

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALVIN GELLER	:	DECISION
	:	DTA NO. 815936
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1991.	:	

Petitioner Alvin Geller, 79 North Broadway, Apartment M, White Plains, New York 10603-3750, filed an exception to the determination of the Administrative Law Judge issued on October 8, 1998. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Justine Clarke Caplan, Esq. And Michael J. Glannon , Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUE

Whether petitioner established that the deficiency notice issued to him was incorrect.

FINDINGS OF FACT

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

The Division of Taxation (“Division”) issued to petitioner, Alvin Geller, a Notice of Deficiency, dated August 28, 1995, asserting a personal income tax deficiency of \$3,275.00, plus penalty and interest, for the year 1991.

The tax deficiency was based on the Division’s finding that in 1991 petitioner was a New York State resident, had earned income in New York and failed to file a personal income tax return or pay income tax on his New York income.

On or about January 31, 1995, the Division sent petitioner notice of the fact that its records showed no filing of petitioner’s 1991 State income tax return. Petitioner was informed that information received from the Internal Revenue Service (“IRS”) indicated that petitioner had filed a Federal income tax return using a New York State address. Petitioner was asked to provide the Division with a copy of a State return, if one was filed, or an explanation of petitioner’s reasons for not filing such a return.

A copy of the 1991 Federal income tax return received from the IRS shows that petitioner reported wage income of \$45,720.00 and prize income of \$10,000.00, yielding total 1991 income of \$55,720.00. Petitioner’s address is shown as White Plains, New York. The Federal tax return has no entries for New York State taxes withheld or estimated taxes paid; however, a W-2 form attached to the return shows New York State income tax withheld of \$325.83 on wages of \$45,719.63. The W-2 form also shows that petitioner claimed nine exemptions for withholding purposes, although his Federal tax return shows only two personal exemptions.

Based on information shown on petitioner's Federal return, the Division computed petitioner's New York State income tax liability for 1991 and issued him a Statement of Proposed Audit Changes, dated July 3, 1995. It explains that Internal Revenue Code § 6103(d) allowed the Division to obtain information from the Internal Revenue Service and that this information was the starting point for the Division's computation of tax due. The letter again requested that petitioner provide the Division with sufficient information to allow it to accurately determine petitioner's tax liability. It then set forth a computation of petitioner's tax liability on the basis of the information shown on petitioner's Federal income tax return. The statement noted that penalties were imposed pursuant to Tax Law § 685(a)(1); (b)(1), (2) for late filing and negligence and an additional penalty for negligence or intentional disregard of the Tax Law, respectively. Petitioner was advised that, if he had filed a 1991 New York State return, he should provide a complete copy of it to the Division including wage and tax statements. In addition, if he had made a payment with the return, he was asked to provide the deposit serial number stamped on the face of the check.

There is no evidence that petitioner responded to the Statement of Proposed Audit Adjustment.

Documents executed by Joan Pflieger, Tax Processing Manager III, and Lawrence E. Stevens, Acting Secretary to the Commissioner of Taxation and Finance, certify that the Division searched its own files for a copy of petitioner's 1991 income tax return and failed to locate one.

Following a conciliation conference, the Division issued a Conciliation Order, dated April 11, 1997, canceling the asserted penalty but otherwise sustaining the statutory notice.

Petitioner then filed a petition where he asserted that the Division's determination of his 1991 income was erroneous; that 1991 New York State income taxes were withheld from his earnings in an amount sufficient to satisfy his tax obligation for 1991; and that the Division incorrectly computed his 1991 State tax liability. Petitioner also claimed that he was denied due process of law.

On February 10, 1998, the Division filed documents relating to the petition with the Division of Tax Appeals. Petitioner had until March 17, 1998 to file documents of his own and a brief, but none were filed. The Division then filed a brief, on April 21, 1998, outlining its position. Petitioner did not respond to the brief, although he was given until May 11, 1998 to do so.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Division was unable to locate a copy of petitioner's 1991 personal income tax return and petitioner failed to present evidence that he filed such a return for 1991. Thus, the Administrative Law Judge concluded that no New York State personal income tax return was filed by petitioner for 1991 and that the Division properly estimated petitioner's 1991 State income tax liability relying on information petitioner supplied to the Federal government with his 1991 Federal income tax return. The Administrative Law Judge determined that petitioner failed to rebut the presumption of correctness which attaches to a properly issued Notice of Deficiency and, by not submitting any evidence, petitioner surrendered to this presumption. Therefore, the Administrative Law Judge sustained the Notice of Deficiency.

However, the Administrative Law Judge concluded that the Division failed to give petitioner credit for New York taxes which were withheld from his wages during 1991 and paid

over to the State. Thus, the Administrative Law Judge modified the amount of tax and interest due pursuant to the Notice of Deficiency by the amount of such withheld taxes.

The Administrative Law Judge also concluded that there was no evidence that petitioner had been denied due process of law. The Administrative Law Judge noted that petitioner was given notice of the Division's position and an opportunity to respond thereto at every stage of the proceedings. Petitioner, however, presented no evidence in support of his position.

ARGUMENTS ON EXCEPTION

On exception, petitioner asserts that it is a violation of his right to due process of law for the Division to rely on his 1991 Federal income tax return as the basis for calculating his New York State taxable income; that Tax Law §§ 612(a) and 689(e) are both unconstitutional as applied to petitioner; that giving a "presumption of correctness" to a properly issued Notice of Deficiency is an error and unconstitutional; and that the assessment procedures utilized by the Division violate his due process rights under the United States and New York State Constitutions.

The Division, in opposition, argues that the determination of the Administrative Law Judge was correct and that the issues raised on exception are the same arguments found to be without merit in an earlier action (*Matter of Geller*, Tax Appeals Tribunal, August 20, 1998) concerning an assessment issued to petitioner for tax year 1989.

OPINION

We affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and we see no reason to modify them except insofar as the Administrative Law Judge concluded that

the amount of taxes withheld from petitioner's 1991 wages was \$352.83. The correct amount based on petitioner's 1991 W-2 Form was \$325.83.

In *Matter of Geller (supra)*, we considered arguments raised by the same petitioner in relation to an assessment of New York State personal income tax for 1989. These arguments are nearly identical to those which petitioner has raised in the present proceeding. In the earlier case, as in the present case, petitioner merely alleges violations of his constitutional rights. He has not provided any legal basis to support his position nor has he provided any evidence that would allow him to meet his burden of proof to show that the Division's assessment or the Administrative Law Judge's conclusion is unconstitutional as applied to him or in any way has deprived him of his due process rights under the law. Thus, relying on *Matter of Geller (supra)*, we find petitioner's arguments on exception to be without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alvin Geller is denied;
2. The determination of the Administrative Law Judge, as modified hereinabove, is affirmed;
3. The petition of Alvin Geller is denied; and

4. The Notice of Deficiency dated August 28, 1995, as modified hereinabove, is sustained.

DATED: Troy, New York
May 13, 1999

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner