

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
SETH OFORI-AWUKU : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 817332
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, Seth Ofori-awuku, 600 West 150th Street #45, New York, NY 10031, 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 June 23, 2000, at 1:45 P.M. with all briefs to be submitted by September 8, 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. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether the Division of Taxation's assertion of a deficiency for the year 1995 on the basis of Federal audit changes was proper and whether petitioner has shown wherein such audit was in error.

FINDINGS OF FACT

1. On May 14, 1966, petitioner, Seth Ofori-awuku, went to H & R Block to prepare his 1995 income tax returns. Among other things, petitioner told his tax preparer that he had received unemployment compensation and that he had a bank account. It is petitioner's understanding that he was told that he did not have to report income that was less than \$5,000.00. Petitioner also believes that he was told that even if there was a problem he would have two years to correct his income tax return.

2. Petitioner filed a U.S. Individual Income Tax Return and a New York State Resident Income Tax Return for the year 1995. The only income which he reported on either of the returns was wages in the amount of \$13,351.00. Petitioner's returns included wage and tax statements showing that he received wages of \$9,044.01 from Brooks Brothers, Inc. and \$4,306.56 from FJC Security Service, Inc., which when added together and rounded off, equal the amount reported on the income tax returns. Petitioner did not report any income from The Wiz Distributors, Ltd. or from unemployment compensation on either the Federal or New York State returns.

3. The Internal Revenue Service ("IRS") issued a notice to petitioner proposing an increase in his tax on the basis of unreported wages and the receipt of unemployment compensation. In response, petitioner advised the IRS that he did not agree with the proposed changes. He also stated that he filed his income tax return before his bank and employers reported the income that he received.

4. The Internal Revenue Service issued a Notice of Deficiency to petitioner, dated July 2, 1997, which asserted a deficiency of tax for the year 1995 in the amount of \$315.00.

5. On or about July 16, 1997, petitioner mailed a payment of \$315.00 to the Internal Revenue Service. He paid the tax in order to settle the matter.

6. The Division of Taxation ("Division") received information from the Internal Revenue Service showing that wages were paid to petitioner by The Wiz Distributors, Ltd. in the amount of \$539.00, FJC Security Service, Inc. in the amount of \$4,306.00, and Brooks Brothers, Inc. in the amount of \$9,044.00. The Division also learned that petitioner received unemployment compensation during 1995 in the amount of \$1,568.00 and interest income of \$44.00 on a bank account at Citibank, N.A.

7. The Division issued a Notice of Additional Tax Due, dated October 23, 1998, which asserted a deficiency of personal income tax in the amount of \$164.02, plus interest in the amount of \$35.14 and penalty in the amount of \$6.60 for a balance due of \$205.76. 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 1995 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 Division noted that any payment made to the IRS to satisfy the Federal changes is a payment of Federal tax and that New York State tax was also due as a result of the Federal changes. The notice shows that changes were made to petitioner's wages to include the income earned from The Wiz Distributors, Ltd. However, petitioner was allowed a credit for taxes withheld on the unreported wages based on information in the Division's withholding tax records. The Division further noted that the amount of unemployment compensation had been

corrected to reflect the Federal adjustment. It also explained that since the original New York State return was filed late, a penalty for late filing had been applied. In addition, interest was due on the underpayment of tax from the due date of the return to the date that the tax is paid in full.

8. On or about October 27, 1997, the IRS issued a refund to petitioner in the amount of \$32.79. The refund was issued because the original amount of tax which the IRS asserted to be due, \$315.00, did not take into account the fact that income tax in the amount of \$58.00 had been withheld from the wages which were paid by The Wiz Distributors, Ltd.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner does not believe that he owes additional tax because he paid individuals, whom he believed to be experts, to prepare his tax returns. He submits that any errors were not his fault because he did not prepare the returns himself. Petitioner also believes that he does not owe additional tax because in 1994, 1996 and 1999 he made more money than he did in 1995, but he received a refund. Petitioner contends that he did not make enough money in 1995 to owe the government money.¹

Petitioner argues that he had two years to correct any mistakes. According to petitioner, he has been taken advantage of by the Division and the IRS because he was not given an opportunity to correct his returns.

¹ Petitioner submitted a copy of his New York State Resident Income Tax Return for 1999 which shows that he reported that he had wages, salaries and tips of \$28,885.00 plus taxable interest income of \$20.00 for a Federal adjusted gross income of \$28,905.00. This led to a reported tax due of \$1,787.00. Petitioner also reported that tax was withheld in the amount of \$1,902.00 resulting in a refund of \$115.00.

Petitioner states that he filed his returns late because he was having financial difficulties and did not have the money to pay the tax. In addition, H & R Block allegedly told him that filing late was not a problem because the government owed him money.

10. In its brief, the Division argues that there is no provision in the law to exclude income because it is less than a certain amount. It also argues that the penalty should not be abated because financial hardship does not constitute reasonable cause for failure to file tax returns in a timely fashion. Lastly, the Division notes that petitioner's argument that he does not owe taxes for 1995 because he had a greater income in 1999 than in 1995, but received a refund for 1999, is meritless because it does not take into account the amount of taxes which were withheld on his wages.

CONCLUSIONS OF LAW

A. 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 notice states 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 notice for the year 1995 was correct (*Matter of Migliore*, Tax Appeals Tribunal, January 17, 1991).

C. Before proceeding to petitioner's main argument, certain preliminary points should be addressed. First, for a calendar year taxpayer, such as petitioner, New York State income tax returns are required to be filed by April 15 of the following calendar year (Tax Law § 651[a][1]; 20 NYCRR 152.1). A taxpayer is expected to pay the tax shown due thereon (Tax Law § 652; 20 NYCRR 152.14). Financial hardship does not constitute reasonable cause for failure to file tax returns in a timely fashion (*Matter of Dworkin Constr. Co.*, Tax Appeals Tribunal, August 4, 1988). Second, the adjusted gross income of a New York resident is defined as his Federal adjusted gross income with certain modifications which are not at issue herein (Tax Law § 612[a]). Federal adjusted gross income is defined by section 61(a) of the Internal Revenue Code to include "all income from whatever source derived." There is no provision which permits the exclusion of amounts of income less than \$5,000.00. In addition, there is no provision in the Tax Law which allows a taxpayer an additional two years to correct the failure to include income in an income tax return.

D. Petitioner's main argument is that he does not owe additional taxes because in other years he had more income than the year in issue, but received a refund. As noted by the Division, petitioner's argument fails to take into account the effect of income tax withholding. Pursuant to Tax Law § 671(a)(1), employers are required to withhold income tax from the wages of their

employees in order to satisfy their income tax liability.² When individuals file their income tax returns, they calculate the amount of tax that they owe and compare it with the amount of tax that has been withheld by the employer and any other entity. If the amount of tax owed is less than the amount of tax which has been withheld from the wages of the taxpayer, there is an overpayment and the taxpayer may claim a refund of the amount which was not needed to satisfy the tax liability. However, if the amount of tax owed is more than the amount of tax which has been withheld, there is a liability which the taxpayer is required to satisfy. Therefore, the determination of whether a taxpayer, in petitioner's position, is able to obtain a refund or is required to pay is dependent on *both* the amount of the tax liability and the amount of money which has been withheld to satisfy that liability. For the year 1995, the amount of tax withheld from petitioner's wages was not sufficient to satisfy the tax liability. Therefore, the Division properly concluded that additional tax was due.

E. The petition of Seth Ofori-awuku is denied and the Notice of Additional Tax Due is sustained together with such penalty and interest as may be lawfully due.

DATED: Troy, New York

February 15, 2001

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE

² Since this case also involves New York City withholding tax, the provisions of the Administrative Code of the City of New York, which are virtually identical to the State statute are also pertinent (*see*, Administrative Code §§ 11-1771-11-1778).