STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN J. MARGIOTTA	:	DETERMINATION DTA NO. 818397
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1990 and 1992.	:	

Petitioner, John J. Margiotta, 79 Echo Lane, Larchmont, New York 10538, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1990 and 1992.

A small claims hearing was held before Winifred M. Maloney, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 3, 2002 at 9:30 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Louis N. Guertin).

The record in this matter was held open until April 30, 2002 to allow both parties to submit additional evidence and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether notices of deficiency dated October 12, 1999 asserting deficiencies of tax, interest, and penalty for the years 1990 and 1992 should be sustained.

FINDINGS OF FACT

1. By letter dated March 11, 1999, the Division of Taxation ("Division") advised petitioner, John J. Margiotta, that its records indicated that petitioner had filed a Form IT-370, Application for Automatic Extension of Time to File for Individuals, but that the Division had been unable to locate his New York State income tax returns for the years 1990 and 1992. Petitioner was requested to complete a questionnaire indicating whether he filed New York returns for those years and to provide other pertinent information. Petitioner did not respond to that letter.

2. The Division searched its databases including Federal income tax system records. It found an individual Federal return report for petitioner for the year 1992. The Division did not find any Federal return information pertaining to petitioner for the year 1990.

3. On August 16, 1999, the Division issued to petitioner a Statement of Proposed Audit Changes for the year 1990. The statement contains the following explanation:

> Your New York State audit covers more than one year. A separate bill will be issued for each individual tax year covered in our previous letter. You may not receive all of the bills on the same day.
>
> A search of our files fails to show a New York State income tax return filed under your name and social security number for tax year(s) 1990. Therefore, your New York State income tax is estimated as allowable by New York State Income Tax Law.
>
> Under section 683(c) of the New York State Tax Law, tax may be assessed at any time if no return is filed.
>
> If you previously filed a New York State return for the above year, please forward a complete copy including wage and tax statements. . . .
>
> Since your address indicates that your residence is in New York City, we have also computed city of New York resident tax.

You have been allowed the appropriate New York standard deduction.[1]

* * *

Penalty for late filing has been applied at 5% per month up to a maximum of 25% (section 685[a][1] of the New York State Tax Law).

A negligence penalty of 5% is imposed on the total correct tax. The penalty is applied to total correct tax before prepayments, rather than the balance due, because you did not file a return (section 685[m] of the New York State Tax Law).

In addition to the 5% negligence penalty, an amount equal to 50% of any interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law has been imposed (section 685[b][2] of the New York State Tax Law).

All taxpayers must prepay each year's tax, either by having tax withheld or by paying estimated tax.

Since no prepayments have been made through withholding tax or estimated tax, a penalty for underpayment of estimated tax has been imposed.

* * *

Interest is due for late payment or underpayment at the applicable rate. Interest is required under New York State Tax Law.

Petitioner's New York State and New York City personal income tax was calculated as follows:

Federal adjusted gross income	$55,000.00
New York adjusted gross income	55,000.00
New York deduction	4,750.00
Dependent exemptions	0.00
New York taxable income	50,250.00
New York state tax	3,600.00
New York City resident tax	1,747.00

[1] A standard deduction based upon married filing separate return filing status was allowed.

The statement also asserted interest in the amount of $4,545.87 and penalty in the amount of $4,396.76 to be due. The Division based its estimation of tax asserted to be due upon information taken from petitioner's 1992 Federal income tax return.

4. The Division issued a Statement of Proposed Audit Changes, dated August 16, 1999, to petitioner which stated that New York State and New York City personal income tax for the year 1992 was due in the amount of $5,192.00, plus interest in the amount of $3,065.31 and penalty in the amount of $3,449.78, for a balance due of $11,707.09. The statement reflected petitioner's Federal adjusted gross income as $51,772.00 and thereafter reduced the same by $4,750.00 (New York married filing separate return), to arrive at New York taxable income of $47,022.00 and a New York State tax liability of $3,344.00 and a New York City resident tax liability of $1,848.00. The statement explained that information furnished by the Internal Revenue Service, under authorization of section 6103(d) of the Internal Revenue Code, indicated that petitioner filed a Federal tax return using a New York State address. Since the Division was unable to locate petitioner's New York return and petitioner had not replied to its previous letter, the Division computed the New York tax that was due on the basis of information obtained from the Internal Revenue Service. Because petitioner's address indicated that his residence was in New York City, the Division also computed City of New York resident tax. In addition to the tax asserted to be due, the Division imposed a penalty of 25 percent for not filing a New York State tax return within 5 months of its due date pursuant to Tax Law § 685(a)(1). It also imposed a negligence penalty of 5 percent under Tax Law § 685(b)(1) and a penalty equal to 50 percent of the interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law pursuant to Tax Law § 685(b)(2). Lastly, the Division imposed a penalty for underestimation of New York State income tax in accordance with Tax Law § 685(c).

5. Petitioner never responded to either the Statement of Proposed Audit Changes for the year 1990 or the Statement of Proposed Audit Changes for the year 1992. Consequently, the Division issued to petitioner two notices of deficiency, one for each year at issue. The first Notice of Deficiency (Notice No. L-016825882-6), dated October 12, 1999, asserts New York State and New York City personal income tax due for 1990 in the amount of $5,347.00, plus penalty of $4,453.83 and interest of $4,654.59, for a total amount due of $14,455.42. The second Notice of Deficiency (Notice No. L-016825883-5), dated October 12, 1999, asserts New York State and New York City personal income tax due for 1992 in the amount of $5,192.00, plus penalty of $3,497.41 and interest of $3,156.06, for a balance due of $11,845.47.

6. Petitioner timely protested the notices of deficiency by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On January 19, 2000, the Division sent a letter to petitioner explaining that petitioner's file and request for conciliation conference had been reviewed and the Division believed its notice to be correct.[2] It went on to state that since the Division was unable to locate petitioner's New York return, and he had not replied to the Division's previous letter, his tax had been computed as a resident of New York State based on the Federal information. The letter contained a breakdown of the amounts due for the years 1990 and 1992. Finally, it stated that petitioner could withdraw his request for conciliation conference upon payment of $26,946.77 within 20 days.

7. In an effort to assist petitioner, the Division reviewed its files for withholding tax information pertaining to petitioner for the years 1989 through 1992 and also reviewed its records of estimated tax payments under petitioner's name and social security number. The Division's search did not reveal any taxes withheld by Greenway Capital Corporation

[2] The letter references the notices of deficiency issued for the years 1990 and 1992.

("Greenway Capital") for the above years. The search did show that Greenway Capital had issued, to petitioner, a Form 1099-MISC for 1992 on which nonemployee compensation of $96,977.94 was reported. The search of its estimated tax files showed an estimated account for petitioner for the year 1994 only. The Division sent petitioner a letter, dated July 25, 2000, in which it identified the records it had searched in an effort to assist him and its failure to find anything in those records for the years 1990 and 1992. It went on to state that the burden was on petitioner to prove that he was entitled to credits for taxes paid, to be applied against the amount he owed.

8. At the conciliation conference held on October 24, 2000, petitioner submitted a copy of a memorandum issued to Greenway Capital employees on January 29, 1991 concerning the 1990 Form 1099 being issued to each employee and a copy of a 1990 Form 1099-MISC issued to him by Greenway Capital on which nonemployee compensation of $2,437.00 was reported. BCMS subsequently issued a conciliation order to petitioner (CMS No. 177772) dated December 15, 2000, which denied petitioner's request and sustained the notices of deficiency dated October 12, 1999.

9. Petitioner filed a petition with the Division of Tax Appeals which alleged that the tax for the year 1990 was estimated based upon earnings from another year not on W-2 or Form 1099 statements for that year and that the 1992 tax was fully paid when the return was filed.

10. In the fall of 1987, after graduating from college and passing his Series 7 exam, petitioner became a licensed stockbroker working at an unidentified brokerage firm. As a broker, petitioner worked on a commission basis only. He earned commissions on trades he made for clients. Sometime in late 1988, petitioner began working at the F.D. Roberts brokerage

firm. He worked there until F.D. Roberts went out of business in January 1990.[3] The last commission check that petitioner received from F.D. Roberts bounced and he had no income from that firm in 1990. In February 1990, petitioner joined J. T. Moran and remained there for approximately two months. Petitioner left J. T. Moran after he heard rumors that the company was going out of business. Because he was in the process of moving his clients over to J. T. Moran, petitioner did not make any trades or receive any commissions during his association with that company. Petitioner then joined Lombard Securities. Within two months, Lombard Securities went out of business and petitioner did not receive any commissions from that firm. Upon hearing that the head trader and one of the top brokers at Lombard Securities were forming their own brokerage firm, Greenway Capital, petitioner decided to join them. Although the process of registering and licensing Greenway Capital was not completed until about December 1990, petitioner remained with those unnamed individuals. In 1990, petitioner received commissions in the amount of $2,437.00 from Greenway Capital. During 1990, in addition to the commissions that he received, petitioner relied upon savings and the generosity of a girlfriend to meet his living expenses.

11. From December 1990 until mid-1997, petitioner worked as a stockbroker at Greenway Capital. The Division's records indicate that petitioner's 1991 income was substantially less than his 1992 income.

12. Since 1988, petitioner has always utilized the services of various accountants in the preparation of his Federal and State income tax returns. In any given year, petitioner signs the prepared returns forwarded to him by the accountant and sends them by ordinary first class mail in the envelopes supplied by the accountant. He pays the taxes reflected as due on those returns

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[3] The exact date on which F. D. Roberts ceased business is not in the record.

by personal check, bank check or money order. Although he has no specific recollection of doing so, petitioner believes he filed his 1992 New York return and paid the tax shown as due on that return because he was required to be current in filing his Federal and State tax returns in order to maintain his broker's license.

13. Petitioner has no record of filing his 1992 New York return. Petitioner has neither a copy of his 1992 New York return nor any proof of payment of the 1992 New York tax liability. He contacted the preparer of his 1992 returns, Jules Scherer; however, Mr. Scherer was unable to supply a copy of the return because he retains copies of returns for only four years and then destroys them.

14. The Internal Revenue Service has return information for petitioner for the years 1988 and 1989 and the years 1991 through 2000 but does not have any return information for the year 1990. Petitioner filed an extension of time to file his 1992 Federal income tax return until August 15, 1993. His 1992 Federal return was filed on December 2, 1994. On that return, petitioner's filing status was married filing separately. There were no Federal prepayments of tax. Petitioner paid his 1992 Federal tax liability in installments.

SUMMARY OF PETITIONER'S POSITION

15. Petitioner asserts that, from late 1987 until 2000, he worked as a stockbroker at approximately six brokerage firms. He claims that he never received a salary from any of those firms. Rather, he received commissions on the trades that he executed for clients. He maintains that because he received commissions, that income would be reported on a Form 1099 rather than on a W-2. With respect to the year 1990, petitioner contends that his income totaled only $2,437.00, the amount he received from Greenway Capital, which amount is reflected on the 1990 Form 1099-MISC that is part of the record. With respect to the year 1992, petitioner asserts that he filed his 1992 State return and paid the tax reflected on that return. However,

because of the inordinate amount of time that has passed, neither he nor his accountant has a copy of the return. Petitioner also cannot find any proof of payment of the 1992 tax liability. He believes that the Division misplaced both his 1992 return and tax payment that he made for that year.

CONCLUSIONS OF LAW

A. Tax Law § 651(a)(1) provides in pertinent part as follows:

> (a) General. On or before the fifteenth day of the fourth month following the close of the taxable year, an income tax return under this article shall be made and filed by or for:
>
> (1) every resident individual (A) required to file a federal income tax return for the taxable year, or (B) having federal adjusted gross income for the taxable year, increased by the modifications under subsection (b) of section six hundred twelve, in excess of four thousand dollars. . . .

B. Generally, New York income tax must be assessed within three years of the date of filing of the return (Tax Law § 683[a]). If no return is filed, however, then the tax may be assessed at any time (Tax Law § 683[c][1][A]). In the instant matter, the Division searched its personal income tax files for petitioner's 1990 and 1992 personal income tax returns and did not locate either return. The Division issued notices of deficiency asserting New York State and New York City personal income tax, interest and penalties for the years 1990 and 1992. Tax Law § 689(e) places the burden of proof on petitioner to show that the notices of deficiency herein are erroneous.

C. Upon review of the record as a whole, it is clear that petitioner's income totaled only $2,437.00 for the year 1990 and therefore he was not required to file a New York State income tax return for that year (Tax Law § 651[a][1][B]). The evidence supporting this conclusion includes petitioner's credible testimony concerning the manner in which he was compensated as a stockbroker, i.e., commissions only, and his employment history as well as the Form 1099

issued to him by Greenway Capital on which the commissions that he received in 1990 were reported. I note that the Division's search of its withholding tax files for 1990 did not reveal any information pertaining to petitioner. The Division's failure to find any withholding information supports petitioner's testimony that, as a stockbroker, he received commissions that were reported on a Form 1099, rather than a salary that was reported on a Form W-2. I also note that the IRS has no return information for petitioner for 1990. Since the IRS receives Form 1099 information for each individual to whom a Form 1099 has been issued in any given year and maintains a database of that information, the fact that it did not issue an assessment for 1990 further supports the conclusion that petitioner did not have sufficient income that year to require the filing of a Federal return.

D. Petitioner was required to file a 1992 New York State personal income tax return (Tax Law § 651[a][1][A]). Throughout the proceedings, petitioner has maintained that a 1992 New York personal income tax return was filed, having been mailed by regular mail, and that he paid the New York State and New York City tax due for that year. Petitioner's evidence on the issue of the filing of the return consisted of his testimony that it is his practice to sign and file, using ordinary mail, the returns prepared for him by his accountant. As a matter of law, such evidence is insufficient to prove that petitioner's 1992 New York State personal income tax return was filed (***see, Matter of Levin***, Tax Appeals Tribunal, April 16, 1998; ***Matter of Schumacher***, Tax Appeals Tribunal, February 9, 1995; ***Matter of Savadjian*****,** Tax Appeals Tribunal, December 28, 1990). Petitioner's evidence of payment of the 1992 New York State and New York City tax liability consisted of his vague testimony that it is his practice to pay the tax using a personal check, bank check or money order. This unsupported testimony is not enough to prove that payment of the 1992 tax liability was received by the Division (***see, Matter of Savadjian, supra***).

E. The petition of John J. Margiotta is granted to the extent that the Notice of Deficiency dated October 12, 1999 issued for the year 1990 is canceled; and, except as so granted, the petition is in all other respects denied. The Notice of Deficiency dated October 12, 1999 issued for the year 1992 is sustained.

DATED: Troy, New York
July 25, 2002

/s/ Winifred M. Maloney
PRESIDING OFFICER