

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ALVIN GELLER</b>	:	DECISION
	:	DTA NO. 815082
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Year 1989.	:	

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Petitioner Alvin Geller, 79 North Broadway, Apt. M, White Plains, New York 10603-3750, filed an exception to the determination of the Administrative Law Judge issued on October 16, 1997. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUE***

Whether the Division of Taxation properly determined petitioner's tax liability for the year 1989.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Alvin Geller, filed a U.S. Individual Income Tax Return for the year 1989. On this return, he reported that his home address was in Port Chester, New York, that his filing status was single and that he was entitled to one exemption. The return stated that petitioner had wages of \$55,547.00 and that he had an adjustment to income of \$10,400.00, resulting in an adjusted gross income of \$45,147.00. Petitioner claimed the standard deduction and one exemption on the return resulting in taxable income of \$40,047.00. The return stated that \$7,844.00 was due. This amount was calculated by subtracting the Federal income tax withheld of \$952.00 from the amount of tax due of \$8,796.00. Petitioner's return included a Wage and Tax Statement which listed an address for petitioner in White Plains, New York. According to the Wage and Tax Statement, petitioner had wages of \$55,546.78 and New York State income tax withheld of \$720.44.

The Division issued a Statement of Proposed Audit Changes, dated September 7, 1993, which explained that the Division of Taxation ("Division") did not have a record of petitioner's having filed a 1989 New York State income tax return. The Division stated that Internal Revenue Code § 6103(d) allowed the Division to obtain information from the Internal Revenue Service and that, upon doing so, this information showed that petitioner filed a Federal return using a New York State address. The letter then set forth a computation of petitioner's tax liability on the basis of the information shown on petitioner's Federal income tax return. The statement also noted that penalties were imposed pursuant to Tax Law § 685(a)(1); (b)(1), (2) for late filing and negligence and an additional penalty for negligence or intentional disregard of the Tax Law, respectively. Petitioner was advised that, if he had filed a 1989 New York State return, he should provide a complete copy of it to the Division including wage and tax statements. In

addition, if he had made a payment with the return, he was asked to provide the deposit serial number stamped on the face of the check.

The Division issued a Notice of Deficiency, dated October 20, 1993, which asserted a deficiency of New York State personal income tax for the year 1989 in the amount of \$2,722.00 plus penalty and interest for a balance due of \$4,842.68.

In a letter, dated June 24, 1994, the Division explained that, following a review of the Division's file and petitioner's Request for Conciliation Conference, it decided that the notice was correct as issued. The Division stated that, as a resident of New York State, petitioner was subject to tax on all income reported on his Federal return. It further noted that petitioner was allowed the appropriate standard deduction and that if he furnished wage and tax statements, an allowance would be made for the New York taxes withheld. The Division reiterated its computation of petitioner's tax liability and asserted the same penalties as in the Notice of Deficiency. Petitioner was also told that a payment of \$5,086.51 would close this matter.

The matter proceeded to a conciliation conference and, by a conciliation order dated March 8, 1996, the penalties imposed against petitioner were abated.

Petitioner filed a petition with the Division of Tax Appeals which alleged: that petitioner's income in 1989 was not \$45,147.00; that State income taxes withheld from petitioner's earnings were more than enough to satisfy petitioner's tax obligations; that the computation which led to the conclusion that petitioner owed additional taxes was incorrect; that petitioner does not owe any taxes for 1989; that the conciliation conferee made an erroneous determination; and that petitioner was denied due process of law.

The Division has not been able to locate a New York State personal income tax return for petitioner for the year 1989. It also does not have a 1989 estimated tax account under petitioner's social security number.

Petitioner did not file a brief or documents in support of his position.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge determined that petitioner did not rebut the presumption of correctness which attaches to a properly issued Notice of Deficiency and, by not submitting any evidence, surrendered to this presumption (*Matter of Tavalacci v. State Tax Commn.*, 77 AD2d 759, 431 NYS2d 174). Based upon petitioner's failure to challenge the Division's contention that petitioner never filed a New York State personal income tax return for 1989, the judge concluded that no return was filed and that the only issue was the accuracy of the amount of the assessment.

Relying on our decision in *Matter of Denn* (Tax Appeals Tribunal, October 25, 1990), the Administrative Law Judge concluded that the Division correctly determined petitioner's income from his Federal income tax return and that said methodology provided a rational basis for the Notice of Deficiency issued herein.

In his review of the record, the Administrative Law Judge noted that petitioner had not been given credit for New York State taxes withheld from wages, as set forth on petitioner's wage and tax statement for 1989. The Administrative Law Judge directed that the Notice of Deficiency be modified in the sum of \$720.44 to properly reflect tax paid. Other than this one modification, the Administrative Law Judge sustained the assessment in its entirety.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner raised the same issues dealt with by the Administrative Law Judge. In addition, petitioner contends that the Division's reliance upon his Federal return to determine his New York adjusted gross income is a violation of his due process rights. Petitioner further argues that he does not have the burden of proof and that placing it on him is another violation of his due process rights.

Petitioner objects to the Administrative Law Judge's conclusion that a presumption of correctness attaches to a Notice of Deficiency and that such a conclusion is a violation of his due process rights under the United States and New York State constitutions.

Finally, petitioner contends that the Administrative Law Judge erred in not setting forth in his decretal paragraphs the cancellation of penalty provided for in the Conciliation Order.

***OPINION***

We affirm the determination of the Administrative Law Judge and see no reason to analyze the same issues on appeal since the Administrative Law Judge completely and adequately addressed them. However, we will address petitioner's constitutional arguments.

Petitioner's contentions that his due process rights under the United States and New York State constitutions have been violated are without merit. First, petitioner claims that the Division's reliance on his Federal adjusted gross income was "irrational" and a violation of "due process." However, the Division was merely employing the definition of New York adjusted gross income as set forth in Tax Law § 612(a). Therefore, petitioner's argument actually challenges the facial constitutionality of Tax Law § 612(a). Such challenges may not be addressed in the Division of Tax Appeals since it lacks the jurisdiction to determine the

constitutionality of a statute on its face (*see, Matter of Unger*, Tax Appeals Tribunal, March 24, 1994).

Since petitioner did nothing more than allege a violation of his due process rights, it is impossible to discern whether his allegation spoke to the constitutionality of the statute as applied to him. The Division of Tax Appeals has jurisdiction to hear and decide these issues. However, in such cases, a petitioner bears the burden of proof and since petitioner herein has offered none, his constitutional challenge to the statute as applied to him would fail also (*see, Matter of Brussel*, Tax Appeals Tribunal, June 25, 1992).

Petitioner's attack on the constitutionality of Tax Law § 689(e), which places the burden of proof in these proceedings upon taxpayers and establishes the presumption of correctness of the Notice of Deficiency, fails for the same reasons as set forth above. As succinctly stated in *Matter of Tavolacci v. State Tax Commn. (supra)*:

[Tax Law § 689(e)] makes it then incumbent upon the taxpayer to proceed to demonstrate the incorrectness of the deficiency, for the burden of proof is upon the taxpayer . . . . The petitioner, through his complete failure to present any proof as to the incorrectness of the statement of deficiency, has surrendered to the statutory presumption of correctness and the determination must be sustained (*Matter of Tavolacci v. State Tax Commn., supra*, 431 NYS2d, at 175; *see also, Kourakos v. Tully*, 92 AD2d 1051, 461 NYS2d 540, *appeal dismissed* 59 NY2d 967, 466 NYS2d 1030, *cert denied* 464 US 1070, 79 L Ed 2d 215).

In sum, petitioner's failure to offer any proof is fatal to each of his constitutional arguments on appeal.

Finally, petitioner contends that the Administrative Law Judge erred in not setting forth in his decretal paragraphs the provision in the Conciliation Order canceling penalty. However, a close reading of the Administrative Law Judge's determination reveals that the cancellation of

penalties was recited in finding of fact "5" and the last decretal paragraph does not disturb the Conciliation Order's provision for abatement of penalty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alvin Geller is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Alvin Geller is granted to the extent set forth in conclusion of law "E" of the Administrative Law Judge's determination, but in all other respects is denied; and
4. The Notice of Deficiency, dated October 20, 1993, as modified by the Conciliation Order, dated March 8, 1996, and paragraph "3" above, is sustained.

DATED: Troy, New York  
August 20, 1998

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.  
Joseph W. Pinto, Jr.  
Commissioner