

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN P. DEMAIO : DETERMINATION
for Redetermination of Deficiencies or for Refund of New : DTA NO. 826875
York State Personal Income Tax under Article 22 of the :
Tax Law for the Years 1997, 1998, 1999 and 2000. :

Petitioner, John P. DeMaio, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1997, 1998, 1999 and 2000.

On July 23, 2015 and August 5, 2015, respectively, the Division of Taxation, appearing by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel), and petitioner, appearing pro se, waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by November 30, 2015, which date commenced the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division properly issued notices and demands for payment of tax due to petitioner for the years 1997, 1998, 1999 and 2000.

II. Whether reasonable cause exists to support the abatement of penalties.

FINDINGS OF FACT

1. Petitioner late filed his 1997 New York State resident income tax return on August 17, 1998, reporting his mailing address in New York, New York, and reporting New York State and City income tax due for 1997 in the amount of \$2,993.00. Petitioner's 1997 return was due on April 15, 1998. Petitioner did not remit payment with his 1997 return.

2. On November 2, 1998, the Division of Taxation (Division) issued to petitioner a Notice and Demand for Payment of Tax Due for 1997, Notice Number L-015663803, asserting tax due in the amount of \$2,993.00, plus interest in the amount of \$117.62 and penalty in the amount of \$778.17 for failure to file or pay tax on or before the due date. This notice was mailed to petitioner's New York, New York, address as reported on his 1997 return.

3. Petitioner's 1998 New York State resident income tax return, with extension, was due on August 16, 1999. Petitioner late filed his 1998 return on August 18, 1999, reporting his mailing address in New York, New York, and reporting New York State and City income tax for 1998 in the amount of \$717.00, less estimated payments of \$500.00. Petitioner reported a self-assessed penalty for tax year 1998 in the amount of \$28.00 for underpayment of estimated tax. Petitioner remitted partial payment in the amount of \$150.00 with his 1998 return.

4. On September 20, 1999, the Division issued to petitioner a Notice and Demand for Payment of Tax Due for 1998, Notice Number L-016939537, asserting tax due in the amount of \$55.00, plus interest in the amount of \$5.32 and penalty of \$38.52 for failure to file or pay tax on or before the due date. This notice was mailed to petitioner's New York, New York, address as reported on his 1998 return.

5. Petitioner timely filed a 1999 New York State resident income tax return, with extension, on May 30, 2000, reporting his mailing address in New York, New York, and

reporting New York State and City income tax due for 1999 in the amount of \$546.00. Petitioner did not remit payment with his 1999 return.

6. On July 27, 2000, the Division issued to petitioner a Notice and Demand for Payment of Tax Due for 1999, Notice Number L-018298873, asserting tax due in the amount of \$546.00, plus interest in the amount of \$12.10. This notice was mailed to petitioner's New York, New York, address as reported on his 1999 return.

7. Petitioner's 2000 New York State resident income tax return, with extension, was due on August 15, 2001. Petitioner late filed his 2000 return on August 16, 2001, reporting his mailing address in New York, New York, and reporting New York State and City income tax for 2000 in the amount of \$473.00. Petitioner did not remit payment with his 2000 return.

8. On October 12, 2001, the Division issued to petitioner a Notice and Demand for Payment of Tax Due for 2000, Notice Number L-020134778, asserting tax due in the amount of \$473.00, plus interest in the amount of \$15.03 and penalty in the amount of \$26.01 for failure to file or pay tax on or before the due date. This notice was mailed to petitioner's New York, New York, address as reported on his 2000 return.

9. Petitioner filed a petition with the Division of Tax Appeals on October 5, 2013 protesting the subject notices and demands.¹

¹ In addition to the notices and demands that are the subject of this determination, the petition protested additional notices of deficiency and notices and demands (notice numbers L-039572485, L-038435221, L-034130849, L-030574366, L-029573330, L-039806861, and L-040365544) which were assigned Division of Tax Appeals case number 825913. By Order of the Division of Tax Appeals dated July 10, 2014, the portion of the petition regarding notices and demands numbers L-040365544, L-039806861, L-039572485, L-034130849, and L-030574366 was dismissed. By Determination of the Division of Tax Appeals dated April 2, 2015, the portion of the petition regarding notice numbers L-038435221 and L-029573330 was dismissed. The notices and demands at issue herein (notice numbers L-015663803, L-016939537, L-018298873, and L-020134778) were originally included in the proceedings under Division of Tax Appeals case number 825913. Pursuant to the Order dated July 10, 2014, the notices and demands at issue herein survived a notice of intent to dismiss petition by reason that when issued, these notices provided petitioner with prepayment hearing rights and the Division was granted 75 days from the date of the Order to file an answer with respect to the subject notices. The Division timely filed its answer on September 10, 2014. The proceeding for the notices at issue was reassigned Division of Tax Appeals case number 826875.

10. The Division timely submitted the following documents in support of its position: waiver of hearing/consent to submission form executed by the parties; petition filed by petitioner in this matter; the Division's answer; notices and demands for the tax years at issue; petitioner's resident income tax returns for the years 1997, 1999 and 2000 and a transcript of petitioner's resident income tax return for the year 1998; a chronological procedural history synopsis for this matter; and an affidavit, dated August 19, 2015, of Richard Lovely, Taxpayer Services Administrator for the Division.

11. Petitioner did not submit any documents within the time frame established for the filing of documents.

CONCLUSIONS OF LAW

A. Section 682(a) of the Tax Law provides that the amount of tax which a return shows to be due, or the amount of tax which a return would have shown to be due but for a mathematical or clerical error, shall be deemed to be assessed on the date of filing the return. Tax Law § 692(b), in turn, provides for the issuance of a Notice and Demand for tax:

“The tax commission shall as soon as practicable give notice to each person liable for any amount of tax, addition to tax, penalty or interest, which has been assessed but remains unpaid, stating the amount and demanding payment thereof. Such notice . . . shall be sent by mail to such person's last known address.”

The term “last known address” is defined as the address given on the taxpayer's last filed return, unless subsequent to the filing of such return the taxpayer notifies the Division of a change of address (Tax Law § 691[b]).

There is no dispute that petitioner reported amounts of tax due on his resident income tax returns for the years at issue (*see* Findings of Fact 1, 3, 5, and 7). As such, the amount of New York State and City income tax due was deemed self-assessed by petitioner's returns for the

years at issue. Additionally, petitioner does not contend that he remitted payment with his returns for the years 1997, 1999 and 2000, or remitted full payment for 1998. The Division thus properly issued notices and demands to petitioner pursuant to Tax Law § 692(b), giving notice of the amount assessed and unpaid for each year at issue. Moreover, the Division sent each notice to petitioner's last known address, which was the mailing address reported on petitioner's return for each corresponding year (*see* Findings of Fact 2, 4, 6, and 8; Tax Law § 691[b]). Petitioner has failed to provide any evidence that he notified the Division of a change of address prior to the issuance of the subject notices.

Due process requires reasonable notice of the basis for the Division's determination of a tax deficiency because it is impossible for a taxpayer to respond effectively if he is uninformed or misled (*see Matter of Silverstein v. Minkin*, 49 NY2d 260 [1980]; *Matter of Diamond Terminal Corporation v. Dept. of Taxation and Finance*, 158 AD2d 38 [1990]). As noted above, the Division provided proper notice of the basis of its determination by issuance of the subject notices and demands sent to petitioner's last known address for the years at issue. Petitioner then bears the burden of proof to show, by clear and convincing evidence, that the Division's determination was incorrect (Tax Law § 689[e]).

B. Petitioner submitted no evidence within the time established for the filing of documents in this matter and has thus failed to meet his burden of proof to dispute the amount of tax due or contest that the Division sent the notices to his last known address for each year at issue. Petitioner argues that the Division violated his right to due process based on the weight of the Division's documents, referring to the pounds, rather than quality, materiality or relevance of the evidence, stating, "[t]he State has submitted over 28 pounds of the unsegregated not highlighted documents making an adequate Response impossible thereby violating fundamental Due

Process.” Petitioner’s argument is without merit. It is first noted that an assertion that an opposing party is in violation of due process because its documents weigh too much is not a legitimate argument. Moreover, it is unclear from petitioner’s argument to what 28 pounds of documents he refers. The Division’s submission in this matter, totaling 110 pages, consisted of a waiver of hearing/consent to submission form executed by the parties; petition filed by petitioner in this matter; the Division’s answer; notices and demands for the tax years at issue; petitioner’s resident income tax returns for the years 1997, 1999 and 2000 and a transcript of petitioner’s resident income tax return for the year 1998; a chronological procedural history synopsis for this matter; and an affidavit, dated August 19, 2015, of Richard Lovely, Taxpayer Services Administrator for the Division. Contrary to petitioner’s argument, the documents submitted by the Division in this matter are clearly marked, numbered, identified and authenticated, and petitioner had full opportunity to respond to the Division’s submission.² Petitioner’s failure to submit any evidence in opposition to the Division’s submission does not amount to a violation of due process. Petitioner had full opportunity to present evidence to support his position, but chose not to do so. As such, petitioner has failed to meet his burden of proof.

C. Tax Law § 684(a) provides that:

“[I]f any amount of income tax is not paid on or before the last date prescribed in this article for payment, interest on such amount . . . shall be paid for the period from such last date to the date paid, whether or not any extension of time for payment was granted.”

² It is also noted that petitioner’s argument against the weight, in pounds, of the Division’s documents, in addition to being irrelevant and meritless, is also incorrect. The documents submitted by the Division in this matter, consisting of 110 pages total, weigh far less than the 28 pounds claimed by petitioner, in fact weighing less than one and a half pounds. Regardless, the weight of evidence is not properly measured in this matter based on pounds of documents. I find that the Division’s documents are relevant, material and properly submitted for the determination in this matter. Petitioner has failed to present any evidence to dispute or contradict the Division’s documents.

Petitioner has presented no evidence to support an abatement of interest. By requesting that the interest charges be abated, petitioner, in essence, seeks an interest-free loan from the State of New York. As noted by the Tribunal in the *Matter of Rizzo* (Tax Appeals Tribunal, May 13, 1993):

“Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds”

D. Penalties were asserted against petitioner for failure to file or pay tax on or before the due date pursuant to Tax Law § 685(a)(1) and (2) for the years 1997, 1998 and 2000. Said penalties may be cancelled if it is shown that the failure to timely file and pay was due to reasonable cause and not willful neglect. Petitioner has not established that the failure to timely file or pay tax was due to reasonable cause and not due to willful neglect. In the words of the Tax Appeals Tribunal, in establishing reasonable cause, the taxpayer faces an “onerous task” (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained why the task is onerous as follows:

“By first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted] (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992).”

Significantly, the amount of tax determined due was self-assessed on petitioner’s returns. Petitioner failed to remit the amount of income tax he reported due at the time he filed his returns. Petitioner has failed to present any evidence that his failure to pay was due to reasonable

cause and not willful neglect. It is thus determined that petitioner's failure to timely file and pay tax was not due to reasonable cause, and penalties were properly imposed.

E. The petition of John P. DeMaio is denied and the notices and demands for payment of tax due dated November 2, 1998, September 20, 1999, July 27, 2000 and October 12, 2001, are sustained.

DATED: Albany, New York
May 5, 2016

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE