

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CARLOS GARCIA : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 818741
New York State and New York City Personal Income Tax :
under Article 22 of the Tax Law and the Administrative :
Code of the City of New York for the Year 1977. :

Petitioner, Carlos Garcia, 1579 Metropolitan Avenue, #1F, Bronx, New York 10462, 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 Administrative Code of the City of New York for the year 1977.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 3, 2002 at 1:15 P.M., with all evidence to be submitted by May 10, 2002, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Louis N. Guertin).

ISSUES

I. Whether the Division of Taxation's assertion of a deficiency based upon Federal audit changes was proper and whether petitioner has shown wherein such audit was in error.

II. Whether petitioner has shown that he made payments on the assessments at issue other than those payments indicated by the Division of Taxation's records or that the Division of Taxation failed to properly apply payments to the assessments at issue.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner, Carlos Garcia, a Notice of Additional Tax Due/Notice and Demand dated April 13, 1983, which asserted \$4,645.79 in additional New York State and City personal income tax due, plus late-filing and negligence penalties and interest, for the year 1977.

2. Following a conciliation conference, the Division's Bureau of Conciliation and Mediation Services issued to petitioner a Conciliation Order dated July 13, 2001, which sustained the assessment at issue.

3. The issuance of the Notice of Additional Tax Due/Notice and Demand resulted from the Division's receipt of notification from the Internal Revenue Service of Federal audit changes increasing petitioner's 1977 Federal adjusted gross income by \$37,100.00. Federal Form 4549 (Income Tax Examination Changes), which was supplied to the Division by the IRS, indicated that such adjustments to income consisted of \$35,860.00 in unreported income and \$1,240.00 in "cost-of-living." By his signature on the Form 4549 dated July 6, 1979, petitioner consented to the assessment of tax by the IRS.¹

¹ The consent part of the Form 4549 signed by petitioner states in pertinent part:

Consent to Assessment and Collection - I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in the United States Tax Court the findings in this report. Therefore, I give my consent to the immediate assessment and collection of any increase in tax and penalties, and accept any decrease in tax and penalties shown above, plus any interest as provided by law.

4. The Division calculated the assessment of tax at issue using the information supplied by the IRS. Specifically, the Division determined petitioner's New York adjusted gross income to be \$37,100.00. The Division then calculated petitioner's liability as a single taxpayer. Specifically, after allowing for a standard deduction of \$2,000.00 and a personal exemption of \$650.00, the Division determined New York taxable income of \$34,450.00 and calculated New York State and City income tax due accordingly.

5. Petitioner was arrested on a drug charge on or about March 1, 1977. At the time of his arrest, he was in possession of \$30,300.00 in cash, which was confiscated by the police. The matter was subsequently referred to the Internal Revenue Service and the confiscated \$30,300.00 was apparently included in the \$35,860.00 of unreported income listed as an adjustment to income on the Form 4549.

6. Petitioner was incarcerated following his arrest in March 1977. He was subsequently convicted of the charge against him and remained in jail for over four years. The confiscated \$30,300.00 was forfeited by petitioner and was ultimately transferred to the New York Police Department pension fund on or about December 10, 1991.

7. The Notice of Additional Tax Due/Notice and Demand dated April 13, 1983 was assigned assessment number F830413034C. The Division later converted the New York State income tax part of this assessment to assessment number L-009439385 and the New York City tax part to assessment number L-009435564.

8. The Division's records indicate payments totaling \$5,259.63 have been applied to assessment number L-009439385. According to the Division's records, such payments consist of tax refund offsets of \$1,120.00, \$551.00, and \$815.00, a bank levy of \$2,362.65, and wage garnishments of \$298.81 and \$112.17.

9. The Division's records indicate that zero payments have been applied to assessment number L-009435564.

10. The Division's records also indicate that payments totaling \$3,651.86 have been applied to assessment L-008429048, an income tax assessment against petitioner unrelated to the year at issue. Among the payments applied to this assessment are two refund offsets in the respective amounts of \$476.00 and \$911.00.

11. Petitioner has made numerous payments to the Division over the years through wage garnishments, bank account levies and tax refund offsets. Petitioner asserted that he has paid more on the assessments at issue than the Division's records indicate, and he submitted documentation to prove such additional payments.

12. Petitioner's documentation shows payments on assessment number L-009439385 consistent with the Division's records. Specifically, petitioner submitted a Voucher for Income Tax Refund (AU-10.1) and two statements of income tax refund (Form PR-753) showing tax refund offsets applied to assessment number L-009439385 in the amounts of \$1,120.00, \$551.00, and \$815.00. Petitioner also submitted a notice from Citibank indicating a levy on his account and that \$2,462.33 had been segregated from such account, an amount which included a \$100.00 service charge payable to the bank. Petitioner also submitted documentation of wage garnishment totaling \$410.98, which amount is the sum of garnishment payments credited to assessment number L-009439385 in the Division's records.

13. Petitioner also submitted copies of Forms 1099-G showing state tax refunds of \$476.00, \$911.00, and \$307.00 for the years 1994, 1995, and 1997, respectively. In addition, petitioner submitted a Statement of Income Tax Adjustment for 1994 showing that the refund for that year had been adjusted by the Division. Petitioner also submitted a copy of his 1991 New

York return which claims a refund of \$547.00. Petitioner asserted that the Division used his refunds to offset the assessments at issue.

14. Petitioner claimed to have received refunds of \$532.00, \$1,765.00, \$331.00, \$394.00, and \$1,093.00 for the years 1988, 1989, 1990, 1993, and 1998, respectively, but did not submit documentation of such refunds. Petitioner asserted that the Division used such refunds to offset the assessments at issue herein.

15. Petitioner or his former accountant contacted the Internal Revenue Service in 1996 requesting information regarding petitioner's 1977 taxes. In response, the IRS advised petitioner that its records indicated that petitioner did not file a tax return for 1977. In response to a request made in 1999, the IRS advised petitioner's former accountant that all returns and attachments filed before 1992 had been officially destroyed.

CONCLUSIONS OF LAW

A. As pertinent here, Tax Law § 659 provides that where a taxpayer's Federal taxable income is changed or corrected by the Internal Revenue Service the taxpayer must report such change or correction to the Division of Taxation within 90 days after the final determination of such change or correction and either concede the accuracy of the Federal change or state the taxpayer's basis for asserting that the change or correction is erroneous. If the Federal change or correction is not reported within the 90-day period, the Division is authorized by Tax Law § 681(e) to issue a notice of tax due. Furthermore, where a taxpayer fails to report the Federal change or correction as required, such a notice may be issued at any time (*see*, Tax Law § 683[c][1][C]). The issuance of such a notice gives rise to a right to a hearing where the

correctness of the notice may be challenged (*Matter of Jaffe*, Tax Appeals Tribunal, September 21, 1995).²

B. Petitioner's consent to the changes to his Federal taxable income on Form 4549 resulted in a final Federal determination for purposes of Tax Law § 659. Petitioner did not report such changes to the Division. Since petitioner failed to comply with the reporting requirements of Tax Law § 659, the Division's assessment of tax against petitioner by notice of additional tax due was proper (*see*, Tax Law § 681[e][1]; § 683[c][1][C]).

C. The Income Tax Examination Changes (Form 4549) for the year at issue, to which petitioner consented, showed that an audit of petitioner by the Internal Revenue Service resulted in additional Federal adjusted gross income. Since such additional income was subject to Federal income tax, it was rational for the Division to rely on the Federal audit changes as a basis for issuing the assessment (*see, Matter of Karayannides*, Tax Appeals Tribunal, March 13, 1997). Therefore, the burden of proof was upon petitioner to show that the Notice of Additional Tax Due was incorrect (Tax Law § 689[e]; *see, e.g., Matter of Delia v. Chu*, 106 AD2d 815, 484 NYS2d 204). Here, petitioner has not presented any evidence which would satisfy this burden. Petitioner contended that the increase to his Federal adjusted gross income by \$37,100.00 as determined by the IRS was erroneous and that the \$30,300.00 amount that was confiscated at the time of his arrest was correct, but given his consent to the Federal changes and the lack of evidence showing that the \$37,100.00 amount was in error, this contention is rejected.³

² The Division did not challenge the timeliness of the petition. Inasmuch as timeliness is a factual as well as a legal issue not addressed at hearing, I have not raised subject matter jurisdiction as an issue here.

³ At hearing, petitioner noted that he signed the consent while incarcerated and contended that he did not understand the Form 4549 that he signed. Given the plain language of the consent (*see*, Finding of Fact "3") petitioner's contention is insufficient to invalidate the consent.

Petitioner also contended that since the \$30,300.00 was forfeited by him it was improper to include such amount in his taxable income. This contention is also rejected. Amounts forfeited in illegal drug activity are not deductible from income (*see, Ruddel v. Commr.*, 71 TCM 2419). Petitioner also took issue with the Internal Revenue Service's calculation of Federal tax due, specifically the lack of any deductions or exclusions and the use of a married filing separately filing status. Such claimed errors have no bearing on the assessments at issue because, while the Division used the Federal changes to determine petitioner's New York adjusted gross income, it then calculated petitioner's New York tax liability by treating petitioner as a single filer and allowing petitioner the appropriate personal exemption and standard deduction (*see*, Finding of Fact "4").

D. Regarding the issue of payments, petitioner has not shown that he made any payments other than those payments indicated by the Division's records or that the Division failed to properly apply payments to the assessments at issue. Accordingly, no adjustment in the amount currently due on the subject assessments is warranted.

Where a taxpayer makes a payment without a specific direction as to how the funds are to be allocated, the payment may be applied as the Division sees fit (*see, Matter of Farkas*, Tax Appeals Tribunal, October 14, 1988). Here, petitioner did not specifically direct the Division to allocate payments to any particular assessment. Accordingly, petitioner may not argue that the Division misapplied any payments. In addition, petitioner has not established that he made any payments in addition to those listed in the Division's records. The Division credited to assessment number L-009439385 the payments documented by the Voucher for Income Tax Refund; the two statements of income tax refund; the notice from Citibank indicating a levy on petitioner's account and that funds had been segregated from this account; and the

documentation of wage garnishment. Additionally, it appears that the Division credited to assessment L-008429048, which is not at issue herein, refund offsets of \$476.00 and \$911.00. The remaining documentation submitted by petitioner to prove payment, i.e., the forms 1099-G and the 1991 tax return, shows that petitioner was credited with a refund for the years 1994, 1995, and 1997 and that he claimed a refund for 1991, but does not show that any payments were made on the assessments at issue (*see*, Finding of Fact “13”). Finally, petitioner produced no documentation to support his claim of refund offsets for the years 1988, 1989, 1990, 1993, and 1998 (*see*, Finding of Fact “14”) and this claim must be rejected.

Petitioner also contended that the Division should have used the \$30,300.00 that was confiscated at the time of his arrest (and subsequently transferred to the police pension fund) to satisfy the tax liabilities at issue. Petitioner has not shown that such confiscated funds were available to the Division to satisfy the subject assessments, but even if such funds were available, the fact that the Division did not take advantage of such an opportunity to collect on the subject assessments does not in any way reduce petitioner’s liability.

E. The petition of Carlos Garcia is denied and the Notice of Additional Tax Due/Notice and Demand dated April 13, 1983 is sustained.

DATED: Troy, New York
June 27, 2002

/s/ Timothy J. Alston
PRESIDING OFFICER