

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CLINT GILBERT</b>	:	DETERMINATION
		DTA NO. 830512
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 2015.	:	

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Petitioner, Clint Gilbert, 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 2015.

A formal hearing by videoconference was held before Donna M. Gardiner, Supervising Administrative Law Judge, on April 23, 2024, at 1:00 p.m., with the final brief to be submitted by October 4, 2024, 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. (Christopher O'Brien, Esq., of counsel).

***ISSUE***

Whether petitioner has established that the Division of Taxation improperly determined his tax liability for the year 2015.

***FINDINGS OF FACT***

1. On November 12, 2020, the Division of Taxation (Division) sent to petitioner correspondence that informed him that a search of the Division's records did not locate a tax return for petitioner for the year 2015 and requested that petitioner respond within 30 days by either filing an income tax return or explaining why he was not required to file a return. The

letter indicated that if petitioner did not respond, a bill would be sent to him. Petitioner failed to respond to the Division.

2. On February 12, 2021, the Division issued to petitioner a statement of proposed audit change (statement) that provided the following explanation, in pertinent part, that:

“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 [IRS]. This information indicates you had sufficient income to require the filing of a New York State return. We could not issue this statement before now because of the time needed to obtain and process the federal information.

We used federal and departmental information to compute your tax as a New York State resident. In cases where the [IRS] provided us with information reported on the federal return, that information was used to compute your New York State tax.

\* \* \*

Based on the information we obtained from the [IRS], we made any applicable additions to federal adjusted gross income for:

- interest income on state and local obligations (other than New York State), and
- public employee 414(h) contributions.

\* \* \*

We imposed a negligence penalty of 5% as an addition to tax (NYS Tax Law section 685(b)(1)). In addition to the 5% negligence penalty, we also imposed an amount equal to 50% of any interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the tax law (NYS Tax Law section 685(b)(2)).

We also applied penalty for late filing at 5% per month up to a maximum of 25% under NYS Tax Law section 685(a)(1).”

3. The Division computed petitioner’s New York State income tax as follows:

Federal adjusted gross income	\$121,225.00
Total Pension exclusion	\$ 6,850.00
<b>Total New York subtractions</b>	<b>\$ 6,850.00</b>
<b>New York adjusted gross income</b>	<b>\$114,375.00</b>
Standard deduction [single filer]	\$ 7,900.00
Dependent exemptions	\$ 0.00

<b>Taxable income</b>	\$106,475.00
New York State tax on taxable income	\$ 6,667.00
<b>Total New York State taxes</b>	\$ 6,667.00
Total tax withheld	\$ 2,710.00
<b>Total payments</b>	\$ 2,710.00
<b>Total Tax amount due</b>	\$ 3,957.00

The statement also asserted penalties and interest (*see* finding of fact 2).

4. On March 1, 2021, petitioner signed the bottom of page four of the statement, “**Consent to amount due**,” wherein he agreed with the proposed audit changes and agreed to pay the amount due. He also agreed, in pertinent part, to the following:

“I waive my right to receive, and formally protest in the Bureau of Conciliation and Mediation Services or the Division of Tax Appeals, a Notice of Deficiency or Notice of Determination related to the amount due.

The tax, interest, and any applicable penalties will become assessed and subject to collection actions.”

5. On March 31, 2021, despite petitioner’s signed consent to the proposed audit changes, the Division issued a notice of deficiency, bearing assessment number L-052869819, to petitioner that asserted additional tax due in the amount of \$3,957.00, plus penalties and interest, for the year 2015 (notice). The notice states that “[y]ou have the right to formally protest this notice” and provides instructions on how to do so.

6. On June 30, 2021, petitioner filed a petition with the Division of Tax Appeals in protest of the notice. The envelope used to mail the petition does not bear a postmark and was date-stamped received by the Division of Tax Appeals on June 30, 2021. Although it appears that the petition was filed 91 days after the date of the notice, the Division did not raise this issue in its answer or at the hearing and did not submit any proof of mailing the notice to petitioner at his last known address on March 31, 2021. Therefore, the 90-day period within which to file a petition is tolled.

7. Petitioner appeared and testified at the hearing. He conceded that he did not file a New York State income tax return for 2015. However, he submitted his form W-2, wage and tax statement, for 2015. Form W-2 was issued to petitioner by his employer, the Rochester City School District and reflected wages in the amount of \$54,561.40, for the year 2015. Petitioner testified that “[t]he only thing I was disputing is the amount because I’ve never made [\$100,000.00], never even came close to that.” The Division did not rebut this testimony.

8. In response to petitioner’s form W-2, the Division’s representative stated that “[w]e get sent electronically, I think they’re called - - [federal] information, and then we match it with our records, and that’s what happened here.” The Division did not submit the federal transcript for petitioner’s 2015 federal filing or any other document that can explain the large difference between the wage income reflected on petitioner’s form W-2 and the federal adjusted gross income (FAGI) used by the Division in its calculation.

9. The Division did not present a witness at the hearing. Instead, it submitted an affidavit from Tim Martuscello, who is a Tax Technician 3 and Team Leader in Audit Group 15 in the Income/Franchise Desk Audit Bureau of the Division. Mr. Martuscello explained that the Division used federal and departmental information to compute petitioner’s tax liability for 2015. Mr. Martuscello stated that the Division used an FAGI of \$121,225.00 as provided in the federal IRS transcript. However, the IRS transcript was not attached to his affidavit. He also failed to disclose the source of the departmental information that was used in calculating petitioner’s tax liability.

10. The affidavit relied upon by the Division did not address its processing procedure and its decision to issue a notice of deficiency in this matter rather than a notice and demand.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 651 (a) (1) requires a New York resident individual to file a New York income tax return for any year if he is required to file a federal tax return for that year; if his federal adjusted gross income plus New York addition modifications (as listed in Tax Law § 612 [b]) exceeds either \$4,000.00 or the amount of his New York standard deduction; or if he receives a lump sum distribution subject to tax under Tax Law § 603.

If a taxpayer fails to file a return as so required, the Division may estimate his New York tax liability and may issue a notice of deficiency to him (*see* Tax Law § 681 [a]). Such a notice requires a rational basis (*see Matter of Mayo*, Tax Appeals Tribunal, March 9, 2017).

B. In this case, the Division submitted the affidavit of Mr. Martuscello who explained that the Division obtained information from the IRS indicating that petitioner, a New York resident, had federal adjusted gross income of \$121,225.00 in 2015. Petitioner conceded that he failed to file a New York income tax return for 2015. Accordingly, the Division exercised its authority under Tax Law § 681 (a) to estimate petitioner's New York tax liability using the federal information and to issue a notice of deficiency to him. Where a notice of deficiency has a rational basis, a presumption of correctness attaches to it and petitioner has the burden to prove it erroneous (*see Matter of Gilmartin v Tax Appeals Trib.*, 31 AD3d 1008, 1010 [3d Dept 2006]).

C. Petitioner argues that the deficiency did not accurately reflect his wage income for 2015. In support of his argument, petitioner submitted his form W-2 that indicated his wage income earned from his employment with the Rochester City School District was \$54,561.40. Petitioner testified that he never earned any amount close to \$100,000.00 in a year. Petitioner's testimony was not rebutted by the Division. The Division merely stated, in its brief, that "[t]he Division used an FAGI of \$121,225.00 as provided in the Federal IRS Transcript[.]" However, it

did not submit a copy of the federal IRS transcript to counter petitioner's assertion that his wage income for 2015 was \$54,561.40.

The Division relies on *Matter of Ohberg* (Tax Appeals Tribunal, August 24, 2020) for the proposition that the Division has the authority to use information provided by the IRS under Internal Revenue Code (IRC) (26 USC) § 6103 (d) to adjust a taxpayer's FAGI and issue an assessment based on that information. The facts in *Matter of Ohberg* are clearly distinguishable. In that case, the petitioner argued that his wage income was not taxable income under the IRC. The amount of wage income was not in dispute. In this case, petitioner does not dispute that his wage income is taxable income for federal purposes. The Division did not present a witness or the IRS transcript it relied upon in calculating petitioner's tax liability.

D. Instead of addressing the amount of income used in its calculations, the Division argued in its brief that "[i]n any event, as described in the Auditor's Affidavit, the Petitioner actually consented to the assessment as indicated on the [statement] on March 1, 2021. . . . This alone waived any right to contest the assessment." The Division did not raise the issue of jurisdiction at the hearing.

In support of its position that petitioner waived his right to challenge the assessment, it points to an attachment to the affidavit. Specifically, the Division relies on the language in the statement that petitioner signed his consent to the proposed audit changes (*see* finding of fact 4). A consent to tax due states that the taxpayer agrees to the amount of tax and penalties asserted by the Division. Additionally, a taxpayer waives his right to receive a notice of deficiency and the protest rights that come with it. Petitioner never paid the amount set forth on the statement.

Tax Law § 692 (b) authorizes the Division to issue a notice and demand "for any amount of tax, addition to tax, penalty or interest, which has been assessed but remains unpaid, stating

the amount and demanding payment thereof.” Tax Law § 173-a (2) specifically states that a notice and demand does not provide a taxpayer with hearing rights at the Division of Tax Appeals.

Instead of issuing a notice and demand for the proposed audit changes to petitioner, the Division chose to issue a notice of deficiency. The affidavit of Mr. Martuscello does not address the fact that the Division issued a notice of deficiency rather than a notice and demand.

Tax Law § 681 (a) authorizes the Division to issue a notice of deficiency “[i]f upon examination of a taxpayer’s return under this article the [Commissioner] determines that there is a deficiency of income tax.” The Division did issue a notice of deficiency, the notice advised petitioner he had petition rights and the Division did not explain why they issued a notice of deficiency as opposed to a notice and demand, including what may or may not have occurred between the date of the consent and the date the Division issued the notice of deficiency. Therefore, as provided by the notice of deficiency, petitioner had the right to protest it by filing a petition with the Division of Tax Appeals.

E. In determining whether petitioner has established that the asserted tax liability was erroneous, it is appropriate to look at the entire record in this matter. Petitioner’s form W-2 has established the amount of his wage income for 2015. The Division did not contest that amount or present any document to refute it. Petitioner testified that he never earned any amount close to \$100,000.00 in a single year. The federal IRS transcript was not attached to the affidavit. The petition clearly advised the Division that petitioner was questioning the federal adjusted gross income amount used in its calculation, yet the Division refused to address this fact. Petitioner introduced his form W-2 that established his wage income, and his testimony was

uncontroverted. Additionally, it remains unexplained why a notice and demand was not issued in this case which raises a concern regarding the handling of this matter.

Without the ability to cross examine a witness who can explain the basis for the computations and the irregularity of issuing a notice of deficiency in this circumstance, it calls into question the calculations made by the Division in this case. Therefore, it is concluded that petitioner has sustained his burden of proof by clear and convincing evidence that the Division erred in the calculation of his tax liability for the year 2015.

F. The petition of Clint Gilbert is granted to the extent that his federal adjusted gross income was \$54,561.40, but in all other respects is denied, and the Division of Taxation is directed to modify the notice of deficiency, dated March 31, 2021, consistent with this determination.

DATED: Albany, New York  
April 03, 2025

/s/ Donna M. Gardiner  
SUPERVISING ADMINISTRATIVE LAW JUDGE