STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH AND MIRIAM DREBIN	:	DECISION DTA No. 812816
for Redetermination of a Deficiency or forRefund 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 1982 through 1987.	:	

The Division of Taxation and petitioners, Joseph and Miriam Drebin, 3910 Bedford Avenue, Brooklyn, New York 11229, each filed an exception to the determination of the Administrative Law Judge issued on January 25, 1996. Petitioners appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners did not file a brief in support of their exception or in opposition to the Division of Taxation's exception. The Division of Taxation filed a brief in support of its exception and in opposition to petitioners' exception. Petitioners' request for oral argument was denied.

Commissioner Jenkins delivered the decision of the Tax Appeals Tribunal. Commissioner DeWitt concurs. Commissioner Pinto took no part in the consideration of this decision.

ISSUES

I. Whether the Division of Taxation is prohibited by the period of limitations on assessment of additional taxes pursuant to Tax Law § 683 from issuing assessments for 1982, 1983 or 1984.

II. Whether the Division of Taxation improperly assessed tax based on "gross profits" of Intercity Electrical Contracting Corporation and Century Electrical Contracting Corporation or

such tax was properly calculated based on the net profits of those corporations.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "2," "3" and "8" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> Petitioner Joseph Drebin was a director of Century Electrical Contracting Corporation ("Century") and Intercity Electrical Contracting Corporation ("Intercity") and the vice president of Intercity during the years 1982 through 1987.
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> Sometime prior to December 1988, Joseph Drebin, on his own behalf and on behalf of Century and Intercity, waived indictment and agreed to be prosecuted under a Superior Court Information in Supreme Court, New York County.
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> The Superior Court Information, consisting of four felony counts, was issued against Century, Intercity and Joseph Drebin, alleging as follows:
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> > Counts one and three charged that Intercity and Century and Joseph Drebin, as corporate officer of each of those corporations, committed the crime of repeated failure to file utility tax or corporate taxes in violation of section 11-4003 of the Administrative Code of the City of New York, with intent to evade payment of corporate income taxes imposed by Chapter 6 of the New York City Administrative Code. Specifically, these counts charged that Intercity, Century and Joseph Drebin willfully failed to file corporate income tax returns for Intercity for 1984, 1985 and 1986 and failed to file corporate income tax returns for Century for 1983, 1984 and 1985. Both corporations had unpaid tax liabilities for each of those years.
> >
> > Counts two and four charged that Intercity and Century and Joseph Drebin, as corporate officer of each of those corporations,

committed the crime of repeated failure to file corporate franchise tax returns in violation of section 1803 of the New York State Tax Law. Specifically, these counts charged that Intercity, Century and Joseph Drebin, with intent to evade payment of franchise tax imposed by Article 9-A of the State Tax Law, willfully failed to file corporate income tax returns for taxable years 1984, 1985 and 1986 with respect to Intercity and failed to file corporate income tax returns for taxable years 1983, 1984 and 1985 with respect to Century. Both of these corporations had unpaid tax liabilities in excess of $250.00 with respect to each of these consecutive taxable years.

All four counts of the Superior Court Information were Class E felonies.[1]

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> In a letter from Assistant District Attorney Roslynn Mundell to defendants' attorney, Jacob Laufer, dated December 19, 1988, the terms of a plea agreement between the District Attorney and the defendants were set forth in detail. The defendants included Intercity, Century, Label Drebin (petitioner's father) and Joseph Drebin. The calendar years covered by the plea agreement were 1982 through 1987. Both Century and Intercity agreed to be prosecuted in accordance with the Superior Court Information and pled guilty to one count each of repeated failure to file corporate taxes, in violation of Tax Law § 1803, and one count each of repeated failure to file utility tax or corporate taxes in violation of section 11-4003 of the New York City Administrative Code. By these pleas, Intercity, Century and Joseph Drebin, as officer, would admit that they willfully failed to file the subject returns for 1982 through 1987 with the intent to evade the payment of tax.

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[1] We modified finding of fact "1" of the Administrative Law Judge's determination to more completely set forth the facts in the record.

The corporate taxes determined to be due from the two corporations for the years 1982 through 1987 were based upon combined earnings for both corporations reached in an agreement between the District Attorney's office and the representatives of the defendants, to wit: Max Wasser, CPA and Jacob Laufer, Esq. The combined earnings and tax thereon for the two corporations for the years in issue were determined to be as follows:

	Gross Receipts	Net Profit	NYS Tax	NYC Tax
1982	$ 85,132	$ 21,283	$ 2,124	$ 1,911
1983	811,238	202,809	20,281	18,253
1984	1,252,276	313,069	31,307	28,176
1985	990,523	247,631	24,763	22,287
1986	746,654	186,663	18,666	16,800
1987	849,252	212,313	21,231	19,198

These figures appear in the record in a letter from Mr. Laufer to Mr. Wasser, dated December 29, 1988.

In a letter from Assistant District Attorney Mundell to Assistant Commissioner Bruce Kato of the New York City Department of Finance, dated January 13, 1989, Ms. Mundell described how the amounts of tax were calculated. She explained that the amount of tax was calculated on a net profit figure established by deducting 75% from the amount of gross income as "the cost of goods sold." This deduction was based on standards established by Dun and Bradstreet for the cost of doing business for this type of company operating in the New York City area. Although Ms. Mundell used the term "cost of goods sold," it is reasonable to conclude from her letter and in looking at the Dun and Bradstreet report in evidence that the 75% contemplated both the "cost of goods sold" and "other expenses" of doing business. Three methods of calculating gross income were compared by the District Attorney's office, to wit: bank deposits were included as gross income; "FISA" records showing all payments to both corporations on City contracts; and gross income figures submitted by Max Wasser, Drebin's accountant. Since the figures submitted by the accountant, Max Wasser, were cumulatively greater than the gross income

amounts determined under the other methods, the District Attorney accepted petitioners' computation of gross income.

Petitioners submitted a Dun & Bradstreet Corporation report for fiscal year ended June 1985 for special trade contractors which indicated a gross margin percentage of 28.24. It also submitted a Robert Morris Associates "Annual Statement Study" for electrical contractors for fiscal years ended March 31, 1982, 1983, 1984, 1985 and 1986, indicating gross profits of 23.9, 23.8, 23.5, 23.6 and 24.0, respectively. Profit before taxes for the same periods according to the Annual Statement Study was listed to be 3.5, 2.5, 1.8, 2.3 and 3.1, respectively. Gross profit was defined to be the difference between contract revenues and cost of sales. Profit before taxes was defined as operating profit minus all other expenses.

Century and Intercity, by Joseph Drebin acting on behalf of the boards of directors of the two corporations, pled guilty to one count each of repeated failure to file New York State franchise tax returns in violation of Tax Law § 1803 and one count each of repeated failure to file utility tax or corporate tax returns in violation of section 11-4003 of the Administrative Code of the City of New York. Intercity agreed to execute a confession of judgment acknowledging the debt due and owing of $118,372.00 to the New York State Department of Taxation and Finance and $106,625.00 to the New York City Department of Finance, representing the combined unpaid corporate taxes for both Century and Intercity for the calendar years 1982 through 1987. They also agreed to pay restitution and a criminal fine of $100,000.00. Petitioner Joseph Drebin also agreed to waive indictment and be prosecuted by Superior Court Information to lesser included crimes of repeated failure to file corporate tax returns with the City and State of New York with respect to Intercity. Joseph Drebin also agreed to a sentence of conditional discharge with the condition that a criminal fine of $50,000.00 be paid in three yearly installments.

The District Attorney's office agreed not to prosecute Label Drebin for his participation in the failure to file returns on behalf of Intercity and Century. The record does not show the reason

for the District Attorney's decision.[2]

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> On December 22, 1988, Joseph Drebin, on behalf of himself and the two corporations, executed waivers of indictment, indicating acceptance of the plea agreement.
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> On January 4, 1989, the defendants, Intercity, Century and Joseph Drebin, appeared for pleas and sentencing before the Honorable John A. K. Bradley, Justice of the Supreme Court, and entered their pleas as described above. In addition, Intercity, by its vice president, Joseph Drebin, executed affidavits confessing judgment to the amounts admitted to be due and owing to the State and City of New York in the sums of $118,372.00 and $106,625.00, respectively. In these affidavits, Joseph Drebin deposes and affirms that he is the vice president of Intercity.
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> Upon Joseph Drebin's being arraigned for sentencing, the Court, in order to determine the amount of the fine, inquired of Assistant District Attorney Mundell as to the amount of the criminal gain involved in this case. Ms. Mundell responded, in part:
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> > "the amount of the gain in this case is at a minimum $225,000.00, which represents the amount of unpaid tax for the period 1982 through 1987" (Division's Exhibit "G," sentencing transcript, p. 5).
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> > At this, Jacob Laufer, Mr. Drebin's attorney, stated:
> >
> > "[w]e specifically agree with Miss Mundell's recounting to the Court of the tax that should have been paid and not paid, your Honor" (Division's Exhibit "G," sentencing transcript, pp. 5-6).
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> The Court then asked Mr. Drebin if he agreed with what Mr. Laufer had said. Mr. Drebin said, "Yes."
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> A memorandum from Paul Giskin, Associate Fraud Investigator with the New York City Department of Finance, dated March 2, 1989, reported some of the details of the investigation performed with regard to Century, Intercity and Joseph Drebin. He stated that information obtained from the New York City Department of Housing, Preservation and Development ("HPD") indicated that the two

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[2] We modified finding of fact "2" of the Administrative Law Judge's determination to more completely set forth the facts in the record.

> companies received in excess of $3,400,000.00 between 1983 and 1987 in contract work performed for HPD. During this period, neither corporation filed any corporation tax returns. Despite numerous attempts to contact the principals of the corporations, Carl Weiss of Century and Label Drebin of Intercity, including subpoenas for tax returns, workpapers, etc., no documents were produced. Given the evidence of tax fraud, the case was referred to the Manhattan District Attorney's Office for criminal prosecution.
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> Both confessions of judgment executed by petitioner Joseph Drebin stated that the confessions were made without prejudice to claims by both the New York State Department of Taxation and Finance and the New York City Department of Finance for accrued interest and/or civil penalties.[3]

The Division of Taxation ("Division") sent an appointment letter to petitioners on November 21, 1989, which requested documents pertaining to petitioners' personal income tax returns for the years 1986 and 1987. The letter also enclosed a power of attorney form in case petitioners chose to appear by a representative.

In fact, in response to this letter, Mr. Max Wasser called on December 4, 1989 to reschedule the appointment and to say that he would be forwarding a power of attorney. The power presented to the Division by Mr. Wasser on January 4, 1990 was invalid because he signed as both representative and notary public. Despite repeated requests by the Division for a properly executed power of attorney, Mr. Wasser never produced one.

Despite his dilatory tactics regarding the power, Mr. Wasser continued to be involved in the criminal case and this matter involving petitioners. On March 2, 1990, Mr. Wasser commented to the auditor that the excess income received by petitioner and his father, Label, was given to charity, but he never submitted any proof of this as requested by the Division. However, the Division interpreted this to mean petitioners had received the income.

The Division assumed that the excess unreported income of the corporations was distributed to the Drebins as constructive dividends or excess wages in light of the fact that

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[3] We modified finding of fact "3" of the Administrative Law Judge's determination to more completely set forth the facts in the record.

Intercity was a corporation closely held by the Drebins; however, petitioners never provided any corporate documents to establish the relationships between petitioner Joseph Drebin and the corporations. With this complete lack of information and stonewalling by petitioners, the Division assessed them for the entire amount of the additional income which resulted from the corporations' additional unreported income which remained unaccounted for.

Petitioners' gross income for each of the years 1982 through and including 1987 was increased by the net profit figure calculated by the District Attorney's office, as set forth above in the finding of fact above, and petitioners' taxable income was adjusted accordingly and the New York State and New York City tax liabilities recomputed. A Statement of Personal Income Tax Audit Changes for the years 1982 through 1987, dated September 12, 1990, was sent to petitioners on September 18, 1990 setting forth in detail the additional tax, penalties and interest due.

The Division issued a Notice of Deficiency to Joseph and Miriam Drebin, dated March 14, 1991, which assessed additional tax, penalty and interest in the sum of $441,278.57 for the years 1982 through 1987. The Division assessed fraud penalty pursuant to Tax Law § 685(e)(1) for all of the years in question. Additional penalty due to fraud pursuant to Tax Law § 685(e)(2) as well as penalty for substantial understatement of liability pursuant to Tax Law § 685(p) were imposed for tax years 1985 through 1987.

Petitioners filed an application for a conference in the Bureau of Conciliation and Mediation Services which was held on November 24, 1993. An Order was issued on April 8, 1994, which sustained the tax deficiency in its entirety but modified the penalties assessed by permitting the assessment of only Tax Law § 685(p) penalty for the years 1985, 1986 and 1987.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> At the hearing in this matter, petitioners submitted the affidavit of Joseph Drebin, acknowledged May 24, 1995, in which he stated that he was not an officer of either Intercity or Century between January 1, 1982 and December 31, 1987. However, on the day of sentencing in

> Supreme Court, New York County, Joseph Drebin executed two affidavits confessing judgment. In the two affidavits, Joseph Drebin stated that he "is the vice president of Intercity Electrical Contracting Corporation and is duly authorized to make this affidavit on behalf of the corporate defendant herein" (Division's Exhibit "G," Affidavit of Confession of Judgment, p. 1).[4]

We make the following additional finding of fact:

> There is no evidence in the record that Miriam Drebin filed a joint New York State personal income tax return with her husband for the years 1982, 1983 and 1984. Miriam Drebin did file joint New York State personal income tax returns with her husband for the years 1985, 1986 and 1987.

OPINION

In the determination below, the Administrative Law Judge concluded: (A) that since the Bureau of Conciliation and Mediation Services ("BCMS") cancelled all penalties for fraud under Tax Law § 685(e) for the years 1982, 1983 and 1984,[5] the Division was effectively denied the right to assess any taxes for those years due to the time limitations placed on assessments by Tax Law § 683(a), and the Administrative Law Judge cancelled the tax assessed for those years; (B) that petitioners had failed to show by clear and convincing evidence that the method used to arrive at the assessment and the assessment itself were erroneous; (C) that the Division reasonably concluded that the additional income of Intercity and Century was distributed to Joseph Drebin and his father, Label Drebin, and sustained the assessment of additional tax for the years 1985, 1986 and 1987; (D) that the Division was entitled to rely on the statements of Mr. Wasser, the Drebins' accountant, that the additional income was distributed to Joseph and Label Drebin from Century and Intercity in the absence of proof by Joseph Drebin to the

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[4] We modified finding of fact "8" of the Administrative Law Judge's determination to more completely set forth the facts in the record.

[5] The determination below states that the penalties asserted for 1984 were for substantial understatement of income pursuant to Tax Law § 685(p). The penalties for substantial understatement of liability were added by section 62 of chapter 65 of the Laws of 1985, effective July 16, 1985, and were not yet in effect in 1984. The penalties assessed for 1984, like those in 1982 and 1983, were for fraud.

contrary; (E) that Joseph Drebin received and benefited from the additional, unreported income as excess wages or as constructive dividends; and (F) that petitioners failed to show reasonable cause for abatement of penalties for the years 1985, 1986 and 1987.

Petitioners, on appeal, only take exception to conclusion of law "B" of the Administrative Law Judge's determination. We note that petitioners did not take exception or challenge Conclusions of Law "D" or "E" of the Administrative Law Judge's determination. Petitioners contend that tax was improperly calculated based upon Intercity's and Century's gross profits and that tax should have been calculated on the "net profits" of those corporations, i.e., the amount remaining after deducting costs of goods sold plus "other expenses" of doing business. Petitioners also argue that the record establishes that Joseph Drebin was not an officer of either corporation and that he only pled guilty to prevent his father from being sent to jail.

We deal first with petitioners' claim that the tax was improperly based on "gross income" figures.

Petitioners state that they now agree with the gross income figures used by the Division, but argue that the Division improperly based tax on petitioners' gross profits. The tax, say petitioners, should have been based on net profits, i.e., the amount remaining after deducting costs of goods sold plus other expenses of doing business. Petitioners cite to Ms. Mundell's letter where she explains that tax was calculated on a net profit figure established by deducting 75% from the amount of gross income "as the cost of goods sold."

We find no merit in this argument. While Ms. Mundell may have been inartful in her terminology (not being an auditor), it is reasonable to conclude from the context of her letter and from the Dun and Bradstreet documents submitted in evidence that the 75% figure contemplated both "the costs of goods sold" plus "other expenses" of doing business, leaving a net

profit figure of 25%. If this 25% figure was incorrect, it was petitioners' burden to produce

books and records to show the actual "net profit figures." It is not sufficient for the taxpayer to merely substitute their "estimate" of net profit for the Division's.

The Tax Appeals Tribunal has spoken to many of petitioners' arguments in our decision in Matter of R & J Automotive (Tax Appeals Tribunal, June 15, 1989), where we said:

> "[i]n a sales and use tax audit, resort to external indices as a method of computing sales tax liability must be founded upon a determination of the insufficiency of the taxpayer's record keeping which makes it virtually impossible to verify sales receipts and conduct a complete audit (Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). This standard, requiring demonstrably inadequate records before an indirect auditing technique may be used, has been explicitly rejected in audits of income for personal income, non-resident earnings and unincorporated business taxes (Matter of Giuliano v. Chu, 135 AD2d 893, 521 NYS2d 883; Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208). The distinction between an income tax audit and a sales tax audit centers on the type of tax being imposed (Hennekens v. State Tax Commn., supra). While sales tax audits seek recovery of taxes imposed directly upon verifiable receipts as evidenced by books and records which are required to be maintained (Matter of Licata v. Chu, 64 NY2d 873, 874, 487 NYS2d 552) audits involving the imposition of tax on income concern the receipt of income which cannot easily be verified by reference to books and records (Matter of Hennekens v. State Tax Commn., supra). The standard articulated by the courts of New York concerning audits of income is that indirect auditing methods are proper where the taxpayer's income is not accurately reflected in his books and records (see, Matter of Giuliano v. Chu, supra; Matter of Hennekens v. State Tax Commn., supra; Matter of Checho v. State Tax Commn., 111 AD2d 470, 488 NYS2d 859).
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> "The New York State reconstruction of income cases have their genesis in the Federal law and cases. In particular, the case of Holland v. United States (348 U.S. 121), is recognized as the cornerstone of the law concerning reconstruction procedures. In Holland the Court recognized that reconstruction methods in income tax cases serve two primary purposes. First, they serve as a means of testing the accuracy of the books and records that have been presented. Second, they are cogent evidence of the amount of income which has been unreported. Further, Holland gave rise to the well settled principle that the fact that books and records appear to be adequate on their face does not preclude the use of reconstruction methods (see, Schwarzkopf v. Commr., 246 F2d 731, citing, Holland v. United States, supra, at 131-132)."

As in R & J Automotive, the application of these principles herein to determine the income for corporate franchise tax supports the audit methodology chosen and utilized by the

Division to compute the additional tax due. The circumstances of this matter are not sympathetic to petitioners. Petitioner Joseph Drebin signed statements for both corporations as a director of both and a vice president of Intercity, with the authority to bind them to the most grave of consequences, pleading to criminal conduct. The corporations, to this day, through their director, Joseph Drebin, have not produced any records to dispute the Division's findings with regard to the additional income to Intercity and Century. If petitioners' net profit was lower than that used by the Division, it was petitioners' burden to come forward with books and records to show it.

Therefore, we affirm the Administrative Law Judge on this issue and hold that petitioners have failed to satisfy their burden of proving by clear and convincing evidence that both the method used to arrive at the assessment and the assessment itself are erroneous (see, Tax Law § 689[e]; Matter of Giuliano v. Chu, supra, 521 NYS2d at 886).

Joseph Drebin's claim that he was not an officer of either corporation is rejected. The evidence in the record is more than sufficient to establish that he was an officer of the subject corporations. The affidavits he executed and submitted to the Supreme Court, New York County, wherein he deposed and affirmed that he was an officer, estop him from denying that status in this forum. The argument that Joseph Drebin only pled guilty to keep his father from going to jail is not supported by the record.

The Division takes exception to that portion of the Administrative Law Judge's determination that concluded that by cancelling fraud penalties for the years 1982, 1983 and 1984, BCMS effectively precluded the assessment of tax against petitioners for those years. Petitioners did not respond to the Division on this issue.

In his determination, the Administrative Law Judge stated:

> "[t]he first issue which must be addressed is that of limitations on assessment. Tax Law § 683(a) provides that any tax under Article 22 shall be assessed within three years after the return was filed with the exception of those situations where the return is a false or fraudulent return, for which assessment can be made at any time (Tax Law § 683[c][1][B]) and those situations where there is an omission of

> income where the omitted income is in excess of 25% of the adjusted gross income, for which there is a six-year statute of limitations (Tax Law § 683[d][1]).
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> "Because the years 1982, 1983 and 1984 are not within the three-year period described in Tax Law § 683(a), one of the exceptions listed above must apply for the assessment to stand, as they were alleged to have applied in the Division's notice of deficiency. As set forth in the facts, the Division asserted fraud penalty for the years 1982 and 1983 and the substantial understatement of tax liability penalty for the year 1984.
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> "The Bureau of Conciliation and Mediation Services ('BCMS') issued an order in this case on April 8, 1994, which cancelled all penalties for the years 1982, 1983 and 1984, effectively denying the Division the right to assess any taxes for those years due to the time limitation placed on assessments by the statutes referred to above. The regulation at 20 NYCRR 4000.5(c)(4) clearly states that in the absence of a showing of fraud, malfeasance or misrepresentation of a material fact, a conciliation order will be binding on the Division of Taxation and petitioner. The order will not be binding on a petitioner if a petition for hearing concerning the notice is timely filed.
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> "It is not known why the conferee cancelled the penalty which made it possible for the Division to assess tax for the years 1982, 1983 and 1984 and then sustained the tax for those periods. However, whether a conscious decision or error, the fact remains that the penalties were clearly cancelled and that must be sustained to the detriment of the Division, as the Division cannot raise issues at hearing which were decided in favor of petitioner at the BCMS conference.
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> "Because the Division cannot rely on any exception to the three-year statute of limitation, the years 1982, 1983 and 1984 are beyond the period of limitation on assessment stated in Tax Law § 683(a) and the tax assessed for those years must be cancelled" (Determination, conclusion of law "A").

We reverse the determination of the Administrative Law Judge on this issue.

Joseph Drebin admitted in Court, on behalf of Intercity, Century and himself, that he failed to file corporate tax returns and that it was done with the intent to evade the payment of tax. It has been determined, and has not been challenged on exception, that petitioners received additional income from Intercity and Century, and this income was not reported by petitioners on their New York State income tax returns.

A taxpayer's conviction for fraudulently filing false tax returns collaterally estops the taxpayer from challenging the civil fraud penalty imposed pursuant to Tax Law §§ 685(e)(1)

and 1804 for the same period covered by the conviction (see, Plunkett v. Commissioner, 465 F2d 299; Matter of J. Botwinick & Sons, State Tax Commn., December 5, 1986). However, for the periods outside those which are covered by a guilty conviction, the Division is required to carry its burden of proof (see, Matter of Chateau Chemists, State Tax Commn., May 4, 1984 [guilty plea collaterally estops taxpayer from contesting civil fraud penalty only for that period for which he entered a plea of guilty to the criminal charge]).

In this case, for reasons we can only speculate, the fraud penalties for 1982, 1983 and 1984 were cancelled by BCMS, while the tax asserted for those years was sustained. As the Administrative Law Judge correctly noted, those penalties cannot be revived now. However, there are two potential consequences of a finding that a taxpayer has committed fraud.

One is that the Division is authorized to impose fraud penalties under Tax Law § 685(e). In this case, those penalties were imposed and then later cancelled by the Division's BCMS.

In addition, however, where "a false or fraudulent return is filed with intent to evade tax," the limitation provided by Tax Law § 683(c), that any tax under Article 22 shall be assessed within three years after a return is filed, does not apply and the tax may be assessed at any time (Tax Law § 683[c][1][B]). This provision is not contingent upon, or triggered by, the assertion of fraud penalties. It is triggered by a taxpayer's fraudulent conduct. The cancellation of fraud penalties by BCMS did not extinguish the underlying fraudulent conduct of Joseph Drebin, Intercity and Century with regard to the corporate taxes.

Accordingly, if it is established that Joseph Drebin received income from Intercity and Century, and failed to report that income on his State income tax returns, the evidence giving rise to Joseph Drebin's criminal convictions as an officer and director of Intercity and Century could constitute circumstantial evidence to reasonably infer that his failure to report that income on his personal income tax returns was also with the intent to evade tax, in which event, the Division can still properly assert tax for the years 1982, 1983 and 1984 even though the fraud penalties have been cancelled and cannot now be revived.

Therefore, if the facts in the record support a finding of fraud, the Notice of Deficiency issued to petitioners is not barred by the three-year statute of limitations under Tax Law § 683(a).

We now address whether the facts of this case support a finding of fraud. To prevail in a case such as this, the Division would have the burden of proving: 1) that Joseph Drebin received additional income for 1982, 1983 and 1984; 2) that he failed to report that additional income on his State personal income tax returns; and 3) that his failure to report this additional income was with the intent to evade tax. At that point, the burden would then shift to petitioners to overcome the presumption of correctness that requires a taxpayer to demonstrate that the deficiency is incorrect (cf., Schaffer v. Commissioner, 779 F2d 849).

The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (Plunkett v. Commissioner, supra at 303; Biggs v. Commissioner, 440 F2d 1; Matter of Cinelli, Tax Appeals Tribunal, September 14, 1989, citing Korecky v. Commissioner, 781 F2d 1566).

Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (Foster v. Commissioner, 391 F2d 727; Merritt v. Commissioner, 301 F2d 484), the refusal to cooperate and make books and records available (Estate of Granat v. Commissioner, 298 F2d 397) and concealment or misstatements concerning ownership (Foster v. Commissioner, supra at 733; Gromacki v. Commissioner, 361 F2d 727). Although a guilty plea in a criminal context collaterally estops the taxpayer from challenging a civil fraud penalty for the period for which the plea was entered, the guilty plea may also constitute evidence of fraudulent intent for the entire assessment period which corresponds to the time period for which the taxpayer was indicted (see, Matter of Cinelli, supra; cf., Matter of Chateau Chemists, supra [guilty plea with respect to an indictment covering one tax period not evidence of fraud for a subsequent audit of a later tax period]). Similarly, while mere proof of

an understatement of tax, by itself, is insufficient to prove fraud, a consistent and substantial understatement of tax constitutes strong evidence of fraud (Merritt v. Commissioner, supra at 487 [understatement of $80,000.00 in income over a seven-year period]; see, Foster v. Commissioner, supra at 733 [understatement alone not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud]).

For a taxpayer to be subject to a civil fraud penalty, willful intent is a critical element. The individual or the corporation, acting through its officers, must have acted deliberately, knowingly and with the specific intent to violate the Tax Law (Matter of Cousins Serv. Sta., Tax Appeals Tribunal, August 11, 1988).

A person who, with intent to evade any tax imposed by Article 22, shall make, render, sign, certify or file any false or fraudulent return, declaration or statement shall be guilty of a misdemeanor (Tax Law § 1804[a]). The Administrative Law Judge concluded that Mr. Drebin received additional income from Intercity and Century arising from the failure to report and pay the corporations' taxes. That conclusion is not challenged by petitioners on exception, so the first element in the Division's proof of fraud has been established.

It has also been concluded that Joseph Drebin failed to report that income on his personal income tax returns. The record supports the conclusion that this failure resulted in a repeated, substantial understatement of his income. This too has not been challenged by petitioners on exception.

The final element of the Division's proof on this issue is whether Joseph Drebin's failure to report this additional income for 1982, 1983 and 1984 was with the intent to evade the payment of tax.

For the Division to establish fraud by a taxpayer, it must produce "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate

nonpayment or underpayment of taxes due and owing" (Matter of Sener, Tax Appeals Tribunal, May 5, 1988; see also, Schaffer v. Commissioner, supra; Matter of Cousins Serv. Sta., supra).

A finding of fraud may be shown by surveying a taxpayer's entire course of business conduct and drawing reasonable inferences therefrom (see, Korecky v. Commissioner, supra). Further, "fraud may be proved by circumstantial evidence since direct proof of the taxpayer's intent is rarely available. . . [and] . . . the taxpayer's entire course of conduct can often be relied on to establish the requisite fraudulent intent" (Frazier v. Commissioner, 91 TC 1, 12). We find Joseph Drebin's course of conduct telling. Mr. Drebin's convictions, the lack of cooperation with the auditor in this matter, the failure to produce any books and records at hearing or at audit as proof to show the actual expenses of Intercity and Century and the repeated failure to file corporate tax returns were willful and with the intent to evade the payment of corporate tax. It is also established that Joseph Drebin received additional income from 1982 through 1987, inclusive, which he failed to report on his State personal income tax returns and that such failure resulted in a repeated, substantial underreporting of his income. We also find it significant that Joseph Drebin was a director of both corporations and Vice President of Intercity. He had the ability to produce evidence of the corporations' shareholders and the disposition of the excess income received by them. He chose not to produce any evidence of the disposition of the income and chose not to testify in this matter. Particularly, Joseph Drebin produced no bank statements, testimony or other books and records to show that he did not receive additional income or that his failure to report his additional income was an innocent mistake. All of these factors constitute strong circumstantial evidence to conclude that Joseph Drebin's failure to report the additional income on his personal income tax returns was with the intent to evade the payment of tax (see, Matter of Cinelli, supra; Matter of AAA Sign Co., Tax Appeals Tribunal, June 22, 1989). Accordingly, we conclude that the Division has satisfied its burden of proving that Joseph Drebin's failure to report the additional income he received in 1982, 1983 and 1984 was fraudulent and with the intent to evade tax.

Accordingly, the unlimited statute of limitations applicable to fraud assessments (Tax Law § 683[c][1][B]) obtains, and the tax assessed for 1982, 1983 and 1984 was properly assessed by the Division.

Having decided that the Division could properly assess tax against petitioners for the years 1982, 1983 and 1984, we need not decide the Division's alternative argument that petitioners could be assessed under the six-year statute of limitations of Tax Law § 683(d)(1).

Finally, we address the potential liability of Miriam Drebin. Tax Law § 651 (former [b][2]) provided that:

> "[i]f the federal income tax liabilities of husband and wife . . . are determined on a joint federal return . . . they shall file a joint New York income tax return, and their tax liabilities shall be joint and several except as provided in paragraph five of this subsection (b) and in subsection (e) of section six hundred eighty-five."

Here, there is no evidence that Miriam Drebin filed joint Federal income tax returns for 1982, 1983 and 1984. Moreover, there is no evidence in the record to determine whether she filed joint State personal income tax returns for those years. Further, there is no evidence in the record that she engaged in any fraudulent conduct. Accordingly, the tax assessed for the years 1982, 1983 and 1984 is cancelled with respect to Miriam Drebin.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted to the extent that Joseph Drebin is liable for the Notice of Deficiency issued for 1982, 1983 and 1984, but is otherwise denied;

2. The exception of Joseph and Miriam Drebin is granted to the extent of cancelling the tax asserted against Miriam Drebin for 1982, 1983 and 1984, but is otherwise denied;

3. The determination of the Administrative Law Judge is reversed with respect to conclusion of law "A," but is otherwise affirmed;

4. The Notice of Deficiency dated March 14, 1991, as modified by the Conciliation Order dated April 8, 1994, is sustained in full with regard to Joseph Drebin, and is sustained with regard to Miriam Drebin for the years 1985, 1986 and 1987; and

5. The petition of Joseph and Miriam Drebin is granted in accordance with paragraph "2" above, but is otherwise denied.

DATED: Troy, New York
February 20, 1997

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner