Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-190

OCTOBER TERM, 2008

Andrew Scott	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
	}	
Department of Taxes	}	DOCKET NO. 716-10-07 Wncv
		Trial Judge: Dennis R. Pearson

In the above-entitled cause, the Clerk will enter:

Taxpayer, Andrew Scott, appeals from the superior court's order affirming, in part, the Department of Taxes' assessment of income tax and penalties on taxpayer for the years 2004 and 2005. On appeal, taxpayer argues that the Department erroneously denied his request for a full refund of his withheld income tax because, under the statutory definition, he is not an employee and his income is not wages. We affirm.

During the relevant period, taxpayer was a resident of Vermont and worked for Manhattan Mortgage Company. Taxpayer timely filed a return for, and paid, his 2003 Vermont personal income tax. For 2004, instead of a W-2, taxpayer submitted federal form 4852, indicating no wages, and requesting a full refund of his $2567.44 in withheld income tax. The Department obtained a copy of taxpayer's W-2 form, which indicated that taxpayer had gross wages of $61,072.39 for 2004. Using this information, the Department sent taxpayer an assessment and notice of tax liability on October 21, 2005. The assessment included interest and a 100% fraud penalty. Taxpayer filed a timely protest and request for a hearing. See 32 V.S.A. § 5883 ("Upon receipt of a notice of deficiency or assessment of penalty or interest . . ., the taxpayer may, within 60 days after the date of mailing of the notice or assessment, petition the commissioner in writing for a determination of that deficiency or assessment.").

In April 2006, taxpayer filed his 2005 return and again submitted form 4852 instead of a standard W-2 form. Like his 2004 return, taxpayer claimed $0 in wages and requested a full refund of his $3218 in withheld tax. The Department issued an assessment and notice of tax due on May 17, 2006. Taxpayer filed a protest and request for a hearing on July 18, 2006. The Department notified taxpayer that his protest was filed beyond the sixty-day deadline and was therefore untimely.

A hearing officer held a hearing on the two assessments at the same time, even though taxpayer's 2005 protest was untimely filed. The hearing officer upheld both assessments in all respects. Taxpayer then appealed to superior court pursuant to 32 V.S.A. § 5885(b). Taxpayer argued that the Department erroneously assessed taxes and penalties on him because he was not an employee and did not earn wages. Following a hearing, the court concluded that taxpayer was indeed an employee of Manhattan Mortgage and that his "arguments to the contrary are frivolous and not worthy of discussion." The court affirmed the hearing officer's determination that tax was due for 2004. In addition, the court concluded that the record supported the Department's assessment of a penalty because taxpayer had engaged in "willful" conduct to "evade a tax liability" by failing to submit his W-2 forms and claiming $0 wages on his form 4852. 32 V.S.A. § 3202(b)(5) (allowing the Department to assess "a penalty equal to the amount of the tax liability unpaid on the prescribed date of payment" if a taxpayer fails to pay a tax liability "fraudulently or with willful intent to defeat or evade a tax liability"). The court remanded, however, for the Department to recalculate the amount of penalty due, explaining that the penalty was limited to the amount of unpaid tax liability, not the full amount of the tax due.[1] See id. As to the 2005 assessment, the court concluded that taxpayer's failure to timely file a notice of protest to the Commissioner, id. § 5883, prevented the court from hearing taxpayer's complaint. See id. § 5887(b) (failure of taxpayer to appeal an assessment to Commissioner in accordance with § 5883 binds taxpayer to terms of assessment); Stone v. Errecart, 165 Vt. 1, 6 (1996) (failure of taxpayer to exhaust administrative remedies by first appealing to Commissioner deprives superior court of jurisdiction). Thus, the court affirmed the Department's 2005 assessment in its entirety.

On appeal, taxpayer claims that the Department's tax assessment is erroneous because he is not an employee and did not earn taxable wages. Taxpayer bases his argument on his interpretation of certain provisions of the Internal Revenue Code. The Code defines employee to "include[] an officer, employee, or elected official of the United States, a State, or any political subdivision thereof." I.R.C. § 3401(c). Taxpayer contends that this definition limits employees to government workers and thus argues that he is not an employee because he is privately employed. In a related argument, taxpayer points to the Code definition of wages as remuneration for "services performed by an employee for his employer," id. § 3401(a), and contends he earned no wages because he is not an employee. Taxpayer's arguments are based on a book by Peter Hendrickson entitled Cracking the Code: The Fascinating Truth about Taxation in America.

We agree with the hearing officer and the superior court that taxpayer's arguments are without merit. The Code specifically explains: "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." I.R.C. § 7701(c). Thus, the definition above is not limiting language and does not preclude private employees from also being employees under the Code. This is a reasonable interpretation of the statute and has been applied by other courts faced with similar arguments. See, e.g., United States v. Latham, 754 F.2d 747, 750 (7th Cir. 1985) ("It is obvious that within the context of both statutes the word 'includes' is a term of enlargement not

[1] The Department has not appealed the court's penalty decision and taxpayer has not raised any additional arguments as to the validity of the court's decision on the penalty; therefore, we do not address it on appeal.

of limitation, and the reference to certain entities or categories is not intended to exclude all others."). As the hearing officer found, taxpayer was an employee of Manhattan Mortgage and earned wages during the years in question. Thus, we affirm the Department's assessment of income tax for 2004.[2]

As to taxpayer's 2005 assessment, we agree with the superior court that taxpayer's failure to file a timely notice of protest precluded the superior court, and precludes this Court, from reviewing the Department's assessment. See Stone, 165 Vt. at 6. Taxpayer does not contest the untimeliness of his protest, but argues that we should exempt him from the time requirements because he claims he was confused by the number of tax notices that he received. While taxpayer may have received many notices, the initial notice was marked as a first notice of audit assessment, specifically stated that taxpayer had sixty days to protest the Department's assessment and explained that failure to file a timely protest would result in the assessment becoming "fixed." Therefore, we affirm the 2005 assessment in its entirety.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

[2] Taxpayer also argues that the State is required to accept his own declaration of income set forth on form 4852 and is prevented from obtaining information about his income from other sources such as his employer or the Internal Revenue Service. Because taxpayer did not raise this issue at the hearing before the hearing officer, it is not preserved, and we will not consider it on appeal. See Hinckley v. Town of Jericho, 149 Vt. 345, 346 (1988).