

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>DOUGLAS BRODMERKEL</b>	:	DECISION
	:	DTA NO. 817246
for Redetermination of Deficiencies or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1991, 1992, 1996 and 1997.	:	

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Petitioner Douglas Brodmerkel, 23 Wagon Lane East, Centereach, New York 11720, filed an exception to the determination of the Administrative Law Judge issued on December 7, 2000. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel).

Petitioner did not file a brief in support of his exception, but instead relied on his brief filed below. The Division of Taxation did not file 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.

***ISSUES***

I. Whether the Division of Taxation's assertion of deficiencies for the years 1991 and 1992 on the basis of Federal audit changes was proper and whether petitioner has shown wherein such audit was in error.

II. Whether petitioner correctly calculated his tax liability for the year 1996.

III. Whether it was proper for the Division of Taxation to issue an assessment of personal income tax for the year 1997 as a result of petitioner's filing a personal income tax return wherein he entered the amount owed as the amount he overpaid.

IV. Whether the Division of Tax Appeals has jurisdiction to determine whether an income execution should be vacated.

V. Whether the Commissioner of Taxation is prohibited from disclosing information about petitioner to the Internal Revenue Service without petitioner's permission.

VI. Whether the asserted deficiencies of tax are unconstitutional.

### ***FINDINGS OF FACT***

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

Petitioner, Douglas Brodmerkel, filed a Resident Income Tax Return for the year 1991. On this return, he reported a filing status of single and stated that he claimed one Federal exemption. Petitioner claimed a New York itemized deduction in the amount of \$13,086.00.

Petitioner filed a Resident Income Tax Return for the year 1992 on which he reported that he did not claim any Federal exemptions. He stated that his New York adjusted gross income was \$12,691.00 and claimed the New York standard deduction, for married filing separately, of \$4,750.00.

A Resident Income Tax Return was filed by petitioner for the year 1996. On this return, petitioner reported that his filing status was married filing separate returns. He also stated that he claimed four exemptions on his Federal return. Petitioner claimed a standard deduction in the

amount of \$3,350.00 and dependent exemptions in the amount of \$10,000.00. The return stated that petitioner's New York taxable income was \$14,122.00.

Petitioner timely filed a Resident Income Tax Return for the year 1997 on which he reported that he overpaid New York State personal income tax in the amount of approximately \$337.00.<sup>1</sup>

The Division of Taxation ("Division"), issued a Notice of Additional Tax Due, dated November 3, 1994, which asserted a deficiency of personal income tax for the year 1991 in the amount of \$1,531.00 plus interest in the amount of \$269.56 for a balance due of \$1,800.56. The computation section of the notice explained that the bill was based on information that New York State received from the Internal Revenue Service ("IRS") regarding adjustments made to petitioner's 1991 Federal income tax return. The Division notified petitioner that any changes should have been reported to New York State within 90 days of the final IRS determination and that the bill was being issued because there was no record of the changes being reported to New York State. The notice shows that changes were made to petitioner's interest and dividend income, unemployment compensation and nonemployee compensation. There were also adjustments made for the self-employment tax paid, the itemized deduction for medical and dental expenses and the itemized deduction for other miscellaneous deductions. According to the Notice of Additional Tax Due, the Division increased the amount of petitioner's adjusted gross income from \$31,863.00 to \$50,355.00. The Division also reduced the amount of petitioner's

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<sup>1</sup> From the handwriting, it is difficult to discern the exact amount of money which was claimed to be overpaid.

itemized deduction from \$13,086.00 to \$12,107.00. A computer printout obtained from the Division's computer system shows that this assessment has been paid.

The Division issued a Notice of Additional Tax Due, dated August 5, 1996, which asserted a deficiency of personal income tax for the year 1992 in the amount of \$1,787.00 plus interest in the amount of \$479.82 and penalty in the amount of \$329.26 for a balance due of \$2,596.08. The computation section of the notice explained that the adjustments to interest or dividend income and wages or tips were based on Federal audit changes which were not reported to New York State. The computation section further explained that petitioner's adjusted gross income was increased from \$12,691.00 to \$36,338.00. In addition, penalties were imposed pursuant to Tax Law § 685(b)(1) and (2) for negligence or intentional disregard of the Tax Law.

The Division issued a Notice and Demand for Payment of Tax Due, dated October 3, 1997, which assessed a deficiency of personal income tax for the year 1996 in the amount of \$368.00 plus interest in the amount of \$14.05 and penalty in the amount of \$2.16 for a balance due in the amount of \$384.21. The computation section of the notice shows that an adjustment was made increasing the amount claimed by petitioner for the standard deduction.<sup>2</sup> However, petitioner claimed ten dependent exemptions on the New York return while claiming only four exemptions on the Federal return. Since New York State exemptions are allowed only for dependents, he was allowed three dependent exemptions. The Division's recalculation of petitioner's tax liability resulted in additional personal income tax due in the amount of \$368.00.

The Division issued a Notice and Demand for Payment of Tax Due, dated July 6, 1998, assessing a deficiency of personal income tax for the year 1997 in the amount of \$337.00 plus

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<sup>2</sup> The amount of the standard deduction was increased from that claimed of \$3,350.00 to \$6,175.00.

interest in the amount of \$5.34 and penalty in the amount \$5.04 for a balance due of \$347.38.

The notice was issued because of an error wherein petitioner entered the amount that he owed as the amount that should have been refunded to him.

Prior to the hearing, petitioner submitted a hearing memorandum which stated that he intended to call, among others, Mr. Marco Zumbolo to testify. Also, petitioner received a subpoena signed by the Chief Administrative Law Judge addressed to Mr. Zumbolo. Petitioner did not serve the subpoena and Mr. Zumbolo was not present at the hearing.

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

Petitioner argued that no State action could be taken against him until the IRS decided to resolve certain Federal changes to his personal income tax returns. The Administrative Law Judge rejected this argument based on Tax Law former § 659 which provided, in pertinent part, as follows:

If the amount of a taxpayer's federal taxable income . . . reported on his federal income tax return for any taxable year . . . is changed or corrected by the United States internal revenue service or other competent authority . . . the taxpayer . . . shall report such change or correction . . . within ninety days after the final determination of such change, correction, . . . or as otherwise required by the commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous.

Here, the Administrative Law Judge pointed out, the notices that pertain to the years 1991 and 1992 indicate that petitioner was required to report any changes to his Federal taxable income within 90 days of the final IRS determination. Petitioner did not challenge the conclusion that there was a final Federal determination of a change in taxable income. In addition, petitioner did not deny the Division's assertion that the Federal determination was not

reported to New York State as required by Tax Law former § 659. Since petitioner failed to comply with Tax Law former § 659, the Administrative Law Judge concluded that the Division's issuance of the notices for the years 1991 and 1992 was correct (*Matter of Migliore*, Tax Appeals Tribunal, January 17, 1991).

Next, the Administrative Law Judge noted, for the year 1996, the Division found a series of errors on the income tax return including an incorrect standard deduction and the claim of ten dependent exemptions on the New York return while claiming only four exemptions on the Federal return. For the year 1997, the Division issued a notice because petitioner entered the amount owed on the return as the amount to be refunded to him. The Administrative Law Judge noted that, at hearing, petitioner did not present any evidence to show that any of the Division's adjustments were in error for either of the foregoing years. Therefore, the Administrative Law Judge found that there was no basis to delay any further action by the Division until negotiations between petitioner and the IRS were concluded. For the same reason, the Administrative Law Judge concluded that petitioner failed to sustain his burden of proof by showing that an adjustment of the notices was required (Tax Law § 689[e]).

Petitioner next urged that the Division's income execution should be revoked, because he cannot settle with the Division until the current IRS problem is resolved. The Administrative Law Judge also rejected this argument. As the Administrative Law Judge noted, petitioner offered no evidence in the record to show that the income execution relates to any of the notices in issue. Further, an income execution is a collection device undertaken after an asserted deficiency of tax has already become fixed and final. As such, the Administrative Law Judge concluded that the Division of Tax Appeals had no jurisdiction to review the collection activities

undertaken by the Division with regard to fixed and final assessments (*citing Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *Matter of Driscoll*, Tax Appeals Tribunal, April 11, 1991).

Next, petitioner asked that the Division of Tax Appeals prohibit the Commissioner of Taxation and Finance from disclosing any information to the IRS without petitioner's permission. The Administrative Law Judge found that this request was contrary to the provisions of Tax Law § 697(f), which provides that, notwithstanding the secrecy provisions of the personal income tax law, the Tax Commissioner may permit the Secretary of the Treasury of the United States or his delegates to inspect any return filed under Article 22 of the Tax Law or furnish to such officer or his authorized representative an abstract of the return or supply information concerning an item contained on the return or revealed by an investigation of tax liability under Article 22 of the Tax Law.

Petitioner also argued that the Division of Tax Appeals should restructure the Tax Law so that all taxpayers pay at the same rate regardless of their marital status, financial status or number of dependents. The Administrative Law Judge concluded that this was within the province of the State Legislature, not the Division of Tax Appeals, since the power to enact laws is vested in the Legislature (*citing* NY Const arts III, IV, VI; McKinney's Cons Laws of NY, Book 1, Statutes § 2).

Petitioner next complained that the current tax system is discriminatory and unconstitutional because he is taxed at a different rate than that of married people. He also noted that he does not get a deduction for interest paid on a mortgage and, since he does not have

children, he does not receive a dependent exemption. The Administrative Law Judge found this to be an argument that the Tax Law is unconstitutional on its face.

The Administrative Law Judge rejected this argument noting that at the administrative level the constitutionality of a statute is presumed (*Matter of Fourth Day Enters.*, Tax Appeals Tribunal, October 27, 1988). Furthermore, the Administrative Law Judge concluded, the Division of Tax Appeals and Tax Appeals Tribunal do not have the authority to determine the facial constitutionality of a statute (*Matter of Allied Grocers Coop.*, Tax Appeals Tribunal, November 30, 1989, *confirmed Matter of Allied Grocers Coop. v. Tax Appeals Tribunal*, 162 AD2d 791, 557 NYS2d 707; *Matter of Fourth Day Enters.*, *supra*).

Petitioner objected to the fact that Mr. Zumbolo did not appear at the hearing to answer his questions. At the hearing, petitioner acknowledged that he had the opportunity to serve a subpoena but chose not to do so.

Section 3000.7 of the Rules of Practice and Procedure of the Tax Appeals Tribunal permits any party to request a subpoena from the administrative law judge assigned to the case. Here, the Administrative Law Judge pointed out that petitioner requested and received a subpoena for Mr. Zumbolo, but chose not to serve it. The Administrative Law Judge concluded that petitioner could not use his own decision not to serve the subpoena as a basis for arguing that he was denied due process (*Matter of Fisher*, Tax Appeals Tribunal, May 25, 2000).<sup>3</sup>

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<sup>3</sup>At the hearing, petitioner claimed that he learned about the subpoena process only about a week before the hearing when he received a letter explaining that he would have to subpoena Mr. Zumbolo. Although he received a subpoena signed by the Chief Administrative Law Judge of the Division of Tax Appeals, which could have been served, petitioner's position was that he was not required to serve a subpoena and, therefore, he did not do so.



In a post hearing letter to the Administrative Law Judge, petitioner objected that it was improper to provide the Division with a copy of the transcript and not give one to him. The Administrative Law Judge noted that every litigant who wants a copy of the transcript, including the Division, must purchase their own copy. Therefore, this argument was rejected.

### ***ARGUMENTS ON EXCEPTION***

Petitioner did not take an exception to the findings of fact of the Administrative Law Judge. Petitioner offers the same arguments as he raised below, except as noted herein.

Petitioner's primary argument appears to be that the New York income tax structure is unconstitutional. Petitioner asserts that it is discriminatory to tax different people at different rates of tax on the basis of the taxpayer's level of income or marital status. Petitioner asserts that the current tax system punishes him for not having deductions and for being subject to the so-called "marriage penalty." According to petitioner, the whole concept of the marriage penalty is one of social engineering. With respect to deductions and exemptions in the tax code, petitioner states that they reduce the tax rate to a politically correct level and are based, again, on the concept of social engineering. Petitioner notes that he does not have children or pay a mortgage. Therefore, he is denied the exemptions and deductions which arise from having children or owning a home. He contends that this constitutes economic discrimination.

In addition, petitioner claims that since he filed a brief and the Division failed to file a brief, the Division violated its briefing obligations, and cannot prevail in this matter. Petitioner further claims that the Administrative Law Judge prevented Mr. Zumbolo from testifying which prejudiced petitioner's position. Petitioner also argues that the Division failed to rebut his evidence, and what evidence it did present, was misleading. Finally, petitioner argues that the

Division of Tax Appeals cannot properly provide the Division of Taxation with a copy of the hearing transcript without also doing the same for petitioner.<sup>4</sup>

***OPINION***

The burden of proof in this matter was upon petitioner (Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). Petitioner's testimony was more in the nature of polemics rather than factual statements. His exhibits were limited to the documents submitted with his petition. Taken together, and giving them an interpretation most favorable to petitioner, they do not satisfy his burden of proof.

Petitioner claims that the Division failed in its "obligation" to file a brief (Petitioner's exception). While the regulations of the Tax Appeals Tribunal for the Division of Tax Appeals provide that a party to a proceeding may file a brief (20 NYCRR 3000.15[d][6]), there is no obligation to do so. It is strictly a matter for the respective litigants to decide.

We note, with respect to hearing transcripts, that section 3000.15(d)(7) of our regulations provide, in pertinent part:

(7) The hearing will be stenographically reported. A transcript thereof will be made available for examination at the offices of the division of tax appeals in Troy, or may be purchased pursuant to section 3000.19 of this Part. . . .

Section 3000.19(b) of the regulations of the Division of Tax Appeals provides, in pertinent part:

(b) The transcript of the hearing and of the oral argument, if any, may be purchased from the hearing reporter at a charge not to exceed that paid by the division of tax appeals . . . .

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<sup>4</sup>Petitioner did not raise on exception the issue of whether the Commissioner of Taxation and Finance is prohibited from disclosing information to the IRS. Also not raised on exception was the issue of whether the Division of Tax Appeals has jurisdiction to vacate an income execution on a fixed and final assessment.

Our regulations make clear that petitioner can purchase a copy of the hearing transcript, or if a petitioner cannot afford one, he can review a copy of the transcript in our Troy office. There is no statutory or regulatory provision that requires the Division of Tax Appeals to provide a free copy of a hearing transcript to a petitioner.

We affirm the determination of the Administrative Law Judge in all respects. Petitioner has offered no evidence below, or arguments here, that would justify our changing the Administrative Law Judge's determination in any regard.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Douglas Brodmerkel is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Douglas Brodmerkel is denied; and

4. The notices issued to petitioner, dated November 3, 1994, August 5, 1996, October 3, 1997 and July 6, 1998, are sustained.

DATED: Troy, New York  
August 9, 2001

/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