

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN CLIFTON	:	DECISION
	:	DTA NO. 826975
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2006.	:	

Petitioner, John Clifton, filed an exception to the determination of the Administrative Law Judge issued on February 16, 2017. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for the issuance of this decision began on July 12, 2017, the due date for petitioner's reply brief.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner met his burden of proving that the notice of deficiency issued for tax year 2006 was improper or erroneous.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except that we have modified finding of fact 8 and we have added an additional finding of fact, numbered 9 herein. We make these changes to more fully reflect the record. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional finding of fact appear below.

1. The Division of Taxation (Division) received information from the Internal Revenue Service (IRS) that petitioner, John Clifton, had sufficient income in 2006 to require the filing of a personal income tax return.

2. The information obtained by the Division from the IRS indicated that petitioner's federal adjusted gross income for tax year 2006 was \$36,235.00 and that petitioner had a New York State address.

3. A search of the Division's records indicated that petitioner did not file a New York State personal income tax return for the year 2006.

4. On August 27, 2012, the Division sent correspondence to petitioner stating that it had not received petitioner's New York State income tax returns for the years 2006 and 2007. The correspondence further stated that information received from the IRS indicated that petitioner had a New York address and sufficient income to require the filing of a New York State personal income tax return for the years in question. The correspondence stated that petitioner must respond within 30 days by either filing a return or explaining why he did not have to file, and that if he did not respond, the Division would issue an assessment.

5. On September 24, 2012, the Division received a response from petitioner, wherein he stated:

“I am not required to file a return for years 2006 or 2007, and I did not receive Federal adjusted gross income or NY additions of more than \$3000. Information reports provided to the IRS by my company erroneously alleged payments of Internal Revenue Code sections 3121 & 3401 that are hereby disputed. They have listed payments as ‘wages’ as defined in the IRC section 3121(a) AND 3401(a). I am rebutting their claim, stating that I am a private sector citizen (non-federal entity) as defined in 3401(c)(d). I am not employed in a ‘trade or business’ nor am I an ‘officer of a Federal Corporation.’ Amounts listed as withheld on the information reports are correct, however.”

6. On January 6, 2014, the Division issued to petitioner a statement of proposed audit changes for tax year 2006 indicating tax due of \$2,398.00, plus penalty and interest. The statement provided, in part, as follows:

“We do not have a record of a New York State income tax return on file for you.

Section 6103(d) of the Internal Revenue Code allowed us to get information from the Internal Revenue Service. This information indicates you had sufficient income to require the filing of a New York State return.

We could not issue this statement before now because of the time needed to obtain and process the federal information.

We used the federal information and computed your tax as a New York State resident. In cases where the Internal Revenue Service provided us with information reported on the federal return, that information was used to compute your New York State tax. When federal return data was not available, your income was determined using information provided by the Internal Revenue Service such as Form 1099 information, etc. This includes wages, interest, dividends, capital gains, and other sources of income.

We have made any applicable additions to federal adjusted gross income for interest income on state and local obligations (other than New York State) and public employee 414(h) contributions based on the information obtained from the Internal Revenue Service. Also, if the record for your wage and tax statement showed an amount for the New York City flexible benefits (IRC 125) program it has been added to your New York income in accordance with section 612(b)(31) of the New York State Tax Law.

You have been allowed any applicable subtractions to federal adjusted gross income for state and local income tax refunds, taxable social security benefits and pension income based on the federal information.

Appropriate credits have been allowed based on available information.

If the New York standard deduction was greater than your allowable itemized deductions, the standard deduction was allowed.”

The Division determined petitioner’s New York adjusted gross income in the amount of \$36,235.00, based on the information received from the IRS indicating that petitioner’s federal adjusted gross income was \$36,235.00. The Division allowed the standard deduction in the amount of \$7,500.00, resulting in New York taxable income of \$28,735.00. From this amount, the Division calculated New York State tax due in the amount of \$1,571.00 and New York City tax due in the amount of \$942.00. The Division allowed a City of New York school tax credit in the amount of \$115.00, resulting in New York State and City tax due in the amount of \$2,398.00.

7. On February 24, 2014, the Division issued to petitioner a notice of deficiency of personal income tax due in the amount of \$2,398.00, plus interest and penalty. Penalties were imposed pursuant to Tax Law § 685 (a) (1); (b) (1) and (2).

8. In accordance with section 3000.12 of the rules of practice and procedure of the Tax Appeals Tribunal (20 NYCRR 3000.12), the parties agreed to have the present controversy determined on submission. Petitioner’s evidence and initial brief were due to be submitted by July 7, 2016. The postmark on the envelope containing petitioner’s brief and a one-page document offered as evidence is dated July 8, 2016. Petitioner’s reply brief was due by August 25, 2016.

9. The document submitted by petitioner with his initial brief is a one-page letter from the IRS to petitioner dated December 24, 2007. The letter indicates that \$393.17 reported as an overpayment on petitioner’s 2006 federal income tax return was being applied to a prior year’s federal tax liability.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first addressed a procedural question arising from petitioner's filing of a document offered as evidence and his initial brief one day after the due date. With respect to the document, the Administrative Law Judge determined that since it was late-filed, she would not consider it in rendering her determination. The Administrative Law Judge also determined that, even if it was timely filed, the one-page letter dated December 24, 2007 provides no support to petitioner's position that he was not required to file a New York return for 2006 or that the IRS information upon which the notice of deficiency relies is in any way inaccurate. The Administrative Law Judge did accept and consider petitioner's initial brief, deeming it timely as measured from the scheduled due date of petitioner's reply brief.

Turning to the substantive issue presented, the Administrative Law Judge rejected petitioner's contention that he was not an "employee" as defined in Internal Revenue Code (IRC) (26 USCA) § 3401 (c) and that, accordingly, the income petitioner received from his employer was not taxable wage income. The Administrative Law Judge noted that federal courts have deemed this argument both meritless and frivolous.

Next, the Administrative Law Judge noted that the record contains evidence indicating that petitioner received wages subject to New York income tax during the year at issue and that he failed to file a New York return as required. The Administrative Law Judge found that, as a consequence, the Division was authorized to determine petitioner's income tax liability and to issue a notice of deficiency with respect to such liability. The Administrative Law Judge concluded that the Division's use of information received from the IRS was reasonable and further concluded that petitioner offered no evidence to show that such information was erroneous. The Administrative Law Judge thus sustained the notice of deficiency.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that the Division did not establish a reasonable basis for its deficiency because it did not establish the accuracy of the information obtained from the IRS. According to petitioner, the Division was required to first establish the accuracy of such information through sworn statements or other evidence before the burden of proof may be shifted to him to show error in the proposed deficiency.

Petitioner also contends that, pursuant to the Administrative Procedure Act (APA) (5 USCA) § 556 (d) the burden of proof in the present matter is upon the IRS and the Division to show that all proper procedures were followed in issuing the notice of deficiency. Petitioner asserts that this burden has not been met.

Petitioner further asserts that the determination improperly ignored his contention that, in 2003, he similarly argued to the Division that the IRS had miscategorized payments to him by his employer as wages, and that the Division accepted his argument at that time.

Regarding the document that he offered as evidence, petitioner asserts that such document does not show that he had taxable income in 2006.

Petitioner also contends that he has submitted forms to the IRS to correct the erroneous information upon which the notice of deficiency herein relies.

Petitioner continues to argue that he was not an “employee” as defined in IRC (26 USCA) § 3401 (c) and that, therefore, the payments to him by his employer were not wages subject to income tax.

Petitioner also asserts that he has made no frivolous statements or arguments in this matter.

The Division contends that the information from the IRS indicating that petitioner had wage income in 2006 and that he did not file a New York return provides a rational basis for the

notice of deficiency and that such a notice is presumptively correct. The Division further contends that petitioner bears the burden of proof to show that the notice of deficiency is erroneous and that petitioner failed to meet that burden. Accordingly, the Division asserts that the Administrative Law Judge properly denied the petition and sustained the notice of deficiency.

OPINION

Regarding the procedural question, we note first that administrative law judges and this Tribunal have some discretion in accepting late-filed non-judicial documents (*see Matter of O'Keh Caterers Corp.*, Tax Appeals Tribunal, November 5, 1992 [brief filed one-day late by the Division was accepted by the Tribunal]). Additionally, although the Administrative Law Judge declined to accept the December 24, 2007 letter, which was filed one day late, she did consider this document and concluded that it did not support petitioner's case. Under such circumstances, we find that the December 24, 2007 letter is part of the record and that we may consider it in reaching our decision in this matter (*see Matter of DeMartino*, Tax Appeals Tribunal, December 16, 2016).

Turning to the substantive issue presented, as relevant here, Tax Law § 651 (a) (1) requires a New York resident individual to file a New York income tax return for any given year if she is required to file a federal tax return for that year or if her federal adjusted gross income plus New York addition modifications (as listed in Tax Law § 612 [b]) exceeds either \$4,000.00 or the amount of her New York standard deduction.

If a taxpayer fails to file a return as so required, the Division may estimate her New York tax liability and may issue a notice of deficiency to her (Tax Law § 681 [a]). Such a notice requires a rational basis (*Matter of Mayo*, Tax Appeals Tribunal, March 9, 2017).

Here, the Division received information from the IRS indicating that petitioner was a New York resident and that he had federal adjusted gross income of \$36,235.00 in tax year 2006. Such information provides a rational basis to conclude that petitioner was required to file a New York income tax return for that year. The Division's records show that petitioner did not so file. Accordingly, the Division exercised its authority under Tax Law § 681 (a) to estimate petitioner's New York tax liability using the federal information and to issue a notice of deficiency to him. We agree with the Administrative Law Judge's conclusion that the Division's use of IRS tax reporting information as the basis for the issuance of the notice of deficiency was rational (*see Matter of Pettis*, Tax Appeals Tribunal, August 18, 2005).

Where, as here, a notice of deficiency has been properly issued, a presumption of correctness attaches to it and the petitioner bears the burden of proving that the proposed deficiency is erroneous (*see Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008 [3d Dept 2006]; *Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992]; Tax Law § 689 [e]). Accordingly, we reject petitioner's contention that the Division was required to first prove the accuracy of the IRS information. Petitioner's assertion that the APA (5 USCA) § 556 (d) requires that the Division bear the burden of proof in the present matter is similarly meritless. The APA applies to federal agencies (*see* APA 5 [USCA] § 551 [1] [definition of "agency" for purposes of the act]) and has no application here.

Although petitioner contends that the IRS information upon which the Division relies is incorrect, he has offered no evidence that supports this contention. More specifically, petitioner has presented no proof (as opposed to mere allegations) to show that his federal adjusted gross income was not \$36,235.00 in 2006, as the IRS information indicates. Furthermore, in correspondence with Division, petitioner conceded that the "[A]mounts listed as withheld on the

information reports are correct” (*see* finding of fact 5). Additionally, we agree with the Administrative Law Judge’s conclusion that the December 24, 2007 letter submitted by petitioner lacks any probative value in the present matter and we adopt the Administrative Law Judge’s analysis of this document in the determination, which states:

“Contrary to petitioner’s argument, the one-page document submitted merely indicates that the IRS applied an overpayment from 2006 in the amount of \$393.17 to a prior year’s federal tax liability. The document does not indicate the total amount of federal tax paid for 2006, by way of withholding or otherwise, and does not indicate the amount of petitioner’s federal adjusted gross income for that year. The document in no way contradicts the information received by the Division from the IRS establishing that petitioner had federal adjusted gross income of \$36,235.00 for tax year 2006.”

We note also that petitioner has offered no evidence to document his claim that he has submitted forms to the IRS to correct the assertedly erroneous information upon which the notice of deficiency relies or his claim that he successfully made a similar argument to the Division in 2003, i.e., that the IRS had miscategorized payments to him as wages. Such claims, whatever their probative value here, are thus unsubstantiated.

We also agree with the Administrative Law Judge’s rejection of petitioner’s legal argument that he was not an “employee” as defined in IRC (26 USCA) § 3401 (c) and that, therefore, the payments to him by his employer were not wages subject to income tax. IRC (26 USCA) § 3401 (c), which relates to income tax withholding, states that the definition of employee for withholding tax purposes, *includes* government officers and employees, elected officials, and corporate officers. The statute does not purport to *exclude* from the definition persons not listed therein (*see also* IRC [26 USCA] § 7701 [c] [“the terms ‘includes’ and ‘including’ when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined”]). As the Administrative Law Judge pointed out, petitioner’s

argument is premised on a gross misreading of the Internal Revenue Code that has been emphatically rejected by various federal courts and, contrary to petitioner's contention, has been deemed frivolous (*see Taliaferro v Freeman*, 595 Fed Appx 961, 962-63 [11th Cir 2014] [rejecting as frivolous the taxpayer's argument that the federal income tax applies only to federal employees, the court ordered sanctions against the taxpayer up to and including double the government's costs]; *Taliaferro v C.I.R.*, 272 Fed Appx 831, 833 [11th Cir 2008] [rejecting the argument that income tax only applies to the federal government and its employees]; *Motes v United States*, 785 F2d 928 [11th Cir 1986] [rejecting as frivolous a claim that only public servants are subject to tax liability]; *Sullivan v United States*, 788 F2d 813, 815 [1st Cir 1986] [finding taxpayer's argument that he did not receive "wages" because he was not an "employee" within the meaning of IRC (26 USCA) § 3401 (c) meritless, and noting that the word "includes" within that section does not limit withholding to the persons listed therein]; *United States v Latham*, 754 F2d 747, 750 [7th Cir 1985] [holding that the district court did not err in refusing taxpayer's requested jury instructions that the term "employee" under IRC (26 USC) § 3401 (c) does not include privately employed wage earners, the court found that such argument was "inane" and "a preposterous reading of the statute. It is obvious within the context of [the statute] the word 'includes' is a term of enlargement not of limitation, and the reference to certain entities or categories is not intended to exclude all others"]; *Waltner v Commissioner*, TC Memo 2014-35, *affd* 659 Fed Appx 440 [2016]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Clifton is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of John Clifton is denied; and
4. The notice of deficiency dated February 24, 2014 is sustained.

DATED: Albany, New York
January 4, 2018

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner