

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>RICHARD ARONOFF</b>	:	DETERMINATION DTA NO. 823822
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 2001.	:	

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Petitioner, Richard Aronoff, 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 2001.

On February 24 and 28, 2012, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs submitted by July 27, 2012, which date commenced the six-month period for the issuance of this determination. After review of the documents and arguments submitted, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

***ISSUE***

Whether the Division of Taxation properly determined petitioner's tax liability for the year 2001.

***FINDINGS OF FACT***

1. In accordance with Internal Revenue Code § 6103(d), the Division of Taxation

(Division) received information from the Internal Revenue Service (IRS) that indicated that petitioner, Richard Aronoff, filed a federal income tax return using a New York State address and had New York income sufficient to require the filing of a New York State personal income tax return for the year 2001. The Division did not have a record of petitioner filing such a return.

2. On October 6, 2008, the Division issued a Statement of Proposed Audit Changes to petitioner, which explained the above information and that in order to determine the amount of tax due, if any, the Division utilized the information provided to it by the IRS and computed the tax on the basis that he was a resident of New York State and City. The items of income identified on petitioner's federal return included: 1) \$221,501.00 received from Smith Barney that was reported on a Form 1099; 2) \$18,000.00 from Prudential Equity that was reported on a Form 1099-Misc; and 3) \$125.00 of interest income from various payers, resulting in a total New York adjusted gross income of \$239,626.00. The Division allowed petitioner the standard deduction of \$7,500.00, as it was greater than any allowable itemized deductions. Petitioner was also informed that penalties were imposed for late filing (Tax Law § 685[a][1]) and negligence (Tax Law § 685[b][1]). In addition, a penalty equal to 50% of the interest due on the deficiency or portion thereof due to negligence or intentional disregard of the law was added pursuant to Tax Law § 685(b)(2). Petitioner was advised that if he filed a New York State income tax return for the year 2001, he should provide a complete copy of it to the Division, along with any wage and tax statements in his possession. Furthermore, if he made a payment with the return, he was asked to provide proof to that effect. Petitioner was also invited to provide evidence if he were a full or part-year resident of another state. None of the requested proof was submitted by petitioner.

3. Based on the Statement of Proposed Audit Changes, the Division issued to petitioner a

Notice of Deficiency, dated August 10, 2009, which asserted that personal income tax was due for the year 2001 in the amount of \$18,954.00, plus penalties and interest, for a balance due of \$36,600.53.<sup>1</sup>

4. Petitioner attached two self-authored, unsworn letters to his petition. In them, he maintains that the \$221,501.00 received from Smith Barney in 2001 was subsequently invested in a self-directed IRA of which he was the owner and the sole participant. Petitioner adds that his self-directed IRA was used to fund a real estate purchase. He states that the property was not purchased for his personal use or held in his name. The name of the purported owner or location of the real estate, however, was not given. One of these letters also listed the names of two IRS employees consulted by petitioner and that “[b]oth of these individuals acknowledged that real estate could be owned in a retirement plan but neither knew the specific mechanism for doing so.” There is nothing in the record from either of these two individuals. Petitioner also submitted as part of his case an additional self-authored, unsworn letter reiterating the arguments in his previous two letters. Other than the aforementioned letters, petitioner did not submit any documentary evidence or testimony in support of his petition.

5. In support of its case, the Division submitted the affidavit of Sally Ostrander, a Tax Technician 4 in its Personal Income Tax Desk Audit Unit. According to Ms. Ostrander, her responsibilities include reviewing and processing New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing administrative records, reports and forms. The information offered in her affidavit is based on her personal knowledge of the facts in this matter and based upon a review of the Division’s

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<sup>1</sup>The amount of penalties asserted in the Statement of Proposed Audit Changes was \$11,493.21, while the penalties in the Notice of Deficiency were only \$4,738.50. This reduction was not explained by the Division, but appears to be a cancellation of the section 685(b)(2) penalty.

official records kept in the ordinary course of business.

6. Ms. Ostrander avers that the Notice of Deficiency was issued to petitioner based upon information about his filing and payment status received from the IRS pursuant to IRC § 6103(d). In particular, petitioner failed to file a New York State personal income tax return for the year 2001 and disclose the existence of additional income. She adds that petitioner was requested to provide documentation substantiating his claim that the IRS accepted the use of the Smith Barney funds in a self-directed IRA and, thus, the income was exempt from taxation. Ms. Ostrander states, however, that such substantiation was never received by the Division.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

7. Petitioner argues that he converted the Smith Barney funds into a legitimate self-directed IRA at the recommendation of an accountant and that he provided the Division with the names and identification numbers of two IRS employees who confirmed that real estate was a permitted investment for retirement plans. As a result, petitioner insists that the Smith Barney funds are exempt from taxation by New York State. He does not dispute the Division's treatment of the other income referenced above or that he was a New York State and City resident during the year at issue.

8. The Division maintains that petitioner simply has not provided any documentation to substantiate his claim that the IRS accepted the funds received from Smith Barney as not taxable and that he had no federal tax liability based on their receipt.

#### ***CONCLUSIONS OF LAW***

A. Tax Law § 681(a) provides, in pertinent part, as follows:

If a taxpayer fails to file an income tax return required under this article, the tax commission is authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of

deficiency to the taxpayer.

B. When the Division properly issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to such notice (*Matter of Hickey*, Tax Appeals Tribunal, August 12, 2004; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). In proceedings for review of a properly issued notice of deficiency, the burden of proof is on the taxpayer to demonstrate that the deficiency assessment is erroneous (Tax Law § 689[e]).

C. In the instant case, petitioner failed to file a New York State personal income tax return for the year 2001. The Division, however, obtained information from the IRS that showed petitioner filed his federal return using a New York address, and received 1) \$221,501.00 from Smith Barney as reported on a Form 1099; 2) \$18,000.00 from Prudential Equity as reported on a Form 1099-Misc; and 3) \$125.00 of interest income from various payers. The essence of petitioner's argument is that he used the income received from Smith Barney to fund a self-directed retirement plan, thereby exempting that income from New York State taxation. Petitioner does not dispute the remaining adjustments or his filing requirement.

D. Petitioner has offered no evidence that would provide a basis for granting his petition. The record is devoid of proof such as documents relating to any real estate investment or the nature of the self-directed retirement plan. Additionally, petitioner has not presented any evidence whatsoever that the IRS accepted the Smith Barney funds as exempt from taxation. Petitioner failed to submit any affidavits, even from himself, on behalf of his case. In sum, petitioner did not introduce any evidence to demonstrate that the Notice of Deficiency was erroneous. As a result, petitioner has not overcome the presumption of correctness that accompanies a notice of deficiency that is properly issued under the Tax Law (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993];

*Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759 [1980]).

E. The petition of Richard Aronoff is denied and the Notice of Deficiency, dated August 10, 2009, is sustained.

DATED: Albany, New York  
December 20, 2012

/s/ Herbert M. Friedman, Jr.  
ADMINISTRATIVE LAW JUDGE