

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**CRAIG CURLEY** : DETERMINATION  
for Redetermination of a Deficiency or for Refund of New : DTA NO. 825923  
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 2007. :  
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Petitioner, Craig Curley, 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 2007.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in New York, New York, on December 17, 2014 at 10:30 A.M. All briefs were to be submitted by February 18, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

***ISSUE***

Whether petitioner owes additional personal income tax due to amounts reported on a federal form 1099-A, which reports acquisition or abandonment of secured property.

***FINDINGS OF FACT***

1. Due to severe financial problems resulting from a failed business venture, petitioner was forced to leave his home in 2006 located at 423 Skyline Drive in Staten Island, New York. Petitioner had lived at this address since 2001.

2. In late 2005 or 2006, petitioner refinanced the mortgage on his 423 Skyline Drive home in order to finance his business venture. Petitioner did not recall the lending institution with whom he refinanced, thinking it was not as important as obtaining a bridge loan for his new business venture. Although he believed it may have been Countrywide, the company that reported the property abandonment was Residential Credit Solutions of Fort Worth, Texas.

3. Petitioner had experience with mortgages working for the East River Savings Bank and then for the Resolution Trust Company. He held the position of bank officer, with experience in foreclosures and residential portfolios, but noted that foreclosures were more the exception than the rule and that repayment agreements were emphasized while he worked in the industry.

4. In 2006, after his business venture failed, petitioner was unable to meet his mortgage obligation. He had no sources of income and abandoned the 423 Skyline Drive property, finding himself homeless for a period of time. Since he was without any source of income, he did not attempt to contact his lender to negotiate a repayment agreement.

5. For the year 2007, petitioner did not file a New York State personal income tax return, despite wage income of \$17,177.00 and unemployment compensation of \$7,290.00. In addition, the wage and income transcript prepared by the Internal Revenue Service and shared with the Division of Taxation (Division) indicated additional imputed income from his abandonment of the 423 Skyline Drive property.

6. The form 1099-A issued by Residential Credit Solutions of Fort Worth, Texas, petitioner's lending institution, was filed with the Internal Revenue Service (IRS) and sent to petitioner in care of a prior employer, Interglobe Communications of Staten Island, New York, for whom petitioner last worked in 2004. It notified the IRS that either the lender had gained knowledge of petitioner's abandonment of the property at 423 Skyline Drive, or had acquired the secured property, on February 21, 2007. It listed the balance of principal outstanding on the mortgage as \$233,078.00 and the fair market value of the property as \$237,250.00. Also, it noted that petitioner was personally liable for the repayment of the debt.

7. One of the sources of federal information upon which the Division determined additional tax was a three-page document entitled Wage and Income Transcript. It identified various documents related to petitioner for the year 2007, including his wages reported on a form W-2 from Broadview Networks Holdings, Inc., and unemployment compensation reported on a form 1099-G by the New York State Department of Labor. His W-2 income was reported as \$17,177.00 and his unemployment compensation as \$7,290.00. In addition, the wage and income transcript reported information from a form 1099-A, Acquisition or Abandonment of Secured Property.

8. A second source utilized by the Division was a document entitled Historical Wage Reporting, which indicated that petitioner received \$17,177.46 in 2007 from Broadview Networks Holdings, Inc., in 2007.

9. The third source utilized by the Division to determine petitioner's 2007 income was a document entitled IRMF Payments by Payee. The Division's representative was unable to explain what the acronym IRMF meant and there was no other elaboration on or foundation provided for the form.

The IRMF form reflected petitioner's wages from Broadview Networks Holdings, Inc., in the sum of \$17,177.00 and his unemployment earnings of \$7,290.00. However, the form also listed a payment to petitioner in the sum of \$233,078.00 for the tax year 2007 by Residential Credit Solutions, without further explanation, other than a segment heading on the form entitled "Misc documents." No testimony or supporting documentation was offered to explain the IRMF or the "payment" by Residential Credit Solutions to petitioner.

10. The Division issued a statement of proposed audit changes, dated July 17, 2012, which informed petitioner that the Division had received information from the IRS indicating that he had sufficient income in 2007 to be required to file a New York State income tax return, and that the Division did not have a record of his filing a return. Specifically, the Division informed petitioner that it had determined his income from federal 1099 income, wages, interest, dividends, capital gains and other sources of income.

11. In the statement of proposed audit changes, the Division computed federal adjusted gross income (FAGI) from the information it had received from the IRS. The FAGI, \$257,545.00, appears to be the sum of wage income of \$17,177.00, unemployment earnings of \$7,290.00 and miscellaneous income of \$233,078.00 as reported on the 1099-A, but the statement of proposed audit changes did not elaborate upon its calculation of FAGI.

12. The statement of proposed audit changes computed additional personal income tax due in the sum of \$24,851.00, interest and penalties for late filing, negligence and additional penalty pursuant to Tax Law § 685(b)(2).

13. The Division issued to petitioner a Notice of Deficiency, dated September 4, 2012, which asserted additional personal income tax for 2007 in the sum of \$24,851.00, plus penalties and interest.

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

14. The Division argues that it properly relied on the federal information it received to assert additional personal income tax for 2007, including the miscellaneous income of \$233,078.00 from form 1099-A. The Division's position is based on language from federal publication 523, which states that an individual may have ordinary income upon abandonment of secured property, where the home secures a debt for which the individual is personally liable and the debt is canceled.

The Division contends that the burden of proof is upon petitioner to prove that its notice of deficiency was improper or erroneous and has failed to do so.

15. Petitioner concedes that if the debt had been forgiven he would owe tax on the amount of the debt forgiven. However, petitioner maintains that the Division has no basis for its conclusion that the debt was forgiven and should not have included it in its computation of FAGI. Petitioner argues that he has never received notice that his debt was canceled by Residential Credit Solutions and believes it to be in force currently.

***CONCLUSIONS OF LAW***

A. A properly issued notice of deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Kourakos v. Tully*, 92 AD2d 1051 [1983], *appeal dismissed* 59 NY2d 967 [1983], *lv denied* 60 NY2d 556 [1983], *cert denied* 464 US 1070 [1984]; *Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759 [1980]; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner.

Accordingly, it is necessary to ascertain whether petitioner has sustained his burden of proof in showing that he is entitled to any modification of the deficiency asserted by the Division for the year 2007.

B. Based on information the Division received from the IRS, the Division became aware that petitioner had not filed a personal income tax return for the year 2007, despite receiving income that required him to do so. The starting point for determining New York personal income tax liability is the taxpayer's FAGI (Tax Law § 612 [a]; 20 NYCRR 112.1). In this matter, the FAGI was not provided by the IRS, but the Division utilized information it received from the IRS to calculate it.

The Division took the three items listed on the federal wage and income transcript and added them together to determine petitioner's FAGI, i.e., it added the \$17,177.00 in wages, the \$7,290.00 in unemployment earnings and the mortgage balance of \$233,078.00 listed on the form 1099-A. Petitioner does not dispute the first two items of income, but directly challenges the Division's inclusion of the mortgage balance on the basis that there has never been a forgiveness of indebtedness with respect to the mortgage that would have yielded ordinary income to him.

C. The Division's reliance on the information in the wage and income transcript received from the IRS appears to be based solely on the language in IRS Publication 523, Selling Your Home, which states the following:

“Abandonment. If you abandon your home, you may have ordinary income. If the abandoned home secures a debt for which you are personally liable and the debt is canceled, you have ordinary income equal to the amount of canceled debt.

If the home is secured by a loan and the lender knows the home has been abandoned, the lender should send you a Form 1099-A or Form 1099-C. See Foreclosure or repossession, earlier, for information about those forms.”

The earlier discussion of the forms in Publication 523 states the following:

“Form 1099-A and Form 1099-C. Generally, you will receive Form 1099-A, Acquisition or Abandonment of Secured Property, from your lender if your home is transferred in a foreclosure. This form will have the information you need to determine the amount of your gain or loss and any ordinary income from cancellation of debt. If your debt is canceled, you may receive Form 1099-C, Cancellation of Debt.”

D. Since the Division relied heavily on the issuance of the form 1099-A by petitioner’s lender, it is instructive to analyze both the 1099-A and 1099-C. It is not disputed by the parties that cancellation of debt results in income to the debtor and is considered ordinary income (IRC § 61[a][12]), with the exception of certain exclusions set forth in IRC § 108 that were not raised, argued or otherwise supported by petitioner.

Internal Revenue Code (IRC) § 6050P provides for returns relating to the cancellation of indebtedness by certain entities. IRC § 6050P(a) provides that “any applicable entity which discharges (in whole or in part) the indebtedness of any person during any calendar year shall make a return (at such time and in such form as the Secretary may by regulations prescribe) . . . .”

Pursuant to IRC § 6050P(c)(2)(D), Residential Credit Solutions was an applicable entity subject to the filing requirement because it was an organization of which lending money was a significant part of its trade or business.

The regulation at Treas Reg § 1.6050P-1(a)(1) provides that any applicable entity that discharges an indebtedness of any person must file an information return on Form 1099-C with the Internal Revenue Service. Form 1099-C contains the creditor’s name and address, the debtor’s name and address, the debt description, the amount of the debt discharged, if the debtor was personally liable for the debt and the fair market value of the property.

The instructions published by the IRS for forms 1099-A and 1099-C address the coordination between the forms and note that “[i]f, in the same calendar year, you cancel a debt

of \$600 or more in connection with a foreclosure or abandonment of secured property, it is not necessary to file both [forms]. You may file Form 1099-C only. You will meet your Form 1099-A filing requirement for the debtor by completing boxes 4, 5, and 7 on Form 1099-C.”

Form 1099-A, relied on by the Division to attribute \$233,078.00 in cancellation of debt income to petitioner for 2007, is required to be filed by an applicable entity when that entity acquires an interest in property that is security for the debt of the borrower or when the applicable entity has reason to know that the property has been abandoned. Significantly, it is an informational return that does not report the cancellation of debt. Applicable entities file the form to inform the IRS that they have acquired an interest in the property that is secured by the debt, which debt has been fully or partially satisfied thereby. The form is also filed by an applicable entity when it has reason to know that the property securing the debt has been abandoned. (IRC § 6050J[a][2].) The evidence submitted by the Division does not demonstrate which event was being reported. More importantly, the Division appears to have confused the applicable entity’s report of acquiring an interest in petitioner’s property or his abandonment of same with a discharge of indebtedness, for which the Division has submitted no evidence. As noted herein, any discharge of indebtedness would have required the applicable entity to file a form 1099-C. (Treas Reg § 1.6050P-1[a][1].) The Division’s use of the outstanding balance of principal on petitioner’s mortgage as reported on the form 1099-A to determine additional income was in error and precludes a finding that there was a rational basis for the assertion of additional income tax based on that principal balance. As such, the notice of deficiency must be modified to reflect the elimination of the amount of the balance of principal on petitioner’s mortgage as reported on the form 1099-A. Petitioner, a nonfiler, remains liable for the tax due on his wages and unemployment earnings, plus applicable penalty and interest.



E. It is noted that this determination considered but did not ascribe much weight to the IRMF attached to the advocate's report of the Bureau of Conciliation and Mediation Services conference. Without any foundation or other explanation of said document's contents, it was impossible to discern if it had any relevance to the issue herein. Further, the Division did not mention the IRMF in its brief and instead specifically stated that it relied on the information from the wage and income transcript in asserting the tax, further underscoring the irrelevance of the IRMF in this matter.

\_\_\_\_ F. The petition of Craig Curley is granted to the extent set forth in Conclusion of Law D and the Division is directed to recompute the deficiency, penalties and interest consistent therewith; in all other respects the petition is denied, and the Notice of Deficiency, dated September 4, 2012, as so modified, is sustained.

DATED: Albany New York  
July 9, 2015

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE