

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>GARY G. SMITH</b>	:	DECISION
	:	DTA NO. 823033
for Revision of a Determination or for Refund of Personal	:	
Income Taxes under Article 22 of the Tax Law and	:	
the Administrative Code of the City of New York for the	:	
Year 2003.	:	

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Petitioner, Gary G. Smith, filed an exception to the determination of the Administrative Law Judge issued on December 3, 2009. Petitioner appeared by Accountancy Lane, Ltd. (Waverly Lane, Jr., EA). 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 brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision. Commissioner Tully took no part in the consideration of this matter.

***ISSUE***

Whether the Administrative Law Judge properly granted summary determination to the Division of Taxation.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact “2” and “3,” which have been modified. We have also made an additional finding of fact.

The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

The Division of Taxation (Division) issued to petitioner, Gary G. Smith, a Notice of Deficiency, dated February 17, 2009, which asserted that personal income tax was due for the year 2003 in the amount of \$3,063.00 plus penalties and interest for a balance due of \$6,013.53. A previously issued Statement of Audit Changes, dated December 22, 2008, explained that the Division did not have a record of petitioner filing a New York State income tax return for the year 2003. The statement further explained that the Division utilized information obtained from the Internal Revenue Service to determine the amount of tax due. In determining the amount of petitioner's liability, the Division allowed petitioner a credit of \$8.00 for withholding.<sup>1</sup>

Petitioner was further advised that the Division would allow additional payments if his withholding from wages or estimated tax payments were greater than the amount allowed by the Division. The 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]).

We have modified finding of fact "2" of the Administrative Law Judge's determination to read as follows:

On April 12, 2009, petitioner's representative faxed to the Division an unsigned copy of petitioner's 2003 New York State Resident Income Tax Return, which included a form W-2, which showed total New York State and New York City taxes withheld in the amount of \$2,907.90. After application of the withheld taxes, the return reported a balance due of \$162.00.<sup>2</sup>

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<sup>1</sup> The credit of \$8.00 was based on information supplied to the Department of Taxation and Finance's Magnetic Media/Wage Reporting Unit.

<sup>2</sup> We have modified finding of fact "2" to more accurately reflect the record.

We have modified finding of fact “3” of the Administrative Law Judge’s determination to read as follows:

On May 11, 2009, petitioner filed a petition with the Division of Tax Appeals. According to the petition, an original return was filed but never processed by the Division. Petitioner also asserted that the Division erred in determining the amount of withholding to be credited to petitioner’s return. On July 15, 2009, the Division of Tax Appeals received the Division’s answer, which denied the petitioner’s allegations of fact or error.<sup>3</sup>

On August 4, 2009, petitioner filed a motion for summary determination.<sup>4</sup> In support of his motion, petitioner states that the Division is seeking to “rob” him of nearly \$6,000.00 when nothing is owed; that his 2003 New York State personal income tax return was prepared by a certified public accountant; and that he submitted a timely return and remitted payment therewith by a money order.

Following receipt of the unsigned copy of petitioner’s 2003 New York State Personal Income Tax Return, the Division performed a further search of the Division’s estimated tax files for 2003 in order to ascertain if the amount that Mr. Smith alleged that he paid was placed into an estimated account in error. The Division determined that petitioner did not have an estimated account for 2003 or any other tax year. As a result, the Division has no record of the \$162.00 that is alleged to have been paid.

We make the following additional finding of fact:

In its brief in response to petitioner’s motion, the Division conceded that, on the basis of petitioner’s form W-2 for 2003, the Notice of Deficiency should be modified to reflect tax due in the amount of \$162.00 plus penalty and interest.

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<sup>3</sup> We have modified finding of fact “3” to more accurately reflect the record.

<sup>4</sup> A motion for summary determination was also made prior to this date but was disregarded as premature.

The Division also requested that petitioner's motion be denied and that summary determination be granted in its favor.

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

In his determination, the Administrative Law Judge noted that a motion for summary determination will be granted if the Administrative Law Judge finds that no material and triable issue of fact is presented and that the Administrative Law Judge can, as a matter of law, issue a determination in favor of any party. The Administrative Law Judge found that it was clear from the motion papers that there were no material issues of fact and that judgment may be granted as a matter of law.

The Administrative Law Judge determined that with respect to the amount of tax in issue, a copy of petitioner's 2003 New York State personal income tax return showed that, after withholding, there was a balance due to New York State of \$162.00. The Division accepted this amount as petitioner's tax liability for the year in issue and, therefore, there was no issue of fact with respect to the amount of petitioner's tax liability.

The Administrative Law Judge found that the imposition of interest and penalty for failure to timely file and pay the tax was supported by the fact that the Division did not have any record of receiving petitioner's tax return for 2003 or a payment of \$162.00. However, the Administrative Law Judge did not further consider the imposition of penalty and interest as petitioner failed to present any arguments regarding these issues.

Citing applicable case law, the Administrative Law Judge determined that petitioner's affidavit and a copy of his unsigned tax return for 2003 were insufficient to prove that petitioner timely filed his personal income tax return for 2003 and were also insufficient to overcome the

presumption of correctness of a notice of deficiency that is properly issued under the Tax Law. The Administrative Law Judge rejected petitioner's argument that he paid the tax due with a money order, as the Division had no record of receipt of the payment and petitioner offered no evidence to support his assertion.

The Administrative Law Judge found that there were no material issues of fact and that he could, as a matter of law, issue a determination in favor of the Division. Therefore, the Administrative Law Judge granted the Division's request for summary determination and denied the petition.

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

On exception, petitioner argues that he should be allowed a hearing in order to explore why his withholding was not properly credited to him by the Division.

The Division, in opposition, argues that petitioner has provided no basis for the modification of the Administrative Law Judge's determination and, as a result, the determination should be sustained.

#### ***OPINION***

Petitioner filed a petition protesting the Notice of Deficiency issued to him by the Division on February 17, 2009. As part of his protest, petitioner alleged that the Division did not allow him full credit for the amount of tax that was withheld from his wages during 2003. The Division, upon receipt of a copy of petitioner's W-2 for 2003, gave him the appropriate credit for tax withheld.

As the Administrative Law Judge found, petitioner failed to provide evidence that he timely filed his return for 2003 or that he paid the amount of tax due on that return. On exception, petitioner failed to address either of these issues.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gary G. Smith is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Gary G. Smith is denied; and
4. The Notice of Determination dated February 17, 2009 is modified in accordance with conclusion of law "B" of the Administrative Law Judge's determination, but is otherwise sustained.

DATED: Troy, New York  
June 24, 2010

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

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