

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**STEPHEN FORTUNATO** : DECISION  
for Redetermination of a Deficiency or for :  
Refund of New York State Personal Income Tax :  
under Article 22 of the Tax Law and New York :  
City Personal Income Tax under Chapter 46, :  
Title T of the Administrative Code of the City :  
of New York for the Years 1983 and 1984. :  
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Petitioner, Stephen Fortunato, 1422 Reed Place, Bronx, New York 10465, filed an exception to the determination of the Administrative Law Judge issued on June 8, 1989 with respect to his petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1983 and 1984 (File No. 804814). Petitioner appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

Neither petitioner nor the Division filed a brief on exception.

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

***ISSUES***

I. Whether the Division of Taxation properly calculated and asserted a deficiency in personal income tax against petitioner, Stephen Fortunato, for each of the years 1983 and 1984.

II. Whether the Division of Taxation properly imposed penalties in connection with the personal income tax deficiencies asserted for each of the years 1983 and 1984.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except that we modify finding of fact "4" of the Administrative Law Judge's determination and we find certain additional facts as indicated below and all of such facts are stated below.

On August 20, 1987, the Division of Taxation issued to petitioner, Stephen Fortunato, two notices of deficiency asserting additional personal income tax due for the years 1983 and 1984 in the respective amounts of \$7,803.41 (for 1983) and \$9,100.88 (for 1984), plus penalties (Tax Law §§ 685[a][1], [2]; [b], [c]) and interest for each of such years. Prior thereto, on May 22, 1987, the Division of Taxation had issued to petitioner statements of audit changes for each of the years at issue providing computational explanations for the above-described notices of deficiency.

For the year 1983, petitioner filed with the Division of Taxation a Form IT-201 (New York State Resident Income Tax Return) reflecting petitioner's name, address and social security number entered in the caption area thereof. Said form was otherwise devoid of markings, except for the typewritten statement (on line 16) "Fifth and Sixth Amendments to Federal Constitution and applicable State Constitution", and the typewritten figures "\$1,500.00" and "\$500.00", entered on lines 64 and 66, respectively (pertaining to estimated tax payments).

For the year 1984, the Division of Taxation searched but could find no record of any income tax return having been filed by petitioner. Division of Taxation computer records did indicate, however, that petitioner had wage earnings for 1984 (and for 1985 and 1986). However, said information included no evidence as to the specific dollar amount of such wage earnings for 1984.

We find the following facts in addition to those found by the Administrative Law Judge.

The Division's records showed that for 1984 a wage and tax statement was filed with respect to the petitioner. This statement would have shown the name of the employer, the quarters that wages were earned by petitioner, the federal identification number,

the address of the employer and the amount of wages per quarter. At the time the desk audit of petitioner was performed this specific information had been destroyed by the Division and the only information that remained was that a wage and tax statement had been filed. For 1983, not even this information was available because the Division's records did not go back this far.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

Notwithstanding this lack of information with respect to petitioner's income for 1983 and 1984, the Division determined to estimate petitioner's income for such years. The Division did not attempt to contact the petitioner to request his books and records, nor does the record indicate that the Division sought information from the federal government with respect to petitioner.

The auditor who prepared the assessment stated that he estimated the income for 1983 and 1984 based on the returns (forms IT-201) filed by petitioner for 1981 and 1982 which reflected total income of \$35,000.00 for 1981 and \$45,447.00 for 1982. The auditor testified that he added the increase (\$10,447.00) from 1981 to 1982 to the 1982 income to estimate the 1983 income. The auditor testified that he similarly estimated the 1984 income by adding the 1981 to 1982 increase (\$10,447.00) to the estimate of 1983 income. If this methodology had been utilized, the 1983 estimated income would have been \$55,894.00 and the 1984 estimated income would have been \$66,341.00. In fact, the notices of deficiency issued were based on an estimated income of \$55,000.00 (Exhibit C1) for 1983 and \$60,000.00 (Exhibit C2) for 1984. There is nothing in the record to reconcile the notices of deficiency issued to the auditor's testimony.<sup>1</sup>

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<sup>1</sup>Finding of Fact "4" of the Administrative Law Judge's determination read as follows:

"Faced with this lack of information for 1983 and 1984, the Division of Taxation determined to estimate petitioner's income for each of such years. The method of estimation utilized by the Division of Taxation involved a review of petitioner's 1981 and 1982 Forms IT-201, on which were reflected the respective amounts of total income (at line '1') of \$35,000.00 (1981) and \$45,447.00 (1982). The Division of Taxation estimated petitioner's income for 1983 by adding \$9,553.00 (nearly the entire increase in petitioner's total income from 1981 to 1982) to petitioner's 1982 total income (\$45,447.00) to arrive at estimated total income for 1983. For 1984, \$5,000 (approximately one-half of the increase from 1982 to 1983) was added to the 1983 estimated total income to arrive at estimated total income for 1984. In turn, tax liability was computed on such resulting estimated total income amounts of \$55,000.00 (1983) and \$60,000.00 (1984).<sup>1</sup> [The auditor's testimony as to the estimation method differs somewhat by indicating that the 1981 to 1982 increase (\$10,447.00) was added to 1982 total income to arrive at 1983 estimated total income (\$55,894.00) and that, in turn, the 1982 to 1983 increase (\$10,447.00) was added to 1983 estimated total income to arrive at 1984 estimated total income (\$66,341.00). However, the documentary evidence supports the method and lower amounts outlined in Finding of Fact '4'.]" The bracketed material was a footnote in the Administrative Law

Petitioner did not appear in person at the hearing and did not provide testimony. As noted, petitioner's filing for 1983 asserted a right to the protections afforded by the Fifth and Sixth Amendments to the United States Constitution. Petitioner's returns for 1981 and 1982 also claim similar constitutional protections. However, unlike the 1983 Form IT-201, said earlier returns were filled in, reflected the choice of filing status "4" (Married, filing separately on separate returns) and apparently constituted acceptable filings. For 1985, petitioner, together with his wife, Angela Fortunato, filed a joint New York State Resident Income Tax Return (Form IT-201). This 1985 return reflected (joint) total income of \$20,880.00. Forms W-2 (Wage and Tax Statements) appended to this 1985 return reflect that petitioner reported wage earnings of approximately \$5,000.00, whereas Mrs. Fortunato reported wage earnings of approximately \$15,000.00.

Petitioner's representative introduced no specific evidence at the hearing. Rather it was asserted that the Division of Taxation had no basis in fact for its determination that petitioner had any taxable income from any sources in 1983 or was otherwise required to file a return for such year, thereby requiring that the 1983 Notice of Deficiency be cancelled as a nullity. For 1984, petitioner's representative asserted that the Division of Taxation's estimate of income was erroneous and that a more accurate estimate of income could have been derived from utilization of other audit estimation methods.

Petitioner's representative sought and received permission to submit, post hearing, certain additional items, to wit, Forms W-2 for petitioner for 1984, a copy of petitioner's wife's Form IT-201 for 1984 and a copy of a cancelled check relative to a claimed estimated tax payment of \$2,000 for 1983. No Forms W-2 were submitted. However, an unsigned copy of a 1984 Form IT-201 for Angela Fortunato (showing total New York income of \$7,234.00) was submitted, as

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Judge's finding of fact.

We modified this fact to more accurately reflect the record.

was a copy of a cancelled check payable to "New York State Income Tax" in the amount of \$2,000.00. Although drawn on the account of petitioner's representative, the check memo indicates said payment to be for "xxx-xx-xxxx" (petitioner's social security number, redacted). With respect to this latter item, the Division of Taxation confirmed receipt and deposit of the above-described check and also confirmed that petitioner is entitled to credit therefor against the 1983 deficiency asserted herein.

### ***OPINION***

In the determination below the Administrative Law Judge decided that there was no evidence that returns were filed by petitioner for the years at issue but there was evidence that returns were required to be filed. Further, it was concluded that the Division of Taxation's estimation of petitioner's income should be upheld as it was based upon information in the Division's possession and it was not refuted by petitioner. Lastly, it was determined that the penalties imposed would be sustained as petitioner failed to provide any evidence to support an abatement or reduction of any of the penalties.

On exception petitioner contends that the Division is not entitled to rely upon a presumption of correctness for its issuance of the subject notices of deficiency because no information is contained in the Division's files from which any reasonable estimate can be made. Specifically, petitioner refers to federal case law as support for his position that the notices of deficiency at issue should be dismissed as arbitrary and unreasonable as the record does not link him to any tax generating actions.

In response, the Division relies upon the determination of the Administrative Law Judge.

We affirm in part and reverse in part the determination of the Administrative Law Judge.

First, we agree with the Administrative Law Judge that petitioner did not file returns for 1983 and 1984. The only evidence of any filing by petitioner for either year was the form IT-201 submitted for 1983. The submission of this form with only petitioner's name, address, social

security number, a notation of estimated tax payments and a claim of constitutional rights does not constitute the filing of a return (United States v. Sullivan, 274 US 259, 1 USTC ¶ 236; Fahy v. Commr., T.C. Memo 1982-37). As a result of this failure to file returns, the Division estimated petitioner's tax liability for the years at issue pursuant to section 681 of the Tax Law. The Administrative Law Judge upheld the estimate methodology utilized by the Division; we reverse this part of the determination for the reasons stated below.

It has been held that a presumption of correctness arises with respect to a notice of deficiency properly issued under the Tax Law and that a petitioner who fails to present any proof as to the incorrectness of the deficiency surrenders to this presumption (Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, 175). Although this is also the general rule under federal law, there is an exception that requires the government to, in certain circumstances, make an initial showing that the assessment has a rational basis before the presumption of correctness arises (see, Anastasato v. Commr., 794 F2d 884, 86-2 USTC ¶ 9529; Llorente v. Commr., 649 F2d 152, 81-1 USTC ¶ 9446; Weimerskirch v. Commr., 596 F2d 358, 79-1 USTC ¶ 9359). Where this exception applies and the government fails to affirmatively demonstrate the rational basis for the assessment, the assessment may be found to be arbitrary even though the taxpayer does not prove that the amount of the assessment is incorrect (Llorente v. Commr., *supra*; Weimerskirch v. Commr., *supra*). We conclude that we need not decide if such an exception may apply under the New York Tax Law because we find the evidence in the record before us not only rebuts any presumption of correctness that could arise but also establishes that the assessment had no rational basis. Since it is the well established law of New York that a notice of deficiency that has no rational basis must be set aside (Matter of Donahue v. Chu, 104 AD2d 523, 479 NYS2d 889, 892; Rosenthal v. State Tax Commn., 102 AD2d 325, 477 NYS2d 767, 769; Welch v. State Tax Commn., 89 AD2d 683, 453 NYS2d 802, 803), we find this assessment must be annulled.

A brief review of the facts underlying this assessment demonstrates its arbitrariness. The Division "estimated" the assessment for 1983 and 1984 even though it had absolutely no information even hinting at whether petitioner had any income or the amount of petitioner's income in these years. Further, this absolute lack of information was at least in part attributable to the Division's own action of destroying the details on wage reported information for 1984 and possibly for 1983. Notwithstanding this complete lack of information, the Division did not even ask petitioner to provide information with respect to his 1983 and 1984 income. Thus, this cannot be seen as a case where the Division was forced to resort to rough estimate techniques because of the taxpayer's refusal to provide information (see, Lysek v. Commr., T.C. Memo 1975-293, 34 TCM 1267, affd 583 F2d 1088, 78-2 USTC ¶ 9792). Instead, it is a case where the Division first destroyed relevant evidence, then neglected to ask the taxpayer for any information and then without even a scintilla of evidence to support its conclusion (for example that petitioner was employed by the same employer from 1981 through 1984) concluded that petitioner's income in 1983 and 1984 bore a direct relationship to his income in 1981 and 1982. An assessment calculated through such an arbitrary methodology could not be upheld but the assessment before us presents another layer of irrationality because the arbitrary methodology purported to be used does not even account for the amount assessed. Thus, we are confronted with an inexplicable calculation that the Division has presented as being founded on a methodology we find lacking a rational basis. On such facts we conclude petitioner has sustained his burden of proving under section 689(e) of the Tax Law that the assessment is improper.

Finally, our cancellation of the instant assessment obviously precludes crediting petitioner's \$2,000 payment against it. We cannot address any other application or disposition of this payment because we have no other assessment nor a claim for a refund before us.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Stephen Fortunato, is granted;

2. The determination of the Administrative Law Judge is reversed;
3. The petition of Stephen Fortunato is granted; and
4. The notices of deficiency dated August 20, 1987 are cancelled.

DATED: Troy, New York  
February 22, 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