

**BEFORE THE TAX APPEAL BOARD
OF THE STATE OF DELAWARE**

WILLIAM R. DONATO and	)	
ROSA H. DONATO,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 1784
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

BEFORE: Todd C. Schiltz, Esq., Steven R. Director, Esq., Joan Winters, CPA,
Robert Slavin and M. Lynn Fuller

William R. Donato and Rosa H. Donato, *pro se*

Anthony J. Testa, Jr., Esq., Deputy Attorney General, for Respondent

DECISION AND ORDER

Petitioners William R. Donato and Rosa H. Donato (collectively, “Petitioners”) are Delaware residents who contend that they are not required to pay Delaware income tax on 2019 wages that they received and that were reported to the Delaware Division of Revenue on IRS Form W-2s. For the reasons set forth below, the Board determines that Petitioners must include within their Delaware income wages that they received in 2019. Judgment is entered against the Petitioners and in favor of the Director of Revenue (“Respondent”).

STATEMENT OF FACTS

Petitioners were residents of Delaware in 2019 and filed Delaware income tax returns for that year.

A. The W-2s and Petitioners' 2019 Returns

In 2020, Petitioners' employers issued each of them IRS Form W-2s reflecting wages the Petitioners earned in 2019. The W-2s also reflected the amount of "withholding" taxes the employers withheld from Petitioners' wages as Delaware income taxes.¹

Petitioners filed a Delaware income tax return for 2019 with the Division of Revenue that reported Delaware income taxes due and paid of \$4,322 and sought a refund of \$469 (the "Original 2019 Return"). The Division of Revenue refunded the \$469 to Petitioners as requested in the Original 2019 Return.

On or about March 20, 2020, Petitioners filed an amended 2019 Delaware income tax return with the Division of Revenue (the "2019 Amended Return"). The 2019 Amended Return sought a refund of the \$4,322 in Delaware income taxes Petitioners had paid on their 2019 income. On or about November 6, 2020, the

¹ In their opening brief, Petitioners appear to assert that the "Payers" of these wages and withholding taxes were not their employers and that the "Payers" "erroneously reported to the IRS" such wages on Form W-2s. Petitioners offer no facts to support these assertions. The Board finds that the Form W-2 issuers employed Petitioners in 2019 and that the wages reflected on the Form W-2s were wages Petitioners earned in 2019. *See* Stipulation of Facts Ex. A.

Division of Revenue issued the Petitioners a refund of \$4,430.05, representing the \$4,322 in claimed refund plus interest on the \$4,322 equal to \$108.05.

B. Petitioners' 2018 Amended Return

On or about March 20, 2020, Petitioners filed an amended 2018 Delaware income tax return with the Division of Revenue (the "2018 Amended Return"). Like the 2019 Amended Return filed the same day, the 2018 Amended Return sought a refund of all income taxes Petitioners paid to Delaware.

By letter dated December 17, 2020, the Division of Revenue notified Petitioners that their 2018 Amended Return was not being accepted and that the amount they claimed as a refund therein would not be returned to them. The December 17, 2020 letter further advised Petitioners that their 2019 Amended Return was being revised to reflect that they owed Delaware income tax on the wages they earned in 2019 (*i.e.*, that the prior refund of the \$4,430.05 based on the 2019 Amended Return was an error and Petitioners had to return the improperly refunded \$4,430.05 plus interest to Delaware).

C. The Notice of Assessment, Notice of Determination and this Appeal

Thereafter, the Division of Revenue issued Petitioners a Notice of Proposed Assessment, showing a balance due for 2019 in the amount of \$4,835.24, reflecting taxes, penalty and interest. Petitioners protested the assessment and on August 3,

2021, the Tax Conferee issued a Notice of Determination rejecting the protest. In pertinent part, the Notice of Determination stated:

The Division of Revenue has reviewed your correspondence, your tax returns, as well as the W2s (sic) in question, and disagrees with your claim. 26 U.S.C. § 3121 defines “wages,” “employee,” and “employer” for the purposes of income taxes in the State of Delaware. Under this section of the U.S.C., “gross income means all income from whatever source derived, unless excluded by law.” After review, the Division of Revenue sees no applicable legal reason to exclude the revenue indicated on the W2’s (sic) you provided from inclusion under gross income for State of Delaware income tax purposes. Accordingly, your protest is denied.

Petitioners timely appealed the Notice of Determination.

ANALYSIS

Portions of Title 30 of the Delaware Code (“Delaware Tax Code”) relate to state income taxes. Section 1105 of the Delaware Tax Code provides that:

The entire taxable income of a resident of this State shall be the federal adjusted gross income as defined in the laws of the United States as the same are or shall become effective for any taxable year with the modifications and less the deductions and personal exemptions provided in this subchapter. (emphasis added)

Section 1101 of the Delaware Tax Code further provides that:

Any term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States referring to federal income taxes, unless a different meaning is clearly required. Any reference to the laws of the United States shall mean the Internal Revenue Code of 1986 and amendments thereto and other laws of the United States relating to federal income taxes (emphasis added)

Thus, when determining a meaning of a term in Section 1105, such as “adjusted gross income,” the Board must look to the Internal Revenue Code of 1986, as amended (the “Internal Revenue Code”).

Under the Internal Revenue Code, “gross income means all income from whatever source derived” 26 U.S.C. § 61. Income reported on a Form W-2 is “gross income” under 26 U.S.C. § 61. *Beard v. Commissioner of IRS*, 82 T.C. 766, 773 (U.S. Tax Court 1984) (“Respondent maintains that the amounts petitioner received for services performed as reflected in the 1981 Form W-2 are taxable as gross income to petitioner for the year in which he received such amounts. There is no doubt that such amounts are taxable as gross income” under 26 U.S.C. § 61).

In the case of an individual, the Internal Revenue Code defines “adjusted gross income” as gross income minus certain enumerated deductions. 26 U.S.C. § 62. The federal government uses “adjusted gross income” as the starting point for calculating an individual’s federal taxes and eligibility for certain tax credits and deductions. 26 U.S.C. § 63.

Reading these federal and state statutes together, the income of a Delaware resident that is subject to Delaware income tax is “all income from whatever source derived,” less the enumerated deductions permitted by the Internal Revenue Code together “with the modifications and less the deductions and personal exemptions provided in” subchapter II of the Delaware Tax Code. The wages Petitioners earned

in 2019 that were reported on Form W-2s fall within this broad definition and are taxable under the Delaware Tax Code.

Petitioners effectively ignore the above and argue on appeal that “they are not subject to Delaware income tax” They acknowledge that Section 1105 of the Delaware Tax Code defines “Taxable income” as “the federal adjusted gross income as defined in the laws of the United States,” but contend that “[t]he word ‘federal’ as written” in Section 1105 “is being used as an adjective to describe or modify the type of income for which the excise tax applies; not as a proper noun i.e. ‘Federal Internal Revenue Code.’” As a result, Petitioners contend, the only income that Delaware can tax is income that is “derived from a federal source i.e. United States, a State or any political subdivision thereof.”

The Board disagrees. The Delaware Tax Code utilizes a term – adjusted gross income - defined in the Internal Revenue Code to identify what income is subject to Delaware income tax. The fact the word “federal” appears before “adjusted gross income” does not change the analysis or bring about a different result. Rather, it confirms what the remainder of the sentence in Section 1105 and Section 1101 of the Delaware Tax Code state: Delaware resident taxpayers must look to federal law/the Internal Revenue Code to identify their “federal adjusted gross income” to determine what income is taxable by Delaware. 30 Del. C. § 1105 (“The entire taxable income of a resident of this State shall be the federal adjusted gross income

as defined in the laws of the United States”); 30 Del. C. § 1101 (“Any reference to the laws of the United States shall mean the Internal Revenue Code of 1986 and amendments thereto.”). Wages reported on a Form W-2 are the quintessential example of income that is taxable under the Internal Revenue Code, and the clear terms of the Delaware Tax Code make such wages subject to Delaware income tax as well.²

Petitioners point to definitions of “wages,” “American employer,” “person” and “employee” located in unrelated areas of the Internal Revenue Code in an attempt to support their position, but these definitions do not help their case. None of the definitions noted by Petitioners limits the scope of the terms “gross income” or “adjusted gross income” under the Internal Revenue Code. As a result, these definitions do not change the fact that wages reported on a Form W-2 are part of adjusted gross income (as determined by reference to federal law) that is taxable by Delaware under Section 1105.

Petitioners must pay Delaware income tax on all of the 2019 wages they received. Petitioners must return the \$4,430.05 refund they received from the

² If adopted, Petitioners’ argument would apply to all resident taxpayers, effectively depriving Delaware of the ability to tax any wages reported on a Form W-2 that were not earned as a result of employment with the United States (Petitioners never explain why wages from a “State” would be viewed as “federal adjusted gross income”). The statutory text referenced above demonstrates this was not the intent of the General Assembly when adopting Section 1105.

Division of Revenue based on the filing of their 2019 Amended Return, and pay any penalties and interest due with regard to the \$4,430.05.

Conclusion

For the foregoing reasons, the Board upholds the Notice of Determination and judgment is entered in favor of Respondent.

We order Respondent to circulate a proposed form of order to the Petitioners for review within fourteen (14) days of the date of this opinion. The proposed form of order shall detail the total tax, interest and penalties that the Petitioners owe for 2019 as of the date of this opinion, as well as a per diem calculation of the amount due for each additional day the taxes, interest and penalties remain unpaid. Tax Appeal Board Rules 19(e) and 20. The parties shall file a joint proposed order for signature by the Board, or, if the parties are unable to agree on a form of order, submit separate proposed forms of order, within thirty (30) days of the date of this opinion. Tax Appeal Board Rule 20.

Carol C. Selt

Don M. Winters

W. Lynn Tucker

[Signature]

Robert W. Slavin

SO ORDERED this 22nd day of July, 2022.