STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CLIFFORD DUFTON AND NOREEN CONLON	:	DECISION DTA No. 811698
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1986.	:	

Petitioners Clifford Dufton and Noreen Conlon, 137 Tree Top Circle, Nanuet, New York 10954, filed an exception to the determination of the Administrative Law Judge issued on August 11, 1994. Petitioners appeared *pro se*. The Division of Taxation appeared by William F. Collins, Esq. (David C. Gannon, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on October 25, 1994, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUE

Whether petitioners have established entitlement to a refund of personal income tax, penalty and interest paid for the year 1986 based upon the claim that their taxable income reported for such year was overstated.

FINDINGS OF FACT

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

On or about June 16, 1987, petitioners Clifford Dufton and Noreen Conlon, husband and

wife, filed their U.S. Individual Income Tax Return (Form 1040) for the year 1986. Petitioners chose filing status "2" (Married Filing Joint Return) and reported adjusted gross income of $111,243.00, taxable income of $53,230.00, and a tax liability of $12,048.00. On or about the same June 16, 1987 date, petitioners also filed their New York State, City of New York and City of Yonkers Resident Income Tax Return (Form IT-201) for the year 1986. On this return, petitioners chose filing status "3" (Married Filing Separately on One Return) and reported a combined total New York income (columns A + B after New York modifications) of $107,532.00,combined New York taxable income of $50,199.00, and a combined New York tax liability of $5,908.00.

On or about October 10, 1987, petitioners filed an Amended U.S. Individual Income Tax Return (Form 1040X) for the year 1986. On this amended return, petitioners reported a net change increasing their taxable income by $21,715.00. This increase to income resulted in an increase to petitioners' tax liability from $12,048.00 (as originally reported) to $19,243.00. After subtracting the amount of tax paid with their original return ($12,048.00),[1] petitioners arrived at an additional amount due of $7,195.00. There is no question that petitioners paid such additional amount with the filing of their amended return.

Included in evidence are copies of petitioners' Schedule D ("Capital Gains and Losses and Reconciliation of Forms 1099B") pertaining, respectively, to petitioners' Form 1040 and their subsequent Form 1040X. Comparison of such two schedules reveals an increase in petitioners' net long-term capital gain in the amount of $50,000.00, described on the Schedule D accompanying petitioners' Form 1040X as "one third share 341-15th Street, Brooklyn, New York - 12/11/85 to 12/16/86." This gain is reflected as derived from a gross sales price of $150,000.00 (at column D), less a cost or other basis of $100,000.00 (at column E) to arrive at a net gain of $50,000.00 (at column G). Petitioner Clifford Dufton stated at hearing that part of the $21,715.00 increase to income per petitioners' Form 1040X resulted from this real property

[1]Consisting of tax withheld plus tax remitted with the filing of petitioners' original Form 1040.

transaction which was inadvertently not reported on petitioners' original return, but was reported subsequently as capital gain on the amended return.[2]

On or about October 10, 1987, petitioners also filed a New York State, City of New York and City of Yonkers Amended Resident Income Tax Return (Form IT-201-X) for the year 1986. On this return, petitioners again filed under status "3" (Married Filing Separately on One Return), reported a (combined) increase in net income of $21,715.00 and, ultimately, a (combined) increased tax liability of $6,063.00. Again, it is undisputed that petitioners paid the additional tax liability as calculated.

On or about January 18, 1988, the Internal Revenue Service ("IRS") issued to petitioners a refund check in the amount of $15,040.89. A notation on this check indicates the amount of interest included therein to be $650.89, thus leaving the amount of refunded tax at $14,390.00. At this point it is noteworthy that the $14,390.00 amount of refunded tax is exactly twice the $7,195.00 amount of tax shown as due on petitioners' amended Federal return.

On or about August 4, 1989, the IRS issued to petitioners a Notice of Deficiency for 1986 asserting additional personal income tax due in the amount of $2,836.00. The amount of this deficiency stems from an IRS-claimed increase to petitioners' income for 1986 based on an unreported taxable pension or annuity payout in the amount of $8,531.00. The IRS calculations are shown on a "Report of Individual Income Tax Examination Changes" attached to the Notice of Deficiency. Also attached to the Notice of Deficiency was a Form 886-A ("Explanation of Items") issued to petitioners in explanation of the tax examination changes for the year 1986.[3] This Form 886-A stated as follows:

> "We received your letter of 4-2-89.
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> "Your 1040X was received and processed. However, the 1040X was processed incorrectly. You paid $7195.00 on 10-21-87. IRS processed your increase as a <u>decrease</u> of $7195.00.

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[2]Calculation of the overall $21,715.00 increase to income is set out below.

[3]It is unknown whether these three forms (the Notice of Deficiency, the Report of Individual Income Tax Examination Changes and the Explanation of Items) were issued to petitioners at the same time by the IRS or, rather, whether petitioners simply submitted these three forms attached together as one exhibit (Exhibit "9") at hearing.

"$ 7195.00	Your payment
7195.00	Decrease in error
$14390.00	
650.89	Interest
$15040.89	Was refunded to you on 2-22-88 in error

"Therefore, the amount of deficiency proposed still remains in effect.

"You will receive a 90-day letter. You have 90 days from the date of that letter to respond."

By way of summary, at this point petitioners have:

(a) paid to the IRS, with their original return and their amended return, a total of $19,243.00 in tax;

(b) received an erroneous refund totalling $14,390.00 in tax, thus leaving a total (net) dollar amount paid of $4,853.00 in tax; and

(c) continued to face the Notice of Deficiency asserting a $2,836.00 liability based on the allegedly unreported pension or annuity payout.

Petitioners offered in evidence a letter issued to them by their then-representative, one James Lewis, Esq., dated October 24, 1990. This letter also had documents attached including a proposed United States Tax Court Stipulation Decision, indicating a deficiency for 1986 in the amount of $14,390.00 (the amount of erroneous IRS refund) and further indicating a stipulation that the IRS claimed an increased deficiency in income tax for 1986 in the amount of $11,554.00. Additional schedules attached to this letter, including a Statement of Account and a Statement of Income Tax Changes, provide some explanation. The IRS Statement of Account indicates:

(a) petitioners' revised tax liability (after their filing of Form 1040X) to be $19,243.00;

(b) credits for payments made by petitioners equalling such amount;

(c) a net refund (the erroneous refund) of $14,390.00; and

(d) a credit to petitioners for the net amount of $4,853.00 in tax paid (calculated as their $19,243.00 of payments less the $14,390.00 amount of the erroneous IRS refund).

In addition, the IRS Statement of Income Tax Changes explains the total adjustments per

petitioners' Form 1040X to have consisted of:

(a) a Schedule D increase to income of $20,000.00;[4]

(b) the fully taxable pension and annuity payout of $8,532.00 (noted above as the basis for the August 4, 1989 Notice of Deficiency); and

(c) a Schedule E loss in the amount of $6,817.00.[5]

These three items together total the $21,715.00 net increase to income per Form 1040X and, in turn, resulted in a revised taxable income per Form 1040X in the amount of $74,945.00. The IRS Statement of Income Tax Changes again reflects an increase in tax of $14,390.00 (i.e., recovery of the erroneous refund) and shows petitioners' net tax payment (as previously adjusted) of $4,853.00. Subtracting the $2,836.00 liability shown on the August 4, 1989 Notice of Deficiency (see, above) from the erroneous refund amount ($14,390.00) results in the $11,554.00 increased deficiency reflected on the proposed stipulation decision.

By a check dated February 11, 1989, petitioners paid $439.03 (consisting of $68.03 in interest and $371.00 in late-payment penalty) with respect to the amount of tax shown as due on their amended New York State return. Petitioner Clifford Dufton noted that, as of the time of this payment, petitioners had no New York State problems paralleling their IRS problems due to the fact that the Division had not issued any erroneous refund to petitioners.

By a letter dated August 14, 1989, petitioners indicated their disagreement with the IRS calculations, noting specifically that the fully taxable pension or annuity amount of $8,531.00 had been reported on their amended return (Form 1040X) such that no adjustment or Notice of Deficiency was proper with respect to such amount. In turn, petitioners challenged the IRS by commencing proceedings in the United States Tax Court.

By a letter dated April 27, 1990, together with an attached proposed stipulation decision, the IRS tentatively advised petitioners of no deficiency in income for the year 1986 (compare,

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[4]$20,000.00 represents the taxable portion of petitioners' $50,000.00 net long-term capital gain after exclusion of 60% thereof per Internal Revenue Code former § 1202(a).

[5]Schedule E to petitioners' returns was not included in evidence herein.

above which reflects IRS calculations indicating that the IRS should not be pursuing the August 4, 1989 Notice of Deficiency based on the pension or annuity payout). Petitioners executed this proposed stipulation decision; however, the IRS letter indicated that the same was subject to IRS approval. No IRS-executed copy or court-approved copy of such proposed stipulation decision was entered in evidence and it appears undisputed that such stipulation was never in fact ultimately approved by the IRS or the Tax Court.

By notice dated August 21, 1990, petitioners and the IRS were advised that a trial involving petitioners' 1986 Federal income tax return was scheduled for the Tax Court's trial session beginning on November 5, 1990, to commence with the 10:00 A.M. calendar call for such session.

By a letter dated November 9, 1990 from petitioners' counsel (James Lewis, Esq.), petitioners were advised of a proposed stipulation decision indicating a deficiency owed by petitioners for the taxable year 1986 in the amount of $10,000.00, together with a further stipulation that the IRS claimed an increased deficiency for the taxable year 1986 in the amount of $7,164.00. Noteworthy at this point is that the dollar difference between the $10,000.00 deficiency and the $7,164.00 increased deficiency is $2,836.00, which is the amount of the Notice of Deficiency relating to the fully taxable pension or annuity. In the same manner, the difference between the earlier proposed stipulated deficiency of $14,390.00 (equal to the IRS erroneous refund) and the claimed increased deficiency of $11,554.00 again equalled the $2,836.00 tax amount related to the fully taxable pension and annuity (see, above). This stipulation decision was executed by petitioners' representative on their behalf, by the IRS, and was filed with the Tax Court, thus effectively ending the Federal dispute. In his November 9, 1990 letter, petitioners' counsel pointed out that the Federal resolution would impact on petitioners' New York liability as follows:

> "Finally, as I am sure you know, there will be a resulting, but smaller, New York tax deficiency. There are two ways of handling that part of the problem. One way would be for you to telephone or write to the New York tax people (you can get their address and telephone number from the blue pages in the back of your white pages telephone directory or the nearest large city white pages telephone directory). The second way would be to let nature take its course, in which case the IRS will

> eventually pass the relevant information on to the New York tax people, who will send you a bill for the New York tax and interest. As in the case of the federal tax, interest on the New York tax will continue to accrue until the tax is paid."

By way of summary, petitioners had earlier received an erroneous IRS refund of $14,390.00 in tax (see, above). By the proposed stipulation decision attached to the November 9, 1990 letter, petitioners would agree to a deficiency of $10,000.00 in tax, with such amount being some $4,390.00 less than a repayment to the IRS of the full $14,390.00 erroneous refund. In turn, it is from this $4,390.00 difference that petitioners' dispute with the Division of Taxation ("Division") arises. In sum, and as will be more fully explained hereinafter, petitioners' position is that the reduction in tax from $14,390.00 to $10,000.00 resulted from the IRS accepting petitioners' claim of a reduction in their taxable income for 1986 (to an amount equal to a Federal tax deficiency of $10,000.00). Stated differently, petitioners claim that their 1986 taxable income was overstated by the amount of income necessary to generate a $4,390.00 reduction in tax (see below). In turn, petitioners argue that the Division should be bound to follow and accept such reduction in tax liability as flowing from a reduction in taxable income, and thus should grant petitioners' request for a corresponding refund.

By a letter dated January 25, 1991, petitioners advised the Division of a change in "Federal income tax" for 1986, as agreed to with the IRS on November 5, 1990 and as reflected in the stipulation decision entered with the Tax Court on November 20, 1990. Petitioners' letter provides that:

> "This change resulted in a reduction of our taxable income for 1986 as reflected in the attached amended return. This change also affects the interest and penalty assessment paid under assessment number R8708313563. We hereby request a refund of the overpayment in the amount of $2,095.00, a recalculation of the assessment, and a refund of the overpayment of the assessment."

Attached to petitioners' letter is a copy of a Form IT-201-X. This (second) amended return reflected a reduction in New York taxable income of $11,767.00, a reduction in State and City tax (combined) of $2,095.00 resulting from such decrease in taxable income, and a claim for refund of such $2,095.00 amount.

By a letter dated August 19, 1992, the Division advised petitioners that their claim for

refund had been disallowed. According to this letter, the Division noted the IRS erroneous refund of $14,390.00, the IRS agreement via stipulation to accept a deficiency of $10,000.00, and the statement that the Division was not bound to accept the Federal reduction to $10,000.00 (citing, 20 NYCRR 153.4).

By a responding letter dated August 23, 1992, petitioners continued to dispute New York State's disallowance of their claim for refund. Petitioners specifically noted that their claim for refund totalled $2,095.00 in tax, plus $371.00 in penalty and $68.03 in interest (together totalling $439.03) as previously paid (see, above). Page 2 of petitioners' letter sets forth petitioners' position as follows:

> "In 1988 the IRS did, in fact, erroneously send us a refund of $14,390.00. As a result of their subsequent discovery of the error we discovered that we had overpaid our taxes for 1986. We indicated to the IRS that we would file an amended return and that the amended return would reduce the deficiency to $10,000.00. The IRS accepted that position, agreed that the net result of our overpayment and their erroneous refund was a deficiency of $10,000.00 and not a deficiency of $14,390.00."

Stated in context, petitioners claim that the amount of tax paid per their original Federal return plus their amended Federal return ($19,242.00) was overpaid by the amount of $4,390.00 (the difference between the erroneous refund of $14,390.00 and the deficiency ultimately agreed to in the amount of $10,000.00). Based upon these calculations, petitioners would argue that their correct 1986 Federal tax liability in total should have been $14,853.00, and that their amended Federal return should have indicated a liability of $2,805.00 rather than $7,195.00. Petitioners go on to note that adding such proposed corrected amount of $2,805.00 to the $12,048.00 paid with their return as originally filed totals to a proposed corrected liability of $14,853.00.

By a letter dated September 9, 1992, the Division repeated its denial of petitioners' claim for refund.

Petitioners requested a conciliation conference to challenge the Division's continued denial of their claim for refund. In turn, on February 12, 1993, a Conciliation Order was issued denying petitioners' request and sustaining the disallowance of petitioners' claim for refund.

Petitioners claim the reduction in taxable income which resulted in an agreed deficiency

of $10,000.00 stemmed from their earlier incorrect reporting of the $50,000.00 long-term capital gain (see, above). Petitioners specifically described the reason for the reduction (at pages 33 through 36 of the transcript of proceedings) as follows:

Mr. Dufton: "Discussions with Professor [James] Lewis[6] and our tax preparer revealed the real estate transaction had not been correctly reported and our income tax had been overstated.

"On Monday, October 29, 1990, we advised the IRS of this and that we wished to file an amended return which would show a reduced income tax for 1986 and therefore a reduced deficiency from $14,390 to some other figure. The IRS requested corroborative information from us concerning the basis of our position and this information was provided to the IRS.

"On Thursday, November 1, 1990, we met with the IRS and reiterated our position that we would not agree to the deficiency of $14,390. We advised them that we would exercise our right to file an amended return. We advised them that the filing would result in a reduction of deficiency based on the reduction of income tax to $10,000."

ALJ Galliher: "Even?"

Mr. Dufton: "We said we hadn't done all the exact math. It looks like $10,000, give or take a hundred or two hundred either way, but certainly within a small variation from $10,000."

ALJ Galliher: "Alright."

Mr. Dufton: "Subsequent to the adjournment of that meeting but on the same date, the IRS advised us they would accept our position based on the submittal of some additional documentation.

"On Friday, November 2, 1990, the initial documentation was provided to the

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[6] Petitioners' representative in the Tax Court proceedings, James Lewis, Esq., is sometimes referred to in testimony as Professor Lewis.

IRS and we were advised by Professor Lewis in the afternoon that the IRS had accepted our position and would prepare a stipulation/decision document reflecting that.

"On Friday evening, we were advised by Professor Lewis that he signed a document on our behalf, the IRS would sign it and file it with the Tax Court on Monday, November 5, 1990 at the 10:00 A.M. calendar call.

"The reasons for doing it that way, as I recall, rather than doing it through an amended return, was because of the short time frame we were dealing with. The IRS dilly-dallied around until we are literally on the afternoon to evening of the last business day before the court call and they agreed to the stipulation and decision document rather than having us file an amended return and that's why there was no amended return filed and that's why the deficiency was changed via stipulation/decision document."

ALJ Galliher: "No Federal amended return?"

Mr. Dufton: "No Federal amended return, right. At no time during our discussions with the IRS was there any discussion whatsoever of any kind of a compromise solution or at no time with the IRS was there any discussion of lack of ability to pay the $10,000 deficiency or, for that matter, the $14,390 deficiency or any other deficiency. There were no discussions of that nature whatsoever" (emphasis added).

Petitioner Clifford Dufton further testified with regard to the real estate transaction and long-term capital gain in question (at pages 53 through 56 of the transcript of proceedings) as follows:

Mr. Dufton: "What it came down to was the -- a transaction was done in 1986 and it was a forced transaction because of the changes in the tax laws that were coming into effect at that point in time and it was a transaction where not -- where the transaction was completed in 1986 but not all of the monies were paid.

"The question was, do we report that transaction fully in that tax year or -- I forget the terminology --"

ALJ Galliher: "Installment payment."

Mr. Dufton: "Do you record it as an installment payment contract or transaction. In the one case you report the entire amount in 1986 and what you got in 1986 and then you report what you get in 1987 and whenever it comes in.

"If you note, we filed late in 1987, in June, because we were wrestling with this and we finally decided we will put in what we have now and get that amount out of the way and file an amended return when we can get to that and there is a statutory time for that, of course. We ended up putting in the entire transaction in 1986.

* * *

"As it turned out, the other funds were never forthcoming. Our position was, look, there was really no installment contract on the basis of this thing; and since the money that was reported never really came in we are entitled to take it back out. I asked my accountant to calculate roughly what that was and to have a number for me. And if you will recall, we were presented with this on one Monday and the next Monday we are looking at the court date. So I didn't ask him to give it to me as $9,852.03 or whatever it might be.

"Here's what actually came in, there was some other expenses and things that haven't been taken out and there is probably some other revenues and so on and so forth that have come in, but here's the number. This is what the real number was, approximately what does this mean in terms of tax.

"And he said, 'Well, that means instead of $14,390 with your approximately $10,000 and given that we're talking about minimal expenses and minimal other associated revenues and adjustments, that's probably good within $100 or $200.'

"We went in and said, 'Here's what happened. We want to file an amended

return reflecting what happened.' And we got to that point on Friday afternoon. And the IRS said, 'Well, show us the transaction document.' We showed them the transaction document.

* * *

"Right. I said -- well on Friday, I think it was, they said -- I believe it was the partnership documents they asked for. They said, 'Everything is fine but you have to show us that the partnership really existed and you're not just saying it.'

"We stipulated -- we FAXed them, on Friday morning as I recall, the partnership documents showing the partnership existed and subsequently, later that day, they issued the stipulation and decision document and Professor Lewis signed it on our behalf" (emphasis added).

Petitioners were afforded the opportunity, post-hearing, to submit documentation with regard to the real estate transaction, the manner in which the same was accounted for, and the ensuing alleged reduction of income for 1986 which, in turn, allegedly accounted for the reduction from $14,390.00 to $10,000.00. Petitioners, however, chose not to submit any such additional documentation specifically pertaining to the real estate transaction, arguing that the same would constitute an unreasonable burden, to wit, researching through eight-year-old financial records in order to produce undefined documentation to substantiate the claim that their taxable income was overstated with respect to the real estate transaction. Petitioners argue that full compensation for the real estate transaction was not received and that they, in essence, would be required to prove a negative (i.e., the nonreceipt of such income) in order to carry their burden of establishing entitlement to a refund. Instead, petitioners rely upon the documentation submitted in evidence and the testimony of Clifford Dufton to establish that: the full amount due on the real estate transaction was not received; that such nonreceipt resulted in a decrease in taxable income previously reported for 1986; that such decrease in income resulted in the reduction of petitioners' Federal tax liability for 1986 by $4,390.00; that such tax reduction was not the product of settlement negotiations centered either on compromise or on a

question of ability to pay; and that the record contains evidence sufficient to carry petitioners' burden and should result in a refund as claimed.

OPINION

In the determination below, the Administrative Law Judge held that:

> "the only issue presented in this case is whether petitioners have demonstrated that their 1986 amended Federal and State returns, filed on or about October 10, 1987, overstated petitioners' taxable income by the amount they were owed but did not receive on a real estate transaction which had been reported as fully completed and paid in 1986 per such amended returns" (Determination, conclusion of law "A").

The Administrative Law Judge, while pointing out that some of petitioners' problems may have been complicated by IRS errors, held that petitioners have not provided documentation explaining the real estate transaction, the amount of income received relating to said transaction, or even the documentation which petitioners admittedly supplied to the IRS regarding negotiations which led to the Tax Court stipulation decision.

The Administrative Law Judge further held that since petitioners' counsel advised them that the resolution of the IRS dispute would have an impact on their New York State liability, petitioners could reasonably have been expected to have maintained and have available some of the paperwork or documentation which was given to the IRS in support of the $10,000.00 agreed-to figure.

The Administrative Law Judge discussed in detail petitioners' claim of a one-third ownership interest in a partnership involved in the sales of premises in Brooklyn and installment payments due after 1986 which were not received. The Administrative Law Judge noted that: 1) the record lacks detail as to the nature of the real estate transaction, the owning partnership, or the amount of payments (or proceeds) due on the sale but not received; 2) the record lacks any evidence of a documentary nature or testimony detailing any attempt(s) by petitioners (or the partnership) to pursue foreclosure and/or collection efforts with respect to the monies due but allegedly not received on the real estate transaction; 3) there is a lack of evidence relating to the actual basis for the calculation of the decrease in Federal liability to $10,000.00; and 4) documentation relating to this transaction was requested, but it was not

submitted.

The Administrative Law Judge held that the Division is not required to accept IRS stipulated liability reductions and grant refunds without proof and since petitioners have not submitted what would appear to be readily available proof, they have failed to carry their burden of proof in establishing their entitlement to a refund.

On exception, petitioners submitted a request to add seven additional findings of fact based on the testimony of petitioner Dufton as well as the copy of the stipulation which was submitted as evidence.

We reject petitioners' request and find that the Administrative Law Judge correctly and adequately reviewed the evidence and record before him in compiling the findings of fact.

On exception, petitioners also request additional conclusions of law as well as changes and exceptions to the findings of facts and conclusions of law, as found by the Administrative Law Judge. A review of same shows petitioners' argument, in essence, to be that:

> 1) the Division mishandled this matter from the time the last amended return was filed in January of 1991;
>
> 2) the Division was given full access to petitioners' files at the conciliation conference on January 4, 1993 and if new information was genuinely wanted at that time, the Division failed to request same;
>
> 3) three years later, after the amended return was filed, the Division is requesting new, undefined information in order to conduct an independent audit which, even if the nature of the request was reasonable, the timeliness is not (imposing such a substantial burden at the eleventh hour is unfair and prejudicial to petitioners' position);
>
> 4) "[i]n order to substantiate that the income was not received petitioner would have to identify, characterize, and substantiate the characterization of all revenues flowing between the partnership that sold the property, the corporation that bought the property, and the taxpayers in 1986"

(Petitioners' exception, "Requested Findings of Fact and Conclusions of Law," p. 4);

5) it is an irrefutable fact that the IRS lowered the deficiency from $14,390.00 to $10,000.00, the only open question now being why they lowered the deficiency;

6) the Administrative Law Judge's conclusion that petitioners did not have available the paperwork, documentation and substantiation submitted to IRS is not correct since that limited scope information was maintained and was readily available, but what was not readily available and never requested by the IRS (IRS never questioned or challenged the revenue flow at all) were the detailed accounting records of all of the entities;

7) as to the real estate transactions, "[i]n order to completely and concisely substantiate the figures petitioners would have had to retrieve accounting records that were eight years old and not readily available, namely those of the partnership and the corporation the property was sold to. . . . It is precisely this procedure that the petitioners claim is unreasonably burdensome, particularly in view of the states lack of specificity in their request; the short time available to retrieve, analyze, and report back; and most particularly the fact that the state made the request at the eleventh hour after three years of mishandling the matter" (Petitioners' exception, "Exceptions to Findings of Fact and Conclusions of Law," p. 3); and

8) it would not have made economic sense to pursue either of the alternatives suggested as a course of action by the Administrative Law Judge and, in fact, they did not for that very reason, and now for the court to suggest that this economic decision somehow or other implies that the shortfall did not occur is both speculative and inappropriate.

The Division, after review of the pertinent documents, advised that it would rely on its

brief below and the analysis and conclusions set forth in the determination of the Administrative Law Judge. In their brief below, the Division argues that: 1) Federal changes are not binding on the Division and, instead, the Division may conduct an independent audit or investigation in regard thereto (20 NYCRR 159.4); 2) petitioners have failed to offer any documentary evidence in support of their position despite the fact that the record was left open for that purpose; and 3) because petitioners have failed to produce documentary evidence sufficient to allow the Division to conduct "an independent audit or investigation," they have failed to demonstrate that they are entitled to a refund.

We affirm the determination of the Administrative Law Judge.

The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Clifford Dufton and Noreen Conlon is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Clifford Dufton and Noreen Conlon is denied; and

4. The Division of Taxation's denial of petitioners' claim for refund is sustained.

DATED: Troy, New York
April 6, 1995

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

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