

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRANK LEOGRANDE	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law and New York City Personal Income Tax	:	
under Chapter 46, Title T of the Administrative Code of	:	
the City of New York for the Year 1983.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on September 27, 1990 with respect to the petition of Frank Leogrande, 15-55 216th Street, Bayside, New York 11360 for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1983 (File No. 804792). Petitioner appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Neither party filed a brief on exception. The Division of Taxation's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly estimated petitioner's 1983 personal income tax based on his income for 1982.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On August 15, 1984, petitioner, Frank Leogrande, through his representative, Murray Appleman, filed an Application for Extension of Time to File requesting an extension of time for filing his 1983 Federal income tax return to October 15, 1984. The form indicated that a prior extension had been granted extending the time to file to August 15, 1984. The application was approved by the Internal Revenue Service on September 7, 1984.

On October 15, 1984, the Division of Taxation received a Form IT-201 containing petitioner's name, address and social security number. No income or adjustments were shown on the form. On line 16, "Other Income", the following words were typed: "Fifth & Sixth Amendments to Federal Constitution & applicable State Constitution". The form showed \$1,284.52 in New York State estimated tax paid and \$500.00 in New York City estimated tax paid. The form was unsigned.¹ A copy of the above-mentioned Federal Application for Extension of Time to File was attached to the Form IT-201.

The Division of Taxation requested Federal income tax information with respect to petitioner from the Internal Revenue Service and was advised as follows: "We have no record of returns being filed in the Brooklyn District for the year(s) 1983 through 1985."

On May 5, 1987, the Division of Taxation issued a Statement of Audit Changes to petitioner for 1983 stating as follows:

"A search of our files fails to show a New York State income tax return filed under your name or social security number. Therefore, your New York State income tax is estimated pursuant to New York State Income Tax Law.

Penalty for late filing, at 4½% per month with a maximum of 22½%, and penalty for late payment, at ½% per month with a maximum of 25% have been applied (Sections 685(a)(1) and (a)(2) of the New York State Tax Law).

Section 685(b) penalty has been imposed due to your negligence and/or intentional disregard of the Tax Law or Regulations.

Penalty for underestimation of tax has been applied (Section 685(c) of the New York State Tax Law).

Interest is due for late payment or underpayment at the applicable rate. Interest is mandatory under the Law.

¹Neither party has contended that the unsigned IT-201 constituted a valid tax return.

Computation of Personal Income Tax	<u>STATE</u>	<u>CITY</u>
Estimated New York Wages	\$25,000.00	
Less: Standard Deduction	2,500.00	
Less: Exemption	<u>800.00</u>	
New York Taxable Income	\$21,700.00	
Tax on Above	\$1,611.00	\$545.60"

Petitioner's 1983 wage income was estimated at \$25,000.00 based on his reported 1982 wage income of \$22,476.00.

On August 7, 1987, the Division of Taxation issued a Notice of Deficiency to petitioner for 1983 asserting \$2,156.60 in tax, \$1,130.77 in penalty and \$733.20 in interest due, for a total due of \$4,020.57.

On November 13, 1989, the deficiency was reduced by application of a credit of \$184.52 from petitioner's 1982 return and \$1,600.00 in payments for 1983, resulting in a deficiency of \$306.96 in State tax and \$65.12 in New York City tax, plus penalty and interest.

OPINION

In the determination below, the Administrative Law Judge annulled the deficiency issued against petitioner, holding that the estimation procedures used by the Division of Taxation (hereinafter the "Division") in calculating the deficiency were without a rational basis.

On exception, the Division asserts that petitioner's acts of filing an extension of time to file a return and making an estimated tax payment indicate that petitioner had taxable income in 1983. The Division further argues that in light of petitioner's failure to file a return for the year, coupled with the Audit Division's unsuccessful attempt to obtain information regarding petitioner's taxable income from the Internal Revenue Service, it was authorized to estimate petitioner's New York taxable income from any information within its possession, with the burden resting upon petitioner to show that the estimate was erroneous or improper.

Petitioner did not respond to the Division's exception.

We reverse the determination of the Administrative Law Judge.

It is an established principle of State taxation that a presumption of correctness attaches to a properly issued notice of deficiency, with the burden resting on the taxpayer to rebut this presumption (Matter of Tavalacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174). In the determination below, the Administrative Law Judge stated in his opinion that the Division failed to request income information from petitioner for the year at issue. Relying on this finding, he determined the assessment to be invalid, citing our decision in Matter of Fortunato (Tax Appeals Tribunal, February 22, 1990). In Fortunato, the record set forth an extensive description of the estimation methodology as well as the circumstances under which the Division resorted to this methodology. These circumstances included the Division's destruction of relevant information and its failure to request information from the petitioner.

In the present case, there was no testimony adduced at hearing. Thus, the record from which facts can be found is comprised solely of documents submitted as hearing exhibits. Based on our examination of this record, we find little which describes the audit technique and nothing which indicates the circumstances surrounding the Division's resort to this estimation methodology. Yet, critical to the Administrative Law Judge's determination was his conclusion that the Division failed to request income information from petitioner. It simply cannot be determined from the record that a request was not made, nor can this fact be assumed in the absence of positive evidence of such a failure. Thus, it was improper for the Administrative Law Judge to base his determination upon this conclusion, as it is completely without an evidentiary basis in the record (see, Margolin v. Newman, 130 AD2d 312, 520 NYS2d 226, appeal dismissed 71 NY2d 844, 527 NYS2d 758).

Therefore, because petitioner failed to put forth any evidence whatsoever, and is not able to point to any evidence in the record tending to demonstrate that the assessment was incorrect, he must surrender to this presumption of correctness (Matter of Tavalacci v. State Tax Commn., supra).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;
3. The petition of Frank Leogrande is denied; and
4. The Notice of Deficiency dated August 7, 1987, as reduced by finding of fact "6" of the Administrative Law Judge's determination, is sustained.

DATED: Troy, New York
July 18, 1991

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner