

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NEIL J. MIGLIORE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Unincorporated Business Tax under	:	
Article 23 of the Tax Law for the Years 1967	:	
and 1968.	:	

Petitioner Neil J. Migliore, c/o Jerome J. Feldman, 249-12 Jericho Turnpike, Floral Park, New York 11001, filed an exception to the determination of the Administrative Law Judge issued on June 7, 1990 with respect to his petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1967 and 1968 (File No. 801587). Petitioner appeared by Jerome J. Feldman, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Neither party filed a brief on exception. Petitioner's request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether a notice of deficiency which was issued based on Federal audit changes is proper when the basis for the Federal audit changes is not known.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Neil J. Migliore, and his wife, Rose Migliore, filed a New York State Combined Income Tax Return and a U.S. Individual Income Tax Return for the year 1967. On each return, Mr. Migliore reported that he was an outside sales representative and that he received commission income in the amount of \$15,000.00.

Petitioner and his wife filed a New York State Income Tax Resident Return and a U.S. Individual Income Tax Return for the year 1968. Mr. Migliore again reported that he was an outside sales representative and that he received commission income in the amount of \$20,000.00.

In or about 1967, petitioner was arrested on criminal charges pertaining to gambling.

Petitioner's gambling activities led the Internal Revenue Service to recalculate petitioner's income. For the years 1967 and 1968, the Internal Revenue Service found that petitioner's annual gross receipts were \$3,600,000.00 on the basis of average monthly receipts of \$300,000.00. It also found that petitioner incurred annual operating expenses of \$3,240,000.00. Therefore, the Internal Revenue Service concluded that petitioner had additional annual income of \$360,000.00 during the years 1967 and 1968. For the year 1967 alone, the Internal Revenue Service also found that petitioner had additional wage income of \$1,300.00. However, for both years, the Internal Revenue Service determined that petitioner was liable for a penalty for fraud on the additional unreported income.

On April 6, 1972, the Internal Revenue Service issued a notice which advised Mr. and Mrs. Migliore that they were liable for a deficiency of tax of \$249,009.10, plus a penalty for fraud of \$124,504.55 for the year 1968. It is not clear whether the Internal Revenue Service issued a notice to petitioner for the year 1967.

The findings of the Internal Revenue Service were conveyed to the Division of Taxation ("Division") and, as a result, the Division issued a Notice and Demand, dated August 23, 1976, which assessed personal income tax and unincorporated business tax in the amount of \$121,296.00. The notice, which stated that it was based on Federal audit changes, also asserted penalties for fraud. In or about June 1984, the Division cancelled the Notice and Demand.

On July 17, 1984, the Division issued a Statement of Audit Changes which explained that petitioner had a deficiency of unincorporated business tax for the years 1967 and 1968. The notice, which was also based on the Federal audit changes, further explained that the Division considered petitioner's income from his commissions and gambling business to be subject to

unincorporated business tax. It also stated that in order to conform with Federal audit results, penalties were imposed pursuant to Tax Law § 685(c) for underestimation of unincorporated business tax and Tax Law § 685(e) for fraud.

On October 17, 1984, the Division issued a Notice of Deficiency to petitioner asserting a deficiency of unincorporated business tax in the amount of \$34,950.00, plus penalty of \$18,525.60 and interest of \$43,817.26, for a total amount due of \$97,292.86. The notice was based upon the Statement of Audit Changes dated July 17, 1984.

Petitioner filed a petition challenging the Notice of Deficiency. In its answer to the petition the Division requested that if it failed to prove fraud, then penalties for failure to file a tax return and for negligence should be imposed. Later, at the hearing, the Division withdrew the fraud penalty and asserted, in the alternative, penalties for failure to file an unincorporated business tax return, for failure to pay unincorporated business tax and for negligence.

OPINION

The Administrative Law Judge held that the issuance of a notice of deficiency based upon Federal audit changes had a rational basis. The Administrative Law Judge noted that petitioner did not report such changes to the Division as required by Tax Law § 659.

On exception, petitioner's representative only makes the statement that "my client isn't liable for the tax" (Petitioner's Exception).

The Division of Taxation made no response.

We affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Neil J. Migliore is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Neil J. Migliore is granted to the extent indicated in conclusions of law "H" and "I" of the Administrative Law Judge's determination but is otherwise denied; and
4. The Division of Taxation is directed to modify the Notice of Deficiency dated July 17, 1984 in accordance with paragraph "3" above but such notice is otherwise sustained.

DATED: Troy, New York
January 17, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner