STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
THOMAS A. SUPPANZ	:	DETERMINATION 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, Apt. 38F, New York, New York 10036, filed petitions 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.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 8, 2002 at 10:30 A.M., which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer L. Hink, Esq., of counsel).

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

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

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

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

9. 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."

10. 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.

11. 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.

SUMMARY OF PETITIONER'S POSITION

12. Petitioner asserts that it is fundamentally unfair for the Division, in 1998, to first raise the issue of the filing of his 1991 and 1992 returns. Petitioner contends that by that time he no longer had copies of his tax returns or his canceled checks to prove payment of the tax. Furthermore, based on the December 15, 2000 letter from Chase Manhattan bank, petitioner asserts that he was unable to obtain copies of his canceled checks for the years at issue. Petitioner thus contends that, as of the time the Division first contacted him regarding the filing of his 1991 and 1992 returns, he was unable to document that he filed his returns and paid tax for those years. Additionally, petitioner notes the inaccuracy of the Division's statements with respect to the filing of his 1998 return (***see***, Finding of Fact "10") and the filing of an extension for 2000 (***see***, Finding of Fact "11"). Given these inaccuracies, petitioner asserts the Division could be in error in its claim that petitioner did not file a return for 1991 and 1992.

CONCLUSIONS OF LAW

A. Generally, New York income tax must be assessed within three years of the date of filing of the return (Tax Law § 683[a]). If no return is filed, however, then the tax may be assessed at any time (Tax Law § 683[c][1][A]). Petitioner bears the burden of proving that he filed the returns in question (Tax Law § 689[e]).

B. The certification of non-filing indicating that 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 is prima facie evidence that such returns were not filed (Tax Law § 691[d]). The certification of non-filing thus establishes the fact of non-filing unless petitioner submits sufficient evidence to overcome or rebut such evidence.

C. "Where a document has not been received by the Division of Taxation, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing" (***Matter of Savadjian***, Tax Appeals Tribunal, December 28, 1990). Petitioner's evidence of filing the returns in question consisted of his testimony that it was his practice to prepare and file his returns. As a matter of law, such evidence is insufficient to prove that petitioner's 1991 and 1992 New York returns were filed (***see***, ***Matter of Levin***, Tax Appeals Tribunal, April 16, 1998). Petitioner has thus failed to prove that he filed the returns in question.

D. Petitioner's argument that certain inaccuracies in the Division's statements with respect to the filing of his 1998 return (***see***, Finding of Fact "10") and the filing of an extension for 2000 (***see***, Finding of Fact "11") shows that the Division could be in error in its claim that petitioner did not file a return for 1991 and 1992 is rejected. This evidence relates to the issue of whether the Division *misplaced* certain documents and has no bearing on the issue of whether petitioner *filed* his 1991 and 1992 returns (***see***, ***Matter of Levin***, ***supra***).

E. Regarding petitioner's claim that it was unfair for the Division, in 1998, to first raise the issue of the filing of his 1991 and 1992 returns, as noted above, Tax Law § 683(c)(1)(A) allows for the assessment of tax at any time where no return is filed and Tax Law § 689(e) places the burden of proving filing squarely upon the taxpayer. Accordingly, the assertion of tax due and the assignment of the burden of proof in this case was consistent with the Tax Law. Moreover, 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 is not substantially greater than the time elapsed in other cases where taxpayers had to prove filing of their tax returns well beyond the standard three-year limitations period (***see***, ***e.g.***, ***Matter of Savadjian***, ***supra*** [approximately five years between original due date for return and notice of disallowance of refund claim]; ***Matter of***

Schumacher, Tax Appeals Tribunal, February 9, 1995 [approximately six years between original due date for return and notice of disallowance of refund claim]).

F. The petition of Thomas A. Suppanz is denied and the notices of deficiency dated November 8, 1999 and November 15, 1999 are sustained.

DATED: Troy, New York
June 6, 2002

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE