

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALVIN GELLER	:	
	:	DETERMINATION
	:	DTA NO. 815082
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1989.	:	

Petitioner, Alvin Geller, 79 North Broadway, Apt. M, White Plains, New York 10603, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1989.

On March 10, 1997 and March 13, 1997, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All briefs were due by July 18, 1997, which date commenced the six-month period to issue a determination in this matter.

Upon review of the entire record, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation erred in determining that petitioner was liable for New York State personal income tax for the year 1989.

FINDINGS OF FACT

1. Petitioner, Alvin Geller, filed a U.S. Individual Income Tax Return for the year 1989. On this return, he reported that his home address was in Port Chester, New York, that his filing status was single and that he was entitled to one exemption. The return stated that petitioner had wages of \$55,547.00 and that he had an adjustment to income of \$10,400.00, resulting in an adjusted gross income of \$45,147.00. Petitioner claimed the standard deduction and one

exemption on the return resulting in taxable income of \$40,047.00. The return stated that \$7,844.00 was due. This amount was calculated by subtracting the Federal income tax withheld of \$952.00 from the amount of tax due of \$8,796.00. Petitioner's return included a Wage and Tax Statement which listed an address for petitioner in White Plains, New York. According to the Wage and Tax Statement, petitioner had wages of \$55,546.78 and New York State income tax withheld of \$720.44.

2. The Division issued a Statement of Proposed Audit Changes, dated September 7, 1993, which explained that the Division of Taxation ("Division") did not have a record of petitioner's having filed a 1989 New York State income tax return. The Division stated that Internal Revenue Code § 6103(d) allowed the Division to obtain information from the Internal Revenue Service and that, upon doing so, this information showed that petitioner filed a Federal return using a New York State address. The letter 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 also 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 1989 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.

3. The Division issued a Notice of Deficiency, dated October 20, 1993, which asserted a deficiency of New York State personal income tax for the year 1989 in the amount of \$2,722.00 plus penalty and interest for a balance due of \$4,842.68.

4. In a letter, dated June 24, 1994, the Division explained that, following a review of the Division's file and petitioner's Request for Conciliation Conference, it decided that the notice was correct as issued. The Division stated that, as a resident of New York State, petitioner was subject to tax on all income reported on his Federal return. It further noted that petitioner was allowed the appropriate standard deduction and that if he furnished wage and tax statements, an

allowance would be made for the New York taxes withheld. The Division reiterated its computation of petitioner's tax liability and asserted the same penalties as in the Notice of Deficiency. Petitioner was also told that a payment of \$5,086.51 would close this matter.

5. The matter proceeded to a conciliation conference and, by a conciliation order dated March 8, 1996, the penalties imposed against petitioner were abated.

6. Petitioner filed a petition with the Division of Tax Appeals which alleged: that petitioner's income in 1989 was not \$45,147.00; that State income taxes withheld from petitioner's earnings were more than enough to satisfy petitioner's tax obligations; that the computation which led to the conclusion that petitioner owed additional taxes was incorrect; that petitioner does not owe any taxes for 1989; that the conciliation conferee made an erroneous determination; and that petitioner was denied due process of law.

7. The Division has not been able to locate a New York State personal income tax return for petitioner for the year 1989. It also does not have a 1989 estimated tax account under petitioner's social security number.

8. Petitioner did not file a brief or documents in support of his position.

SUMMARY OF THE DIVISION'S POSITION

9. The Division submits that petitioner has not established that he filed a 1989 New York State income tax return or that he made estimated tax payments which satisfied the asserted liability. It is maintained by the Division that the documents which it submitted into evidence show: that petitioner did not file a 1989 New York State income tax return; that petitioner did not make estimated tax payments for 1989; that the Division properly relied upon petitioner's 1989 Federal income tax return in computing petitioner's New York State income tax liability; and that petitioner's 1989 New York State income tax liability was correctly determined.

CONCLUSIONS OF LAW

A. The only question presented is whether petitioner has sustained his burden of proof of establishing that he is not liable for the personal income tax asserted to be due in the Notice of Deficiency (Tax Law § 689[e]). There is a presumption of correctness of a notice of deficiency

which has been properly issued under the Tax Law (Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174). A taxpayer who fails to present any evidence to show that the notice of deficiency is incorrect surrenders to this presumption (Matter of Tavolacci v. State Tax Commn., supra).

B. In this case the Division concluded that petitioner did not file a New York State income tax return for the year in issue. In response, petitioner does not directly challenge this conclusion. Rather, petitioner asserts that the amount sought is incorrect. Therefore, it is concluded that petitioner did not file a New York State personal income tax return for the year 1989.

C. The record shows that the Division relied upon petitioner's Federal income tax return to determine the amount of income subject to New York State personal income tax. This methodology provides a rational basis for the Notice of Deficiency (see, Matter of Denn, Tax Appeals Tribunal, October 25, 1990 [where the Tribunal concluded that the information on the taxpayer's New York State personal income tax return provided a rational basis for the notice of deficiency issued to the taxpayer]). However, a question is presented concerning the Division's decision not to give petitioner the benefit of the New York State taxes which were withheld from his wages. According to the Wage and Tax Statement which accompanied the Federal income tax return, New York State income tax in the amount of \$720.44 was withheld from petitioner's wages for the year 1989. The Division has not presented any reason why this amount was not considered in determining the amount of tax due. Accordingly, the Division is directed to reduce the amount of tax and corresponding interest by the taxes which were withheld from petitioner's income in 1989.

D. Petitioner has not presented any evidence or argument warranting any other adjustments.

E. The petition of Alvin Geller is granted to the extent of Conclusion of Law "C"; the Division is directed to modify the Notice of Deficiency accordingly; and, except as so granted, the petition is denied and the Notice of Deficiency, dated October 20, 1993, is sustained

together with such interest as may be lawfully due.

DATED: Troy, New York
October 16, 1997

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE