

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH RUSSO	:	DECISION
	:	DTA No. 806982
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and Chapter 46, Title T	:	
of the Administrative Code of the City of New York for	:	
the Years 1982 and 1983.	:	

Petitioner Joseph Russo, 219-26 74th Avenue, Bayside, New York 11364 filed an exception to the determination of the Administrative Law Judge issued on December 20, 1990 with respect to his petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1982 and 1983. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in response to petitioner's exception and brief.

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

ISSUE

Whether the Division of Taxation properly concluded that petitioner had income subject to New York State and New York City personal income tax during the years 1982 and 1983.

FINDINGS OF FACT

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

In a letter dated November 7, 1985, the Division of Taxation ("Division") advised petitioner, Joseph Russo, that it was unable to locate his income tax returns for the years 1980 through 1983. The letter asked petitioner to complete the income tax returns which were included with the letter and enclose payment. If petitioner filed returns, the letter requested that petitioner submit copies of the returns and copies of the cancelled checks paying the additional taxes due or a copy of the refund stub if a refund of tax was made.

The Division issued two notices and demands for payment of income tax due, dated November 20, 1986, to petitioner. One notice assessed a penalty of \$950.00 for the year 1982. The other notice assessed the same amount of penalty for the year 1983. The notices explained that "PENALTY IS IMPOSED UNDER SECTION 685(I) OF THE TAX LAW FOR FAILURE TO SUBMIT INFORMATION REQUESTED IN OUR CORRESPONDENCE."

On or about January 13, 1988, the Division issued a Statement of Audit Changes which, among other things, explained that petitioner had a deficiency of personal income tax for the years 1982 and 1983. The Statement of Audit Changes calculated the deficiency of personal income tax as follows:

"TAX YEAR JURISDICTION STATUS/SPOUSE	1982 N.Y. STATE MFS-H	1982 N.Y. CITY MFS-H	1983 N.Y. STATE MFS-H	1983 N.Y. CITY MFS-H
TOTAL ADJUSTMENT	23589.00	23589.00	26410.00	26410.00
TOTAL INCOME REPORTED/ADJ'D	.00	.00	.00	.00
ADJUSTMENT	24389.00	24389.00	27210.00	27210.00
TOTAL INCOME CORRECTED	24389.00	24389.00	27210.00	27210.00
STANDARD DED CLAIMED/ADJ'D	.00	.00	.00	.00
EXEMPTION(S) CLAIMED/ADJ'D	.00	.00	.00	.00
ADJUSTMENT	800.00	800.00	800.00	800.00
EXEMPTION(S) ALLOWED	800.00	800.00	800.00	800.00
NET INCOME CORRECTED	23589.00	23589.00	26410.00	26410.00
TAXABLE INCOME CORRECTED	23589.00	23589.00	26410.00	26410.00
TAX ON ABOVE	1862.46	618.56	2257.40	735.63
CITY SURCHARGE		30.93		73.56
BALANCE		649.49		809.19
LESS: TAX WITHHELD	.00	.00	-1808.00	-720.00
TAX PREVIOUSLY STATED/ADJ'D	.00	.00	.00	.00
PERSONAL INCOME TAX DUE	1862.46	649.49	449.40	89.19
SECTION 685(A)(1)(A)	419.05	146.14	101.12	20.07
SECTION 685(A)(2)	465.62	162.37	101.12	20.07

SECTION 685(B)(1)	93.12	32.47	22.47	4.46
SECTION 685(C)	125.00	41.00	22.00	1.00
TOTAL PENALTY	1102.79	381.98	246.71	45.60
TOTAL INTEREST	944.85	329.51	168.74	33.49
TOTAL DUE	3910.10	1360.98	864.85	168.28"

The Statement of Audit Changes explained that penalties were asserted pursuant to Tax Law § 685(a)(1) and (2) for failure to file a tax return when due and failure to pay tax when due. The Division also asserted a penalty pursuant to Tax Law § 685(b) for negligence and/or intentional disregard of the Tax Law. Lastly, the Division asserted penalties for underestimation of New York State and New York City personal income tax.

Handwritten notes on the audit report indicate that the Division calculated the amount of income attributed to petitioner for 1982 by subtracting an amount of income attributed to petitioner for 1980 of \$18,747.00 from an amount of income attributed to petitioner in 1981 of \$21,568.00 for a difference of \$2,821.00. The difference was then added to the 1981 amount to calculate an amount of income in 1982 of \$24,389.00.¹ There is nothing in the record to indicate the source or nature of the income attributed to petitioner for 1980 and 1981.

The amount of wage income attributed to petitioner for the year 1983 was based on a wage and tax statement from Westchester Farms, Inc. which reported that petitioner received income subject to tax. The wage and tax statement stated that petitioner received "Wages, Tips, Other Compensation" of \$27,210.09

¹At the hearing, the auditor testified that he believed that the Division estimated petitioner's 1982 income by adding the difference in "actual" earnings between 1983 and 1984 to the 1978 earnings. There is nothing in the record to reconcile the Notice of Deficiency to the auditor's testimony. The documentary evidence supports the method outlined in Finding of Fact "5".

In a letter dated February 12, 1988, petitioner advised the Division that he disagreed with the Division's findings and stated, among other things, that he did not engage in any "taxable activity".²

The Division of Taxation ("Division") issued a Notice of Deficiency dated April 12, 1988 to petitioner, which asserted a deficiency of New York State and New York City personal income tax for the years 1982 and 1983. The notice stated that additional tax was due in the amount of \$3,050.54 plus penalty of \$1,785.16 and interest of \$1,549.79 for a total amount due of \$6,385.49.

In a letter dated November 22, 1988, the Division advised petitioner that it considered its position correct because:

"[a] review of our records show you were employed by Westchester Farms, Inc., and received wages which are subject to tax. Your protest has been dealt with time and time again by the Federal Tax Courts which have found such protests to be frivolous and without merit."

On or about May 30, 1989, petitioner filed a petition with the Division of Tax Appeals wherein he argued (1) that there is no jurisdiction over him; (2) that there is no basis to conclude that he engaged in an activity subject to tax; (3) that he is not a "taxpayer" because he is not subject to tax; (4) that the income tax is an indirect tax which is in the nature of an excise tax and that an income tax can not be imposed upon an individual or an individual's exercise of a natural right secured by the constitution of the United States or New York State; (5) that his employers have falsely advised state and Federal agencies that he engaged in activities subject to tax; and (6) that the earning of compensation does not create a tax liability.

During the period in issue, petitioner was married and lived in a household consisting of his wife and three children. In 1982, the children were 22, 20 and 11 years old. At the hearing,

²At the hearing, the Division's representative stated that this letter was accepted as the original petition.

petitioner was unable to state whether any of his children were dependent upon him for support. He also did not recall if his wife was employed in 1982.

It was revealed at the hearing that during the years 1982 and 1983, petitioner was employed by Westchester Farms, Inc. as a clerk. He was compensated by his employer for his services.

OPINION

In the determination below, the Administrative Law Judge first addressed petitioner's jurisdictional objection that the Division of Tax Appeals lacked jurisdiction over the subject matter and concluded that the Division of Tax Appeals had jurisdiction (Tax Law §§ 2000 and 2006[4]) and held that the petition to challenge the notice of deficiency was properly brought before the Division of Tax Appeals. The Administrative Law Judge (relying on Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990) also cancelled the notice of deficiency pertaining to 1982 on the grounds that the record does not establish any basis for the Division's conclusion that petitioner had taxable income in 1982. The Administrative Law Judge, however, held that a rational basis existed for the issuance of the notice of deficiency for 1983. Since petitioner presented no evidence to sustain his burden of proof to show that the amount asserted was in error, the Administrative Law Judge found no basis to modify the 1983 deficiency. Further, since the Tax Law does not provide a taxpayer with the right to petition notices and demands, the Administrative Law Judge made no ruling with respect to said notices.

On exception, petitioner alleges he is not a "taxpayer" as defined in the Internal Revenue Code and is, therefore, not subject to or liable for the tax and an individual who is only engaged in lawful, innocent and harmless activities is not subject to any "income" or other revenue laws.

The Division argues that based on a wage and tax statement for petitioner, income taxes due were properly determined for 1983. Further, since petitioner has failed to present any legal basis to modify the asserted deficiency, the determination of the Administrative Law Judge must be sustained and the exception dismissed.

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

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

1. The exception of Joseph Russo is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Joseph Russo is granted to the extent indicated in conclusions of law "D" and "F" of the Administrative Law Judge's determination but is otherwise denied; and
4. The Division of Taxation is directed to modify the Notice of Deficiency dated April 12, 1988 in accordance with paragraph "3" above but such Notice is otherwise sustained.

DATED: Troy, New York
August 8, 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