

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTINE O'SHAUGHNESSY	:	DETERMINATION
		DTA NO. 821949
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 Year 2004.	:	

Petitioner, Christine O'Shaughnessy, 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 year 2004.

Pursuant to Tax Law § 2006(6) and 20 NYCRR 3000.9(b), by a motion dated January 30, 2008, the Division of Taxation, which appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel), moved for summary determination on the grounds that there were no material issues of fact and the undisputed facts mandated a finding in its favor. Answering papers due by February 29, 2008 were never filed, and such due date commenced the 90-day period for issuance of this determination. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether the Division of Taxation properly disallowed petitioner's \$5,000.00 College Choice tuition savings deduction.

FINDINGS OF FACT

1. Petitioner, Christine O'Shaughnessy, timely filed a 2004 New York State and City Resident Income Tax Return (form IT-201) on which she claimed a \$5,000.00 New York State College Choice tuition savings deduction pursuant to Tax Law § 612(c)(32).

2. The New York State College Choice tuition savings program (overseen by the New York State Comptroller and the Higher Education Services Corporation) is managed by UPromise Investments, Inc. (UPromise), which sends a yearly report to the Department of Taxation and Finance. This yearly report lists all contributors to the New York State College Choice tuition savings program. Petitioner was not listed as a contributor to the program on the yearly report for 2004. In addition, by an e-mail dated June 13, 2007 to the Division of Taxation's tax technician, the director of investment services at UPromise confirmed that petitioner had not made any contributions to the New York State College Choice tuition savings program in 2004 and that her account had not been opened until January 2005.

3. The Division of Taxation (Division) issued a Statement of Proposed Audit Changes dated July 7, 2006 to petitioner disallowing her \$5,000.00 deduction to the New York State College Choice tuition savings program, which she had claimed on her 2004 tax return. This statement included a calculation showing New York State income tax due of \$385.00 plus interest and New York City income tax due of \$222.50 plus interest based upon the Division's disallowance of such deduction.

4. With no response from petitioner to its Statement of Proposed Audit Changes, the Division issued a Notice of Deficiency dated August 31, 2006 against her asserting New York State income tax due of \$385.00 plus interest and New York City income tax due of \$222.50 plus interest for 2004.

5. Petitioner remitted the full amount due on or about October 27, 2006. Nonetheless, she filed a petition dated October 20, 2007 alleging that she “in fact did make the contribution.”

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

[I]f, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Here, petitioner did not respond to the Division’s motion, and she is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671 [1975]; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325 [1984], *appeal dismissed* 62 NY2d 942 [1984]).

Consequently, the ultimate fact in this matter is not in dispute: petitioner did not make a contribution to the New York State College Choice tuition savings program in 2004.

B. Furthermore, the burden of proof was upon petitioner to demonstrate that the deficiency was erroneous by clear and convincing evidence (*Matter of O’Reilly*, Tax Appeals Tribunal, May 17, 2004). In sum, because she offered no evidence to contradict the proof produced by the Division in support of its motion, it is properly concluded that petitioner did not make a contribution to the New York State College Choice tuition savings program in 2004 as alleged in her petition.

C. The petition of Christine O’Shaughnessy is denied, and the Notice of Deficiency dated August 31, 2006 is sustained.

DATED: Troy, New York
May 22, 2008

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE