STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANDREW I. WALZER	:	DETERMINATION DTA NO. 827327
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 2008.	:	

Petitioner, Andrew I. Walzer, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the year 2008.

On June 6, 2017 and June 7, 2017, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by December 18, 2017. On November 20, 2017, the Division of Taxation brought a motion seeking summary determination in the above-referenced matter pursuant to Tax Law § 2006.6 and § 3000.9 (b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner had until December 20, 2017 to file a response to the Division's motion.[1] Pursuant to 20 NYCRR 3000.5 (d), the time period for the issuance of this determination was extended to six months. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Barbara J. Russo, Administrative Law Judge, renders the following determination.

[1] Petitioner did not respond to the Division's motion but submitted documents in accordance with the previously established submission schedule. As such, petitioner's submissions dated August 21, 2017 and September 22, 2017 will be considered in this determination.

ISSUE

Whether the Division of Taxation has established that summary determination is warranted upon the basis that there are no material and triable issues of fact presented, such that, as a matter of law, a determination can be made in its favor.

FINDINGS OF FACT

1. On October 24, 2012, the Division of Taxation (Division) sent an inquiry letter to petitioner, stating, in part,

> "We haven't received your New York State income tax return for tax year 2008. Information provided to us indicates you filed a federal tax return for the year(s) indicated, were either: (1) a NY resident or (2) a non-resident with New York source income and may have a filing responsibility with New York State. Section 6103(d) of the Internal Revenue Code allowed us to obtain information from the Internal Revenue Service."

The letter requested that petitioner respond within 30 days by either filing a return or explaining why he did not have to file.

2. On January 14, 2014, the Division issued to petitioner a statement of proposed audit changes for tax year 2008, assessment identification number L-040663953, stating in part:

> "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."

The Division used federal information and computed petitioner's tax as a New York State resident. The Division's computation asserted tax due of $2,430.00, plus penalty and interest.

3. The Division issued a notice of deficiency, notice number L-040663953, dated April 2, 2014, asserting tax due of $2,430.00, plus penalty and interest for tax year 2008.

4. On or about May 12, 2014, petitioner filed a 2008 New York nonresident and part-year resident income tax return and a request for conciliation conference with the Bureau of Conciliation and Medication Services (BCMS) in protest of notice number L-040663953.

5. The Division sent petitioner correspondence, dated August 5, 2014, in response to petitioner's late-filed New York return and request for conciliation conference. The correspondence stated that the estimated assessment should be canceled and that under a separate cover, petitioner would receive information based on the processing of his late-filed 2008 return. The correspondence further stated that petitioner's return was subject to audit review.

6. Petitioner and the Division signed a withdrawal of protest, on September 5, 2014 and September 15, 2014, respectively, withdrawing the protest for notice number L-040663953 and indicating that said notice would be canceled. Notice number L-040663953 is not at issue in the present matter.

7. On September 24, 2014, the Division issued to petitioner a statement of proposed audit changes for tax year 2008, stating, in part, as follows:

> "We have received your late filed 2008 New York State personal income tax return.
>
> This assessment has been issued to replace your previous assessment for 2008, L-040663953-3.
>
> Based on all available information, you are considered a New York State resident and are taxed on all the income reported on your federal income tax return.
>
> Information furnished by the Internal Revenue Service under authorization of section 6103(d) of the Internal Revenue Code indicates that your federal adjusted gross income was $82,824.00, rather than $63,606.00, as reported on your New York return.
>
> According to available information, your federal filing status is Single. In nearly all cases, you must use the same filing status on your New York return that you used on your federal return.

> According to available information, your total federal itemized deduction was $39,967.00. A portion of your federal itemized deduction was for state and local income tax in the amount of $1,428.00. State and local income tax must be subtracted from your federal itemized deduction in order to calculate your New York itemized deduction. You have been allowed the college tuition itemized deduction of $20,000.00 as part of your New York itemized deduction. Therefore, your correct New York itemized deduction is $58,539.00. You have been allowed the appropriate New York itemized deductions.
>
> You have been allowed the correct exemption amount."

The statement of proposed audit changes asserted tax due in the amount of $1,060.00, plus penalty and interest.

8. The Division issued a notice of deficiency, notice number L-041897068, dated November 10, 2014, asserting tax due in the amount of $1,060.00, plus penalty and interest.

9. Petitioner requested a conciliation conference with BCMS, which was conducted on May 20, 2015. During proceedings with BCMS, petitioner provided the following:

1) a copy of his New York drivers license issued on September 28, 2008;

2) an invoice dated April 20, 2006 from NJ-AISC;

3) a New Jersey insurance identification card with expiration date October 16, 2004;

4) a New Jersey vehicle registration with expiration date October 2004;

5) a New Jersey insurance identification card with expiration date October 16, 2006;

6) New Jersey vehicle registration cards in the name of Paola Colombo with expiration dates of December 2004 and 2006;

7) co-op certificate and lease assignment in the name of Paola Colombo, dated August 23, 2007, for an apartment in Fort Lee, New Jersey; and

8) correspondence regarding petitioner's father's retirement and military service.

10. The Division's auditor obtained information from New Jersey stating that there was no record of petitioner filing a 2008 New Jersey resident return.

11. Information in the Division's audit file indicates that petitioner owned a residence in Blauvelt, New York, in 2008 and during prior and subsequent years.

12. On August 21, 2015, BCMS issued a conciliation order sustaining notice number L-041897068.

13. Petitioner submitted an amended U.S. Individual Income Tax Return for tax year 2008, purporting to reduce his federal adjusted gross income from $82,824.83 to $62,696.61. Petitioner did not submit any evidence to substantiate the claimed reduction in federal adjusted gross income, and did not submit any evidence regarding his residency status in 2008.

CONCLUSIONS OF LAW

A. A motion for summary determination "shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented" (20 NYCRR 3000.9 [b] [1]). Section 3000.9 (c) of the Rules provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853 [1985], citing ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]). As summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v Tri-Pac Export Corp.***, 22 NY2d 439, 441 [1968]; ***Museums at Stony Brook v Village of Patchogue Fire Dept.***, 146 AD2d 572 [2d Dept 1989]). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided

on a motion (***Gerard v Inglese***, 11 AD2d 381, 382 [2d Dept 1960]). "To defeat a motion for summary judgment, the opponent must . . . produce 'evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim'" (***Whelan v GTE Sylvania***, 182 AD2d 446, 449 [1st Dept 1992] citing ***Zuckerman***).

B. Petitioner has failed to present any evidentiary proof to defeat the Division's motion. Although petitioner alleges that his federal adjusted gross income should be reduced from $82,824.83, as originally reported, to $62,696.61, he has not presented any evidence to support such reduction, beyond his unsubstantiated arguments. Petitioner has likewise failed to present any evidence to dispute that he was a New York resident for 2008. Petitioner's unsubstantiated allegations or assertions are insufficient to raise an issue of fact (***see Matter of Alvord & Swift v Muller Constr. Co.***, 46 NY2d 276 [1978]).

As the Division correctly notes, determinations made in a notice of deficiency are presumed correct, and the burden of proof is upon petitioner to establish, by clear and convincing evidence, that those determinations are erroneous (***see Matter of Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***see also*** Tax Law § 689 [e]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (***see Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842 [3d Dept 1986]). There is a presumption of correctness of a notice of deficiency that has been properly issued under the Tax Law (***see Matter of Tavolacci v State Tax Commn.***, 77 AD2d 759 [3d Dept 1980]). A taxpayer who fails to present any evidence to show that the notice of deficiency is incorrect surrenders to this presumption (***id.***). Petitioner has not presented any cogent or credible evidence to substantiate his claim that the statutory notice is incorrect and has not demonstrated any error

made by the Division in calculating his tax liability for the year 2008 (***see*** Tax Law § 689 [e]). The deficiency of tax for the year at issue is therefore sustained.

C. The Division's motion for summary determination is hereby granted, the notice of deficiency dated November 10, 2014 is sustained, and the petition is denied.

DATED: Albany, New York
May 31, 2018

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE