

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**OSUNG AND QUAN LEE** : DECISION  
for Redetermination of a Deficiency or for :  
Refund of New York State and New York City :  
Income Taxes under Article 22 of the Tax Law :  
and the New York City Administrative Code for :  
the Years 1980, 1981 and 1982. :

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Petitioners Osung and Quan Lee, 1426 12th Street, Fort Lee, New Jersey 07024, filed an exception to the determination of the Administrative Law Judge issued on March 15, 1990 with respect to their petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1980, 1981 and 1982 (File No. 802277). Petitioners appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioners filed a memorandum of law on exception. The Division of Taxation submitted a letter. Petitioners' request for oral argument was denied.

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

***ISSUES***

I. Whether the Division of Taxation properly determined additional personal income tax due from petitioners for the years 1980, 1981 and 1982 utilizing a cash availability audit methodology.

II. Whether the Division of Taxation was barred from assessing tax against petitioners for the year 1980 by the statute of limitations set forth in Tax Law § 683.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and such facts are restated below.

As a result of a field audit of petitioners' books and records, the Division of Taxation issued three statements of personal income tax audit changes to petitioners, Osung and Quan Lee, for the years 1980, 1981 and 1982.

For the year 1980, the Statement of Personal Income Tax Audit Changes stated the following as an explanation for the tax deficiency for said year:

	<u>Wife</u>	<u>Husband</u>	
"As a result of audit, additional cash needed is being deemed			
Miscellaneous Income	\$75,316.00	-0-	
Medical Adjustment	107.00	\$1,911.00	
<u>NYS Only</u>			
Interest on U.S. Gov't. bonds modification	1,161.00	(1,161.00)	
Each person has to take his own exemption	750.00	(750.00)	
Net Adjustment	77,334.00	-0-	
Taxable Income Previously stated	4,085.00	-0-	
Corrected Taxable Income	81,419.00	-0-	
Tax on Corrected Taxable Income	9,958.66	-0-	
New York City Tax	3,101.02	-0-	
Corrected Tax Due	13,059.68	-0-	
Tax Previously Computed	162.43	-0-	
Total Additional Tax Due	12,897.25	-0-	
Penalty 685(b)	644.86	-0-	
Interest	5,976.33	-0-	
Total			<u>\$19,518.44"</u>

For the year 1981, the explanation on the Statement of Personal Income Tax Audit

Changes set forth the following:

	<u>Wife</u>	<u>Husband</u>	
"As a result of audit, additional cash needed is being deemed			
Miscellaneous Income	\$93,936.00	-0-	
Medical Adjustment	-0-	1,556.00	
<u>NYS Only</u>			
Interest actually belonging to wife	7,739.00	(7,739.00)	
Interest on U.S. Government bonds modification	(81.00)	81.00	
Net Adjustment	101,594.00	(6,102.00)	
Taxable Income Previously Stated	5,835.00	6,746.00	
Corrected Taxable Income	107,429.00	644.00	
Tax on Corrected Taxable Income	13,600.00	13.00	
Add: New York City Tax	4,219.00	6.00	
Corrected Tax Due	17,819.00	19.00	
Tax Previously Computed	292.00	320.00	
Total Additional Tax Due	17,527.00	(301.00)	
Penalty 685(b)	876.00	-0-	
Interest	5,698.00	(98.00)	
Total	\$24,101.00	(399.00)	
Net Due for Both Spouses			<u>\$23,702.00"</u>

Finally, for the year 1982, a Statement of Personal Income Tax Audit Changes was issued to petitioners which set forth the following explanation:

	<u>Wife</u>	<u>Husband</u>	
"As a result of audit, additional cash needed is being deemed			
Miscellaneous Income	\$64,571.00	-0-	
Medical Adjustment	3,347.00	-0-	
Disallowed Capital Loss	3,000.00	-0-	
<u>NYS Only</u>			
Income and Exemptions must be taken by Actual Person			
Subchapter S Income	2,100.00	(2,100.00)	
Interest Income	3,129.00	(3,129.00)	
Interest on U.S. Government bonds modification	(7,489.00)	7,489.00	
Exemption	800.00	(800.00)	
Net Adjustment	69,458.00	1,460.00	
Taxable Income Previously Stated	7,195.00	1,523.00	
Corrected Taxable Income	76,653.00	2,983.00	
Tax on Corrected Taxable Income	9,291.00	79.00	

Add: New York City Tax	2,896.00	37.00	
NYC Surtax at .05	145.00	-0-	
Corrected Tax Due	12,332.00	116.00	
Tax Previously Computed	360.00	52.00	
Total Additional Tax Due	11,972.00	64.00	
Penalty 685(b)	599.00	-0-	
Interest	2,128.00	11.00	
Total	\$14,699.00	75.00	
Net Due for Both Spouses			<u>\$14,774.00"</u>

Petitioners timely filed New York State income tax resident returns for the years 1980, 1981 and 1982. Although petitioners marked the filing status "Married filing joint return" they in fact filed separately on one return for each of the years in issue.

The auditor sent a consent fixing the period of limitation on assessment to the petitioners or their representative on March 2, 1984. Petitioners, by their representative, Murray Appleman, Esq., and the State Tax Commission, executed a consent fixing the period of limitation upon assessment of personal income tax extending the date by which the Division of Taxation must have assessed additional tax liability to petitioners for the year 1980 to April 15, 1985. However, neither the signature of petitioners' representative nor that of the Deputy Commissioner signing on behalf of the State Tax Commission was dated. Further, the consent form bore no date stamp.

On March 25, 1985, the Division of Taxation issued to Osung and Quan Lee four notices of deficiency which set forth the following:

<u>Year</u>	<u>Additional Tax Due or Tax Deficiency</u>	<u>Total Penalty</u>	<u>Interest</u>	<u>Amount Due</u>
1980	\$12,897.25	\$644.86	\$6,389.22	\$19,931.33
1981	1 7,226.00	876.00	6,099.35	24,201.35
1982	64.00	-0-	12.64	76.64
1982	11,972.00	599.00	2,436.46	15,007.46

After requesting and receiving books and records from petitioners, the Division of Taxation performed a "cash availability" audit, which traced petitioners' sources of income and subsequent applications of that income. The Division made a complete analysis of savings and checking accounts including all withdrawals, deposits and interest credited.

For each of the years in issue, sources of income such as net salary, social security, rental income, interest income, loan repayments, sale of stock, insurance proceeds and withdrawals from accounts were totalled and compared with the disposition or application of income including deposits to savings and checking accounts. For the year 1980, disposition or application of income exceeded sources of income by \$75,316.00; for 1981 applications of income exceeded the sources by \$93,936.00; and for 1982 application or disposition of income exceeded sources by \$64,571.00. The sum of these excesses of application over sources of income was categorized as miscellaneous income to petitioners and was treated as unreported income. When this figure was combined with medical adjustments, modifications of interest on United States Government bonds, personal exemptions, a disallowed capital loss, modifications to subchapter S income, additional interest income, and redistribution of income between spouses, the result was a net adjustment reflected on the statements of personal income tax audit changes. The Division then combined these figures for each of the three years with the taxable income reported to arrive at a corrected taxable income. State and City taxes were computed from this amount and, for each of the years, subjected to penalty pursuant to Tax Law § 685(b) and interest to arrive at a total amount due.

Petitioners offered no evidence, either documentary or testimonial, to contradict or prove erroneous either the audit methodology or conclusions reached by the Division in the statements of personal income tax audit changes or the notices of deficiency.

***OPINION***

The Administrative Law Judge determined that the use of the cash availability analysis to determine if there were deficiencies in petitioners' personal income tax was proper under the facts in this case; that the auditor's workpapers adequately reflect the methodology used by the Division; that the burden of proof is upon petitioners to demonstrate by clear and convincing evidence that the method used to arrive at the assessments was erroneous; and that through their complete failure to present any proof as to the incorrectness of the notices of

deficiency, petitioners have surrendered to the presumption of correctness which attaches to notices issued by the Division and have failed to meet the burden of proof imposed upon them.

Petitioners assert that the Administrative Law Judge erred in sustaining the use of the cash availability analysis and that petitioners' cross examination of the auditor was sufficient to prove the Division's audit to be erroneous. Petitioners assert that before the Division can resort to an indirect method of determining petitioners' income, it must first show the inadequacy of the books and records employed by the taxpayer.

On exception, the Division relies on the determination of the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

We deal first with petitioners' assertion that before the Division can resort to an indirect method of determining petitioners' income, it must first show the inadequacy of petitioners' books and records. We disagree. The same argument was raised and rejected under almost identical circumstances in Matter of Giuliano v. Chu (135 AD2d 893, 521 NYS2d 883) where the court determined that "[a]n initial consideration of inadequate or incomplete books and records before employing an indirect method is normally only required in sales and use tax cases where the tax is imposed upon verifiable receipts evidenced by statutorily required books and records" (Matter of Giuliano v. Chu, *supra*, 521 NYS2d 883, 886, citing Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209).

We deal next with petitioners' assertion that the Division's audit was unreasonable in not allowing petitioners credit for certain bank withdrawals as redeposits<sup>1</sup> and that solely through the cross examination of the auditors, petitioners have met their burden of proving the Division's method was erroneous. We do not agree.

The cash availability analysis is a method by which a taxpayer's reported income for a particular period is compared with his or her expenditures for the same period as revealed by canceled checks, bank withdrawals and any other relevant documents made available by the

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<sup>1</sup> In this regard, petitioners' petition for hearing faulted the results of the audit, stating: "Adjustments based on alleged unexplained deposits. Deposits fully indicate transfers from other accounts."

taxpayer. Any unexplained excesses of expenditures over income are treated as additional income to the taxpayer (Matter of Giuliano v. Chu, supra).

The audit here resulted in a determination that petitioners' sources of income, i.e., net salaries, social security income, interest income from treasury bills, etc., were less than petitioners' expenditures which included, among other things, deposits to savings and checking accounts. The overage was treated by the Division as additional income and forms the basis for the assessments at issue in this case.

The audit workpapers introduced by the Division at hearing detail the transactions examined by the Division in conducting the audit. The workpapers reflect the auditor's review and evaluation of the various books and accounts of petitioners. At the hearing, the auditor testified as to the audit methodology and the basis for the conclusions reflected in her workpapers.

Petitioners assert that the auditor could not explain the origin or basis of the deductions labeled "Withdrawals to Buy T-Bills" in the section of the workpapers entitled "Summary of Saving Accounts." We find no support for this assertion. The amounts in question are: for the year 1980, \$329,784.31 (shown in the column labeled "Withdrawal" on workpaper number 8); for the year 1981, \$819,565.61 (shown in the column labeled "Withdrawal" on workpaper number 9); and, for the year 1982, \$355,326.77 (also shown in the column labeled "Withdrawal" on workpaper number 10). Examination of the transcript of the hearing, specifically pages 59, 60 and 61, coupled with a review of the auditor's detailed workpapers, reveals that the origin of each of the questioned amounts was adequately explained. The \$329,784.31 figure for 1980 represents the total amount withdrawn from the National Bank of N.A. (\$351,284.31) less the sum of \$21,500.00 for a withdrawal made on October 9, 1980, which sum the auditor determined was not utilized to buy T-Bills (see, workpaper number 27). For 1981, the figure of \$819,565.61 represents the total sum withdrawn from the National Bank of N.A. (\$819,566.61), less a \$1.00 withdrawal made on April 15, 1981 (see, workpaper number 28). For 1982, the figure of \$355,326.77 represents the total amount withdrawn from

the National Bank of N.A. (\$576,326.77), less the sum of \$70,000.00, which amount was withdrawn on August 5, 1982 and subsequently transferred to a different account,<sup>2</sup> and the sums of \$91,000.00 and \$60,000.00 which were withdrawn on May 28, 1982 and December 9, 1982, respectively, which sums the auditor determined were not utilized to buy T-Bills (see, workpaper number 29). Our review of the summary worksheets shows that in the deposit columns petitioners were given credit for "T-Bills Matured" of \$214,236.59 for 1980; \$764,425.56 for 1981; and \$526,014.54 for 1982, for a total of \$1,504,676.69. Thus, petitioners received credit for all amounts withdrawn from the National Bank of N.A., with the specific exceptions noted above.

Petitioners' further argument that the Division erred by not allowing credit for certain withdrawals totaling \$40,357.23 for 1980; \$5,000.00 for 1981; and \$184,500.00 for 1982 is also without basis. At issue here are eleven transactions totaling \$229,857.00, which transactions are specifically identified in the workpapers as to date, amount and financial institution. Since additional income disclosed pursuant to the cash availability analysis totals \$233,823.00 (\$75,316.00 for 1980; \$93,936.00 for 1981; and \$64,571.00 for 1981), it is obvious that the bulk of the additional income at issue (98.3%) stems from the eleven withdrawals not allowed as transfers or purchases of T-Bills. Credit was not allowed for said withdrawals because the auditor was not able to trace these funds as deposits to other accounts nor was she able to document that the withdrawn funds were utilized to purchase T-Bills. Petitioners submitted no evidence whatsoever, or for that matter even argument, concerning any of the eleven specifically identified disallowed withdrawals.

Finally, we note that the situation here is almost identical to that in Giuliano where the court sustained the State Tax Commission decision because of the "petitioners' failure to present any substantiating evidence other than (the taxpayer's) own, rather non specific, testimony. Petitioners offered no proof at the hearing that a cash availability analysis was not a valid method of determining a tax deficiency or that the figures used by the auditor were inaccurate"

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<sup>2</sup> Petitioners were given credit for the \$70,000.00 transfer (see, workpaper numbers 10, 13 and 29).

(Matter of Giuliano v. Chu, supra, 521 NYS2d 883, 886). Here we also have no documentary evidence or testimony on behalf of petitioners. Petitioners introduced none of their records which were examined by the auditor, the results of which are reflected in the audit workpapers, to disprove the conclusions reached by the auditor and upon which the assessments were based. Rather, petitioners' entire case at hearing consisted of the cross examination of the Division's auditor concerning various details of the audit and the basis of the conclusions reached in the audit. Our examination of the cross examination of the auditor, upon which petitioners totally rely in making their case, reveals no flaws in the audit or the workpapers underlying the audit. In fact, the auditor's testimony on redirect examination clearly responds to the issues raised on cross examination by petitioners' representative (see, Tr., pp. 59, 60, 61). Petitioners have failed to sustain their burden of proof imposed pursuant to Tax Law § 689(e) and the Administrative Code § T46-185.0(e).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Osung and Quan Lee is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Osung and Quan Lee is denied; and
4. The notices of deficiency dated March 25, 1985 are sustained.

DATED: Troy, New York  
October 11, 1990

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

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

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

