STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
IRWIN R. EISENSTEIN	:	DETERMINATION DTA NO. 818439
for Redetermination of a Deficiency or for Refund of Personal Income Tax under the Administrative Code of the City of New York for the Year 1996.	:	

Petitioner, Irwin R. Eisenstein, 601B Surf Avenue, 17-K, Brooklyn, New York 11224, filed a petition for redetermination of a deficiency or for refund of personal income tax under the Administrative Code of the City of New York for the year 1996.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 15, 2001 at 10:30 A.M., with all briefs to be submitted by March 29, 2002, 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. (Kevin R. Law, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation may impose and collect New York City resident income tax from petitioner when he has already made payments under section 1127 of the Charter of the City of New York City equal to such New York City resident income tax.

II. Whether petitioner's requests to join New York City as a party to this proceeding and to videotape the hearing were properly denied.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued a Notice and Demand for Payment of Tax Due dated May 3, 1999 against petitioner, which assessed additional income tax for 1996 of $2,021.00 plus penalty and interest. Penalty was imposed for "failure to file or pay tax on or before the due date" since petitioner's tax return for 1996 was received by the Division on February 3, 1999, nearly two years late. The Notice and Demand showed an increase of $2,323.00[1] in petitioner's 1996 New York taxable income from the reported amount of $54,080.00 to $56,403.00. Total 1996 New York State and City income tax on $56,403.00 was calculated to be $6,096.00, consisting of New York State income tax of $3,759.00 and New York City income tax of $2,337.00. Based upon tax withheld of $4,075.00, the Notice and Demand asserted additional tax due of $2,021.00.[2]

2. On his 1996 New York Resident Income Tax Return (form IT-201), petitioner claimed "Total city of New York tax withheld" of $2,393.00 which was reduced by the Division to $287.00. Petitioner had included payments under section 1127 of the Charter of the City of New York City, retained from his wages by his employer, the City of New York, as withheld income tax on his 1996 income tax return.

3. As a condition of employment, section 1127 of the Charter of the City of New York requires a New York City municipal employee, who is a nonresident of New York City, to pay to the city the difference between the New York City resident income tax computed and determined as if the employee were a resident of New York City and the nonresident earnings tax imposed

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[1] On his income tax return, petitioner had failed to include as New York additions to his federal adjusted gross income (i) public employee 414(h) retirement contributions of $1,852.55 and (ii) IRC § 125 modifications of $470.82, which were not at issue in this proceeding.

[2] The Division in its answer admitted that petitioner made a payment of $2,000.00 against the amount in question.

on the employee for the same taxable period. Petitioner became a New York City municipal employee in 1973[3] when he was a New Jersey resident, and as such, the City through the years has retained from his wages an amount equal to what his City income tax liability would have been if he had been a resident.

4. In the early 1990s, petitioner's life was in a downward spiral. He candidly testified that he was thrown out of his New Jersey home leaving behind a wife and children, attempted suicide, and was hospitalized for several weeks. In this period, he also changed his New Jersey residency to an apartment in the Coney Island section of Brooklyn, where he lived during the year at issue and continues to reside. When petitioner first moved to Brooklyn, he felt he might move back to New Jersey in order to be closer to his children and did not fill out a change of address form with the Office of Personnel Services of the City of New York. It was not until the year 2000 that he updated his address with the City's personnel office. His wage and tax statement from New York City for the year at issue shows a South Orange, New Jersey address.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioner argues that New York City has the right to collect the payments under section 1127 of the City's Charter or the equivalent tax, but not the right to collect both. He

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[3] On page 28 of petitioner's brief, the taxpayer noted that he "entered City service" in 1973. This contrasts with the error in the transcript of the hearing on page 48 that recorded petitioner as testifying that he has been working for the City of New York "since 1993[sic]." Unfortunately, the transcript of the hearing in this matter contains hundreds of errors, including this one concerning the year in which petitioner commenced employment with the City of New York, that has made it unuseable. By a letter dated January 14, 2002, the administrative law judge advised the parties of the hundreds of errors in transcription which made the transcript unuseable. Noting that the dispute between the parties was basically a legal dispute and not factual in nature, the administrative law judge nonetheless gave the parties an opportunity to submit corrections of a substantive nature. Petitioner replied by concurring in the administrative law judge's opinion concerning the inaccuracy of the transcript but made no request for corrections of a substantive nature. The representative for the Division, noting that his list of errors "is not all inclusive", submitted an "errata sheet" listing various corrections on 45 lines of the transcript. Although the Division's listing of errors has been reviewed, the extent of errors in the transcript precludes any attempt to amend the transcript so that it might be considered an accurate transcription of the hearing. In light of the legal nature of the dispute, with no fundamental facts at issue, the hearing in this matter was not reopened in order to retake the testimony of petitioner who was the only witness called to testify at the hearing on November 15, 2001.

contends that the Division's actions are unjust. In the alternative, petitioner maintains that section 1127 of the New York City Charter is unconstitutional because it discriminates against nonresidents. New York City employees who are residents of the City can take a deduction for income taxes paid to the city while nonresidents who are City employees cannot take a similar deduction for section 1127 payments. He further contends that section 1127 is selectively enforced by the City, and if it is enforced against him it results in giving effect to a contract of adhesion. Petitioner, citing a Federal court rule, seeks the imposition of sanctions against the Division for alleged misstatements of fact.

6. The Division counters that it "does not have the authority to apply other nontax payments made to the City of New York to petitioner's tax obligations." Citing ***Legum v. Goldin*** (55 NY2d 104, 447 NYS2d 900), the Division maintains that payments under section 1127 of the City charter are not tax.

CONCLUSIONS OF LAW

A. Section 1127 of the Charter of the City of New York provides in relevant part as follows:

> [E]very person seeking employment with the city of New York or any of its agencies . . . shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual . . . during employment by the city, such person will pay to the city an amount by which a city personal income tax on residents computed and determined as if such person were a resident individual . . . during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period.

As noted in the Findings of Fact, the City of New York employed petitioner and retained from his salary during the year at issue so-called section 1127 payments which were equivalent to the City personal income tax that a New York City resident would have paid on such salary.

B. Pursuant to Tax Law § 1312, the collection of New York City's income tax is the Division's responsibility, and the Division is authorized to administer and collect New York City personal income taxes in the same manner as the New York State personal income tax. Further, all of the statutory provisions relating to review of the liability for New York State personal income tax apply to the New York City personal income tax. Consequently, under Tax Law § 1312, there is no question that the Division of Tax Appeals is the proper forum for resolving whether the Notice and Demand dated May 3, 1999 should be sustained.

C. Petitioner's forceful contention that it is unjust to permit the Division to collect on behalf of New York City the equivalent tax when the City has already collected the payments under section 1127 of the City's Charter demands attention. At the same time, the Division is correct that payments under section 1127 made by a nonresident who is a municipal employee of New York City have been viewed by the courts as payments related to a contractual condition of employment and not as taxes, which are "forced contributions imposed upon citizens to pay the expenses of government, and are in no way related to the will or contract . . . of the persons taxed" (***Legum v. Goldin*** 99 Misc 2d 654, 416 NYS2d 712, 715, ***affd*** 435 NYS2d 426, ***affd*** 55 NY2d 104, 447 NYS2d 900; ***cf.***, ***Ganley v. Giuliani***, 94 NY2d 207, 701 NYS2d 324). Weighing these two considerations, in the circumstances at hand, it is concluded that it would be inequitable to sustain the Division's attempt to impose New York City resident income tax on petitioner for 1996 when he has already paid the equivalent amount to the City in the form of section 1127 payments (***cf., Woods v. Commissioner***, 92 TC 776 [wherein the Tax Court discusses at some length the application of equitable principles in tax matters]). Further, Tax Law § 2000 provides that the independent Division of Tax Appeals is mandated to provide the public with a "just" system of resolving controversies. To permit the Division, as an *agent* of the

City of New York to collect New York City personal income tax for 1996, which has already been collected by the City in the form of equivalent payments under section 1127, would contravene this mandate and permit the tax appeals system to be utilized in an unjust fashion. In conclusion, in these unique circumstances, as emphasized by the Appellate Division in ***Riluc Co., Inc. v. Tax Appeals Tribunal*** (169 AD2d 988, 565 NYS2d 265, 267), "the mindless elevation of form over substance cannot be considered anything other that an arbitrary and capricious exercise of power." ***Also see, Matter of Kazis,*** Tax Appeals Tribunal, May 16, 2002 [wherein the Tribunal recognized that equity may be invoked to prevent a substantial injustice in "exceptional circumstances"].

D. With reference to petitioner's complaints concerning certain procedural matters, there is no basis in the Tax Law or regulations to permit the joining of New York City as a party to this proceeding or to have permitted petitioner to videotape the tax hearing. Furthermore, Civil Rights Law § 52 prohibits taking motion pictures of proceedings, "in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state." In addition, petitioner's request that sanctions be imposed against the Division also has no basis in the Tax Law or regulations, and his reference to a Federal basis for such sanctions is inapposite. Finally, the record does not establish any reasonable cause for the late filing of petitioner's tax return, and penalty on the small additional tax liability from what was reported on his late filed 1996 tax return, based upon the minor adjustments noted in footnote "1", may be properly imposed. It is observed that if petitioner had timely filed his tax return for 1996, the problem at hand would have come to the fore at an earlier date so that petitioner's status with the City's personnel office could have been corrected to that of a resident of the City, with income tax rather than section

1127 payments withheld from his wages, sooner than the year 2000 as noted in the Findings of Fact.

E. Petitioner's challenge to the constitutionality of § 1127 of the Charter of the City of New York is rendered moot.

F. The petition of Irwin R. Eisenstein is granted to the extent indicated above, and the Notice and Demand dated May 3, 1999 is to be modified to so conform.

DATED: Troy, New York
June 13, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE