

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>DOUGLAS BRODMERKEL</b>	:	DETERMINATION
	:	DTA NO. 817246
for Redetermination of Deficiencies or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1991, 1992, 1996 and 1997.	:	

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Petitioner, Douglas Brodmerkel, 23 Wagon Lane, Centereach, New York 11720, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1991, 1992, 1996 and 1997.

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 April 13, 2000, at 12:15 P.M. with all briefs to be submitted by June 29, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation's assertion of deficiencies for the years 1991 and 1992 on the basis of Federal audit changes was proper and whether petitioner has shown wherein such audit was in error.

II. Whether petitioner correctly calculated his tax liability for the year 1996.

III. Whether it was proper for the Division of Taxation to issue an assessment of personal income tax for the year 1997 as a result of petitioner's filing a personal income tax return wherein he entered the amount owed as the amount he overpaid.

IV. Whether the Division of Tax Appeals has jurisdiction to determine whether an income execution should be vacated.

V. Whether the Commissioner of Taxation is prohibited from disclosing information about petitioner to the Internal Revenue Service without petitioner's permission.

VI. Whether the asserted deficiencies of tax are unconstitutional.

### ***FINDINGS OF FACT***

1. Petitioner, Douglas Brodmerkel, filed a Resident Income Tax Return for the year 1991. On this return, he reported a filing status of single and stated that he claimed one Federal exemption. Petitioner claimed a New York itemized deduction in the amount of \$13,086.00.

2. Petitioner filed a Resident Income Tax Return for the year 1992 on which he reported that he did not claim any Federal exemptions. He stated that his New York adjusted gross income was \$12,691.00 and claimed the New York standard deduction, for married filing separately, of \$4,750.00.

3. A Resident Income Tax Return was filed by petitioner for the year 1996. On this return, petitioner reported that his filing status was married filing separate returns. He also stated that he claimed four exemptions on his Federal return. Petitioner claimed a standard deduction in the amount of \$3,350.00 and dependent exemptions in the amount of \$10,000.00. The return stated that petitioner's New York taxable income was \$14,122.00.

4. Petitioner timely filed a Resident Income Tax Return for the year 1997 on which he reported that he overpaid New York State personal income tax in the amount of approximately \$337.00.<sup>1</sup>

5. The Division of Taxation ("Division"), issued a Notice of Additional Tax Due, dated November 3, 1994, which asserted a deficiency of personal income tax for the year 1991 in the amount of \$1,531.00 plus interest in the amount of \$269.56 for a balance due of \$1,800.56. The computation section of the notice explained that the bill was based on information that New York State received from the Internal Revenue Service ("IRS") regarding adjustments made to petitioner's 1991 Federal income tax return. The Division notified petitioner that any changes should have been reported to New York State within 90 days of the final IRS determination and that the bill was being issued because there was no record of the changes being reported to New York State. The notice shows that changes were made to petitioner's interest and dividend income, unemployment compensation and nonemployee compensation. There were also adjustments made for the self-employment tax paid, the itemized deduction for medical and dental expenses and the itemized deduction for other miscellaneous deductions. According to the Notice of Additional Tax Due, the Division increased the amount of petitioner's adjusted gross income from \$31,863.00 to \$50,355.00. The Division also reduced the amount of petitioner's itemized deduction from \$13,086.00 to \$12,107.00. A computer printout obtained from the Division's computer system shows that this assessment has been paid.

6. The Division issued a Notice of Additional Tax Due, dated August 5, 1996, which asserted a deficiency of personal income tax for the year 1992 in the amount of \$1,787.00 plus

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<sup>1</sup> From the handwriting, it is difficult to discern the exact amount of money which was claimed to be overpaid.

interest in the amount of \$479.82 and penalty in the amount of \$329.26 for a balance due of \$2,596.08. The computation section of the notice explained that the adjustments to interest or dividend income and wages or tips were based on Federal audit changes which were not reported to New York State. The computation section further explained that petitioner's adjusted gross income was increased from \$12,691.00 to \$36,338.00. In addition, penalties were imposed pursuant to Tax Law § 685(b)(1) and (2) for negligence or intentional disregard of the Tax Law.

7. The Division issued a Notice and Demand for Payment of Tax Due, dated October 3, 1997, which assessed a deficiency of personal income tax for the year 1996 in the amount of \$368.00 plus interest in the amount of \$14.05 and penalty in the amount of \$2.16 for a balance due in the amount of \$384.21. The computation section of the notice shows that an adjustment was made increasing the amount claimed by petitioner for the standard deduction.<sup>2</sup> However, petitioner claimed ten dependent exemptions on the New York return while claiming only four exemptions on the Federal return. Since New York State exemptions are allowed only for dependents, he was allowed three dependent exemptions. The Division's recalculation of petitioner's tax liability resulted in additional personal income tax due in the amount of \$368.00.

8. The Division issued a Notice and Demand for Payment of Tax Due, dated July 6, 1998, assessing a deficiency of personal income tax for the year 1997 in the amount of \$337.00 plus interest in the amount of \$5.34 and penalty in the amount \$5.04 for a balance due of \$347.38. The notice was issued because of an error wherein petitioner entered the amount that he owed as the amount that should have been refunded to him.

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<sup>2</sup> The amount of the standard deduction was increased from that claimed of \$3,350.00 to \$6,175.00.

9. Prior to the hearing, petitioner submitted a hearing memorandum which stated that he intended to call, among others, Mr. Marco Zumbolo to testify. Also, petitioner received a subpoena signed by the Chief Administrative Law Judge addressed to Mr. Zumbolo. Petitioner did not serve the subpoena and Mr. Zumbolo was not present at the hearing.

***SUMMARY OF PETITIONER'S POSITION***

10. Petitioner filed a petition with the Division of Tax Appeals which asserted: that he was denied his right of access to the courts by issuance of an income execution on an employer without the approval of a court; that the Commissioner discriminated against him by utilizing certain deductions or the lack thereof in the application of the Tax Laws; that utilizing the deductions allowed by the Internal Revenue Service in the application of the New York State Tax Laws has caused petitioner to be subject to an income execution without due process of law; and that the Commissioner provided information to the Internal Revenue Service which placed him in a less desirable position in negotiating with the Internal Revenue Service. The petition asks for the following relief:

- 1) No action taken against Petitioner until IRS decides to settle with the Petitioner on the question of allowable deductions and tax rate.
- 2) That the Income Execution order be revoked because I can not settle with the New York Department of Taxation and Finance until the current IRS problem is resolved.
- 3) Prohibit the Commissioner of Taxation and Finance from disclosing to the IRS any information or correspondence or the like that is not expressly allowed by the Petitioner.
- 4) Construct tax structure as to tax all taxpayers the same rate independent and regardless of marital status, financial situation or dependents or lack thereof [sic].

The petition includes a copy of an income execution against petitioner, dated April 5, 1999, in the amount of \$4,090.26.

11. At the hearing, petitioner explained that he learned about the subpoena process only about a week before the hearing when he received a letter explaining that he would have to subpoena Mr. Zumbolo. Petitioner objects that Mr. Zumbolo did not appear despite the fact that his name was listed on a Division of Tax Appeals Hearing Memorandum as a witness that he planned to call to testify. Although he received a subpoena signed by the Chief Administrative Law Judge of the Division of Tax Appeals, which could have been served, petitioner's position was that he did not need to serve a subpoena and therefore he did not do so.

12. With respect to the tax rates, petitioner asserts that it is discriminatory to tax different people at different rates of tax on the basis of the taxpayer's level of income or marital status. Petitioner asserts that the current tax system punishes him for not having deductions and for being subject to the "marriage penalty." According to petitioner, the whole concept of the marriage penalty is one of social engineering which has fallen into disfavor. Petitioner does not accept the position that the courts do not have the ability to change the law. He submits that an unfair law is subject to review and change at any time.

Petitioner makes two points with respect to the deductions and exemptions in the tax code: they reduce the tax rate to a politically correct level and they are based on the concept of social engineering. Petitioner notes that he does not have children or pay a mortgage. Therefore, he is denied the exemptions and deductions which arise from having children or owning a home. He contends that this constitutes social engineering and economic discrimination. Petitioner posits

that he should get a deduction for not having dependents since he does not place a burden on the school system and he requires no youth services.

### ***CONCLUSIONS OF LAW***

A. In his petition, petitioner requests that no action be taken against him until the Internal Revenue Service decides to settle with him on the question of allowable deductions and the tax rate. There is no basis to honor this request. During the periods in issue, Tax Law former § 659 provided, in pertinent part, as follows:

If the amount of a taxpayer's federal taxable income . . . reported on his federal income tax return for any taxable year . . . is changed or corrected by the United States internal revenue service or other competent authority . . . the taxpayer . . . shall report such change or correction . . . within ninety days after the final determination of such change, correction, . . . or as otherwise required by the commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous.

B. Here, the notices that pertain to the years 1991 and 1992 state that petitioner was required to report any changes to his Federal taxable income within 90 days of the final IRS determination. In response, 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. In view of petitioner's failure to comply with Tax Law former § 659, the Division's issuance of the notices for the years 1991 and 1992 was correct (*Matter of Migliore*, Tax Appeals Tribunal, January 17, 1991).

For the year 1996, the Division found a series of errors on the income tax return including an incorrect standard deduction and claiming ten dependent exemptions on the New York return while claiming only four exemptions on the Federal return. For the year 1997, the Division

issued a notice because petitioner entered the amount owed on the return as the amount to be refunded to him. At the hearing, petitioner did not present any evidence to show that any of the Division's adjustments were in error for either of the foregoing years. It follows that there is no basis to delay any further action by the Division until negotiations between petitioner and the Internal Revenue Service are concluded. For the same reason, petitioner has not sustained his burden of proof of showing that an adjustment of the notices is in order (Tax Law § 689[e]). In this regard, it is noted that the Internal Revenue Service and the Division are separate and distinct taxing authorities. The Division is not required to accept the accuracy of a change to a taxpayer's Federal taxable income by the Internal Revenue Service (20 NYCRR 159.4).

C. Petitioner next requests that the income execution be revoked because he cannot settle with the Division until the current IRS problem is resolved. This request may not be granted. There is no evidence in the record which shows that the income execution relates to any of the notices in issue. Second, an income execution is a collection activity undertaken after an asserted deficiency of tax becomes fixed and final. The Division of Tax Appeals has no authority to review activities undertaken by the Division of Taxation to collect unpaid income tax after such assessments become fixed and final (*see, Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *Matter of Driscoll*, Tax Appeals Tribunal, April 11, 1991).

D. Petitioner asks that the Division of Tax Appeals prohibit the Commissioner of Taxation and Finance from disclosing any information to the IRS without petitioner's permission. This request is contrary to the provisions of the Tax Law. Subdivision (f) of section 697 of the Tax Law provides that, notwithstanding the secrecy provisions of the personal income tax law, the Tax Commissioner may permit the Secretary of the Treasury of the United States or



his delegates to inspect any return filed under Article 22 of the Tax Law or he may furnish to such officer or his authorized representative an abstract of the return or supply information concerning an item contained on the return or revealed by an investigation of tax liability under Article 22 of the Tax Law.

E. Petitioner asks that the Division of Tax Appeals restructure the Tax Law so that all taxpayers pay at the same rate regardless of their marital status, financial status or number of dependents. This request fails to recognize the structure of the government of the State of New York. In the same manner as the Federal Constitution, the New York State Constitution distributes the powers of government among three departments, the executive, the legislative and the judicial (*see*, NY Const arts III, IV, VI; McKinney's Cons Laws of NY, Book 1, Statutes § 2). The power of making laws is vested in the Legislature (*id*). Accordingly, the Division of Tax Appeals does not have the authority to consider the request (*see*, Tax Law § 2006).

F. Petitioner has complained that the current tax system is discriminatory and unconstitutional because he is taxed at a different rate than that of married people. He also notes that he does not get a deduction for interest paid on a mortgage and, since he does not have children, he does not receive a dependency exemption.

G. In effect, petitioner is arguing that the Tax Law is unconstitutional on its face. This argument may also not be considered. At the administrative level the constitutionality of a statute is presumed (*Matter of Fourth Day Enterprises*, Tax Appeals Tribunal, October 27, 1988). Furthermore, the Division of Tax Appeals and Tax Appeals Tribunal do not have the authority to declare a statute unconstitutional on its face (*Matter of Allied Grocers Cooperative*,

Tax Appeals Tribunal, November 30, 1989, **confirmed** 162 AD2d 791, 557 NYS2d 707; ***Matter of Fourth Day Enterprises, supra***).

H. As noted earlier, petitioner objected to the fact that Mr. Zumbolo did not appear at the hearing and answer his questions. At the hearing, petitioner acknowledged that he had the opportunity to serve a subpoena but chose not to do so.

I. In general, section 3000.7 of the Rules of Practice and Procedure of the Tax Appeals Tribunal authorizes any party to request a subpoena from the administrative law judge or presiding officer assigned to the case. Here, petitioner requested and received a subpoena for Mr. Zumbolo. Petitioner could have served the subpoena but chose not to do so. The decision not to serve the subpoena does not constitute a denial of due process (***Matter of Fisher***, Tax Appeals Tribunal, May 25, 2000).

J. In a post hearing letter, Mr. Brodmerkel objected that it was improper to provide the Division with a copy of the transcript and not give one to him. In fact, every litigant, including the Division of Taxation, who wants a copy of the transcript must purchase their own copy. Therefore, this argument is also rejected.

K. The petition of Douglas Brodmerkel is denied.

DATED: Troy, New York  
December 7, 2000

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE