

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JAMES J. KLOCEK : DECISION
for Revision of a Determination or for Refund of Personal : DTA NO. 822316
Income Tax under Article 22 of the Tax Law for the :
Year 2000. :

Petitioner, James J. Klocek, filed an exception to the determination of the Administrative Law Judge issued on February 18, 2010. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a letter in reply.

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

ISSUE

Whether petitioner filed his New York State resident income tax return for the year 2000 and paid the tax due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "5," which has been modified. The modified finding of fact and the Administrative Law Judge's findings of fact are set forth below.

On August 14, 2006, the Division of Taxation (Division) issued a Statement of Audit Changes to petitioner, James J. Klocek, which explained that the Division did not have a record of petitioner filing a New York State income tax return for the year 2000. In order to determine the amount of tax due, the Division utilized federal information and computed the tax on the basis that petitioner was a resident of New York State. Petitioner was further advised that penalties were imposed for late filing (Tax Law § 685[a][1]), negligence (Tax Law § 685[b][1]) and negligence or intentional disregard of the Tax Law (Tax Law § 685[b][2]). Petitioner was advised that, if he had filed a New York State income tax return for the year 2000, 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.

On the basis of the explanation set forth in the Statement of Audit Changes, the Division issued to petitioner a Notice of Deficiency, dated October 10, 2006, which asserted that personal income tax was due for the year 2000 in the amount of \$5,839.00 plus penalties and interest for a balance due of \$11,461.11.

On or about July 18, 2007, petitioner sent a facsimile copy of a U.S. Individual Income Tax Return and a New York State Resident Income Tax Return for the year 2000 to the Division. The New York State return showed a balance due of \$5,993.00. The tax returns were unsigned and undated but bore the name and address of a tax preparer.

Petitioner filed a Request for a Conciliation Conference. Following the conference, which was held on October 1, 2007, the Bureau of Conciliation and Mediation Services sustained the Notice of Deficiency.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

On December 24, 2007, the Division received a facsimile copy of a New York State Resident Income Tax Return for the year 2000, which was signed and dated on December 24, 2007. This return reported that a refund was due in the amount of \$587.00.¹

On January 27, 2009, the Division conducted a search of its files and was unable to locate a personal income tax return for petitioner for the year 2000 prior to the unsigned return received on July 18, 2007 and the signed return received on December 24, 2007.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner failed to establish that he filed his original 2000 New York State income tax return and paid the amount due thereon. The Administrative Law Judge noted that petitioner was required to rebut the presumption of correctness that attaches to a properly issued Notice of Deficiency. Since petitioner did not meet his burden of proof, the Administrative Law Judge concluded that the Notice should be sustained.

ARGUMENTS ON EXCEPTION

Petitioner maintains that the Administrative Law Judge erred in refusing to give any weight to his amended return filed in 2007. Petitioner argues that the Administrative Law Judge deemed his amended return as untimely filed. Petitioner claims that the Division did not initiate this proceeding until the statute of limitations had expired on any potential refund claim filed by petitioner herein. Therefore, petitioner states that the Administrative Law Judge should have considered his amended return.

¹We modify this fact to properly reflect the amount of refund sought on the amended return.

In opposition, the Division states that petitioner was issued a Statement of Audit Changes for the year 2000 since it had no record of a 2000 New York State income tax return filed by petitioner. In an effort to prove that he did file a New York State income tax return for 2000, petitioner submitted copies of his Federal return as well as an alleged 2000 return for New York State. The Division states that the New York State return indicated that a balance was due and owing. However, the Division emphasizes that petitioner has not substantiated that such amount was ever paid over to the Division. As such, the Division argues that petitioner has not met his burden of proof and that the Administrative Law Judge correctly determined that the Notice of Deficiency was properly issued in this case. The Division requests that the determination be sustained in its entirety.

OPINION

We affirm the determination of the Administrative Law Judge.

This case turns on whether petitioner could adequately demonstrate that he filed his 2000 New York State income tax return as alleged. In support of his position, petitioner submitted a copy of his 2000 return. This return indicated a balance due of \$5,993.00, yet petitioner was unable to demonstrate that any payment was made with the return. This document alone is not sufficient to prove that the return was filed. In fact, the Division submitted a Certification of Nonfiling, which states that it conducted a search of its files and was unable to locate a personal income tax return for petitioner for the year 2000. As discussed by the Administrative Law Judge, where a return has not been received by the Division, petitioner must come forward with sufficient proof of mailing, i.e., by certified or registered mail (*see, Matter of Schumacher*, Tax Appeals Tribunal, February 9, 1995; *see also, Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990).

Additionally, petitioner submitted a photocopy of an amended 2000 State income tax return that was filed in 2007. This amended return reflected a balance due to petitioner in the amount of \$587.00. We find that this amended return is insufficient to show that the 2000 State income tax return was timely filed. Clearly, one return showed a balance due and the other return reflected that a refund was due. In the absence of any other documents to support his position, we are unable to find that petitioner timely filed his original 2000 State income tax return. As such, we find that the Administrative Law Judge adequately addressed the issue before him. Petitioner has not presented any argument that would allow us to modify his determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of James J. Klocek is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of James J. Klocek is denied; and
4. The Notice of Deficiency dated August 14, 2008 is sustained.

DATED: Troy, New York
November 24, 2010

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner