STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
THOMAS A. SUPPANZ	:	DECISION DTA NOS. 818628
for Redetermination of Deficiencies or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1991 and 1992.	:	AND 818629

Petitioner Thomas A. Suppanz, 235 West 48th Street, Apartment 38F, New York, New York 10036, filed an exception to the determination of the Administrative Law Judge issued on June 6, 2002. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUE

Whether notices of deficiency dated November 8, 1999 and November 15, 1999 asserting deficiencies of tax, interest, and penalty for the years 1991 and 1992 should be sustained.

FINDINGS OF FACT

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

On November 8, 1999, the Division of Taxation ("Division") issued to petitioner, Thomas A. Suppanz, a Notice of Deficiency which asserted $3,794.00 in additional New York State and City personal income tax due, plus late-filing and negligence penalties and interest, for the year 1991.

On November 15, 1999, the Division issued to petitioner a Notice of Deficiency which asserted $1,371.00 in additional New York State and City personal income tax due, plus late-filing and negligence penalties and interest, for the year 1992.

Pursuant to statements of proposed audit changes dated September 13, 1999, the Division advised petitioner that it was unable to locate petitioner's New York returns for 1991 and 1992. The Division further advised petitioner that it computed petitioner's tax liability as a New York resident using information reported on petitioner's filed Federal income tax returns for those years. This Federal information was furnished to the Division by the Internal Revenue Service.

Following a conciliation conference, the Division's Bureau of Conciliation and Mediation Services issued to petitioner a Conciliation Order dated April 13, 2001, by which the Division recomputed the total deficiency for both statutory notices to be $3,308.00 in tax, plus late-filing and negligence penalties and interest. The recomputation gave petitioner credit for $1,857.00 in State and City income tax withheld for the 1991 tax year. Petitioner produced a W-2 form indicating such withholding. Petitioner did not produce a W-2 form for 1992.

As indicated by a certification of non-filing dated March 7, 2002 and signed by Karen McCarthy-Townsend, Assistant to the Commissioner for Regulatory Affairs, the Division searched its personal income tax files for petitioner's 1991 and 1992 personal income tax returns and did not locate either such return.

Although he has no specific recollection of doing so, petitioner believes he filed his 1991 and 1992 New York returns because it was (and is) his practice to prepare and file his own returns. Petitioner also has no specific recollection of filing his returns for other years with respect to which the Division concedes that a return was filed.

Petitioner has no record of filing his 1991 or 1992 New York returns. Petitioner also has no copies of his 1991 or 1992 returns.

According to petitioner, the Division first contacted him in 1998 regarding the filing of his 1991 and 1992 returns.

Petitioner's bank, Chase Manhattan, advised petitioner in a letter dated December 15, 2000, that the bank "can only provide statements on deposit accounts for the past seven years."

Petitioner's 1998 New York resident return (Form IT-201) was stamped received by the Division's Tax Compliance Telephone Collection unit on October 2, 2000. A letter to petitioner dated December 4, 2001 from the Division's representative indicates that petitioner's 1998 return is not on file.

Petitioner received a Form DTF-372 from the Division dated September 4, 2001 approving petitioner's application for an additional extension of time to file for the tax year 2000. Petitioner received a letter from the Division dated November 2, 2001 indicating that the Division has no record of a Form IT-372 (Application for Additional Extension of Time to file for Individuals) on file with respect to the year 2000.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that generally, New York income tax must be assessed within three years of the date of filing of the return. However, if no

return is filed, the tax may be assessed at any time and a taxpayer bears the burden of proving that the return in question was filed.

The Administrative Law Judge concluded that the Division's certification of non-filing for petitioner's tax returns for 1991 and 1992 was prima facie evidence that such returns were not filed and it was petitioner's burden to overcome or rebut such evidence. The Administrative Law Judge found that petitioner's evidence of filing the returns in question consisted of his testimony that it was his practice to prepare and file his returns. The Administrative Law Judge determined that, as a matter of law, such evidence is insufficient to prove that petitioner's 1991 and 1992 New York returns were filed.

The Administrative Law Judge rejected petitioner's argument that certain inaccuracies in the Division's statements with respect to the filing of his 1998 return and the filing of an extension for 2000 demonstrated that the Division could be in error in its claim that petitioner did not file a return for 1991 and 1992.

The Administrative Law Judge also rejected petitioner's claim that it was unfair for the Division to first raise the issue of the filing of his 1991 and 1992 returns in 1998. The Administrative Law Judge noted that pursuant to Tax Law § 683(c)(1)(A), tax may be assessed at any time where no return is filed and Tax Law § 689(e) places the burden of proving filing on the taxpayer. The Administrative Law Judge found that the amount of time elapsed in this case between the original due dates of the returns at issue and the raising of the filing issue in 1998 was not substantially greater than the time which had elapsed in other cases where taxpayers had to prove the filing of their tax returns well beyond the standard three-year limitations period.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that his ability to produce proof that he filed his returns and paid his New York State income tax for 1991 and 1992 has been hampered by the passage of time. Petitioner asserts that he was unable to obtain copies of his canceled checks for the years at issue. Petitioner maintains that if taxpayers are required to keep checks for more than seven years, they should be advised of this requirement. Petitioner points out inaccuracies in the Division's records for his return filed for 1998 and infers that the Division's records are also inaccurate for 1991 and 1992 in regard to his tax liability for those years.

In opposition, the Division argues that petitioner bears the burden of demonstrating that he filed the returns at issue and paid the tax due. The Division asserts that its Certificate of Non-filing is prima facie proof that the returns have not been filed. The Division points out that petitioner offered no evidence in support of having filed his returns except a general comment that it is his practice to prepare and file his returns. The Division also maintains that the penalties should be upheld as petitioner has failed to prove that his failure to file his returns and remit the necessary taxes was due to reasonable cause rather than to willful neglect.

OPINION

Petitioner has presented the same arguments on exception that were considered and rejected by the Administrative Law Judge. Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas A. Suppanz is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Thomas A. Suppanz are denied; and

4. The notices of deficiency dated November 8, 1999 and November 15, 1999 are sustained.

DATED: Troy, New York
April 17, 2003

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

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