

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ROBERT L. COHEN AND JOYCE A. COHEN : DECISION
for Redetermination of a Deficiency or for : DTA No. 807006
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1985 and 1986 :

Petitioners Robert L. Cohen and Joyce A. Cohen, 859 Derry Drive, Toms River, New Jersey 08753 filed an exception to the determination of the Administrative Law Judge issued on February 27, 1992 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 and 1986. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

The Division of Taxation submitted a letter in response to petitioners' exception. Oral argument was not requested.

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

ISSUES

I. Whether the Division of Taxation properly disallowed deductions claimed by petitioners for employee business expenses, interest expenses and automobile depreciation.

II. Whether the Division of Taxation properly disallowed an investment tax credit claimed by petitioners in 1985.

III. Whether the Division of Taxation properly excluded a claimed farm loss in its calculation of petitioners' 1985 New York adjusted gross income.

IV. Whether petitioners are entitled to a default determination against the Division of Taxation on the ground of a late answer to the petition.

FINDINGS OF FACT

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

Petitioners, Robert L. Cohen and Joyce A. Cohen, filed 1985 and 1986 New York State resident income tax returns under the status married filing separately on one return.¹

On his 1985 return, petitioner calculated his total New York income by including a farm loss of \$32,017.00 from an entity identified as G & B Nursery Farm (the "Farm") and business losses of \$3,403.00 in connection with a business identified on an attached schedule C as Robert L. Cohen, Public Accountant. He also claimed an investment tax credit of \$1,606.00. The business losses were calculated by subtracting unreimbursed employee business expenses, "in connection with salaried position as senior V.P.," of \$4,003.00 from gross income of \$600.00. There is no information on the schedule C to indicate whether the income and expenses flowed from the same business. Petitioner attached a Federal depreciation schedule (Form 4562) to his State return. It shows a total depreciation of \$3,125.00 on a 1984 Oldsmobile. Petitioner claimed 60 percent business use of the vehicle thus claiming total depreciation in 1985 of \$1,875.00. Petitioner itemized his New York deductions, and he included in those deductions interest payments of \$10,891.00. Attached to petitioner's return is a 1985 wage and tax statement from L.F. Rothschild, Unterberg and Towbin, showing wages paid to petitioner of \$94,739.53. This amount was reported by petitioner on his 1985 State income tax return as income from salary or wages.

On his 1986 return, petitioner reported a business loss of \$6,925.00 (a schedule C was not attached to the return offered in evidence), and he included in his calculation of itemized

¹Petitioner Joyce Cohen is included in these proceedings by virtue of having filed a joint return with her husband, Robert L. Cohen; she had no separate income. Therefore, this determination is concerned only with facts applying to Mr. Cohen, and all references to petitioner should be understood to apply to Robert L. Cohen.

deductions interest payments of \$15,741.00. A wage and tax statement attached to his 1986 return shows wages, tips and other compensation of \$77,101.49 from L.F. Rothschild, Unterberg and Towbin of New York City.

In August of 1988, the Division of Taxation ("Division") began an audit of petitioner's 1985 and 1986 returns. A letter was sent to petitioner scheduling an audit in the offices of the Division on September 20, 1988 (this letter was not placed in evidence; therefore, its precise contents are unknown).

On September 19, 1988, petitioner telephoned the Division and spoke with the auditor assigned to this audit, Felipe Rivera. Petitioner stated that he was now living in Texas and provided Mr. Rivera with his new address and telephone number. There is some dispute between Mr. Rivera and petitioner with regard to agreements made by them in this telephone conversation. Petitioner's understanding of the conversation is set forth in a letter to Mr. Rivera dated September 19, 1988. In that letter, he objected to the audit on the ground that his 1981 tax return had been audited. According to petitioner, that audit resulted in substantiation of the 1981 income tax return as filed, except that an additional refund was determined on the basis of additional unclaimed business expenses. Petitioner stated his belief that auditing three out of six tax returns amounted to unwarranted harassment. As the only categories not audited in 1981 were the farm loss and related investment tax credit, he offered to provide information on these items only. He also made the following statements:

"I have contacted the administrative group for the 'G & B Nursery Farm 1985.' They told me that I should ask you to wait for data since they are presently in the midst of a Federal audit of the nursery. When the audit is completed the state will be notified regarding any changes."

Petitioner provided Mr. Rivera with the telephone number of the Farm's accountant so that he could verify that information if he wished to.

A letter dated September 21, 1988 from Mr. Rivera to petitioner evidences Mr. Rivera's understanding of his telephone conversation with petitioner. The body of the letter states:

"[p]ursuant to your request, the audit of your income tax returns for the years 1985 and 1986 may be conducted through the mail.

"For that purpose, please remit to us evidence that substantiates the following items checked in our letter of August 18.

Interest Expense
Farm Loss
Investment Credit
Schedule C Expenses

"As indicated in said letter, the evidence may be in the form of receipts, cancelled checks, records, or other documents. We will review them and give you credit for whatever amount you substantiate.

"Please also send us copies of the federal income tax returns for said years.

"The documentation must be received in this office by October 20, 1988.

"Thank you for your cooperation in this matter."

Petitioner responded somewhat angrily to Mr. Rivera's letter. By letter dated September 27, 1988, he denied agreeing to have the audit conducted by mail (since, in effect, he objected to the audit being conducted at all). He also stated that he had just moved to his new residence and had 20 cartons of papers and records to unpack in order to find the records for 1985 and 1986. Petitioner reasserted his willingness to provide information about the farm loss. Finally, petitioner requested that Mr. Rivera contact him by telephone so that they could "establish a dialogue."

By letter dated September 29, 1988, Mr. Rivera advised petitioner that the previous audit of his 1981 return "has no bearing on the present years audit." He also asked petitioner to send a written statement from the Farm confirming the Federal audit and providing the location of the farm. Petitioner responded to this letter with a letter dated October 18, 1988. In this letter, he objected to what he saw as Mr. Rivera's ignoring statements made in the earlier letter. Specifically, he objected to Mr. Rivera's failure to call him to discuss the audit procedure and to Mr. Rivera's failure to verify statements regarding the Federal audit by contacting the Farm's accountant (see, above). He once again asked that Mr. Rivera discuss the procedure for conducting the audit with him.

Mr. Rivera sent another letter to petitioner, dated November 2, 1988, in which he stated:

"[i]n our letter of September 21, 1988 we informed you that the audit of your income tax returns for the year[s] 1985 and 1986 might be conducted through the mail. We requested that you submit by October 20th the evidence substantiating certain items. In addition, on September 29, 1988 we requested a specific document also pertinent to the audit.

"To this date, however, you have failed to supply the documentation requested.

"Since this is the fourth letter we have sent to you requesting substantiation, we must soon make a determination in this case. If the substantiation requested is not forthcoming, we will have to disallow the deductions you took on the items checked in our letter of August 18, 1988 and assess the corresponding tax liability."

Dissatisfied with his communications with Mr. Rivera, petitioner sent a letter to then Commissioner of Taxation and Finance, Roderick Chu. In that letter, he reiterated his objection to having both his 1985 and 1986 returns audited and requested that the audit encompass only one of the two years. If this request was denied, he asked to be supplied with the reasons for its denial. Petitioner then asked to have more time to supply documents and records, since he was not fully unpacked from his move to Texas and had moved twice since filing his 1985 return. Statements made in petitioner's letter indicate that Mr. Rivera previously sent and asked him to execute a consent to extend the period of time for assessment of the 1985 tax year, with instructions to return the form within 10 days of its mailing to him (which was November 2, 1988 according to the letter).² Petitioner pointed out that he did not receive the consent form until November 9, 1988 and, therefore, had almost no time to respond. His letter indicates that he interpreted Mr. Rivera's letter, coupled with the request that he execute the consent form, as a threat to issue an unwarranted assessment. Finally, petitioner requested that the matter be transferred "to Albany," apparently meaning to the Division's central offices in Albany.

Commissioner Chu referred petitioner's letter to John B. Langer, Deputy Commissioner for Operations. Commissioner Langer replied to petitioner by letter dated December 7, 1988. In that letter, he stated that petitioner's 1985 and 1986 returns were selected for audit "by a

²The auditor's contact sheet also shows that on November 2, 1988 petitioner was sent a consent to extend the statute of limitations for assessment of the 1985 tax year.

routine manual screening process" and stated that it is a common practice for the Division to audit several years at the same time "for cost effectiveness to the state as well as the taxpayer." Commissioner Langer stated that additional time to gather and provide documents would be granted to petitioner, if he signed and returned the consent form sent to him on November 2, 1988. The letter directed petitioner to send the consent form directly to Commissioner Langer.

On December 23, 1988, the Division issued to petitioner two statements of audit changes for the years 1985 and 1986, respectively. The statement for 1985 disallowed petitioner's claimed business losses, farm losses and deductions for interest expenses and asserted additional tax due for 1985 of \$6,005.44, plus penalties and interest. The statement for 1986 disallowed petitioner's claimed business losses and deductions for interest expenses and asserted additional tax due of \$4,064.38 plus penalty and interest. Each statement includes a section showing that it was issued from the Maiden Lane office of the Division, in New York City.

Apparently, petitioner had not received the statements of audit changes when he replied to Commissioner Langer's letter of December 7, 1988, for he makes no mention of them in his own letter of December 31, 1988. In that letter petitioner expressed a great deal of dissatisfaction with the Division's audit procedures in general and Commissioner Langer's letter in particular. One paragraph is adequate to convey the tone of petitioner's letter and his most repeated complaint about the audit.

"It is clear that I, as a citizen, misread the nature of your mandate. I had thought it was 'compliance' of the taxpayers--not one of revenue raising as a prime directive. Since most taxpayers tax lines are patterned--containing similar income and deductions from year to year--your 'cost effective' 2 year at a time screening process guarantees the audit group the ability to harass taxpayers with a continuous audit of 100% of the returns filed. Further, the Federal IRS requests that if a taxpayer has been audited previously, for the same deduction claimed for the year under review, that you bring that matter to the attention of the service. Mr. Rivera and your letter reiterate that previous audits have no bearing on the current audits--leaving the State Dept of Taxation in the position to harass as well as abuse the taxpayer."

In this letter, petitioner offered to provide the Division with a "restricted" extension of time to assess tax for 1985, meaning an extension that would apply only to the audit of the farm

loss and associated investment tax credit. Since the only substantial difference between his 1981 income tax return (audited by the Division) and his 1985 and 1986 returns was the farm related items claimed in 1985, petitioner believed that auditing other items was unnecessary. Petitioner made several other points in this letter. Most notably, he requested that the Division "rescind the threat" to disallow all deductions if he did not sign the consent form sent to him by Mr. Rivera and again requested that the Division select either 1985 or 1986 for audit. In this letter, petitioner also stated that he had finally "found" his 1985 return and expected to be able to send the Division documentation supporting his deductions and expenses by February. This, his letter states, would include Federal tax schedules related to the Farm which were originally prepared by the Farm's accountant.

By January 11, 1989, petitioner was in receipt of the statements of audit changes. In his letter to Commissioner Langer of this date, petitioner stated that he did not accept the findings shown in the statements and that he would not communicate further with Mr. Rivera. He again requested that the audit be extended while he continued to gather information.

Petitioner forwarded to Commissioner Langer, with a cover letter dated January 30, 1989, the following documentation applicable to 1985: federal schedules F, 4562, and 3468 (regarding the farm loss and investment tax credit); bank and other creditor statements establishing payments of interest expenses; and invoices, canceled checks and worksheets relating to business expenses. He advised Commissioner Langer that he expected to be able to submit information with regard to the 1986 tax year by February 16, 1989. His letter states that he was at that time still awaiting a reply to his letters of December 31, 1988 and January 11, 1989.

Without replying to petitioner's letters, the Division issued to petitioner a Notice of Deficiency for the 1986 tax year, dated February 10, 1989, asserting a tax deficiency of \$4,064.38, plus penalty and interest. It would appear that several of the letters exchanged between Commissioner Langer and petitioner after this date crossed in the mail.

Upon receipt of the Notice of Deficiency for 1986, petitioner wrote to Commissioner Langer by letter dated March 3, 1989. Petitioner strongly suggested that the Division's issuance of the 1986 Notice of Deficiency was precipitous and motivated by the Division's desire to issue an assessment before petitioner had an opportunity to submit substantiation of his 1986 expenses and deductions. With this letter, petitioner enclosed various records and documents to substantiate deductions claimed on his 1986 return.

By letter dated February 22, 1989, Commissioner Langer responded to petitioner's letters of December 31, 1988, January 4, 1989 and January 11, 1989. This letter indicates that by this time Commissioner Langer had also received the letter of January 30, 1989, with its submissions. Replying directly to one of petitioner's major concerns, namely repetitious audits, Commissioner Langer stated:

"[i]n your situation, your 1985 and 1986 New York State tax returns were selected for audit. This is four tax years after your 1981 audit. Additionally, new issues arose from your previous audit; namely the investment tax credit and farm loss."

Commissioner Langer also explained that Mr. Rivera's request for an extension of time for assessment of the 1985 tax year, concededly made well before the time period for assessment was due to expire, was necessitated by changes in the Division's automated accounting system.

The remainder of Commissioner Langer's letter states:

"[b]y the time you receive this letter you will likely have received a Notice of Deficiency setting forth the amounts due shown on the Statement of Audit changes; therefore, the waiver originally requested by Mr. Rivera will no longer be of necessity.³ We have taken the steps necessary to stop the maturing of this Notice to the collection stage pending adjustments to the audit findings when substantiation is submitted.

"With respect to your 'restrictive extension', we do not require an extension for any items that are under Federal audit because you are required to notify New York State of Federal audit changes within ninety days of the final determination. The extension we previously requested would have covered all other issues raised on audit.

"I am sorry that you viewed Mr. Rivera's letter of November 2, 1988 as a threat. I can assure you, it was merely his intention to inform you of the

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This statement indicates that Commissioner Langer believed that the Notice of Deficiency issued on February 10, 1989 was for the 1985 tax year.

consequences of not responding by either substantiation of the items requested or signing of the waiver to extend the statute.

"In view of the fact that your audit will be completed through correspondence, we are granting your request for transfer of your case to Albany. You will be contacted in the near future by a Central office tax technician who will be assigned to your case. In the meantime, if you have any questions regarding your audit, you may contact Howard Parsons, Tax Audit Administrator We have received the material you sent on January 30, 1989 and February 6, 1989 will forward it along with your case file to Mr. Parsons for reassignment.

"We are sorry for any misunderstanding or inconvenience caused you. I'm sure this matter can be resolved with mutual cooperation."

The second Notice of Deficiency, asserting a tax deficiency for 1985 of \$6,005.44, plus penalty and interest, was issued to petitioner on March 16, 1989, after his receipt of Commissioner Langer's letter of February 22, 1989. He replied to the notice with a letter to Commissioner Langer dated March 20, 1989. In it, petitioner stated:

"[c]ontrary to what was said in your letter to me of February 22, 1986, I have now received an additional notice of deficiency (dated 3/16/89) this time for the year 1985 (prior notice 1986) assessment #A88122543251" (emphasis in original).

In addition, he complained that the Division had adequate time to review the documents submitted in January 1989 but issued the notice, disallowing all expenses and deductions for 1985, without discussing the adequacy of the submitted documents. He also contended that the issuance of the 1985 notice was inconsistent with the statements made in Commissioner Langer's letter of February 22.

Petitioner filed a petition protesting the 1985 and 1986 notices of deficiency on June 5, 1989.

In this proceeding, petitioner submitted a schedule of Farm Income and Expenses (Federal schedule F) for 1985. It shows Robert Cohen as the sole proprietor of G & B Nursery Farm. A net loss of \$32,017.00 is calculated by subtracting deductions of \$32,645.00 from income of \$628.00. The location of G & B Nursery Farm and petitioner's relationship to that enterprise (other than the listing of his name as sole proprietor) is not shown on the return. A Federal form 3468 shows the calculation of an investment tax credit of \$2,677.00 on property with a cost basis of \$26,767.00. The property, somehow associated with the Farm, is not

identified and the situs of the property is not known. The schedules submitted were also filed with petitioner's 1985 New York income tax return.

Petitioner submitted bank statements, cancelled checks, an installment contract and other documents showing interest expenses for 1985 of \$11,118.90 and interest expenses for 1986 of \$16,034.87.

Petitioner submitted documents showing his purchase of a 1984 Oldsmobile on October 11, 1983 and his purchase of a 1987 Oldsmobile on December 30, 1986. Cash paid for the 1984 automobile was \$8,940.93 (retail price minus trade-in). He depreciated the cash cost of the automobile over a period of three years, claiming depreciation of \$1,704.00 for 1984 and depreciation of \$3,125.00 for each of the next two years. Petitioner claimed a business use of the automobile of 60 percent. Thus, he claimed a deduction in 1985 of \$1,875.00 based upon automobile depreciation.

Petitioner computed the cost basis of the 1987 Oldsmobile by adding the "book value" of the 1984 Oldsmobile at the time it was traded for the purchase of the 1987 Oldsmobile (\$6,787.63) to the cash cost to him of the 1987 Oldsmobile (\$11,924.11). This resulted in a cost basis of \$18,711.74. He determined that total depreciation for 1986 was \$9,541.00. He claimed 62.7 percent business usage of the automobile, thus calculating a deduction of \$5,915.42.

Petitioner also submitted documents showing expenses related to the maintenance and repair of both automobiles, including insurance and motor vehicle registration costs. Petitioner claimed total automobile expenses for 1985 of \$918.55 and business usage of 60 percent resulting in deductible expenses of \$551.13. He submitted cancelled checks substantiating total expenses of \$796.30. For 1986, petitioner claimed total automobile expenses of \$1,441.11, 62.7 percent of which was claimed as business usage, yielding deductible expenses of \$893.48.

For 1985, petitioner submitted a schedule of "Employee Expenses" totalling \$4,213.89, calculated as follows:

Passport	\$ 35.00*
Passport	8.00

Insurance--Nat'l Assoc. of Accountants	93.79*
Insurance--Nat'l Assoc. of Accountants	234.48
Nat'l Luggage--Attache case	58.44*
Real Estate Tapes	295.00
Airline Upgrade	111.00*
Business Meeting/Meal	
Drexel Burnham	62.30*
NASD	34.75
Lord Abbott	42.00
8 round trips to New York City	
53 gallons of gasoline	53.00
8 parking fees	1200.00
8 bridge tolls	16.00
Christmas Party for employees	624.00
Allocated automobile expenses	551.13
Allocated depreciation expense	1,875.00
Total	\$4,213.89

* These expenditures were documented with cancelled checks or guest checks.

Petitioner subtracted these expenses from income of \$600.00 to calculate a business "loss" of \$3,613.89.

For 1986, petitioner submitted a schedule of business losses calculated as follows:

Nat'l Assoc. of Accts. Insurance	\$ 578.40*
Christmas Party for employees	158.85*
Belated 1985 Secretary's lunch	35.00
1986 Secretary's lunch	31.00
Reardon Security Analyst Lord Abbott	29.50
Lorelli asst cashier Drexel Burnham	60.67*
Morea VP NASD	50.00*
Real Estate Investment Seminar (telephone expense)	1.50
Six trips to New York City	
33 gallons of gasoline	33.00
Parking and tolls	108.00
Allocated auto expenses	893.48
Allocated depreciation	5,915.42
Total	\$7,894.82

* These expenditures were documented.

On workpapers, petitioner subtracted expenses from income of \$600.00 to calculate a business loss of \$7,294.82.

On or about June 5, 1989, petitioner filed a single petition protesting both notices of deficiency. On or about October 5, 1989, petitioner brought a motion for determination on

default on the ground that the Division failed to file an answer to the petition within 60 days. The Division filed an affidavit in opposition to the motion on or about October 30, 1989. In conjunction with its affidavit, the Division filed an answer to the petition. On November 9, 1989, Assistant Chief Administrative Law Judge Daniel J. Ranalli issued a short form order denying petitioner's motion. In a letter to the Supervising Administrative Law Judge, dated November 20, 1989, petitioner stated:

"I . . . do believe that the Administrative Law Judge in issuing his short form order in this matter has not considered all the facts touched upon in my petition in arriving at his decision to deny me a default judgment against the Tax Dept.

"a. The failure of the Tax Dept. to meet time restraints as well as to respond to previous taxpayer's repeated attempts to gain a response from the department have denied me the opportunity to exhaust avenues in a normal review-and I feel this has been so consistently applied against petitioner as to leave little doubt as to its deliberate nature."

By letter dated December 11, 1989, Judge Ranalli replied to petitioner. He did not respond directly to petitioner's contention that the motion was wrongly decided, but he explained that petitioner still had a right to a hearing. The letter states, in material part:

"[t]he order only means that the Department's failure to file its answer promptly will not result in your petition's being granted. You may still present all your evidence and arguments at hearing."

By its answer, the Division asserted that the petition in this matter was untimely with respect to the Notice of Deficiency issued for 1986. The administrative law judge severed the timeliness issue from the other issues raised by the pleadings and, on July 25, 1991, issued a determination deeming the petition timely for both years and remanding for a determination on the merits. Following the issuance of that determination, both parties were given an opportunity to submit additional evidence and arguments of law. The Division did not except to the administrative law judge's determination.

Based on the documents submitted by petitioner to substantiate claimed interest expenses, the Division concedes that petitioners were entitled to interest deductions of \$11,119.00 for 1985 and \$16,035.00 for 1986.

OPINION

In her determination below, the Administrative Law Judge held that the burden of proof in this proceeding was upon petitioner and that it was incumbent upon him to prove the material facts which would establish his entitlement to the business deductions claimed. The Administrative Law Judge also held that it appeared from the record that petitioner had no income separate from wages received as an employee and that if any of the expenditures made by petitioner were related to a trade or business carried on by him other than as an employee, there is no evidence in the record to show it.

The Administrative Law Judge further held that: 1) there is no evidence in the record to establish that travel and automobile expenses were incurred in connection with petitioner's services as an employee; 2) petitioner failed to establish that an audit was conducted in 1981 or that business expenses claimed in 1981 were similar to those claimed in 1985 and 1986 or that those audit results were even favorable to petitioner's position; 3) petitioner's claimed investment tax credit on equipment must be denied as he failed to provide a description of the equipment and further failed to establish that the equipment is located in New York; 4) the Division was warranted in disallowing the full amount of the farm loss claimed by petitioner since he was required to substantiate the loss when it was challenged by the Division and he failed to do so; and 5) the tax deficiency asserted for each year must be recalculated since the Division concedes that petitioner is entitled to claim deductions for interest expenses of \$11,119.00 for 1985 and \$16,035.00 for 1986, as well as an allowance for automobile depreciation and expenses in the amount of \$58.00 for 1986.

While petitioner has repeatedly requested that the notices be cancelled because of the Division's alleged arbitrary behavior, the Administrative Law Judge found that it appeared from the onset of the audit that petitioner misunderstood the relative duties and obligations of the Division and the taxpayer. Therefore, the Administrative Law Judge held that: 1) the Division has the authority to conduct an audit for the purpose of ascertaining the correctness of a filed return; 2) a presumption of correctness attaches to a notice of deficiency properly issued under

the Tax Law; 3) when a credit, expense deduction or other item is challenged by the Division, the burden of proof is on the taxpayer to show the correctness of the return; and 4) while it is true that a notice of deficiency which has no rational basis must be set aside, the record herein does not support petitioner's contention that these notices of deficiency have no rational basis. The Administrative Law Judge noted that petitioner never submitted all of the information requested and has never submitted information to substantiate the farm loss, the investment tax credit, or the business nature of the claimed business expenses.

The Administrative Law Judge also rejected petitioner's claim of estoppel, holding that there is no evidence in the record that representations made to petitioner by the Division prevented him from presenting proof of the deductions, expenses, and losses claimed on his returns or otherwise denied him the opportunity to prove facts which were his burden to prove.

Finally, the Administrative Law Judge held that since there is no provision in the Tax Appeals Tribunal Rules and Regulations which would enable one administrative law judge to set aside the order of another judge, she was without authority to reconsider petitioner's motion for a determination on default here.

On exception, petitioner disagrees with all of the conclusions of law based upon his exceptions to the facts as outlined in attachments to his exception and summary of prior proceedings. Petitioner argues for a determination on default and requests the returns be accepted as filed. Petitioner alleges that: 1) the notices are flawed, in error and without merit; 2) the tax years in question are time barred; and 3) the taxpayer was deprived of the benefit of a normal and reasonable audit. Alternatively, petitioner requests that if the finding is against petitioner, at least penalties and interest may be voided.

In response, the Division argues that a desk audit was conducted for 1985 and 1986, credits and deductions claimed were not substantiated and petitioner has failed to sustain his burden of proving entitlement to the credits and deductions claimed, with the exceptions that form the bases of the modifications allowed. The Division requests that petitioner's exception

be denied, the Administrative Law Judge's decision be affirmed and the notices of deficiency be sustained as modified.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Further, we find no basis to modify the order of the Administrative Law Judge denying petitioner's motion for a default determination. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination and affirm the order denying the motion for the reasons stated in the order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Robert L. Cohen and Joyce A. Cohen is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The order denying the motion for default is affirmed;
4. The petition of Robert L. Cohen and Joyce A. Cohen is granted to the extent indicated in conclusion of law "B" of the Administrative Law Judge's determination, but is otherwise denied; and
5. The Division of Taxation is directed to modify the notices of deficiency dated February 10, 1989 and March 16, 1989 in accordance with paragraph "4" above, but such notices are otherwise sustained.

DATED: Troy, New York
November 5, 1992

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

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

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