STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
IRWIN R. EISENSTEIN	:	DECISION DTA NO. 818439
for Redetermination of a Deficiency or for Refund of Personal Income Tax under the Administrative Code of the City of New York for the Year 1996.	:	

Petitioner Irwin R. Eisenstein, 601 B Surf Avenue, Apartment 17-K, Brooklyn, New York 11224 and the Division of Taxation each filed exceptions to the determination of the Administrative Law Judge issued on June 13, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner filed a brief in support of his exception and in opposition to the exception filed by the Division of Taxation. The Division of Taxation filed a brief in support of its exception and in opposition to the exception filed by petitioner. Petitioner filed a reply brief. Oral argument, requested by both parties, was denied.

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

ISSUES

I. Whether the Administrative Law Judge correctly determined that payments made pursuant to section 1127 of the Charter of the City of New York may be used to offset a liability for New York City personal income tax.

II. Whether petitioner's request to videotape the hearing held in this matter was properly denied.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued a Notice and Demand for Payment of Tax Due dated May 3, 1999 against petitioner, which assessed additional income tax for 1996 of $2,021.00 plus penalty and interest. Penalty was imposed for "failure to file or pay tax on or before the due date" since petitioner's tax return for 1996 was received by the Division on February 3, 1999, nearly two years late. The Notice and Demand showed an increase of $2,323.00[1] in petitioner's 1996 New York taxable income from the reported amount of $54,080.00 to $56,403.00. Total 1996 New York State and City income tax on $56,403.00 was calculated to be $6,096.00, consisting of New York State income tax of $3,759.00 and New York City income tax of $2,337.00. Based upon tax withheld of $4,075.00, the Notice and Demand asserted additional tax due of $2,021.00.[2]

On his 1996 New York Resident Income Tax Return (form IT-201), petitioner claimed "Total city of New York tax withheld" of $2,393.00 which was reduced by the Division to $287.00. Petitioner had included payments under section 1127 of the Charter of the City of New

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[1] On his income tax return, petitioner had failed to include as New York additions to his federal adjusted gross income (i) public employee 414(h) retirement contributions of $1,852.55 and (ii) IRC § 125 modifications of $470.82, which were not at issue in this proceeding.

[2] The Division in its answer admitted that petitioner made a payment of $2,000.00 against the amount in question.

York City, retained from his wages by his employer, the City of New York, as withheld income tax on his 1996 income tax return.

As a condition of employment, section 1127 of the Charter of the City of New York requires a New York City municipal employee, who is a nonresident of New York City, to pay to the city the difference between the New York City resident income tax computed and determined as if the employee were a resident of New York City and the nonresident earnings tax imposed on the employee for the same taxable period. Petitioner became a New York City municipal employee in 1973[3] when he was a New Jersey resident, and as such, the City through the years has retained from his wages an amount equal to what his City income tax liability would have been if he had been a resident.

In the early 1990s, petitioner's life was in a downward spiral. He candidly testified that he was thrown out of his New Jersey home leaving behind a wife and children, attempted suicide, and was hospitalized for several weeks. In this period, he also changed his New Jersey residency to an apartment in the Coney Island section of Brooklyn, where he lived during the year at issue and continues to reside. When petitioner first moved to Brooklyn, he felt he might move back to

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[3] On page 28 of petitioner's brief, the taxpayer noted that he "entered City service" in 1973. This contrasts with the error in the transcript of the hearing on page 48 that recorded petitioner as testifying that he has been working for the City of New York "since 1993[sic]." Unfortunately, the transcript of the hearing in this matter contains hundreds of errors, including this one concerning the year in which petitioner commenced employment with the City of New York, that has made it unuseable. By a letter dated January 14, 2002, the administrative law judge advised the parties of the hundreds of errors in transcription which made the transcript unuseable. Noting that the dispute between the parties was basically a legal dispute and not factual in nature, the administrative law judge nonetheless gave the parties an opportunity to submit corrections of a substantive nature. Petitioner replied by concurring in the administrative law judge's opinion concerning the inaccuracy of the transcript but made no request for corrections of a substantive nature. The representative for the Division, noting that his list of errors "is not all inclusive", submitted an "errata sheet" listing various corrections on 45 lines of the transcript. Although the Division's listing of errors has been reviewed, the extent of errors in the transcript precludes any attempt to amend the transcript so that it might be considered an accurate transcription of the hearing. In light of the legal nature of the dispute, with no fundamental facts at issue, the hearing in this matter was not reopened in order to retake the testimony of petitioner who was the only witness called to testify at the hearing on November 15, 2001.

New Jersey in order to be closer to his children and did not fill out a change of address form with the Office of Personnel Services of the City of New York. It was not until the year 2000 that he updated his address with the City's personnel office. His wage and tax statement from New York City for the year at issue shows a South Orange, New Jersey address.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted the provisions of section 1127 of the Charter of the City of New York. Pursuant to that section, all employees of the City of New York must sign an agreement that during the term of their employment, they will pay to the City an amount by which the New York City personal income tax, computed as if the employee was a resident, exceeds the amount of any city earnings tax and city personal income tax actually imposed on such person for the same taxable period.

The Administrative Law Judge also noted that pursuant to Tax Law § 1312, it is the responsibility of the Division to collect New York City's income tax and such tax is collected and administered in the same manner as the New York State personal income tax. Therefore, the Administrative Law Judge concluded that the Division of Tax Appeals was the proper forum for resolving whether the Notice and Demand issued to petitioner should be sustained.

The Administrative Law Judge acknowledged the correctness of the Division's position that payments under section 1127 by a nonresident municipal employee of the City of New York have been found to be payments related to a contractual condition of employment and not taxes. The Administrative Law Judge concluded, however, that it would be inequitable to sustain the Division's attempt to impose New York City resident income tax on petitioner for 1996 when he has already paid the equivalent amount to the City in the form of section 1127 payments. The

Administrative Law Judge also concluded that it would contravene the mandate of the Division of Tax Appeals (i.e., to provide the public with a just system of resolving controversies) to permit the Division, as an agent of the City of New York, to collect New York City personal income tax for 1996 when equivalent payments under section 1127 had already been collected.

The Administrative Law Judge rejected petitioner's requests to join New York City as a party to this proceeding, to impose sanctions against the Division and to permit petitioner to videotape the tax hearing. The Administrative Law Judge noted that there was no basis for the imposition of sanctions and that Civil Rights Law § 52 prohibited the taking of motion pictures of proceedings such as a hearing before the Division of Tax Appeals. The Administrative Law Judge found that petitioner's challenge to the constitutionality of section 1127 of the Charter of the City of New York was moot.

The Administrative Law Judge found that there was no reasonable cause demonstrated for petitioner to have filed his tax return late, and the Administrative Law Judge upheld the imposition of penalty on the small additional tax liability remaining on petitioner's late filed 1996 tax return.

ARGUMENTS ON EXCEPTION

On exception, petitioner agrees with the Administrative Law Judge's conclusion that section 1127 payments should be offset against petitioner's liability for New York City personal income tax. Petitioner continues to assert, as he did before the Administrative Law Judge, that he should have been allowed to videotape his hearing and that section 1127 of the Charter of the City of New York is unconstitutional as currently applied because it treats nonresident city

employees in a manner that impacts them more severely than resident city employees. Petitioner seeks the imposition of sanctions against the Division for alleged misstatements of fact.

On exception, the Division argues that petitioner is liable for the amount of tax asserted due by the Notice and Demand and that the Administrative Law Judge improperly modified the amount of petitioner's tax liability on equitable grounds. The Division agrees with the Administrative Law Judge that section 1127 payments are not tax. The Division asserts that there is no authority to apply nontax payments made to the City of New York to satisfy petitioner's tax obligations.

OPINION

Section 1127 of the Charter of the City of New York provides in relevant part as follows:

> every person seeking employment with the city of New York or any of its agencies . . . shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual . . . during employment by the city, such person will pay to the city an amount by which a city personal income tax on residents computed and determined as if such person were a resident individual . . . during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period.

Petitioner claims that section 1127 of the Charter of the City of New York has been applied in a manner which is unconstitutional. The Division of Tax Appeals is a forum of limited jurisdiction and is not authorized to determine the facial constitutionality of statutes (***Matter of J.C. Penney Co.***, Tax Appeals Tribunal, April 27, 1989; ***Matter of Fourth Day Enters.***, Tax Appeals Tribunal, October 27, 1988). However, the Division may determine whether tax law statutes are constitutional as applied (***see, Matter of David Hazan, Inc.,*** Tax Appeals Tribunal, April 21, 1988, ***confirmed Matter of David Hazan, Inc. v. Tax Appeals Tribunal***, 152 AD2d 765, 543 NYS2d 545, ***affd*** 75 NY2d 989, 557 NYS2d 306). Petitioner

maintains that although tax classifications can survive scrutiny under the Privileges and Immunities clause of the United States Constitution if they provide a "rough parity of treatment between residents and nonresidents" (Petitioner's brief in support, p. 4), section 1127 always discriminates against nonresident employees of the City of New York. We reject petitioner's position.

It has been determined by the Court of Appeals that section 1127 is not a tax statute (***Legum v. Goldin***, 55 NY2d 104, 447 NYS2d 900). Therefore, the money paid by nonresident employees to the City of New York pursuant to that statute does not constitute the payment of taxes. As a result, we find that the application of section 1127 to nonresident New York City employees does not impose an impermissible tax burden on them.

Petitioner argues that he should have been allowed to videotape his hearing. Petitioner alleges that Civil Rights Law § 52, which prohibits taking motion pictures in legal proceedings such as a hearing before the Division of Tax Appeals, is unconstitutional on its face. We note again that the Division of Tax Appeals is not authorized to determine the constitutionality of statutes. Therefore, we reject petitioner's argument.

In his determination, the Administrative Law Judge found that "it would be inequitable to sustain the Division's attempt to impose New York City resident income tax on petitioner for 1996 when he has already paid the equivalent amount to the City in the form of section 1127 payments" (Determination, conclusion of law "C"). The Administrative Law Judge concluded that to do so would be to contravene the mandate of the Division of Tax Appeals to provide the public with a just system of resolving controversies.

The Administrative Law Judge's equitable determination provided a rational solution to petitioner's dilemma. However, it is not within our power to fashion such a broad solution. Our jurisdiction is limited by statute to matters involving taxation (Tax Law § 2006[12]) and we have no authority to offset petitioner's tax liability by the amount of his contractual payments.

Petitioner was obligated as a condition of his employment to make payments pursuant to section 1127 so long as he was a nonresident employee of the City of New York. It was petitioner's failure to advise his employer of his change of residence from New Jersey to Brooklyn that has caused petitioner's dilemma. Had petitioner notified his employer of his change in address in the year it occurred, it would seem that his current problem may have been avoided. As a result of his failure to so advise his employer, the City of New York continued to deduct money from petitioner's wages in an amount sufficient to meet his section 1127 obligation.

There is no statutory or regulatory provision that allows section 1127 payments erroneously made in one year to be credited against taxes owed to the City of New York for that same year. It may be that petitioner is eligible for a refund of the contractually-based section 1127 payments he made after he became a resident of New York City. This, however, is a matter beyond our jurisdiction.

For purposes of this proceeding, petitioner has not paid the New York City tax owed for calendar year 1996 and he is liable for such tax in the amount set forth by the Division in the Notice and Demand issued to petitioner. As there is no right of offset of the section 1127 payments made by petitioner against his tax obligation, petitioner's challenge to the Notice and Demand must be denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted:

2. The exception of Irwin R. Eisenstein is denied;

3. The determination of the Administrative Law Judge is reversed to the extent that petitioner's payments pursuant to section 1127 of the Charter of the City of New York cannot be used to offset his New York State personal income tax liability for the year 1996, but is otherwise sustained;

4. The petition of Irwin R. Eisenstein is denied; and

5. The Notice and Demand dated May 3, 1999 is sustained.

DATED: Troy, New York
March 27, 2003

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

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