

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KENNETH J. ERIKSON	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and City of	:	
New York Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Year 1981.	:	

Petitioner, Kenneth J. Erikson, 7600 Shore Front Parkway, Arverne, New York 11692, 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 and City of New York personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1981 (File No. 802133).

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 18, 1988 at 3:00 P.M., with additional information to be submitted by November 18, 1988. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner's salary income from his employment with Pan American World Airways, Inc. was exempt from taxation on the basis that he was a member of a religious order who turned over his earnings from said employment to this order pursuant to a vow of poverty.

II. Whether additions to tax and civil penalties imposed upon the deficiencies of tax at issue herein should be abated on the basis that petitioner's failure to comply with the provisions of the Tax Law and the Administrative Code of the City of New York was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

1. Kenneth J. Erikson ("petitioner") timely filed a New York State and City of New York Resident Income Tax Return for the year 1981 whereon the only information furnished was his name, address, social security number, school district code, occupation (reported as "minister"), the amount of State and City taxes withheld and a request for refund of the total taxes withheld. Petitioner signed the return "Reverend Kenneth J. Erikson". Attached to the return was a wage and tax statement issued by Pan American World Airways, Inc. ("Pan Am") which indicated that, for 1981, wages, tips and other compensation in the amount of \$23,036.38 had been paid by Pan Am to petitioner. Also attached to the return was a typewritten document which stated as

follows:

"Reverend Kenneth Erikson is a member of a Religious Order who has taken an irrevocable Vow of Poverty and performs services pursuant to direction by the Order as an agent. The income generated is the property of the Church and Order and not personal income to the individual.

For confirmation or clarification you may write to:

Worldwide Religious Order of Almighty God
Section T-1
4395 Austin Boulevard
Island Park, New York 11558"

2. On April 3, 1985, the Division of Taxation issued a Statement of Audit Changes to petitioner which advised him that, based on Revenue Ruling 77-290, his 1981 salary income was considered taxable. Petitioner's tax liability was calculated using the standard deduction with one exemption and the maximum tax benefit. Tax, penalties and interest were computed as follows:

	<u>STATE</u>	<u>CITY</u>	<u>TOTAL</u>	
Total Tax		\$1,338.60	\$476.51	
Less: withholding		<u>480.00</u>	<u>167.00</u>	
Tax due		\$ 858.60	\$309.51	\$1,168.11
§ 685(a)(1) penalty		193.19	69.64	262.83
§ 685(a)(2) penalty		154.55	55.71	210.26
§ 685(b) penalty		42.93	15.48	58.41
		Interest <u>418.43</u>		
		Total <u>\$2,118.04</u>		

3. On April 12, 1985, the Division of Taxation issued a Notice of Deficiency to petitioner asserting additional tax due of \$1,168.11, penalty of \$531.50 and interest of \$422.35, for a total amount due of \$2,121.96.

4. Prior to the year at issue, petitioner executed a "Vow of Poverty" which, in essence, stated petitioner's intent to make an irrevocable gift of all of his possessions and all of his income to the Church or Order designated thereon and further stated his intent that all such possessions and income would become the property of the said Church or Order, regardless of whether or not they continued to appear in his personal name, to be used to support the Church or Order. The "Vow of Poverty" contained a statement that outside employment remuneration is not considered to be personal income, but is, instead, income of or a gift to the Church or Order. The Church or Order designated to receive the possessions and income of petitioner was the Order of the Life Science Church.¹

¹Petitioner could not recall the exact date on which he executed the "Vow of Poverty" nor could he produce the executed document. The contents thereof have, therefore, been extracted from similar documents which have been accepted into evidence at other hearings before the State Tax

5. At some point (petitioner was unclear as to whether it occurred prior to or subsequent to the year at issue), petitioner's church ceased its association with the Life Science Church and became affiliated with the Order of St. Matthew, Province of St. Joachim, 2090 Merrick Avenue, Merrick, New York which was under the direction of Fr. John Brennan, OSM. During his membership in the Order of St. Matthew, petitioner was the educational coordinator and also performed charity and volunteer work for the Order.

6. Both prior to and during the year at issue, petitioner was employed as a shipping clerk for Pan Am. Pursuant to the "Vow of Poverty" which he executed, petitioner was required to and did deposit his paycheck from Pan Am into an account which had been opened in the name of Life Science Church (and, subsequently, the Order of St. Matthew). Petitioner was required to submit an itemized listing of his monthly living expenses for which he would be reimbursed, from a portion of the proceeds of his paycheck, by a member of the Church. The remainder of petitioner's paycheck was retained by and used for Church purposes.

7. During the period at issue, petitioner owned an automobile and owned shares in a cooperative apartment wherein he resided.

8. Petitioner's activities for the Church (or Order) were performed outside the hours of his employment with Pan Am and, therefore, did not conflict with the duties for which he received remuneration. His paychecks from Pan Am were payable solely to petitioner and not to the Church.

9. For the year at issue, petitioner's income tax return was prepared pursuant to instructions received at a meeting with Church officials. At this meeting, attorneys referred to by petitioner as "IANDRO" (petitioner stated that these were the same attorneys who assisted petitioner and other members in the preparation of their petitions for an administrative hearing relative to the taxability of their income) instructed petitioner and other members of the Church in the preparation of their Federal, State and local income tax returns. Members were instructed to fill in their names and social security numbers only, list all wages, salary or remunerations on a separate sheet of paper, attach applicable Forms W-2 and 1099, attach a money order payable to the Order of St. Matthew or cash in the amount of \$25.00 and return the tax return and attachments to their "guardians". The members were advised that "all remaining information will be done for you." In addition to the advice of the attorneys, each member received a written sheet setting forth the above instructions. The year at issue was the first year for which petitioner claimed that his income from Pan Am was exempt from taxation.

SUMMARY OF PETITIONER'S POSITION

10. Petitioner contends that inasmuch as the advice which he received was from attorneys, he verily believed such advice that he was properly completing his tax return and that his income from Pan Am was not taxable, especially in light of the fact that he actually signed over his paycheck to the Church and received, in return, only enough to cover his essential living expenses.

CONCLUSIONS OF LAW

A. Section 612(a) of the Tax Law provides that the New York adjusted gross income of a

Commission and the Division of Tax Appeals.

resident individual is his Federal adjusted gross income for the taxable year with certain modifications not applicable herein. Former section T46-112.0(a) of the Administrative Code of the City of New York, in effect for the year at issue, contained a similar provision with respect to City of New York adjusted gross income.

B. A member of a religious order under a vow of poverty is subject to tax on income earned or received by him in his individual capacity. If the member is acting as an agent of the order, he is not subject to tax (see, Rev Rul 77-290, 1977-2 C.B. 26).

C. The elements to be considered in determining whether income was received as an individual or as an agent of a religious order were stated by the United States Court of Appeals for the Federal Circuit as follows:

"A determination of whether a member of a religious order earns income in an individual capacity, or as an agent of the order, is a question of law based on general rules of agency to be established by considering all the underlying facts. [Citations omitted.]

There is no fixed way to approach the issue. The presence of unique facts in each case will inevitably lead the court to place more emphasis on one or more factors and less on others. The relationship between the order and the member gives rise to a number of factors. Relevant considerations there will include the degree of control exercised by the order over the member as well as the ownership rights between member and order, Kelley v. Commissioner, 62 T.C. 131 (1974), the purposes or mission of the order, and the type of work performed by the member vis-a-vis those purposes or mission, Rev Rul 77-290 (member who was a lawyer with law firm representing private clients).

Other factors will include the dealings between the member and the third-party employer (circumstances surrounding job inquiries and interviews, and control or supervision exercised by the employer), and dealings between the employer and order." (Fogarty v. United States, 780 F2d 1005, 1012.)

D. In applying the above-mentioned factors to this case, it is clear that petitioner earned his salary from Pan Am in his individual capacity rather than as agent of the Life Science Church or the Order of St. Matthew. Pan Am paid the salary to petitioner, not to the Church or the Order; there is nothing in the record to show that Pan Am dealt with anyone other than petitioner with respect to his employment or that petitioner was supervised in his work by anyone other than Pan Am personnel; and there is nothing in the record to show any relationship between the type of work performed by petitioner for Pan Am and the purposes of the Order of St. Matthew. (see, Fogarty v. United States, supra; Schuster v. Commissioner, 800 F2d 672).

E. "An individual who turns over his entire annual income to a church is still taxable on that income, subject to the deduction allowed for charitable contributions." (McGahen v. Commissioner, 76 TC 468, affd 720 F2d 664.) "A member of a religious order under a vow of poverty is not immune from Federal income tax by reason of his clerical status or his vow of poverty, but is subject to tax to the same extent as any other person on income earned or received in his individual capacity." (Id.____ at 478. See also, Rev Rul 77-290, 1977-2 C.B. 26.)

F. In Plante v. Commissioner (49 TCM 963) the taxpayer, also a member of the Life Science Church, sought to abate additions to tax imposed pursuant to IRC §§ 6651(a) and 6653(a) (which are similar to the additions to tax and civil penalties imposed herein) by reason of the fact that his failure to comply with the aforesaid sections was due to reasonable cause. The basis of his argument was good-faith reliance on the advice of competent tax counsel. The court, in rejecting petitioner's argument, determined that the record contained no evidence that the advice which petitioner received was given by competent tax counsel since petitioner testified that he relied on the advice of a minister whom he believed to be an accountant.

In certain circumstances, a taxpayer may rely in good faith on the advice of competent tax counsel to avoid addition to tax for failure to file a return (Steven Bros. Foundation, Inc. v. Commissioner, 39 TC 93, revd on other grounds, 324 F2d 633) or for negligence (Nelson v. Commissioner, 19 TC 575; Woodbury v. Commissioner, 49 TC 180; Conlorenz Corporation v. Commissioner, 51 TC 467).

In the present case, petitioner relied on the advice of attorneys who also, in the initial stages of the proceeding herein, represented petitioner (and others) in his administrative hearing before the Division of Tax Appeals. While in Plante (supra) the court stated that it did not believe that competent tax counsel would have advised petitioner that his income was exempt from taxation, it is hereby found that, in the present matter, petitioner's reliance on the advice of attorneys that his income was exempt did constitute reasonable cause. Petitioner attended a meeting with these attorneys, was presented with an instruction sheet on how to complete his return and was required to pay the sum of \$25.00 for tax preparation. Moreover, since it was the first such year in which he claimed exemption from taxation and credibly testified that he believed that the advice received was accurate, the additions to tax and civil penalties imposed on petitioner's deficiency of State and City income taxes must be cancelled.

G. The petition of Kenneth J. Erickson is granted to the extent indicated in Conclusion of Law "F"; the Division of Taxation is directed to modify the Notice of Deficiency issued April 12, 1985, accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
December 15, 1988

/s/ Brian L.

Friedman _____

ADMINISTRATIVE LAW JUDGE