

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PATRICK C. AND ANNE M. KENNEDY	:	DETERMINATION
	:	DTA NO. 823722
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 2006.	:	

Petitioners, Patrick C. and Anne M. Kennedy, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2006.

On June 27, 2011 and July 6, 2011, respectively, petitioners, appearing pro se, and the Division of Taxation, appearing by Mark F. Volk, Esq. (Christopher O'Brien, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by December 8, 2011, which date began the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Timothy Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether a Notice of Deficiency, as revised by the Division of Taxation, should be sustained.

FINDINGS OF FACT

1. Petitioners, Patrick C. and Anne M. Kennedy, timely filed their joint 2006 New York resident income tax return on or before April 15, 2007. A copy of petitioners' signed IT-201,

dated April 10, 2007, is in the record. The return reports \$153,372.00 in federal and New York adjusted gross income (AGI), \$99,437.00 in New York taxable income and a New York State tax liability (after credits) of \$5,065.00. The return also reports \$7,701.00 in tax withheld and thus claims a refund of \$2,636.00. The record contains a photocopy of a cancelled check in the claimed refund amount, dated May 17, 2007, issued to and cashed by petitioners. The return also bears the signature of a tax preparer.

2. Pursuant to a routine exchange of information with the Internal Revenue Service (IRS), the Division of Taxation (Division) received an IRS report detailing petitioners' filed 2006 federal income tax return. Such information showed that petitioners reported federal AGI of \$192,646.00 on their 2006 federal return. A computer printout of the information received by the Division from the IRS in connection with this matter is in the record.

3. Following its receipt of petitioners' 2006 federal return information, the Division issued a Statement of Proposed Audit Changes, dated January 25, 2010, advising petitioners of the Division's recomputation of their 2006 New York income tax liability based on the information received from the IRS, as noted above. Specifically, as indicated in the Statement of Proposed Audit Changes, the Division determined the difference between federal AGI as reported on petitioners' 2006 federal return and federal AGI as reported on their 2006 New York return to be additional New York taxable income and recalculated petitioners' New York liability accordingly. The Division thus determined New York taxable income of \$138,711.00 and total New York income tax due thereon of \$7,755.70. After adjusting for \$5,065.00 in total tax as reported on the return, the Statement of Proposed Audit Changes asserted additional tax due of \$2,690.70, plus penalty and interest, for the year 2006.

4. On April 5, 2010, the Division issued to petitioners a Notice of Deficiency asserting \$2,690.70 in additional income tax due, plus penalty and interest, for the year 2006.

5. In response to the Statement of Proposed Audit Changes, on or about February 17, 2010, the Division received a second joint New York resident return for 2006 in petitioners' names. Although unsigned by petitioners, the Division ultimately accepted the amounts reported on this second return as a basis for the adjustment of the asserted deficiency. Specifically, consistent with the information obtained from the IRS (*see* Finding of Fact 2), this second return reports \$192,646.00 in federal AGI. Additionally, although there are numerous differences in detail between the original and second returns, the bottom-line difference between the two returns is modest, as the second return reports \$155,490.00 in New York AGI, \$106,861.00 in New York taxable income, and a total New York state tax liability (after credits) of \$5,266.00.

6. By a Response to Taxpayer Inquiry dated May 17, 2010, the Division advised petitioners that the subject deficiency was reduced to \$201.00, plus interest, and that the assertion of penalty was withdrawn. The revised tax deficiency equals the difference between total New York State tax due as reported on the second return and total New York State tax due as reported on the original return.

SUMMARY OF PETITIONERS' POSITION

7. Petitioners deny the legitimacy of the income tax return submitted on or about February 17, 2010. They assert that the so-called "second return" was unknown to them until the Division provided them with a copy. They further assert that they never authorized any person or entity to file such a return on their behalf and that they have not filed any amended return for the year at issue.

8. Petitioners also advise that they have presented aspects of this matter to the New York State Attorney General's office for investigation. They provided a reference complaint number and request that the Division of Tax Appeals take notice of the complaint. They also request that the Division of Tax Appeals take notice of any and all work performed by the Attorney General's office regarding their complaint before rendering a determination in this matter.

CONCLUSIONS OF LAW

A. The Division of Taxation may issue a Notice of Deficiency of income tax if, upon examination of a return, the Division determines that there is a deficiency of tax (Tax Law § 681[a]). Tax Law § 697(f) authorizes the Division to exchange tax return information with the IRS. Here, an examination of petitioners' 2006 New York return in light of the IRS information obtained by the Division revealed a difference in reported federal AGI between petitioners' federal and New York returns. Such a difference is significant because federal AGI is the starting point for determining New York AGI and, ultimately, New York income tax (*see* Tax Law § 612[a]). Accordingly, the Division reasonably issued a Notice of Deficiency to petitioners based on that difference.

B. Where, as here, a Notice of Deficiency is properly issued under the Tax Law, a presumption of correctness arises and the petitioner bears the burden of proving error (*see Matter of Panuccio*, Tax Appeals Tribunal, August 16, 2007; Tax Law § 689[e]).

C. Petitioners have not met their burden to establish error in the Notice of Deficiency as revised pursuant to the Response to Taxpayer Inquiry (*see* Finding of Fact 6). Petitioners do not contest the "original" 2006 return or the federal tax information that prompted the issuance of the Notice of Deficiency. Petitioners do take issue with the so-called second return, which, as noted, forms the basis of the revised deficiency. Petitioners' denial of the legitimacy of the second

return is curious, inasmuch as the Division's consideration of this return wiped out nearly the entire deficiency, and without this return there is no basis for any revision. In any event, as the Division has accepted the amounts reported on the second return for purposes of its adjustment to the deficiency, and considering that such adjustment inures greatly to petitioners' benefit, it is not necessary to address the legitimacy of the second return herein.

D. This determination declines to take notice, as requested by petitioners, of the complaint filed with the Attorney General's office or any work performed by that office in connection with such complaint. State Administrative Procedure Act § 306(4) provides that "[o]fficial notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency." Courts of the State of New York may take judicial notice of their own record of the proceeding of the case before them, their own records of cases involving one or more of the same parties or their own records of cases involving different parties (*Berger v. Dynamic Imports, Inc.*, 51 Misc 2d 988, 989, 274 NYS2d 537, 540 [1966]; *Matter of Kolovinas*, Tax Appeals Tribunal, December 28, 1990). Courts need not take judicial notice of records of proceedings in other courts; proof of such proceedings is required and the records of such proceedings must be introduced as evidence (*Berger v. Dynamic Imports, Inc.* at 989). Similarly, in the present matter, it is appropriate to decline to take official notice of the records of the Office of the Attorney General, an agency separate from the Division of Tax Appeals. Assuming its relevance to the deficiency at issue, it was incumbent upon petitioners to introduce evidence of their complaint and any related material.

E. The petition of Patrick C. and Anne M. Kennedy is denied and the Notice of Deficiency dated April 5, 2010, revised as indicated by the Response to Taxpayer Inquiry dated May 17, 2010 (*see* Finding of Fact 6), is sustained.

DATED: Troy, New York
January 12, 2012

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE