

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| RICHARD ARONOFF | : | |
| for Redetermination of a Deficiency 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 Year 2001. | : | DECISION DTA NO. 823822 |

Petitioner, Richard Aronoff, filed an exception to the determination of the Administrative Law Judge issued on December 20, 2012. Petitioner appeared *pro se*. The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, Esq., of counsel).

Petitioner filed a letter brief in lieu of a formal brief in support. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a letter brief in lieu of a formal 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 the Division of Taxation properly determined petitioner's tax liability for the year 2001.

FINDINGS OF FACT

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

In accordance with Internal Revenue Code (IRC or 26 USC) § 6103 (d), the Division of Taxation (Division) received information from the Internal Revenue Service (IRS) that indicated that petitioner, Richard Aronoff, filed a federal income tax return using a New York State address and had New York income sufficient to require the filing of a New York State personal income tax return for the year 2001. The Division did not have a record of petitioner filing such a return.

On October 6, 2008, the Division issued to petitioner a Statement of Proposed Audit Changes, which explained the above information and advised that in order to determine the amount of tax due, if any, the Division had utilized the information provided to it by the IRS and computed the tax on the basis that he was a resident of New York State and City. The items of income identified on petitioner's federal return included: 1) \$221,501.00 received from Smith Barney that was reported on a Form 1099; 2) \$18,000.00 from Prudential Equity that was reported on a Form 1099-Misc; and 3) \$125.00 of interest income from various payers, resulting in a total New York adjusted gross income of \$239,626.00. The Division allowed petitioner the standard deduction of \$7,500.00, as it was greater than any allowable itemized deductions.

Petitioner was also informed that penalties were imposed for late filing (Tax Law § 685 [a] [1]) and negligence (Tax Law § 685 [b] [1]). In addition, a penalty equal to 50 percent of the interest due on the deficiency or portion thereof due to negligence or intentional disregard of the law was added pursuant to Tax Law § 685 (b) (2). Petitioner was advised that if he had filed a New York State income tax return for the year 2001, he should provide a complete copy of it to the Division, along with any wage and tax statements in his possession. Furthermore, if he had made a payment with the return, he was asked to provide proof to that effect. Petitioner was also invited to provide evidence if he was a full or part-year resident of another state. None of the

requested proof was submitted by petitioner.

Based on the Statement of Proposed Audit Changes, the Division issued to petitioner a Notice of Deficiency, dated August 10, 2009, which asserted that personal income tax was due for the year 2001 in the amount of \$18,954.00, plus penalties and interest, for a balance due of \$36,600.53.¹

Petitioner attached two self-authored, unsworn letters to his petition. In them, he maintained that the \$221,501.00 received from Smith Barney in 2001 was subsequently invested in a self-directed IRA, of which he was the owner and the sole participant. Petitioner added that his self-directed IRA was used to fund a real estate purchase. He stated that the property was not purchased for his personal use or held in his name. The name of the purported owner or location of the real estate, however, was not given. One of these letters also listed the names of two IRS employees consulted by petitioner, and indicated that “[b]oth of these individuals acknowledged that real estate could be owned in a retirement plan but neither knew the specific mechanism for doing so.” There is nothing in the record from either of these two individuals. Petitioner also submitted as part of his case an additional self-authored, unsworn letter reiterating the arguments in his previous two letters. Other than the aforementioned letters, petitioner did not submit any documentary evidence or testimony in support of his petition.

In support of its case, the Division submitted the affidavit of Sally Ostrander, a Tax Technician 4 in its Personal Income Tax Desk Audit Unit. According to Ms. Ostrander, her responsibilities include reviewing and processing New York State personal income tax returns, conducting audits and resolving protests, including communicating with taxpayers and preparing

¹ The amount of penalties asserted in the Statement of Proposed Audit Changes was \$11,493.21, while the penalties in the Notice of Deficiency were only \$4,738.50. This reduction was not explained by the Division, but appears to be a cancellation of the section 685 (b) (2) penalty.

administrative records, reports and forms. The information offered in her affidavit is based on her personal knowledge of the facts in this matter and upon a review of the Division's official records kept in the ordinary course of business.

Ms. Ostrander averred that the Notice of Deficiency was issued to petitioner based upon information about his filing and payment status received from the IRS pursuant to IRC § 6103 (d). In particular, petitioner failed to file a New York State personal income tax return for the year 2001 and disclose the existence of additional income. Ms. Ostrander added that petitioner was requested to provide documentation substantiating his claim that the IRS had accepted the use of the Smith Barney funds in a self-directed IRA and, thus, that the income was exempt from taxation. Ms. Ostrander stated, however, that such substantiation was never received by the Division.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge explained that under the Tax Law, the taxpayer bears the burden of proving that a statutory notice issued by the Division is erroneous. As petitioner failed to introduce any evidence, the Administrative Law Judge held that petitioner failed to meet his burden and sustained the subject Notice of Deficiency.

ARGUMENTS ON EXCEPTION

On exception, petitioner raises the same argument that was presented before the Administrative Law Judge, to wit, that the amounts he received from Smith Barney in 2001 were exempt from tax because they were used to purchase real estate and federal law does not prohibit real estate from being held as part of a retirement plan. Petitioner also contends that various agents of the Division failed to act in good faith. Specifically, petitioner notes that the Division could have confirmed or requested more information about the Smith Barney income and the

IRA by contacting him, and that Mr. O'Brien, the Division's attorney in this matter, did not respond to him after petitioner made a settlement offer.

The Division argues that the determination should be affirmed.

OPINION

When the Division properly issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to such notice (*Matter of Hickey*, Tax Appeals Tribunal, August 12, 2004; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). The taxpayer bears the burden of proving, by clear and convincing evidence, that the assessment is erroneous (Tax Law § 689 [e]).

The instant matter involves New York State and City personal income tax. As is relevant herein, Tax Law § 681 (a) provides the following:

“If a taxpayer fails to file an income tax return required under this article, the tax commission is authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of deficiency to the taxpayer.”

For the year 2001, petitioner failed to file a New York State personal income tax return. However, upon the review of IRS information, the Division discovered that petitioner filed his 2001 federal return using a New York address, and that he received income from the following sources:

- 1) \$221,501.00 from Smith Barney as reported on a Form 1099;
- 2) \$18,000.00 from Prudential Equity as reported on a Form 1099-Misc; and,
- 3) \$125.00 of interest income from various payers.

On exception, petitioner again argues that the Smith Barney item is exempt from New York State and City personal income tax because that money was used to fund a self-directed retirement plan.

We affirm the determination of the Administrative Law Judge because petitioner failed to overcome the presumption of correctness (Tax Law § 689 [e]; *Matter of Legogrande v Tax Appeals Trib.*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]). Before the Administrative Law Judge, petitioner was afforded an opportunity to provide evidence supporting his position that the Smith Barney funds were tax exempt. Petitioner did not avail himself of this opportunity and provided no evidence. Indeed, the record lacks any indication of how the Smith Barney funds were actually invested, much less proof that the funds were actually used to purchase real estate for a self-directed retirement plan. As such, we must sustain the Notice of Deficiency because petitioner failed to meet his burden of proof. Finally, regarding petitioner's assertions that several agents of the Division were not acting in good faith, petitioner failed to provide any facts warranting an equitable remedy (*see e.g. Matter of Harry's Exxon Serv. Station*, Tax Appeals Tribunal, December 6, 1988).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard Aronoff is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Richard Aronoff is denied; and
4. The Notice of Deficiency, dated August 10, 2009, is sustained.

DATED: Albany, New York
November 27, 2013

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

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