

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**GREGORY L. BLUE** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 818931  
York State Personal Income Tax under Article 22 of the :  
Tax Law for the Year 1998. :

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Petitioner, Gregory L. Blue, 135 Clinton Street, #6E, Hempstead, New York 11550, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1998.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 400 Oak Street, Garden City, New York on August 21, 2003 at 9:15 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Pierre Jason).

Since neither party herein elected to reserve time to file a post-hearing brief, the three-month period for the issuance of this determination began as of the date the hearing was held.

***ISSUES***

I. Whether \$10,310.14 of a taxable distribution totaling \$14,304.11 reported as paid to petitioner by Local 282 Annuity Trust Fund on Form 1099-R can be excluded from Federal and New York adjusted gross income since the \$10,310.14 was paid directly to the Internal Revenue Service as the result of a Notice of Levy it had filed for past due Federal income taxes.

II. Whether the Division of Taxation properly determined petitioner's New York adjusted gross income to be \$79,897.00 for the 1998 tax year.

***FINDINGS OF FACT***

1. On or about April 15, 1999, petitioner herein, Gregory L. Blue, filed a 1998 New York State resident income tax return on Form IT-100. Said return indicated that petitioner was filing a joint return with his spouse; however, the return was signed only by petitioner. The Division of Taxation ("Division") did not process the Form IT-100 since it was not signed by petitioner's spouse and also because a review of its records revealed that petitioner's spouse had already filed a 1998 personal income tax return as a married individual filing separately. On or about July 29, 1999, petitioner submitted a 1998 resident income tax return on Form IT-200 indicating that he was filing as a married individual filing a separate return.

2. The Form IT-200 submitted on or about July 29, 1999 reported New York taxable income of \$52,639.30, which amount was computed as follows:

<b><i>ITEM</i></b>	<b><i>AMOUNT</i></b>
Wages	\$51,651.83
Interest	22.40
Unemployment compensation	12,465.00
IRA deduction	(2,000.00)
Adjusted gross income	62,139.30
New York standard deduction	(6,500.00)
Dependent exemptions	(3,000.00)
New York taxable income	\$52,639.30

3. Attached to petitioner's 1998 return was one wage and tax statement and five forms 1099 which reported the following items of income:

<b><i>SOURCE</i></b>	<b><i>FORM</i></b>	<b><i>AMOUNT</i></b>
King Kullen Grocery Co., Inc.	W-2	\$37,347.72
Fleet Bank NA	1099-INT	10.74
Fleet Bank NA	1099-INT	11.72
Local 282 Pension Fund	1099-R	15,758.00
Local 282 Annuity Trust Fund	1099-R	14,304.11
NYS Dept. of Labor	1099-G	12,465.00
Total		\$79,897.29

4. On February 5, 2001, the Division issued a Notice of Deficiency to petitioner asserting that \$2,869.58 of additional New York State personal income tax was due for the 1998 tax year, together with interest of \$387.64 and penalties of \$598.06. The proposed additional tax due was determined based on an audited New York adjusted gross income figure of \$79,897.00 (see Finding of Fact “3”). Taxable income of \$72,397.00 was computed by subtracting the standard deduction of \$6,500.00 and one dependent exemption of \$1,000.00 from the audited New York adjusted gross income figure of \$79,897.00. Penalties were asserted pursuant to Tax Law § 685(a)(1) for failure to file the 1998 return on time and Tax Law § 685(a)(2) for failure to pay the tax due on or before the prescribed due date. The late filing penalty was canceled as the result of a Conciliation Order issued by the Division’s Bureau of Conciliation and Mediation Services and at the hearing held herein the Division’s representative stipulated to the cancellation of the late payment penalty. The Notice of Deficiency also gave petitioner credit for a payment of \$675.00.

5. Petitioner’s 1998 Federal income tax return reported an adjusted gross income figure of \$77,217.00, which amount was comprised of the following items:

<i>ITEM</i>	<i>AMOUNT</i>
Wages	\$37,348.00
Interest	33.00
Taxable pensions	29,021.00
Unemployment compensation	12,465.00
IRA deduction	(1,650.00)
Federal adjusted gross income	\$77,217.00

6. In 1997 the Internal Revenue Service (“IRS”) filed a Notice of Levy with Local 282 Annuity Trust Fund indicating that petitioner owed \$10,310.14 in unpaid Federal income taxes and statutory additions for the years 1992 through 1996. On June 1, 1998, Local 282 Annuity Trust Fund issued a check payable to the “Internal Revenue Service FBO Gregory L. Blue” in the sum of \$10,310.14. Petitioner had not yet attained the age of 59 1/2 as of the date the Local 282 Annuity Trust Fund check was issued on June 1, 1998. Petitioner asserts that the \$10,310.14 paid directly to the IRS by Local 282 Annuity Trust Fund was included in the \$14,304.11 taxable distribution reported on Form 1099-R<sup>1</sup> and that the \$10,310.14 is not taxable income and should not be included in either Federal or New York adjusted gross income. The record herein contains an unsigned “draft copy” of Form 1040X wherein petitioner’s reported Federal adjusted gross income for 1998 is reduced by \$8,880.00, from \$77,217.00 to \$68,337.00. The record contains no evidence to show (i) if this form was actually filed with the IRS; (ii) how the \$8,880.00 reduction in Federal adjusted gross income was computed and what items comprised this amount; and (iii) that the IRS accepted the changes reflected on the form.

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<sup>1</sup> The Form 1099-R issued by Local 282 Annuity Trust Fund reflects a gross and taxable distribution of \$14,304.11 and Federal income tax withheld of \$3,270.53. Petitioner maintains that after the \$10,310.14 was sent to the IRS he received a check for the \$723.44 balance (\$14,304.11 - \$3,270.53 - \$10,310.14).

**CONCLUSIONS OF LAW**

A. Tax Law § 612(a) provides that the New York adjusted gross income of a resident individual is his or her Federal adjusted gross income as increased by the modifications contained in Tax Law § 612(b) and decreased by the modifications provided for in Tax Law § 612(c). Since petitioner has no modifications which would increase or decrease his Federal adjusted gross income for 1998, his New York adjusted gross income for 1998 is the same as his Federal adjusted gross income.

B. Petitioner's argument that \$10,310.14 of the taxable distribution he received from Local 282 Annuity Trust Fund is not taxable income since it was paid over directly to the IRS as the result of an income levy is rejected. In *Larotonda v. Commr.* (89 TC 287), the Tax Court concluded that funds taken from the taxpayers' Keogh retirement account pursuant to an IRS income levy to pay back Federal income taxes was includible in Federal adjusted gross income as the funds were deemed to have been constructively received by the taxpayers. The same result is required here.<sup>2</sup>

C. As noted in Finding of Fact "3", the Division determined petitioner's New York adjusted gross income for 1998 to be \$79,897.00, which amount is greater than the \$77,217.00 figure reported on his 1998 Federal income tax return. The \$2,680.00 difference between these two figures is due to the fact that, in the Division's computation, interest income is \$11.00 less than the amount reported on the Federal return; pension income is \$1,041.00 more than the amount shown on the Federal return; and, no allowance was given for the \$1,650.00 IRA

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<sup>2</sup> Petitioner may be somewhat confused in this matter. For Federal purposes, petitioner is subject to Federal income taxes on the \$10,310.14 distribution from Local 282 Annuity Trust Fund; however, he is not liable for the additional 10% premature distribution penalty since the premature distribution was the result of an IRS income levy. While the \$10,310.14 distribution from Local 282 Annuity Trust Fund is likewise subject to New York State personal income tax, it must be noted that there is no corresponding New York State premature distribution penalty asserted by the Division in this matter.

deduction as claimed on the Federal return. For purposes of this determination, petitioner's New York adjusted gross income is determined to be \$78,258.00, which amount is computed in the following manner:

<i>ITEM</i>	<i>AMOUNT</i>
Audited New York income	\$79,897.00
Add: additional interest income	11.00
Subtract: IRA deduction	(1,650.00)
Revised New York income	\$78,258.00

For New York purposes taxable pension income totals \$30,068.00, which is the total of the taxable pension income as reported on the two Forms 1099-R attached to petitioner's return. It is not known why petitioner's Federal return reported taxable pension income of only \$29,021.00; however, this lower amount is not accepted as accurate for purposes of this determination. Also, the changes in Federal adjusted gross income shown on the unsigned "draft copy" of Form 1040X are not accepted since there is no evidence to support how the changes were computed; what items were included in the changes; or that the IRS accepted the changes.

D. The petition of Gregory L. Blue is granted to the extent indicated in Conclusion of Law "C" and Finding of Fact "4" (wherein the Division stipulated to the cancellation of the late payment penalty); the Division is hereby directed to recompute the additional tax and interest due consistent with this determination; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York  
October 30, 2003

/s/ James Hoefler  
PRESIDING OFFICER