STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **EDWIN AND JOSEPHINE GORSKI** for Redetermination of a Deficiency or for Refund of Personal Income Tax Under Article 22 of the Tax Law for the Tax Year 2014.	DECISION DTA NO. 829475

Petitioners, Edwin and Josephine Gorski, filed an exception to the determination of the Administrative Law Judge issued on February 3, 2022. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on May 24, 2022, the date that petitioners' reply brief was received.

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

ISSUE

Whether petitioners have established that the Division of Taxation erred in adjusting their federal adjusted gross income for tax year 2014, resulting in additional tax due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 1, 2, 3, 5 and 7, which we have edited for clarity. The modified findings of fact, together with

the facts as determined by the Administrative Law Judge, are set forth below.

1. On or about April 13, 2015, petitioners, Edwin and Josephine Gorski, filed their 2014 New York State resident income tax return, form IT-201 (state return). Petitioners also filed their 2014 federal personal income tax return, form 1040 (federal return), at the same time. Lines 1 through 19 of the state return request information from petitioners' federal return regarding income and federal adjustments. Official notice was taken of the instructions for the state return and of the state return form itself.

2. On their 2014 federal return, petitioners reported their total income as $146,207.56 at line 22. On line 17 of their state return, petitioners reported their total income as $146,206.00. Petitioners reported total adjustments to federal income of $3,763.40 at line 36 of their federal return. However, at line 18 of their state return, "[t]otal federal adjustments to income," petitioners reported $77,563.00 in total adjustments with a note reflecting that this consisted of the $3,763.00 from the federal return plus $73,800.00 from line 11 of the capital gain tax worksheet (worksheet). This resulted in petitioners' federal adjusted gross income (FAGI) being reported as $142,444.16 on their federal return at line 37, but as $68,643.00 on their state return at line 19. A qualified dividends and capital gain tax worksheet was attached to petitioners' federal return. Line 11 of the worksheet states "[s]ubtract line 10 from line 9. This amount is taxed at 0%." The corresponding entry is handwritten in as $73,800.00. On their state return, petitioners also listed an overpayment amount of $4,500.00. Petitioners requested that $2,500.00 of the overpayment be refunded and that $2,000.00 be applied to their 2015 estimated tax.

3. On May 18, 2015, the Division of Taxation (Division) issued an account adjustment notice stating that the refund requested on petitioners' income tax return was $2,500.00 but the refund allowed was $1,500.00. The notice provided that petitioners had overpayments of

$3,500.00 that came from prepayments consisting of $2,000.00 applied from a prior period and an estimated tax payment of $1,500.00. The computations section of the notice provided that $2,000.00 of the prepayments would be applied as estimated tax for the next year leaving $1,500.00 to be refunded. This notice listed petitioners' FAGI as $68,643.00, the amount petitioners reported on line 19 of their 2014 IT-201.

4. On January 23, 2018, the Division issued a statement of proposed audit changes to petitioners. The statement explained that New York State has an exchange of information agreement with the Internal Revenue Service (IRS) where the IRS provides the Division with information reported on taxpayers' federal income tax returns pursuant to Internal Revenue Code (IRC) § 6103 (d). In comparing petitioners' income, exemptions, and itemized deductions reported on their New York State personal income tax return with those reported on their federal personal income tax return, the Division found a discrepancy in petitioners' reported FAGI. The statement provided that "[t]he starting point for computing New York tax is Federal Adjusted Gross Income (FAGI). All sources of income reported on your federal return must be included on your New York State return." The statement then explained that on petitioners' federal income tax return, they reported their FAGI as $142,444.00. However, on petitioners' New York State income tax return, they reported their FAGI as $68,643.00. The statement advised that because of the difference, petitioners owed additional tax to New York State in the amount of $3,377.00 with interest from the due date of the return until the tax is paid in full.

5. On March 12, 2018, the Division issued petitioners notice of deficiency number L-047644184 assessing tax due of $3,377.00 plus interest. Petitioners then requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) appealing the notice. By conciliation order (CMS. No. 000305088), dated May 10, 2019, BCMS

sustained the notice. Petitioners then filed a petition on July 9, 2019, asserting that the Division did not follow Tax Law § 612 (c) and that the notice was not timely served and is defective.

6. On January 19, 2021, the Division requested a certified copy of petitioners' 2014 federal personal income tax return, form 1040, including all attachments from the IRS. On February 25, 2021, the IRS informed the Division that they had no record of the Division's request and could not provide certified copies of federal returns due to the coronavirus pandemic.

7. On March 3, 2021, the Division again requested a copy of petitioners' federal personal income tax return for 2014, and on April 2, 2021, received such return.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by setting forth the relevant provisions of the Internal Revenue Code (IRC) describing the terms "gross income" and "adjusted gross income" for federal income tax purposes, noting that adjusted gross income is gross income less certain deductions (IRC [26 USC] §§ 61 [a] - 62 [a]). She noted that income from capital gains is not among the stated deductions used to compute a taxpayer's FAGI (***see id.***) and therefore should not be deducted.

The Administrative Law Judge next noted that where a notice of deficiency has been properly issued, the taxpayer bears the burden of proving that the proposed deficiency is erroneous. She further noted that the IRS properly acted within its authority when it provided the Division with petitioners' FAGI as reported on their 2014 federal income tax return. The Administrative Law Judge held that petitioners had failed to offer any evidence that their FAGI, as reported on their federal personal income tax return, was incorrect or that they took the proper deductions when reaching a different FAGI on their state personal income tax return.

Accordingly, she found that petitioners had not met their burden of establishing that the notice of deficiency was erroneous.

Turning to the issue of deductions, she explained that lines 23 through 37 of petitioners' federal income tax return, which are under the section labeled "adjusted gross income," listed the federal adjustments to income. These adjustments include the self-employed health insurance deduction petitioners included on line 18 of their state return, but do not include any of the information provided in the worksheet. In addition, the Administrative Law Judge noted that the worksheet should not have been completed until petitioners determined their federal taxable income at line 43 of form 1040.

Next, considering petitioners' argument that the notice was time-barred by a three-year statute of limitations, the Administrative Law Judge explained that Tax Law § 683 [a] provides that, in general, any tax under article 22 must be assessed within three years after the return is filed (***see Matter of Sznajderman***, Tax Appeals Tribunal, July 11, 2016, ***confirmed*** 168 AD3d 55 [3rd Dept 2019]) or after the last day the return was due, whichever is later (Tax Law § 683 [b]). She found that the assessment asserted in the notice of deficiency issued on March 12, 2018 was timely because petitioners' return was filed on April 13, 2015 and thus is deemed to have been filed on April 15, 2015.

Next, she considered petitioners' argument that the state is barred by res judicata from assessing additional tax due after issuing a refund for the same return, noting that this doctrine holds only that once a claim is litigated to final adjudication, all other claims arising out of the same transaction or series of transactions are barred, even if they are based on different theories or seek a different remedy (citing ***O'Brien v City of Syracuse***, 54 NY2d 353, 357 [1981]).

Noting that in petitioners' case, there never was a prior proceeding initiated or concluded for the refund issued for 2014, she found the doctrine inapplicable.

Lastly, the Administrative Law Judge rejected the Division's assertion that because the instructions for the 2014 New York State resident personal income tax return had not been admitted into evidence, petitioners' arguments about them should be given little weight. Instead, she took judicial notice of the New York State instructions for form IT-201 for 2014 as an item either of common knowledge or determinable by referring to a source of indisputable accuracy.

The Administrative Law Judge thus denied the petition and sustained the notice of deficiency.

ARGUMENTS ON EXCEPTION

Petitioners argue generally that their New York State personal income tax return was properly and timely filed and that all instructions, including how to utilize FAGI on their New York State return, were followed correctly. Petitioners also claim that the Division erred in calculating adjusted gross income and had submitted documents "that are questionable in their veracity." Petitioners also contend that, in any event, the entire action is barred because they were not "served timely within the three years required for serving such notification," as they "did not receive the purported notice of March 12, 2018" and the Division was still trying to find "conforming documents" in 2021.

The Division contends that the Administrative Law Judge correctly determined that petitioners were properly assessed a deficiency and that the issuance of the notice of deficiency was not time-barred.

OPINION

At issue is petitioners' interpretation of the instructions for completion of the New York

State personal income tax return. Petitioners contend that the amount calculated on their capital gain tax worksheet at line 11 and taxed at 0% should be considered as a federal adjustment to income for the purposes of determining New York State adjusted gross income. Thus, petitioners argue this amount should, as a result, be subtracted from FAGI for purposes of determining New York State adjusted gross income.

A petitioner bears the burden of proof by clear and convincing evidence that the determination made by the Division was in error (Tax Law § 689 [e]; ***see also Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of Clifton***, Tax Appeals Tribunal, January 4, 2018). Here, petitioners cannot sustain this burden, as they simply incorrectly interpreted and misapplied relevant state and federal tax provisions.

The adjusted gross income of a New York resident is that taxpayer's FAGI subject to certain modifications (Tax Law § 612 [a]). IRC (26 USC) § 62 (a) (1) defines adjusted gross income for federal purposes as an individual's gross income minus certain deductions.

In support of their view that the claimed modification is allowed, petitioners point to the instructions for form IT-201 (2014) and their adherence thereto in filling out their IT-201. The Administrative Law Judge correctly rejected petitioners' contention that they properly followed those instructions. Petitioners could not explain how deduction of capital gains income from gross income is part of the calculation of FAGI. Instead, they seem to have confused the amount of capital gain income exempt from federal tax for their filing status as an adjustment to gross income for purposes of determining FAGI (***see*** IRC [26 USC] former § 1 [h] [1] [B] [describing maximum capital gains rates]). Nonetheless, such a subtraction is not provided by the Tax Law as an adjustment to FAGI for the purposes of determining New York State adjusted gross income

(***see*** Tax Law § 612 [c]). The Administrative Law Judge was correct to conclude that the Division properly assessed an additional $3,377.00 in tax due plus interest, as a result of the difference between the FAGI reported on the state return and the FAGI reported on their federal return.

Petitioners' argument that the Division exceeded the period of limitations on assessment is similarly unavailing. Tax Law § 683 (a) requires that "any tax . . . shall be assessed within three years after the return was filed." In addition, Tax Law § 683 (b) provides that a "return . . . filed before the last day prescribed by law . . . shall be deemed to be filed on such last day." In sum, the Division has three years in which to make an assessment measured from the date on which the return was either due or was filed, whichever is later.

Notably, petitioners do not contend that the Division failed to timely issue a notice of deficiency but rather contend they were not timely "served" because they did not receive it within the three-year period. Petitioners misunderstand the point at which a notice of deficiency is deemed issued under New York law. It is well-settled that "[a] statutory notice is issued when it is properly mailed, and it is properly mailed when it is delivered into the custody of the USPS." (***Matter of Khayer Kayumi***, Tax Appeals Tribunal, November 29, 2018). Petitioners do not make any challenge to the date of issuance, contending only that they did not receive the notice within three years. Accordingly, because the Division issued the notice of deficiency on March 12, 2018, which date is within three years of the date on which petitioners were deemed to have filed their IT-201 for tax year 2014, such proposed assessment was issued within the period provided for under Tax Law § 683 (a).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Edwin and Josephine Gorski is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition Edwin and Josephine Gorski is denied; and

4. The notice of deficiency, dated March 12, 2018, is sustained.

DATED: Albany, New York
November 17, 2022

/s/ Anthony Giardina
Anthony Giardina
President

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

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner