

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JERRY AND RIKKI WEINER : DETERMINATION
 : DTA NO. 827337
 :
for Redetermination of a Deficiency or for Refund of :
Personal Income Tax under Article 22 of the Tax Law :
for the Year 2011. :
:

Petitioners, Jerry and Rikki Weiner, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2011.

A formal hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York, on April 28, 2017, with all briefs to be submitted by September 13, 2017, which date began the six-month period for the issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly treated income amounts reported on forms 1099-INT as interest income for the tax year 2011.

FINDINGS OF FACT

1. Petitioner Jerry Weiner and his deceased wife, Ruthellyn Weiner, were retirees from their employment with the New York City Public School system.¹

¹Subsequent to their respective retirements, Ruthellyn Weiner passed away. The income that is at issue in this proceeding is a direct result of moneys received after Ruthellyn's death that were paid to Mr. Weiner as a surviving spouse entitled to receive Ruthellyn Weiner's retirement benefit. Petitioner Rikki Weiner is named as a

2. Both Mr. Weiner and Ruthellyn Weiner applied for and received pension benefits from the New York State Teachers' Retirement System (TRS).

3. There were two components to the calculation of a retiree's pension benefits: the amount of their regular salary as employees and the amount of per session pay. "Per session pay" refers to compensation earned by TRS members for the performance of duties prior to retirement on a "per session" basis in addition to the regular academic workload such as after-school activities or during the summer.

4. At the time of their retirement, the TRS did not view the per session pay to be included in the computation of a retiree's pension benefits. Because of this characterization, a class-action lawsuit was commenced in order to have these per session payments included in the calculation of pension benefits.

5. At the conclusion of the legal proceedings, the per session payments were deemed a pension benefit and petitioners' pension benefits were recalculated to include these payments. On May 26, 2011, the TRS sent correspondence to Mr. Weiner that explained the settlement of the class-action lawsuit and how it would affect his pension benefits. This correspondence advised Mr. Weiner that his monthly pension benefit would increase. Additionally, it states that:

"you are also entitled to receive a retroactive adjustment of all monthly benefits paid to you, as the continuing beneficiary to the pension, since the date your benefit entitlement began. This retroactive payment includes interest at the rate of 5% simple interest per year. The amounts of your retroactive payment and the interest on that payment are also shown on the enclosed 'Class Participant Date Statement' (emphasis supplied)."

Enclosed with this correspondence was a recalculation of pension benefits due Mr. Weiner, as a surviving spouse of Ruthellyn Weiner. The retroactive adjustment period for Ruthellyn

Weiner's pension benefits was August 30, 1996 through April 30, 2011 and simple interest at the rate of 5% per year was calculated as follows:

Additional benefit due retroactively: less	\$38,066.24
Overpayment offset:	\$ 0.00
Net benefit due retroactively:	\$38,066.24
Interest on net benefit:	\$ 8,811.39
Total amount of one-time retroactive adjustment	\$46,877.63

6. Subsequently, on July 18, 2011, the TRS sent correspondence to Mr. Weiner that set forth the adjusted calculation of his pension benefits and what he could expect to receive in both retroactive payments and in his future monthly payments due him from the TRS. This correspondence set forth his retroactive adjustment period from July 1, 1997 through June 30, 2011. The adjustment noted that simple interest at the rate of 5% per year was applied.

Additional benefit due retroactively: less	\$38,592.96
Overpayment offset (if any):	\$ 0.00
Net benefit due retroactively:	\$38,592.96
Interest on net benefit:	\$13,587.95
Total amount of one-time retroactive adjustment	\$52,180.91

7. The TRS issued forms 1099-INT to Mr. Weiner for the calendar year 2011 in the amounts of \$8,811.39 and \$13,587.95, which represent the interest payments on the net benefits outlined in findings of fact 5 and 6.

8. On or about April 16, 2012, petitioners jointly filed form IT-201 New York State resident income tax return for the tax year 2011. On line 10 of the tax return, petitioners reported pension income in the amount of \$181,650.00. On line 26 of the tax return, petitioners reported a

New York subtraction of \$204,049.00 in public pension income excludable from taxable income. This amount of \$204,049.00 included the two payments made in 2011 under the class-action settlement in the amount of \$22,399.34 that represented the interest payments of the retroactive benefit payment.

9. The 2011 tax return was selected by the Division of Taxation (Division) to review the taxability of the amount of excludable public pension income in excess of the amount of public pension income received by Mr. Weiner.

10. After reviewing the information and corresponding with petitioners regarding the interest income issue, the Division issued a notice of deficiency, assessment number L-042323043, dated April 3, 2015, assessing additional tax and interest in the amount of \$2,946.89, reflecting adjustments made to include the interest income of \$22,339.00 as taxable income.²

11. On April 23, 2015, petitioners timely requested a conciliation conference with the Bureau of Conciliation and Mediation Services. The conciliation conferee issued a conciliation order, CMS Number 266242, dated October 30, 2015, sustaining the notice of deficiency.

12. Thereafter, on November 19, 2015, petitioners filed a timely petition with the Division of Tax Appeals.

13. Mr. Weiner testified at the formal hearing in this matter. Despite the correspondence sent to him from the TRS outlining the terms of the settlement agreement and the retroactive adjustments made to him, Mr. Weiner testified that the amounts characterized as interest income

²Ironically, on April 28, 2017, the date of the formal hearing, petitioners received notice from the Collections & Civil Enforcement - Offset Unit of the Division that their overpayment of income tax for the year 2016 was applied against the notice of deficiency at issue in this proceeding in the amount of \$2,818.00. Additionally, on May 12, 2017, petitioners remitted payment in the amount of \$771.88, which satisfied the notice of deficiency in full. Therefore, the petition will be treated as a claim for refund.

to him should not be deemed interest income payments. Mr. Weiner stated that if the per session pay had been originally included in his retirement benefit calculation, the money would not have been taxable. Moreover, he stated that the amount of the retroactive adjustment payment, if paid from the beginning, could have been invested, which would have earned them a larger interest rate than the simple rate of 5% as applied by the TRS.

CONCLUSIONS OF LAW

A. When the Division properly issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to such notice (*Matter of Hickey*, Tax Appeals Tribunal, August 12, 2004; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). The taxpayer bears the burden of proving, by clear and convincing evidence, that the assessment is erroneous (Tax Law § 689 [e]).

The instant matter involves the New York subtraction modification for certain pension income. Tax Law § 612 (a) provides that the adjusted gross income of a resident individual is his federal adjusted gross income with certain addition and subtraction modifications provided for in subsections (b) and (c) of Tax Law § 612. The specific subtraction modification at issue in this matter is set forth at Tax Law § 612 (c) (3) (i), which provides that a taxpayer's federal adjusted gross income is to be reduced for "[p]ensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes."

B. The specific income in dispute emanates from two forms 1099-INT that were issued to Mr. Weiner as interest income, calculated at the rate of 5% per year, on retroactive pension benefits that were due and owing to him pursuant to a class-action settlement. Mr. Weiner was informed, by written correspondence, of the retroactive payment adjustments made on behalf of

his pension and that of Ruthellyn Weiner. The interest payments were set forth in the correspondence and were paid to Mr. Weiner. Subsequently, the TRS issued to Mr. Weiner forms 1099-INT reflecting the interest income payments made to him. Petitioners' argument that these payments were not interest income contradicts the evidence presented herein. As such, petitioners have failed to prove that they are entitled to a refund (*Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [3d Dept 1981]).

C. The petition of Jerry and Rikki Weiner is denied, the notice of deficiency, assessment number L-042323043, dated April 3, 2015 is sustained and the claim for refund is denied.

DATED: Albany, New York
March 8, 2018

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE