

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SAUL J. KLEIN	:	DECISION
	:	DTA NO. 816921
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1995.	:	

Petitioner Saul J. Klein, 2126 Benson Avenue, Apt. 6C, Brooklyn, New York 11214-5029, filed an exception to the determination of the Administrative Law Judge issued on March 9, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

Neither party filed a brief on exception. Petitioner'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 petitioner failed to report Federal audit changes as required by section 659 of the Tax Law and, if so, whether this failure may be excused because the Division of Taxation is seeking to impose tax on unemployment insurance benefits which New York State ultimately required petitioner to repay.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “5,” “6” and “8” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below. We have also deleted findings of fact “9” and “10” to eliminate facts extraneous to this decision.

Petitioner, Saul J. Klein, was employed by a company named Audits and Surveys Co., Inc. from May 23, 1995 until June 2, 1995, when his employment with this firm came to a conclusion.

Petitioner filed for unemployment insurance benefits at his local office in Brooklyn, New York. Initially, petitioner’s application for benefits was denied based on a finding that petitioner left his employment without good cause. Also, petitioner’s right to future benefits was reduced by four effective days because he willfully made a false statement.

Petitioner requested a hearing and in the late summer of 1995 he received a decision from an administrative law judge which reversed the local office’s initial denial of benefits. However, the administrative law judge sustained the portion of the determination that reduced petitioner’s right to future benefits by four effective days.

The employer appealed the decision of the administrative law judge insofar as it overruled the determination that petitioner left his employment without good cause. On October 5, 1995, the Unemployment Insurance Appeals Board (“Board”) affirmed the decision of the administrative law judge.

We modify finding of fact “5” of the Administrative Law Judge’s determination to read as follows:

On or about December 5, 1995, petitioner was advised that the Board had decided, on its own motion, to reopen and reconsider its prior decision. The Board issued a new decision in which it found that petitioner was employed as an assistant project director for a marketing research firm from May 23, 1995 until June 2, 1995. In its revised decision, the Board found that credible evidence established that petitioner's employment ended when he announced his intention to go on an extended trip after he was denied permission to do the same. The Board concluded that petitioner left his employment without good cause and was disqualified from receiving benefits.¹

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

Petitioner appealed the decision of the Board to the Appellate Division, Third Department which issued a decision on October 10, 1996 (*Matter of Klein v. Sweeney*, 232 AD2d 720, 647 NYS2d 1007). The Court stated: "We have considered claimant's contention that the Board erred in reopening the case and find it to be without merit (*Matter of Klein v. Sweeney, supra*, at 1007 [citation omitted])."²

As a result of the foregoing sequence of events, petitioner collected unemployment insurance benefits of more than \$7,000.00 from approximately May until November 1995. Petitioner states that he was confused and did not know whether he was supposed to report the unemployment benefits as income. Petitioner did not report the unemployment insurance benefits as income on his Federal and New York State income tax returns for 1995. He did not receive anything from New York State stating that he was supposed to repay the money.

¹We modified finding of fact "5" of the Administrative Law Judge's determination by deleting irrelevant material.

²We modified finding of fact "6" of the Administrative Law Judge's determination by deleting irrelevant material.

We modify finding of fact “8” of the Administrative Law Judge’s determination to read as follows:

In the summer of 1998, petitioner was employed as a student legal specialist for the New York City Law Department. Upon graduation, this position terminated automatically and petitioner applied for unemployment insurance benefits. Initially, petitioner was told that he would receive a benefit of a certain number of dollars a week. However, about two weeks later he was told that he would receive only about one-half of this amount because there was an outstanding lien of approximately \$7,000.00. Ultimately, petitioner received a decision which affirmed the prior decision to reduce his benefits. Petitioner would be required to repay the unemployment benefits he had received in 1995. As a result, petitioner’s benefits in 1998 were reduced by 50 percent and the remaining amount was applied to the balance due.³

The Division of Taxation (“Division”) administers a CP 2000 program. This program matches unreported changes on a taxpayer’s Federal return with his New York State return. Usually, the Division receives information of an audit change from the Internal Revenue Service on a Form CP-2000. The Division compares this information with the taxpayer’s New York State return and, when necessary, makes adjustments.

The Division received a Form CP-2000 from the Internal Revenue Service stating that a Federal adjustment was made to petitioner’s 1995 Federal income tax return to include unreported unemployment insurance benefits in the amount of \$7,350.00. On the basis of this form, the Division issued a Notice of Additional Tax Due, dated October 26, 1998, stating that additional tax was due in the amount of \$688.00 plus interest in the amount of \$147.88 for a balance due of \$835.88.

³We modified finding of fact “8” of the Administrative Law Judge’s determination to eliminate material irrelevant to this decision.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge found that if the amount of a taxpayer's Federal taxable income is changed or corrected by the United States Internal Revenue Service, he must report such change or correction in Federal taxable income to the Division within ninety days after the final determination of such change or correction, or as otherwise required by the Commissioner. The taxpayer must either concede the accuracy of such determination or state wherein it is erroneous (Tax Law former § 659).

In addition, the Administrative Law Judge determined that if a taxpayer failed to comply with section 659, then instead of issuing a Notice of Deficiency the Division could assess a deficiency based upon such Federal change or correction "by mailing to the taxpayer a notice of additional tax due" (Tax Law former § 681[e][1]). The deficiencies, interest and additions to tax or penalties stated in a Notice of Additional Tax Due are deemed assessed on the date the Notice is mailed

unless within thirty days after the mailing of such notice a report of the federal change [or] correction . . . is filed accompanied by a statement showing wherein such federal determination and such notice of additional tax due are erroneous (Tax Law former § 681[e][1]).

In this instance, the Administrative Law Judge pointed out, petitioner did not challenge the conclusion that there was a final Federal determination of a change in taxable income. Petitioner also did not contest the Division's assertion that he failed to report the Federal determination to New York State as required by Tax Law former § 659. Since petitioner failed to comply with Tax Law former § 659, the Administrative Law Judge concluded that the Division's issuance of a Notice of Additional Tax Due was proper.

The Administrative Law Judge also found, contrary to petitioner's argument, that the Division was not under any obligation to advise petitioner that he was required to report the unemployment insurance benefits as income. Rather, a taxpayer is required to act with ordinary care and prudence in attempting to ascertain his tax liability (*Matter of A & V Crown*, Tax Appeals Tribunal, May 24, 1990). Here, while petitioner said he was unsure whether he was required to report his unemployment insurance benefits as income on his income tax returns, there was no indication he took any steps to determine what he was required to report.

To the extent that petitioner urged that the Administrative Law Judge overrule previous determinations of the Unemployment Insurance Appeals Board, the Administrative Law Judge concluded that the Division of Tax Appeals only has the jurisdiction to resolve tax and licensing controversies with the Division of Taxation (*see*, Tax Law § 2000).

In discussing whether petitioner was required to pay tax on his unemployment benefits, the Administrative Law Judge considered a factually analogous case, which was presented in *Fisher v. Commissioner* (T.C. Memo 1987-88, 53 TCM 128). In that case, Mr. Fisher received unemployment compensation in 1982 from the State of Virginia. Mr. and Mrs. Fisher included the unemployment compensation in their gross income in their 1982 tax return. Thereafter, Mr. Fisher was reinstated to his job with back pay and under Virginia law, he was required to repay the unemployment benefits that had been paid to him. Mr. Fisher argued that since the unemployment benefits had to be repaid, those benefit amounts should be removed from his gross income for 1982.

The Tax Court concluded that petitioners were not entitled to exclude the unemployment compensation from their 1982 gross income. The Tax Court explained:

If a taxpayer receives earnings under a claim of right and without restrictions, the earnings are taxable in the year received, *Corliss v. Bowers* [2 USTC ¶ 525], 281 U.S. 376, 378 (1930), even though the taxpayer may still be adjudged liable to restore its equivalent. *North America Oil Consolidated v. Burnet* [3 USTC ¶ 943], 286 U.S. 417, 424 (1932). When, in a later year, a taxpayer is required to restore an amount received by him and included in income in a prior year, the taxpayer may deduct the repayment from income in the year repayment is made, or, if the repayment exceeds \$3,000, reduce his tax liability in the year of repayment by the amount of tax for the earlier year, which was attributable to inclusion in income of the repaid amount. Section 1341(a); section 1.1341-1, Income Tax Regs. (*Fisher v. Commissioner, supra*, 53 TCM, at 132.)

Relying on the decision in *Fisher*, the Administrative Law Judge concluded that petitioner also received unemployment compensation under a claim of right and was required to include the benefit amounts in his gross income for 1985. Petitioner was then at liberty to adjust his tax liability in the year the repayments were made (*see, Fisher v. Commissioner, supra*, 53 TCM, at 132).

ARGUMENTS ON EXCEPTION

In his exception, petitioner argues that the Unemployment Insurance Appeals Board denied him due process by including evidence “not testified to by either party” without providing a basis for its rationale (Exception, p. 1).

OPINION

As stated by the Administrative Law Judge in his determination, the Division of Tax Appeals has no authority to review the actions of another administrative agency. We find that the Administrative Law Judge correctly addressed each of the issues presented to him and we can find no basis to modify his conclusions in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Saul J. Klein is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Saul J. Klein is denied; and
4. The Notice of Additional Tax Due, dated October 26, 1998, is sustained together with

such interest as may be lawfully due.

DATED: Troy, New York
November 16, 2000

/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