

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

EDWIN AND JOSEPHINE ROSE C. GORSKI

for Redetermination of a Deficiency or for Refund of
Personal Income Tax under Article 22 of the Tax Law
for the Tax Year 2014.

DETERMINATION
DTA NO. 829475

Petitioners, Edwin and Josephine Rose C. Gorski, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the tax year 2014.

A videoconferencing hearing was held via CISCO Webex on April 28, 2021, with all briefs to be submitted by August 4, 2021, which date began the six-month period for issuance of this determination. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Colleen McMahon, Esq., of counsel). After reviewing the entire record in this matter, Jessica DiFiore, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners have established that the Division of Taxation erred in adjusting their federal adjusted gross income resulting in additional tax due.

FINDINGS OF FACT

1. On or about April 13, 2015, petitioners, Edwin and Josephine Rose C. Gorski, filed their 2014 New York State resident income tax return, form IT-201 (state return). Petitioners also filed their 2014 federal income tax return at the same time. Lines 1 through 19 of the state

return request information from petitioners' federal return regarding income and federal adjustments. Official notice is taken of the instructions for the state return and of the state return form itself.

2. On their federal return, petitioners listed their total income as \$146,207.56. On the corresponding line of their state return, line 17, petitioners listed their income as \$146,206.00. On petitioners' federal return, they had adjustments of \$3,763.40. On their state return, on line 18 where it asks for the "[t]otal federal adjustments to income," petitioners listed \$77,563.00 with a handwritten note reflecting this consisted of the \$3,763.00 from the federal return plus \$73,800.00 from the capital gains worksheet line 11. Because these adjustments to income do not match, petitioners' resulting federal adjusted gross income (FAGI) was written as \$142,444.16 (\$146,207.56 minus \$3,763.40) on their federal return on line 37, but it was written as \$68,643.00 (\$146,206.00-\$77,563.00) on their state return on line 19. A qualified dividends and capital gain tax worksheet- line 44 (Worksheet) was attached to petitioners' federal return. Line 11 states "[s]ubtract line 10 from line 9. This amount is taxed at 0%." The corresponding amount is handwritten in as \$73,800.00.

On their state return, petitioners also listed an overpayment amount of \$4,500.00. Petitioners requested that \$2,500.00 of the overpayment be refunded and that \$2,000.00 be applied to their 2015 estimated tax.

3. On May 18, 2015, the Division of Taxation (Division) issued an account adjustment notice stating that the refund requested on petitioners' income tax return was \$2,500.00 but the refund allowed was \$1,500.00. The notice provided that petitioners had overpayments of \$3,500.00 that came from prepayments consisting of \$2,000.00 applied from a prior period and an estimated tax payment of \$1,500.00. The computations section of the notice provided that

\$2,000.00 of the prepayments would be applied as estimated tax for the next year leaving \$1,500.00 to be refunded. This notice listed petitioners' federal adjusted gross income as \$68,643.00, the amount petitioners reported on line 19 of their return.

4. On January 23, 2018, the Division issued a statement of proposed audit changes to petitioners. The statement explained that New York State has an exchange of information agreement with the Internal Revenue Service (IRS) where the IRS provides the Division with information reported on taxpayers' federal income tax returns pursuant to Internal Revenue Code (IRC) § 6103 (d). In comparing petitioners' income, exemptions, and itemized deductions reported on their New York State income tax return with those reported on their federal income tax return, the Division found a discrepancy in petitioners' FAGI. The statement provided that "[t]he starting point for computing New York tax is Federal Adjusted Gross Income (FAGI). All sources of income reported on your federal return must be included on your New York State return." The statement then explained that on petitioners' federal income tax return, they listed their FAGI as \$142,444.16. However, on petitioners' New York State income tax return, they listed their FAGI as \$68,643.00. The statement advised that because of the difference, petitioners owed additional tax to New York State in the amount of \$3,377.00 with interest from the due date of the return until the tax is paid in full.

5. On March 12, 2018, the Division issued petitioners notice of deficiency number L-047644184 assessing tax due of \$3,377.00 plus interest. Petitioners then requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS) appealing the notice. By BCMS conciliation order number 000305088, dated May 10, 2019, BCMS sustained the notice. Petitioners then filed a petition on July 9, 2019 asserting that the Division did not follow Tax Law § 612 (c) and that the notice was not timely served and is defective.

6. On January 19, 2021, the Division requested a certified copy of petitioners' 2014 federal income tax return, form 1040, including all attachments from the IRS. On February 25, 2021, the IRS informed the Division that they had no record of the Division's request and could not provide certified copies of federal returns due to the coronavirus pandemic.

7. On March 3, 2021, the Division again requested a copy of petitioners' federal income tax return, and on April 2, 2021, received such return.

SUMMARY OF THE PARTIES' POSITIONS

8. Petitioners assert that the state return instructions require that the amount from line 11 of the Worksheet, which states in part "[t]his amount is taxed at 0%," be included in line 18 of the state return that provides for the total federal adjustments to income. They contend this is the federal adjustment to income that is not taxable and is part of their FAGI.

Petitioners also assert that the Division is time-barred from issuing the notice of deficiency for their state return that was timely filed on or before April 15, 2015 because the applicable three-year statute of limitations has run. They further claim that because New York State has already issued a refund for their state return the Division is barred from assessing them by res judicata.

Attached as exhibits to petitioners' brief in reply to the Division's opposition were publications of the Department, including Publication 131, page 14 of the Division's 2014 instructions for form IT-201, a portion of Tax Law § 612, and exhibits that were previously admitted into evidence.

9. The Division argues that the guidelines of the IRC describe the deductions from gross income that are permitted in calculating a taxpayer's FAGI and note that capital gains income is not one of those deductions. The Division states that petitioners' FAGI reported on their 2014

federal income tax return was \$142,444.00 as compared to the \$68,643.00 reported FAGI on their New York State income tax return but contends that petitioners have failed to offer any evidence that their FAGI as reported to the Division by the IRS from their federal income tax return was incorrect.

The Division asserts that as its notice of deficiency was issued less than three years after petitioners filed their returns, it is not barred by the statute of limitations. The Division also claims that because petitioners rely on the instructions for the 2014 New York State resident personal income tax return but did not place these instructions into evidence, petitioners' arguments about these instructions are of limited value.

CONCLUSIONS OF LAW

A. Federal gross income is all income earned (IRC [26 USC] § 61). Federal adjusted gross income is gross income minus certain deductions (IRC former [26 USC] § 62 [a]). These deductions include expenses such as expenses of performing artists, expenses of elementary and secondary school teachers, and certain expenses of members of the Armed Forces (*see id.*). Income from capital gains is not among the stated deductions used to compute FAGI (*see id.*). Accordingly, such income should not be deducted to determine petitioners' FAGI.

B. Where a notice of deficiency has been properly issued, a presumption of correctness attaches to it and the petitioners bear the burden of proving that the proposed deficiency is erroneous (*see Matter of Clifton*, Tax Appeals Tribunal, January 4, 2018). IRC (26 USC) § 6103 (d) authorizes the disclosure of return information to a state agency charged with the responsibility of auditing state revenues. The IRS provided the Division with the FAGI reported on petitioners' 2014 federal income tax return. Petitioners have failed to offer any evidence that the FAGI provided on their federal return was incorrect or that they took the proper deductions

when reaching a different FAGI on their state return. Accordingly, petitioners have not met their burden establishing the notice of deficiency was improperly assessed.

C. The requirements and parameters of what deductions are permitted are reflected in the state and federal return forms. Lines 23 through 37 of petitioners' federal income tax return, which are under the section labeled "adjusted gross income," listed the federal adjustments to income. While it does include the self-employed health insurance deduction petitioners included on line 18 of their state return, it does not include any of the information provided in the Worksheet. In addition, the Worksheet is not supposed to be completed until petitioners have completed their federal return through line 43, which is not in the section for adjustments to income but is instead further on in the form in the tax and credits section.

D. Without citing a specific statute, petitioners also argue that the notice is time-barred by a three-year statute of limitations. To the extent petitioners are asserting that the Division is barred from issuing the notice by Tax Law § 683 (a), such reliance is unavailing. Tax Law § 683 (a) provides that other than for exceptions not relevant here, any tax under article 22 must be assessed within three years after the return is filed (*see Matter of Sznajderman*, Tax Appeals Tribunal, July 11, 2016, *confirmed* 168 AD3d 55 [3d Dept 2019]). When a return is filed before the last day prescribed by law or by regulations, such return is deemed to be filed on the last day the return is due (Tax Law § 683 [b]). Petitioners' return was filed on or before April 15, 2015. The notice of deficiency assessing income tax due was issued on March 12, 2018 (*see* finding of fact 5), less than three years after the return was deemed to have been filed. Accordingly, the notice of deficiency is not barred by the statute of limitations.

E. Petitioners' argument that the state is barred by res judicata from assessing additional tax due after issuing a refund for the same return must be rejected. Under res judicata, once a

claim is litigated to final adjudication, all other claims arising out of the same transaction or series of transactions are barred, even if they are based on different theories or seek a different remedy (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Here, as there was never a proceeding initiated much less brought to conclusion regarding the refund issued for 2014, such doctrine is inapplicable.

F. The Division's assertion that because the instructions for the 2014 New York State resident personal income tax return were not admitted into evidence petitioners' arguments about them should be given little weight is also rejected. A court may take judicial notice of particular facts if the items are of common knowledge or are determinable by referring to a source of indisputable accuracy (*Matter of Piscopo*, Tax Appeals Tribunal, April 29, 2019, citing *Matter of Crater Club v Adirondack Park Agency*, 86 AD2d 714 [3d Dept 1982], *aff'd* 57 NY2d 990 [1982]). Because the New York State instructions for form IT-201 for 2014 are determinable from a source of indisputable accuracy that is a matter of public record, judicial notice is taken of such instructions.

G. The petition of Edwin and Josephine Rose C. Gorski is denied and notice of deficiency L-047644184 is sustained.

DATED: Albany, New York
February 3, 2022

/s/ Jessica DiFiore
ADMINISTRATIVE LAW JUDGE