

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALVIN GELLER	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 816178
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1992.	:	

Petitioner, Alvin Geller, 79 North Broadway, Apartment M, White Plains, New York 10603-3750, 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 1992.

Petitioner, appearing *pro se*, and the Division of Taxation, by Steven U. Teitelbaum, Esq., (Michael J. Glannon, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by August 14, 1998, which date commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

1. As specifically set forth in a Statement of Proposed Audit Changes dated December 4, 1995, the Division of Taxation ("Division") advised petitioner, Alvin Geller, as follows:

We do not have a record of a 1992 New York State income tax return on file for you. You did not reply to our previous letters asking about your New York return.

An exchange of information agreement with the Internal Revenue Service allowed us to get information from them. This information shows you filed a 1992 federal income tax return using a New York State address.

We used information from your federal return and computed your tax as a New York resident. The starting point for computing your New York tax is federal adjusted gross income. We allowed subtractions to income and any appropriate child care credit based on the federal information.

If the New York standard deduction was greater than your allowable itemized deduction it was allowed as follows:

\$9,500 - Married filing joint or qualifying widow(er)
7,000 - Head of Household
6,000 - Single
4,750 - Married filing separate return
2,800 - Dependent filer

We will allow additional payments if your 1992 tax withheld from wages or estimated tax payments are greater than the amounts shown on this bill. Please furnish a wage and tax statement or canceled check showing a larger amount.

2. The Division's Statement of Proposed Audit Changes also specified that penalties were imposed pursuant to Tax Law § 685(a)(1); (b)(1) and (2), for late filing, negligence and an additional penalty for negligence or intentional disregard of the Tax Law, respectively. Petitioner was advised that if he had filed a 1992 New York State return, he should provide a complete copy of it to the Division including wage and tax statements and that, if he had made a payment with the return, he should provide the deposit serial number stamped on the face of the check. Petitioner was further advised that if he was a full-year resident of another state he should

provide documentation to establish the same, including a copy of any income tax return filed with the other state. Finally, petitioner was advised that if he was a part-year resident of another state, he should show the period of residence in New York State, New York City or Yonkers, and include a copy of any income tax return filed with the other state.

3. The Division's Statement of Proposed Audit Changes reflects petitioner's Federal adjusted gross income as \$63,170.00, and thereafter reduces the same by \$7,000.00 (New York Head of Household standard deduction) and \$1,000.00 (dependent exemption), to arrive at New York taxable income of \$55,170.00 and a New York tax liability of \$3,861.00. The Statement indicates that no New York tax was withheld, thus leaving the \$3,861.00 tax liability as the amount of petitioner's tax deficiency for 1992.

4. By a Statement of Assessment Resolution dated August 23, 1995, the Division advised petitioner that since he had not provided the required information, the deficiency described above was considered to be correct. In turn, the Division issued to petitioner, Alvin Geller, a Notice of Deficiency, dated September 23, 1996, asserting a personal income tax deficiency for the year 1992 in the amount of \$3,861.00, plus penalty and interest. This asserted deficiency was premised on the Division's finding, as detailed in its Statement of Proposed Audit Changes, that in 1992 petitioner was a New York State resident, had earned income in New York State and failed to file a personal income tax return or pay income tax on his New York State income.

5. Following a conciliation conference, the Division issued a Conciliation Order (CMS No. 158629), dated August 8, 1997, which sustained the Notice of Deficiency as issued.

6. Petitioner continued his challenge by filing a petition wherein he asserted that the Division's determination of his 1992 income was erroneous; that 1992 New York State income taxes were withheld from his earnings for 1992 in an amount sufficient to satisfy his tax

obligation for such year; that the Division incorrectly computed his 1992 State tax liability; that he owes no taxes for 1992; and that the conciliation order was erroneous. Petitioner also claimed that he was denied due process of law.

7. On May 19, 1998, the Division filed documents relating to the petition with the Division of Tax Appeals. Petitioner had until June 26, 1998 to file documents of his own and a brief, but none were filed. The Division then filed a brief, on July 10, 1998, outlining its position in this matter. Petitioner did not respond to the brief, although he was given until August 14, 1998 to do so.

CONCLUSIONS OF LAW

A. Tax Law § 689(e) provides that petitioner has the burden of proof to establish that he is not liable for the personal income tax asserted to be due in the Notice of Deficiency issued to him. A notice of deficiency which has been properly issued under the Tax Law is presumed to be correct, and a taxpayer who fails to present any evidence to show that the notice of deficiency is incorrect surrenders to this presumption (*Matter of Leogrande*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398; *Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174).

B. In this case, the Division could find no record that petitioner had filed a New York State personal income tax return for the year 1992, and advised petitioner of this fact. Petitioner, in turn, failed to present any evidence that he filed a 1992 personal income tax return, although he had several opportunities to do so. Accordingly, it may be concluded that petitioner did not file such a return. Since a return was not filed, the Division properly estimated petitioner's 1992 State income tax liability by relying on information petitioner supplied to the Federal government with his 1992 Federal income tax return. This methodology provides a rational basis for the

Notice of Deficiency (*see, Matter of Geller*, Tax Appeals Tribunal, August 20, 1998 [where, in a proceeding involving the same petitioner and issues as are raised here, the Tribunal held that the information on petitioner's Federal income tax return provided a rational basis for the notice of deficiency]; *see also, Matter of Denn*, Tax Appeals Tribunal, October 25, 1990).

C. Petitioner has provided no evidence to establish that his New York State income for 1992 was erroneously determined; that the computation of tax owed thereon was improperly arrived at; that any New York State income tax was withheld from his income and paid over to the State; or that the conciliation conferee erred in issuing an order sustaining the statutory Notice of Deficiency issued to petitioner. Furthermore, petitioner has advanced no evidence or argument to support abatement of any of the penalties imposed. Accordingly, the Notice of Deficiency must be sustained as issued.

D. Finally, there is no evidence that petitioner has been denied due process of law. The procedure followed by the Division gave petitioner ample opportunity to address the matter of his 1992 tax filings before a notice of deficiency was issued. The Division informed petitioner that it did not have a record of his filing a 1992 New York State income tax return and asked him to provide a copy. When petitioner failed to respond, the Division issued a Statement of Proposed Audit Changes explaining the basis for its determination of a tax deficiency. Again, petitioner was given an opportunity to respond. A Notice of Deficiency was then issued to petitioner. Petitioner was afforded a conciliation conference and, thereafter, was given an opportunity in this proceeding to provide whatever evidence he has to show that a 1992 New York State income tax return was filed and that taxes were paid. Petitioner, for his part, has presented no evidence in support of his claims. Against this background of opportunities to present evidence and

argument, it cannot be said that petitioner was not afforded due process of law (*see, Matter of Geller, supra*).

E. The petition of Alvin Geller is hereby denied and the Notice of Deficiency dated September 23, 1996 is sustained.

DATED: Troy, New York
December 31, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE