Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-248

JANUARY TERM, 2020

James Michael Lambert* v. Department of Taxes	}	APPEALED FROM:
	}	
	}	Superior Court, Washington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 2-1-19 Wncv
		Trial Judge: Mary Miles Teachout

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

Taxpayer appeals the civil division's decision affirming the Commissioner of Taxes' approval of an assessment of personal income tax, penalties, and interest for the years 2016 and 2017. We affirm.

Along with his 2016 and 2017 state tax returns, taxpayer attached, instead of a W-2, federal form 4852, in which he reported $0 wages but indicated amounts withheld for federal income tax and for Social Security and Medicare tax. On the 2016 form, taxpayer stated that he did not receive any wages or income as defined by federal law, but that the amounts withheld were correct. On the 2017 form, he stated that Tridyne Process Systems, Inc., from whom he received compensation for services rendered, provided bad payer data. There was no evidence that taxpayer submitted form 4852 with his federal tax returns for the years in question.

The Department of Taxes obtained from the Internal Revenue Service (IRS) federal W-2 wage reports for taxpayer that Tridyne had submitted to the IRS. Those reports showed that Tridyne paid taxpayer $39,539 in 2016 and $34,798 in 2017. Based on the wage information obtained from the IRS, the Department recalculated taxpayer's 2016 and 2017 tax liabilities, denied his claim for a 2017 tax refund, and reassessed his 2016 tax liability, including interest and penalties.

Taxpayer appealed the denial of his request for refunds for tax years 2016 and 2017 to the Commissioner pursuant to 32 V.S.A. § 5885(a). At the administrative evidentiary hearing held to consider the appeal, taxpayer argued that under federal law he was not an employee and that payments from Tridyne did not qualify as taxable income. He also asserted that the W-2 forms submitted by the Department could not be considered evidence of his receipt of wages without the declarant being made available at the hearing and that income tax is a direct tax prohibited by the United States Constitution. The Commissioner rejected these arguments, concluding that the federal W-2s were the best information of taxpayer's tax liability and that taxpayer was an employee of Tridyne who received taxable wages from Tridyne for the years in question. The Commissioner noted that many of taxpayer's arguments, including his constitutional arguments,

were widely available from various sources, including a book about "cracking" the tax code, and that courts had rejected the arguments as frivolous.

Taxpayer appealed to the civil division of the superior court pursuant to 32 V.S.A. § 5885(b). The superior court conducted an on-the-record review. State Dep't of Taxes v. Tri-State Indus. Laundries, Inc., 138 Vt. 292, 294-95 (1980) (review by superior court of Commissioner's tax assessment pursuant to 32 V.S.A. § 5885 is on the record). It upheld the Commissioner's decision, concluding that the compensation taxpayer received from Tridyne for tax years 2016 and 2017 was taxable income. On appeal to this Court, taxpayer argues that the payments he received from Tridyne during tax years 2016 and 2017 were not derived from any federal taxable activities and that his report of wages on federal form 4852 for those tax years was superior evidence of his income compared to the inadmissible hearsay in the W-2s relied upon by the Commissioner and the civil division.

"Where there is an intermediate level of appeal from an administrative body, this Court reviews the case under the same standard as applied in the intermediate appeal." Travia's Inc. v. State Dep't of Taxes, 2013 VT 62, ¶ 12, 194 Vt. 585. "We review the Commissioner's decision independent of the superior court's findings and conclusions." Id. The taxpayer has the burden to show by clear and convincing evidence that the challenged tax assessment is erroneous. Id.

We find no merit to taxpayer's arguments. Section 9273(b) of Title 32 plainly allows the Commissioner to examine tax returns and to " 'make such further audits or investigation as he or she may deem necessary.' " Id. ¶ 13. If returns "suggest inaccuracies, it follows that the returns filed are not 'as . . . required,' and the Commissioner may proceed to make an investigation and estimation of tax, just as if no returns has been filed at all." Id. (quoting 32 V.S.A. § 9273(a)). Here, there is no dispute that taxpayer worked for and received payments from Tridyne in 2016 and 2017. Further, the wage withholding that taxpayer reported on form 4852 for those years matched the wage withholding on the W-2 forms that Tridyne was required to submit to the Commissioner. See 32 V.S.A. § 5842(c) (requiring reports of withholding). Apart from contending that payments he received from Tridyne during those years could not be considered taxable income, taxpayer does not challenge the amount of payments he received. Accordingly, the Commissioner did not err in relying upon the W-2s submitted by Tridyne in determining taxpayer's tax liability. See id. § 5864(b) (providing that Commissioner may compute tax liability "according to the Commissioner's best information and belief").

Moreover, the Commissioner had the discretion to consider the W-2s in the context of the appeal. See id. § 5885(a) (stating that Administrative Procedure Act (APA) governs hearings before Commissioner concerning tax deficiencies or refunds); 3 V.S.A. § 810(1) (authorizing admission of evidence otherwise inadmissible under the Vermont Rules of Evidence "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules," where the evidence "is of a type commonly relied upon by reasonably prudent [people] in the conduct of their affairs); see also In re Cent. Vt. Pub. Serv. Corp., 141 Vt. 284, 292 (1982) (stating that discretion to admit in administrative proceedings evidence that "would normally be excluded in court hearings" is codified in 3 V.S.A. § 810(1) of APA, which "recognizes the need of agencies to consider any evidence which may illuminate the case").

Finally, we reject as frivolous taxpayer's summary argument that payments he received from Tridyne in the years in question were not taxable wages and were not based on "federal taxable activities," and thus could not be considered taxable income. For the years in question, Vermont calculated personal income tax based on federal taxable income. "Wages are income."

Connor v. C.I.R., 770 F.2d 17, 20 (2d Cir. 1985) ("The argument that [wages] are not [income] has been rejected so frequently that the very raising of it justifies the imposition of sanctions.").

Affirmed.

BY THE COURT:

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice