In this matter, the petition, in part, challenges a notice of additional tax due dated January 31, 2018 and a notice and demand dated March 12, 2018, both for assessment L-047684066. This proceeding must be dismissed with respect to the notice of additional tax due and notice and demand because the Division of Tax Appeals lacks jurisdiction to review these documents. 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 and a notice of additional tax due “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 of additional tax due and the notice and demand for the tax year 2014 (*see Matter of Nevins*, Tax Appeals Tribunal, June 7, 2018; *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 (*see* 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 (*see Matter of Voelker*, Tax Appeals Tribunal, August 31, 2006 *confirmed* 50 AD3d 1187 [3d Dept 2008]).

D. Where, as here, the timeliness of a taxpayer's protest of a notice of deficiency is in question, the initial inquiry is whether the Division has met its burden of demonstrating the date and fact of mailing of the relevant statutory notice, by certified or registered mail, to the taxpayer's last known address (*see Matter of Feliciano*, Tax Appeals Tribunal, August 24, 2017). As the Division did not timely provide evidence regarding the mailing of the notice of deficiency, petitioner Juan Bruno has a right to proceed on notice of deficiency L-040614127.

E. The petition of Juan and Yocaira Bruno 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 8, 2019

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE