

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| VITO MANENTE | : | DETERMINATION |
| | : | DTA NO. 828942 |
| | : | |
| for Redetermination of Deficiency or for Refund | : | |
| of Personal Income Tax under Article 22 of the Tax Law | : | |
| for the Years 2016 and 2017. | : | |

Petitioner, Vito Manente, filed a petition for redetermination of deficiency or for the refund of personal income tax under article 22 of the Tax Law for the years 2016 and 2017.

A hearing was held before Nicholas A. Behuniak, Administrative Law Judge, in New York, New York on February 24, 2020, with all briefs to be submitted by January 7, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

ISSUE

Whether petitioner may exclude certain income that is reflected in his federal adjusted gross income from his New York State personal income tax return.

FINDINGS OF FACT

1. Petitioner, Vito Manente, is a resident of New Jersey, and for the years at issue filed New York State nonresident and part year resident income tax returns (form IT-203).
2. Petitioner filed an original and an amended New York State personal income tax return for 2016.

3. On the original 2016 form IT-203 filed by petitioner, his federal adjusted gross income was stated as \$135,277.00. On the amended New York State tax return (form IT-203X) filed by petitioner for 2016, his federal adjusted gross income was stated as a loss of \$33,121.00 and he sought a refund of \$4,295.00.

4. Petitioner asserts that the change in his 2016 reported income between the original form IT-203 tax return filed and the amended form IT-203X tax return filed was the result of a decrease in the amount of wages petitioner reflected on the returns.

5. For 2017, petitioner filed a form IT-203 with New York State. On petitioner's 2017 form IT-203, his federal adjusted gross income was reflected as a loss of \$11,560.00 and he sought a refund of \$5,087.00.

6. The Division of Taxation (Division) performed an audit of petitioner's 2016 form IT-203, 2016 form IT-203X and 2017 form IT-203.

7. The Division's auditor, Sunil Mehra, testified at the hearing. Mr. Mehra testified that in auditing petitioner's returns, he reviewed information provided by the Internal Revenue Service (IRS) regarding petitioner's federal tax filings for the years at issue. According to the auditor, the IRS information reviewed contradicted petitioner's filing positions on his 2016 form IT-203X and his 2017 form IT-203. In particular, the auditor testified that the information provided by the IRS prior to the issuance of any notices indicated that petitioner's 2016 federal adjusted gross income was \$135,277.00, and petitioner's 2017 federal adjusted gross income was \$58,812.71.¹

¹ The auditor testified that he "may" have also verified petitioner's 2016 and 2017 wage information with the State's W-2 employer wage reporting database. However, there is nothing in the record to further support the auditor's vague recollection of this possibility.

8. On December 26, 2017, the Division issued to petitioner a notice of disallowance, which stated that petitioner did not substantiate the changes to his reported wages on his 2016 amended State tax return and accordingly his claim for a refund for 2016 was disallowed.

9. On March 30, 2018, the Division issued to petitioner a statement of proposed audit changes, which indicated that the wages claimed on petitioner's 2017 State tax return were adjusted based upon available information and, therefore, as the Division had previously processed petitioner's 2017 tax return and paid the refund claimed, petitioner owed the State \$935.82 in taxes. On June 18, 2018, the Division issued to petitioner a notice of deficiency, which assessed taxes due of \$935.82 plus interest for his 2017 tax year.

10. On February 21, 2020, in preparation for the hearing, the auditor printed out an IRS "Account Transcript" for petitioner's 2016 tax year. The February 21, 2020 IRS account transcript for 2016 was entered into the record. The IRS account transcript for 2016 reflected petitioner's 2016 federal adjusted gross income as \$135,604.00.

11. On February 21, 2020, in preparation for the hearing, the auditor printed out an IRS "Account Transcript" for petitioner's 2017 tax year. The February 21, 2020 IRS account transcript for 2017 was entered into the record. That document reflected petitioner's 2017 federal adjusted gross income as a loss of \$11,560.00.

12. Petitioner testified at the hearing that he filed an amended 2016 form IT-203X based upon adjusted wage information and that he believed certain income was not taxable. Petitioner testified that he was working with the IRS in an attempt to adjust his federal 2016 wage numbers.²

² Petitioner did not assert a protective claim on his 2016 form IT-203X return.

13. Petitioner submitted into the record a self-written statement that offered several disjointed legal propositions but appeared to be arguing in significant part that the wages at issue were not “wages” as that term is defined in section 3401 of the Internal Revenue Code (IRC).

14. Petitioner submitted into the record an unsigned and unsworn “affidavit” which asserted, in part, that petitioner’s 2016 and 2017 filing positions were premised upon adjusting wage information that he had received. In the “affidavit,” petitioner also asserted that his income was not taxable under the Sixteenth Amendment of the United States Constitution.

15. Petitioner also submitted into the record an additional 12-page self-written statement that appears to argue that income is not taxable under the Sixteenth Amendment of the Constitution.³

SUMMARY OF THE PARTIES’ POSITIONS

16. Petitioner argues that the wages in question are not taxable. Petitioner’s briefs assert several disjointed arguments in this matter. In part, petitioner argues that his income is not taxable because he alleges the Sixteenth Amendment of the Constitution forbids such; however, in his reply brief, petitioner asserts he is not making arguments based upon the Sixteenth Amendment of the Constitution. Otherwise, the reoccurring theme in petitioner’s briefs is that the subject wages are not taxable pursuant to section 61 of the IRC since neither petitioner, nor his wife, are an “employee” as defined by section 341 of the IRC. As a result thereof, petitioner asserts his subject wages are not taxable by the federal government or the State.

³ Petitioner submitted a “motion” into the record whereby petitioner sought the undersigned to take judicial notice of a certain legal observation articulated in the federal circuit court case of *Stubbs, Overbeck & Assoc., Inc. v United States*, 445 F2d 1142 (5th Cir 1971). Pursuant to State Administrative Procedure Act § 306 (4) official notice can be taken of all facts of which judicial notice could be taken. However, petitioner’s motion in this case does not request judicial/official notice of a particular fact(s) but rather an irrelevant legal observation made in a federal circuit case from 1971. The motion is denied as inappropriate and irrelevant.

17. The Division asserts that the IRS information reviewed by the Division contradicts petitioner's 2016 and 2017 filing positions. The Division asserts that petitioner has failed to meet his burden of proof establishing that the notices at issue are erroneous and that the subject income should not be taxed.

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, by clear and convincing evidence, that the asserted deficiency is erroneous (*see Matter of O'Reilly*, Tax Appeals Tribunal, May 17, 2014; *see also Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Tavalacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]; Tax Law § 689 [e]).

B. Section 601 (e) of the Tax Law imposes personal income tax on New York taxable income of nonresident individuals that is derived from New York sources.

C. Section 631 of the Tax Law provides that the New York source income of a nonresident individual shall be, in part:

“(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year.”

D. In accordance with section 6103 (d) of the IRC the Division received information from the IRS which provided petitioner's 2016 and 2017 federal adjusted gross income numbers for 2016 and 2017.

2016

E. In auditing petitioner's 2016 form IT-203X, the auditor testified that the information provided by the IRS, before the relevant notice was issued, indicated that petitioner's 2016

federal adjusted gross income was \$135,277.00. The February 21, 2020 IRS account transcript for petitioner's 2016 tax year confirmed the accuracy of that amount. On petitioner's amended 2016 form IT-203X, petitioner claims his federal adjusted gross income should be a loss of \$33,121.00. Petitioner claims that his wages are not taxable. As a starting point, petitioner completely fails to establish the nature of the wages at issue. Neither petitioner's testimony nor the "affidavit" submitted into the record establish what the wages at issue were for, whether such were even wages, who paid them or any other relevant information pertaining to the amounts at issue. Petitioner does not provide any useful information in this regard. It is also noted that petitioner's "affidavit" is neither signed nor sworn to before a person authorized to administer oaths and is therefore defective (*see Siegel and Connors*, NY Prac § 205 [6th Ed 2019]). However, even if it were not defective the "affidavit" still does not articulate particulars of the wages at issue. Without establishing what the wages at issue are, petitioner fails to meet his burden of proof that the relevant notice was erroneous and the wages not subject to tax.

F. Petitioner argues that his income is not taxable under the Sixteenth Amendment of the Constitution. However, in petitioner's reply brief, petitioner expressly states that he is not making arguments based upon the Sixteenth Amendment of the Constitution. Accordingly, petitioner's earlier arguments premised on the Sixteenth Amendment of the Constitution appear to have been withdrawn. Although it is not possible to fully analyze petitioner's Sixteenth Amendment arguments because it is not clear what type of wages are at issue, it should be noted that most arguments asserting wages at large are not taxable under the Sixteenth Amendment have already been rejected (*see Matter of Ellett*, Tax Appeals Tribunal, October 18, 2001).

G. Petitioner also asserts that his wages are not taxable pursuant to section 61 of the IRC since neither petitioner, nor his wife, are an "employee" as defined by section 341 of the IRC.

For the same reason that the Sixteenth Amendment arguments cannot be fully analyzed because the detail of the wages at issue are unknown, petitioner's arguments regarding section 61 of the IRC cannot be fully analyzed in this case and therefore petitioner has not met his burden of proof. However, it is noted that what appear to be similar arguments as what petitioner makes in this case have also already been rejected as wrong (*see Matter of Adrian van Rossem*, Tax Appeals Tribunal, October 24, 2017).

2017

H. For petitioner's 2017 tax filings the Division's auditor asserts that, prior to issuance of the notice pertaining to 2017, he examined information provided by the IRS indicating that petitioner's 2017 federal adjusted gross income was \$58,812.71. On petitioner's 2017 form IT-203 his federal adjusted gross income was stated as a loss of \$11,560.00. In preparation for the hearing the auditor printed out an IRS account transcript for petitioner's 2017 tax year which reflected petitioner's 2017 federal adjusted gross income as a loss of \$11,560.00. Since the IRS account transcript for 2017 reflects the same amount of federal adjusted gross income as indicated on petitioner's 2017 form IT-203, the accuracy of his 2017 adjusted gross income as reported on his 2017 form IT-203 has been sufficiently established.

I. The petition of Vito Manente is granted to the extent of conclusion of law H but otherwise denied. The December 26, 2017 notice of disallowance is sustained, and the June 18, 2018 notice of deficiency is cancelled.

DATED: Albany, New York
July 01, 2021

/s/ Nicholas A. Behuniak 1
ADMINISTRATIVE LAW JUDGE