STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SAUL J. KLEIN	:	DETERMINATION 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, filed a petition 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.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 15, 1999, at 12:00 P.M. with all briefs to be submitted by October 12, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert Friedman, Jr., Esq., of counsel).

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 allegedly wrongfully withdrew.

FINDINGS OF FACT

1. 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.

2. 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.

3. 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.

4. 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.

5. 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. According to the Board, after working for one week, petitioner told his employer that he wished to have a leave of absence for a period of six months in order to accompany his father on a trip to Europe. The employer denied

petitioner's request for an extended leave of absence. Petitioner continued to insist on taking the trip and, in response, petitioner's employer asked petitioner to select his last day of work. Thereafter, petitioner asked his employer to pick the day. Initially, the employer set a date of June 9, 1995 but this was later changed to 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. In reaching its conclusion, the Board specifically noted that it accepted the employer's testimony that petitioner requested that the employer decide the date for terminating his employment and petitioner did not express any reservation regarding ending his employment at that time.

6. 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). In its decision, the Court noted that at the hearing petitioner denied that he requested a six-month leave of absence and stated that he sought a leave of absence of only two or three weeks to accompany his father on a trip to Europe. Petitioner also stated that his request was not denied but that, after this conversation, his supervisor informed him when his last day of work would be. In response to these contentions, the Court stated:

> Claimant's testimony is totally contrary to that given by the employer's representative, who stated that claimant resigned from his position after she refused his request for a six-month leave of absence. Insofar as this conflicting testimony presented a question of credibility for the Board to resolve, we find that substantial evidence supports the Board's decision. 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].)[1]

7. 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 by the situation and did not know what he was supposed to do. Petitioner did not report the unemployment insurance benefits as income on his Federal and New York State tax income tax returns for 1995. He did not receive anything from New York State stating that he was supposed to repay the money.

8. 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. Petitioner challenged this decision before an administrative law judge who, at the hearing, stated on the record that what petitioner stated at the hearing was basically correct. Nevertheless, about two weeks later, petitioner received a decision which affirmed the prior decision to reduce his benefits. As a result, petitioner's benefits were reduced by 50 percent and the remaining amount was applied to the balance due. Petitioner appealed the decision of the administrative law judge to the Unemployment Insurance Appeals Board. In a decision dated September 28, 1998, the Board affirmed the decision of the

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[1] In accordance with the provisions of State Administrative Procedure Act § 306(4), official notice has been taken of the facts set forth in Finding of Fact "6." It is noted that judicial notice could have been taken of these facts (***see generally***, Fisch, New York Evidence, § 1065 [2nd ed 1977]).

administrative law judge and stated that "[t]he determination of the Commissioner of Labor, reducing the claimant's benefit rate of $288 to $144, effective June 22, 1998, because of a 50 percent offset due to a prior recoverable overpayment, is sustained." One of the Board members who made the decision of September 28, 1998 was also one of the Board members who made the decision of December 5, 1995.

9. After he received the last decision of the Board, petitioner went to his local state senator and to an individual with the Inspector General's Office seeking to have this matter investigated because he believed that his right to due process had been denied. Specifically, it was petitioner's belief that the Board failed to inform him of new evidence that it had considered between October 5, 1995 and December 5, 1995.

10. On or about March 25, 1999, petitioner was informed by the Executive Director of the Board that his file had been misplaced. According to the Executive Director, the most common reason for the Board to reopen an appeal on its own motion is the receipt of a timely statement on appeal from the losing party. He further explained that what commonly happens is that when the time for submitting statements on appeal has expired and no statement has been received, the case is assigned for review and decided. After the decision has been mailed, if a statement arrives bearing a timely postmark from the losing party, the Board will usually reopen and reconsider the appeal on its own motion. The Executive Director strongly suspected that this is what occurred. This individual also noted, among other things, that the Board only considers evidence which is offered at the hearing; that there was not an improper relationship between the Board members who made the decision and the employer; and that since a court had ruled that the Board's decision was proper, the matter was concluded. Upon receipt of this letter, petitioner decided not to pursue his objections to the Board's actions any further.

11. 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.

12. 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.

SUMMARY OF THE PARTIES' POSITIONS

13. At the hearing, petitioner argued that due to the circumstances, which he regards as extraordinary, New York should not seek the taxes due on the unemployment insurance benefits. In his brief, petitioner recounts a portion of the facts and then notes that the Department of Labor's regulations prohibit the use of additional information against a claimant unless the party it is to be used against consents or the evidence is made a part of the record at a subsequent hearing. Petitioner maintains that after he collected approximately $7,000.00 in benefits

> [t]he Appeals Board found a completely new set of facts as is evidenced by comparing the October 5, 1995 decision with the December 5, 1995 decision. . . . The finding of these 'new' facts were fabricated by the Appeals Board and without merit as having never occurred. After October 5, 1995 and before December 5, 1995, I never received any additional information from the Appeals Board or from the employer regarding additional information to be considered at a further hearing. In fact no further hearing was ever held after the one with the ALJ - occurring in the summer of '95. It is therefore obvious that the Appeals

> Board concocted new facts so that they could rule against me. (Petitioner's brief, p. 1.)

Petitioner further asserts that the answer to the question of how the Appeals Board could rule against him without any additional facts would be contained in the file since it would have the notes of the Appeals Board. Petitioner argues that the Appeals Board's loss of the file provides a convenient end of a matter requiring investigation. Petitioner asks that the Appeals Board's conduct be deemed corrupt and inequitable. He further asserts that he was damaged by the placement of a lien of in excess of $7,000.00 against any future unemployment insurance benefits. Petitioner notes that he did not receive notice from New York that the amounts received from unemployment compensation in 1995 were taxable. It is submitted by petitioner that he was under the impression that these funds were no longer taxable since they no longer belonged to him as a result of the December 5, 1995 Board decision.

Petitioner requests that an equitable remedy be applied and that all interest and penalties be waived. He further asks that since he was severely harmed by one of the branches of this State, that the amounts asserted to be due by the Division be extinguished in order to achieve an equitable result.

14. The Division argues that petitioner has not offered any facts or law which would support a cancellation of the Notice of Additional Tax Due.

CONCLUSIONS OF LAW

A. Tax Law former § 659 provided in relevant part:

> [i]f the amount of a taxpayer's federal taxable income . . . is changed or corrected by the United States internal revenue service . . . or if a taxpayer's claim for credit or refund of federal income tax is disallowed in whole or in part, the taxpayer . . . shall report such change or correction in federal taxable income . . . or such

> disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous . . . . Any taxpayer filing an amended federal income tax return . . . shall also file within ninety days thereafter an amended return under this article, and shall give such information as the commissioner may require.

Tax Law former § 681(e)(1) provided that if a taxpayer failed to comply with section 659 of the Tax Law then instead of issuing a Notice of Deficiency the Division "may assess a deficiency based upon such federal change, correction or disallowance by mailing to the taxpayer a notice of additional tax due." 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, correction or disallowance or an amended return, where such return was required by section six hundred fifty-nine, 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]).

B. In this instance, petitioner has not challenged the conclusion that there was a final Federal determination of a change in taxable income. In addition, petitioner did not contest the Division's assertion that the Federal determination was not reported to New York State as required by Tax Law former § 659. Since petitioner failed to comply with Tax Law former § 659, the Division's issuance of a Notice of Additional Tax Due was proper.

C. The Division was not under any obligation to advise petitioner that he was required to report the unemployment insurance benefits as income (***see generally, Matter of Jones***, Tax Appeals Tribunal, January 9, 1997 [which held that the Division did not have a duty to advise

every taxpayer who is potentially eligible for a refund of his or her right to the refund]). 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, although petitioner stated that he was unsure of whether he was required to report the unemployment insurance benefits on his income tax returns, petitioner did not describe any steps he took to determine what he was required to report.

D. The Division of Tax Appeals' responsibility, pursuant to Tax Law § 2000, is to provide:

> the public with a just system of resolving controversies with such department of taxation and finance and to ensure that the elements of due process are present with regard to such resolution of controversies. The division shall be responsible for processing and reviewing petitions, providing hearings as prescribed pursuant to this chapter or as a matter of right where the right to a hearing is not specifically provided for, modified or denied by another provision of this chapter, rendering determinations and decisions and all other matters relating to the administration of the administrative hearing process. The administrative hearing process is the process commenced by the filing of a petition protesting a notice issued by the commissioner of taxation and finance of a determination of tax due, a tax deficiency, a denial of a refund or credit application, a cancellation, revocation or suspension of a license, permit or registration, a denial of an application for a license, permit or registration or any other notice which gives a person a right to a hearing under this chapter (Tax Law § 2000).

E. It is clear from the foregoing that the Division of Tax Appeals only has the authority to resolve controversies with the Division. There is no authority to review the actions of another administrative agency. Therefore, petitioner's allegations of misconduct by the Unemployment Insurance Appeals Board may not be considered.

F. An analogous factual situation was presented in ***Fisher v. Commr.*** (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. Under Virginia law, Mr. Fisher was required to repay the unemployment compensation paid to him. Petitioners argued that since the unemployment compensation had to be repaid, the amount of unemployment compensation should be removed from their gross income for 1982. At the time the case was submitted to the Tax Court, the issue of repayment had not been resolved with the State of Virginia and the amount received had not been repaid.

The Court concluded that petitioners were not entitled to exclude the unemployment compensation from their 1982 gross income with the following explanation:

> 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 of income of the repaid amount. Section 1341(a); section 1.1341-1, Income Tax Regs. (***Fisher v. Commr.***, ***supra*** at 132.)

Similarly, in this case, petitioner received the unemployment compensation under a claim of right and was required to include the amount in his gross income for 1985. Petitioner was then at liberty to adjust his tax liability in the year the repayments were made (***Fisher v. Commr.***, ***supra*** at 132).

G. The petition of Saul J. Klein is denied and 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
March 9, 2000

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE