STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

OSEI BONSU BOATENG :

for Redetermination of a Deficiency or for Refund of :
Personal Income Tax and Yonkers Income Tax Surcharge
under Article 22, 30A & 30B of the Tax Law :
for the Years 2000 through 2005.
:

DETERMINATION
DTA NO. 827289

Petitioner, Osei Bonsu Boateng, filed a petition for redetermination of a deficiency or for refund of personal income tax and Yonkers income tax surcharge under Articles 22, 30A and 30B of the Tax Law for the tax years 2000 through 2005.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on November 15, 2016, with all briefs to be submitted by March 24, 2017, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

ISSUE

Whether petitioner has established that the notice of deficiency issued to him, on the basis of a restitution order that reflected the amount of money that petitioner misappropriated from his employer, should be canceled or modified.

FINDINGS OF FACT

1. On or about March 28, 2006, the Revenue Crimes Bureau (now named the Criminal Investigations Division or CID) of the Division of Taxation (Division) opened a case to investigate petitioner, Osei Bonsu Boateng (also known as Daniel Otchere). CID received a criminal referral with respect to petitioner from the Office of the New York County District Attorney (DA) for tax-related offenses based upon criminal charges of larceny.

2. On April 11, 2006, representatives from the DA's office met with representatives from the Division to discuss the criminal investigation. At this meeting, the Division was provided with spreadsheets of bank account details that the DA determined were used to embezzle funds. These bank accounts included (1) Amalgamated Bank-Educational Applications, Account 01153220; (2) North Fork Bank - Advanced Training and Assessment, Account 6569700526; (3) North Fork Bank - Consortium of Worker Education, Account 6569700534; (4) Citibank - Daniel Otchere, Account 66474962; and (5) Chase Manhattan Bank - Emma Bremtuo, Account 053-0686579-65.

3. These bank account spreadsheets were further analyzed for the tax years 2000 through 2005 to determine what embezzled funds could be directly attributed to petitioner as income. The breakdown of yearly income attributable to petitioner was based on the fact that he was the payee of checks drawn on these accounts.

4. The auditor for the criminal case prepared a report for referral based upon the analysis of yearly income in conjunction with her review of the New York State personal income tax returns filed by petitioner. The auditor reviewed forms IT-201 filed by petitioner for the years 2000 through 2004. There is no record of petitioner filing a tax return for the year 2005. The

embezzled income was not reported on petitioner's filed income tax returns. The audit report was then reviewed by supervisors within CID and a referral was sent, on April 27, 2006, to the DA for prosecution.

5. On May 23, 2007, petitioner pled guilty to charges including grand larceny in the first degree. On August 27, 2007, petitioner was sentenced for his crimes as follows:

> "Indictment 380/2006 grand larceny in the first degree, a sentence, indeterminate years a term of four to twelve years; on the second count, first degree grand larceny four to twelve years, those to run concurrent with each other; on indictment number 2434/2006; defendant pled guilty to grand larceny in the first degree; a sentence of four to twelve years; his admission of guilt to four counts of falsifying business records a sentence of one to three years; each of those counts conspiracy in the fifth, a sentence of one year definite; all sentences to run concurrent with each other with the sentences imposed on the previous indictment. As to restitution . . . I am ordering restitution in the amount of five million six hundred and three thousand one hundred and fifty-three dollars and three cents."

CID closed the case following the DA's plea agreement with petitioner. The court's restitution order did not include taxes owed by petitioner to New York State.

6. CID opened a civil audit to process an assessment for additional New York State and City personal income tax owed for tax years 2000 through 2005 based upon the unreported income revealed pursuant to CID's analysis of the bank schedules provided by the DA. On October 13, 2010, the case was assigned to an auditor who uploaded an assessment for additional New York State and City personal income tax owed by petitioner for the tax years 2000 through 2005.

7. A notice of deficiency, assessment #L-036226781, dated June 6, 2011, was issued to petitioner for additional tax in the amount of $113,854.00 plus fraud penalty and interest for a total amount of $283,387.14. The Division assessed petitioner based upon his guilty plea to the

charges of grand larceny which is an admission that he received unreported income of $953,357.00 from his involvement in the embezzlement scheme against his former employer, the Consortium for Worker Education, Inc., during the tax years 2000 through 2005. As these crimes involve fraudulent actions, the Division imposed a fraud penalty.

8. Petitioner testified at the hearing. He submitted into evidence a page of computations that were part of the statement of proposed audit changes that was issued to him by the Division for the tax years at issue. This statement breaks down the tax and interest for both the state and city for the years 2000 through 2005. He testified that he does not dispute the amount of tax assessed, but does not agree with the amounts of the fraud penalty and the interest assessed. Petitioner testified that, although he was guilty of the crimes charged against him, there were others involved in the embezzlement scheme. As such, he argues that each individual involved should be liable for a portion of the civil tax assessment, not just him. He also stated that the amounts of fraud penalty and interest are excessive since the crimes took place from 2000 through 2005, but that the notice of deficiency was not issued until June 6, 2011.

9. Attached to petitioner's brief in support of his petition were copies of certain documents that were not submitted into evidence at the hearing. Moreover, no request was made at the hearing to keep the record open in order to submit further evidence. Therefore, these documents were not considered in rendering this determination (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

CONCLUSIONS OF LAW

A. When the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice, and the burden of proof is on the taxpayer to demonstrate that

the deficiency assessment is erroneous by clear and convincing evidence (***see Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759 [3d Dept 1980]). In contrast, in order to impose the fraud penalty pursuant to Tax Law § 685(e) with respect to the asserted deficiency for the five years at issue herein, the Division has the burden of establishing fraud by petitioner. Furthermore, Tax Law § 683(a) provides that any tax under Article 22 shall be assessed within three years after the return was filed with the exception of those situations where the return is a false or fraudulent return for which assessment can be made at any time (Tax Law § 683[c][1][B]). As noted in Finding of Fact 7, the Notice of Deficiency was dated June 6, 2011, so that the period of limitations of three years for assessment would have run unless petitioner's returns for the years at issue were false or fraudulent returns. Consequently, the Division had the burden to establish fraud on the part of petitioner in the first instance.

B. The Tax Appeals Tribunal has explained the standard for the determination of fraud on the part of a taxpayer as follows:

> "For the Division to establish fraud by a taxpayer, it must produce 'clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing'" (***Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000).

C. Here, as noted in Finding of Fact 5, petitioner entered a guilty plea to the indictments, admitting his role in embezzling funds from his then employer. Funds obtained through theft or other illegal means have long been recognized to be includable in gross income, even if the wrongdoer had an obligation to return the funds to the rightful owner (***James v. United States***, 366 US 213 [1961]). The Penal Law does not limit civil liability for damages to the amount of restitution ordered (Penal Law § 60.27[6]; ***see Matter of N.T.J. Liqs.***, Tax

Appeals Tribunal, May 7, 1992). The Division may issue a notice of deficiency for tax it determined was due based on the income realized as the fruits of criminal conduct; it is not limited by the amount of restitution ordered by the sentencing court in making its own determination of tax due on ill-gotten gains (***see Matter of Miras***, Tax Appeals Tribunal, October 22, 1992; ***see also Matter of N.T.J. Liqs.***). It is petitioner's burden to show by clear and convincing evidence that the amount of tax and interest assessed is incorrect (Tax Law § 689 [e]).

As the Division points out, petitioner, upon advice of counsel, entered a guilty plea and confirmed that he understood he would be held responsible for the misappropriation of $5,633,153.33 from his employer. The Division had access to detailed bank records which were used in its analysis and reports to the DA and which ultimately formed the basis for the notice of deficiency. Petitioner's guilty plea to multiple charges of grand larceny, taken together with CID's analysis of the transactions between petitioner and his employer clearly establishes fraud (***see Matter of N.T.J. Liqs.***). Therefore, it is determined that the Division has proven fraud and that the notice as issued to petitioner was proper.

D. In this case, petitioner does not argue that the amount of tax assessed to him is erroneous. Instead, petitioner argues that the amount of fraud penalty and interest is excessive, especially in light of the fact that he asserts there were other individuals involved in the embezzlement scheme, and he argues that they should also bear an appropriate portion of the outstanding tax liability. This argument is without merit.

Penalties, constituting an addition to tax, are assessed, collected and paid in the same manner of taxes (Tax Law § 685 [*l*]). If any part of a deficiency is due to fraud, there shall be a penalty addition equal to twice the deficiency (***see*** Tax Law § 685 [e][1]). Since the Division

has demonstrated fraud, the imposition of the fraud penalty was proper.

E. Petitioner argues that statutory interest should be waived because his criminal activity took place during the time frame of 2000 through 2005, and that the notice of deficiency was not issued to him until 2011. Petitioner argues that interest should not accrue beginning with the tax year 2000, but much later. It is noted that interest on an underpayment of tax due is required by law (***see*** Tax Law § 684). Interest is properly computed from the payment due date to the date paid in full (***see Heller v. State of New York***, 180 AD2d 299 [3d Dept 1992], ***affirmed*** 81 NY2d 60 [1993]).

The facts demonstrate that petitioner filed New York personal income tax returns for 2000 through 2004, and he failed to file in 2005. As a consequence of his embezzlement, he underreported his income for the entire period 2000 through 2005. The amount of interest due on an underpayment of tax is determined by a function of the amount of the deficiency, the date such tax was due and the date that the deficiency is paid in full (Tax Law § 684). Since petitioner received income due to the embezzlement, beginning with the tax year 2000, interest is properly accrued beginning with the due date for the 2000 tax return. Therefore, the interest as calculated was proper.

F. The petition of Osei Bonsu Boateng is denied and the Notice of Deficiency, #L-036226781, dated June 6, 2011, is sustained.

DATED: Albany, New York
September 21, 2017

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE