STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN CLIFTON	:	DETERMINATION DTA NO. 826975
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 2006.	:	

Petitioner, John Clifton, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2006.

On April 7, 2016 and April 14, 2016, respectively, petitioner, appearing pro se, and the Division of Taxation, appearing by Amanda Hiller, Esq. (Charles Fishbaum, Esq., of counsel), waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by August 25, 2016, 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.

ISSUE

Whether petitioner met his burden of proving that the Notice of Deficiency issued for tax year 2006 was improper or erroneous.

FINDINGS OF FACT

1. The Division of Taxation (Division) received information from the Internal Revenue Service (IRS) that petitioner, John Clifton, had sufficient income in 2006 from a New York source to require the filing of a personal income tax return.

2. The information obtained by the Division from the IRS indicated that petitioner's federal adjusted gross income for tax year 2006 was $36,235.00 and that petitioner had a New York State address.

3. A search of the Division's records indicated that petitioner did not file a New York State personal income tax return for the year 2006.

4. On August 27, 2012, the Division sent correspondence to petitioner stating that it had not received petitioner's New York State income tax returns for the years 2006 and 2007. The correspondence further stated that information received from the IRS indicated that petitioner had a New York address and sufficient income to require the filing of a New York State personal income tax return for the years in question. The correspondence stated that petitioner must respond within 30 days by either filing a return or explaining why he did not have to file, and that if he did not respond, the Division would issue an assessment.

5. On September 24, 2012, the Division received a response from petitioner, wherein he stated:

> "I am not required to file a return for years 2006 or 2007, and I did not receive Federal adjusted gross income or NY additions of more than $3000. Information reports provided to the IRS by my company erroneously alleged payments of Internal Revenue Code sections 3121 & 3401 that are hereby disputed. They have listed payments as 'wages' as defined in the IRC section 3121(a) AND 3401(a). I am rebutting their claim, stating that I am a private sector citizen (non-federal entity) as defined in 3401(c)(d). I am not employed in a 'trade or business' nor am I an 'officer of a Federal Corporation.' Amounts listed as withheld on the information reports are correct, however."

6. On January 6, 2014, the Division issued to petitioner a Statement of Proposed Audit Changes for tax year 2006 indicating tax due of $2,398.00, plus penalty and interest. The statement provided, in part, as follows:

> "We do not have a record of a New York State income tax return on file for you.
>
> Section 6103(d) of the Internal Revenue Code allowed us to get information from the Internal Revenue Service. This information indicates you had sufficient income to require the filing of a New York State return.
>
> We could not issue this statement before now because of the time needed to obtain and process the federal information.
>
> We used the federal information and computed your tax as a New York State resident. In cases where the Internal Revenue Service provided us with information reported on the federal return, that information was used to compute your New York State tax. When federal return data was not available, your income was determined using information provided by the Internal Revenue Service such as Form 1099 information, etc. This includes wages, interest, dividends, capital gains, and other sources of income.
>
> We have made any applicable additions to federal adjusted gross income for interest income on state and local obligations (other than New York State) and public employee 414(h) contributions based on the information obtained from the Internal Revenue Service. Also, if the record for your wage and tax statement showed an amount for the New York City flexible benefits (IRC 125) program it has been added to your New York income in accordance with section 612(b)(31) of the New York State Tax Law.
>
> You have been allowed any applicable subtractions to federal adjusted gross income for state and local income tax refunds, taxable social security benefits and pension income based on the federal information.
>
> Appropriate credits have been allowed based on available information.
>
> If the New York standard deduction was greater than your allowable itemized deductions, the standard deduction was allowed."

The Division determined petitioner's New York adjusted gross income in the amount of $36,235.00, based on the information received from the IRS indicating that petitioner's federal adjusted gross income was $36,235.00. The Division allowed the standard deduction in the

amount of $7,500.00, resulting in New York taxable income of $28,735.00. From this amount, the Division calculated New York State tax due in the amount of $1,571.00 and New York City tax due in the amount of $942.00. The Division allowed a City of New York school tax credit in the amount of $115.00, resulting in New York State and City tax due in the amount of $2,398.00.

7. On February 24, 2014, the Division issued to petitioner a Notice of Deficiency of personal income tax due in the amount of $2,398.00, plus interest and penalty. Penalties were imposed pursuant to Tax Law § 685(a)(1); (b)(1) and (2).

8. Petitioner's submission of documents and initial brief in this matter were due by July 7, 2016. The postmark on the envelope containing petitioner's brief and a one-page submitted document is dated July 8, 2016. Petitioner's reply brief was due by August 25, 2016.

CONCLUSIONS OF LAW

A. As a preliminary matter, petitioner's submission of a document and initial brief beyond the due date will be addressed. The submission and briefing schedule established in this matter required petitioner to submit any documents and initial brief by July 7, 2016. The postmark on the envelope containing petitioner's submission is dated July 8, 2016. Pursuant to the Tax Appeals Tribunal's Rules of Practice and Procedure:

> "[i]f any document required to be filed . . . on or before a prescribed date . . . is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals . . . the date of the United States postmark stamped on the envelope . . . in which such document is contained will be deemed to be the date of filing" (20 NYCRR 3000.22[a][1]).

Since the postmark on the envelope containing petitioner's submitted document falls after the deadline for the filing of such document, petitioner's submission is late-filed and will not be considered in rendering a determination in this matter (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

Even if petitioner's submission had been timely filed, the document submitted does not support petitioner's argument. According to petitioner, the IRS "accepted the Petitioner's statement for the purposes of a return for 2006" and applied an overpayment to a prior year, indicating that "no tax is owed, or any alleged tax owed or does not amount to the $3000 threshold needed to make a NYS return necessary." Contrary to petitioner's argument, the one-page document submitted merely indicates that the IRS applied an overpayment from 2006 in the amount of $393.17 to a prior year's federal tax liability. The document does not indicate the total amount of federal tax paid for 2006, by way of withholding or otherwise, and does not indicate the amount of petitioner's federal adjusted gross income for that year. The document in no way contradicts the information received by the Division from the IRS establishing that petitioner had federal adjusted gross income of $36,235.00 for tax year 2006. As such, even if petitioner's submission was timely and considered herein, it would not support his position.

Regarding the filing of petitioner's initial brief beyond the due date, it is noted that petitioner was also given the opportunity to file a reply brief by August 25, 2016. Petitioner's initial brief, filed on July 8, 2016, was the only brief he filed in this matter. Petitioner did not file a reply brief. Because the initial brief was filed beyond the July 7, 2016 due date, but was filed within the time prescribed for the filing of petitioner's reply brief, it will be treated as petitioner's reply brief and deemed timely as such.

B. Pursuant to Tax Law § 612(a), "[t]he New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year." Internal Revenue Code (IRC) § 62(a) defines federal adjusted gross income in the case of an individual, as "gross income minus [specified] deductions." "Compensation for

services, including fees, commissions, fringe benefits, and similar items" are among the items included as income for federal tax purposes (IRC § 61[a][1]).

Petitioner does not dispute that he received compensation from his employer for services performed in New York, but contends that his employer erroneously reported such payments as wages. Petitioner's position, while not clearly articulated, appears to be that the income he received from his employer was not taxable wages pursuant to IRC §§ 3121 and 3401. Petitioner's argument that he is "a private sector citizen (non federal entity) as defined in 3401c(d) [sic], not employed in a 'trade or business'" and not an "officer of a Federal Corporation," appears to imply that he does not fall within the definition of employee under IRC § 3401(c).

Petitioner's argument misinterprets the Internal Revenue Code's definition of employee. IRC § 3401(c), provides that the term "'employee' includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing. The term 'employee' also includes an officer of a corporation." Petitioner's argument that he is not an employee because he is not a federal entity or officer of a corporation ignores IRC § 7701(c), which specifically provides that "the terms 'includes' and 'including' when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined." As such, petitioner's position that the payments he received from his employer were not wages paid to him as an employee because he is a "private sector citizen" and "non federal entity" is without merit. Courts have repeatedly rejected such argument as meritless and the IRS has warned taxpayers that such argument is considered frivolous (***see*** Rev Rul 2006-18, 2006-1 CB 743; ***see also Taliaferro v. Freeman***, 595 Fed Appx 961, 962-63 [11th Cir 2014] [rejecting as frivolous the taxpayer's

argument that the federal income tax applies only to federal employees, the court ordered sanctions against the taxpayer up to and including double the government's costs]; ***Taliaferro v. C.I.R.***, 272 Fed Appx 831, 833 [11th Cir 2008] [rejecting the argument that income tax only applies to the federal government and its employees]; ***Motes v. United States***, 785 F2d 928 [11th Cir 1986] [rejecting as frivolous a claim that only public servants are subject to tax liability]; ***Sullivan v. United States***, 788 F2d 813, 815 [1st Cir 1986] [finding taxpayer's argument that he did not receive "wages" because he was not an "employee" within the meaning of 26 USC § 3401(c) meritless, and noting that the word "includes" within that section does not limit withholding to the persons listed therein]; ***United States v. Latham***, 754 F2d 747, 750 [7th Cir 1985] [holding that the district court did not err in refusing taxpayer's requested jury instructions that the term "employee" under 26 USC § 3401(c) does not include privately employed wage earners, the court found that such argument was "inane" and "a preposterous reading of the statute. It is obvious within the context of [the statute] the word 'includes' is a term of enlargement not of limitation, and the reference to certain entities or categories is not intended to exclude all others"]; ***Waltner v. Commissioner***, TC Memo 2014-35, at 19).

C. Since petitioner received wage income as indicated by the information received from the IRS, said wages should have been included in his federal income and, consequently, he is subject to New York State personal income tax on the same reported wages (***see*** Tax Law §§ 611[a]; 612[a]; IRC § 62). Petitioner failed to file a return for the year at issue despite being required by law to do so (Tax Law § 651). Accordingly, the Division was authorized to determine petitioner's liability for the year at issue and to issue a notice of deficiency in respect of such liability (Tax Law § 681[a]). The use of IRS and employer wage reporting information is a reasonable and rational method of estimating income tax liability (***see Matter of Pettis***, Tax Appeals Tribunal, August 18,

2005). Petitioner offered no evidence (e.g., a form W-2) to show that the information upon which the Division relied was in any way erroneous.

There is a presumption of correctness of a notice of deficiency that has been properly issued under the Tax Law (***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759 [3d Dept 1980]). A taxpayer who fails to present any evidence to show that the notice of deficiency is incorrect surrenders to this presumption (***Id.***). Petitioner has not presented any cogent or credible evidence to substantiate his claim that the statutory notice is incorrect (***see*** Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]). The deficiency of tax for the year at issue is therefore sustained.

D. The petition of John Clifton is denied and the Notice of Deficiency dated February 24, 2014 is sustained.

DATED: Albany, New York
February 16, 2017

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE