STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOEL M. AND MERCEDES LEVIN	:	DECISION DTA NO. 814230
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1985.	:	

Petitioners Joel M. Levin, c/o Joseloff, 15 Bath Crescent Road, Bloomfield, Connecticut 06002, and Mercedes Bograd Levin[1], 1000 Park Avenue, New York, New York 10028, filed an exception to the determination of the Administrative Law Judge issued on April 17, 1997. Petitioner Joel M. Levin appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Oral argument, at petitioner's request, was heard on November 12, 1997 in Troy, New York.

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

ISSUES

I. Whether petitioners have produced clear and convincing proof that they timely filed a New York resident income tax return for 1985.

[1]The caption in this matter refers to Mercedes Levin based upon the Notice of Deficiency at issue. She also appears in this record as Mercedes Bograd Levin.

II. If it is found that petitioners timely filed a New York resident tax return for 1985, whether the Notice of Deficiency in this matter was issued outside the applicable statute of limitations.

III. Whether Mercedes Bograd Levin is jointly liable with her former husband for taxes asserted as due and owing to the State of New York for tax year 1985.

IV. Whether petitioner Mercedes Bograd Levin is entitled to relief under the "innocent spouse" provisions of Tax Law § 651(a)(5).

V. Whether income taxes owed for 1985, if any, were discharged in bankruptcy.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "2," "5," "6," "7," "8," "9" and "16" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

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

> Petitioners in this matter were divorced sometime between September 14, 1992 (the date of Mr. Levin's bankruptcy petition wherein he listed his marital status as married living apart) and January 19, 1994 (the date of separate letters to petitioners explaining that even though divorced they remained jointly and severally liable for any joint return filed before their divorce). Joel Levin appeared in this proceeding on behalf of himself and purported to appear on behalf of his former wife. Petitioners began living apart in 1984.[2] The Notice of Deficiency in this matter was issued to both petitioners for a liability arising from 1985 when petitioners, although living apart, were still married and filed a joint Federal tax return. The petition in this matter was filed with the Division of Tax Appeals in August 1995. Mercedes Levin did

[2]The Administrative Law Judge permitted Mr. Levin to appear on behalf of his former wife, since the Notice of Deficiency was issued for tax year 1985, a year when they were married, but living apart.

not file the 1995 petition, nor did she execute a power of attorney authorizing Joel Levin to appear on her behalf.

Joel Levin conceded at hearing that if it is found that they did not file a New York State personal income tax return for 1985, the Notice of Deficiency was timely and the debt is not one that would have been discharged in bankruptcy (***see***, Tax Law § 683[c][1][A]; 11 USC § 523[a][1][B]). [3]

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

On or about October 7, 1986, petitioners filed their 1985 Federal income tax return. The return is dated October 7, 1986 and there is attached to the return an approved request for an extension of time to file the return until October 15, 1986. This return was prepared by Elliot Kastein, CPA, 250 W. 57 Street, New York, N.Y. The return shows $81,543.00 as the amount petitioners owed after deducting $28.00 for withholding and a $32,000.00 estimated tax payment.

Petitioners also submitted a copy of their New York personal income tax return for 1985 ("the return") at the hearing in this matter. This return is also dated October 7, 1986, was prepared by Elliot Kastein, CPA, and bears the signatures of Joel Levin and Mercedes Levin, as taxpayers, and Elliot Kastein, as preparer. Attached to the return is a copy of a request for extension of time to file the return, but there is no evidence of a response from the Division of Taxation ("Division"). Joel Levin asserts that this return was mailed at the same time that he mailed the Federal return in 1986. The Division asserts it has no record of receiving the State return. The Division's attorney claims that the introduction of the 1985 resident return into evidence at the hearing was the first time the Division had seen a copy of the return. The filing status on the return was listed as "married filing separately on one return," and lists the amount owed as $32,137.00 for Column A and $14,633.00 for Column B. This was after deducting an estimated tax payment of $18,000.00 from Column B.

[3]We modified finding of fact "1" of the Administrative Law Judge's determination to more concisely reflect the record. We have also added a paragraph that was previously found in a footnote and more appropriately included it in the finding of fact.

> Joel Levin admits that no payments were submitted with either the Federal or New York State personal income tax returns even though there was a balance due for Federal tax of $81,543.00, and a balance due for State tax of $46,770.00. He testified that no payments were submitted with the returns because he did not have the money to pay them.
>
> A certified check for $98,264.84 was issued to the Internal Revenue Service on June 10, 1987 in satisfaction of the remainder that petitioners owed for 1985. Joel Levin admitted on cross-examination that he had not initiated any contact with the Division to pay the $46,770.00 tax liability listed on the copy of the New York State personal income tax return for 1985.
>
> Joel Levin testified, variously, that he had filed his Federal and State returns and that he believed he had filed his State return. He testified that he would file his Federal and State returns together. On cross-examination, Mr. Levin testified that he mailed the returns from some post office in Manhattan and that he thought he had mailed them certified but that he did not have any certified receipts. When asked by the Division's representative whether he had mailed them certified or certified return receipt requested, Mr. Levin replied that he did not know because some years he mailed the returns one way and other years the other way.[4]

By letter dated November 16, 1988 and addressed to both petitioners, the Division's Central Office Audit Bureau informed petitioners that it had obtained information pursuant to IRC § 6103(d) that petitioners had filed a Federal income tax return for 1985 listing an address within New York State, but that the Division had been unable to locate a State return. The letter asked certain questions regarding whether petitioners had filed a 1985 New York State income tax return and informed petitioners that failure to reply to the letter would result in an estimated assessment being issued based upon the information in the Division's file.

The Division issued a Statement of Audit Changes, dated July 24, 1989 and addressed to both petitioners, showing a 1985 amount of New York State tax due of $29,159.14, exclusive of

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

interest or penalties, and a 1985 amount of New York City tax due of $9,151.20, exclusive of interest or penalties. The statement explained that since petitioners had not responded to the Division's previous letter, their tax was computed using the information obtained from the Internal Revenue Service pursuant to IRC § 6103(d). The statement further explained that a late filing penalty had been imposed together with a negligence penalty, and that an amount equal to 50% of the interest due had been imposed since petitioners' deficiency was due to negligence or intentional disregard of the Tax Law. There is no indication on the statement as submitted into evidence as to which bureau or unit within the Division prepared the statement.

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> Joel Levin responded with a letter dated August 10, 1989, addressed to the Division's Tax Compliance Division, in which he explained that a payment of $18,000.00 had been made for the 1985 tax liability by check dated January 10, 1986, and he attached a copy of the canceled check. With regard to whether petitioners had filed a State resident return for 1985, the letter stated:
>
> > "I had felt I subsequently filed a completed return but have not yet been able to locate such - (I recently lost my job and my employer threw all my records and files recklessly into various boxes.)"
>
> There is no explanation in the record as to why Joel Levin did not simply go to his accountant, Mr. Kastein, and request a copy of his 1985 New York return. Instead, Mr. Levin's letter requested time to "reconstruct" the relevant records and asked if the Division would recompute the tax due with the $18,000.00 payment, and requested that penalty be abated since there had been no negligence on their part.
>
> This letter was submitted into evidence by the Division and was the original letter sent to the Division by Joel Levin. The Division's attorney explained that when he received this particular letter, attached to it was a copy of a computer printout which was submitted by the Division as part of the same exhibit. The computer printout is dated February 18, 1989 and was apparently

> either printed by, or requested by, the Division's Estimated Tax Processing & Revenue Management Division. It shows that the $18,000.00 payment was received by the Division on January 16, 1986. While not explained by the Division at the hearing, this document shows this payment being applied to petitioners' 1984 return, not the 1985 tax year.[5]

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> On September 14, 1992, Joel Levin signed a Voluntary Petition, which was submitted to the United States Bankruptcy Court, Southern District of New York. In this application, the Division was listed as a creditor.[6]

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> On April 7, 1993, the Division's Revenue Opportunity Division sent a letter to Joel Levin regarding returns for 1987, 1989 and 1990 (i.e., not the year at issue in these proceedings). The letter stated that it had become necessary to initiate formal assessment procedures since petitioners had not responded to earlier correspondence concerning the filing of New York State income tax returns for those years. The letter attempts to impress upon Mr. Levin the urgency of submitting the requested returns within 30 days. It also states that the liability would be estimated at $1,900.00 per year for each of the three years. The total estimated assessment was for $5,700.00. There is no indication in the record that Mr. Levin ever filed these returns.[7]

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

---

[5]We modified finding of fact "5" of the Administrative Law Judge's determination to more clearly reflect the record.

[6]We modified finding of fact "6" of the Administrative Law Judge's determination to clarify that the Division was listed as a creditor on the bankruptcy petition.

[7]We modified finding of fact "7" of the Administrative Law Judge's determination to more completely reflect the record.

On June 23, 1993, the Division sent Joel Levin a Consolidated Statement of Tax Liabilities. Listed as liabilities were assessments #L-000347229 (showing a zero balance due) and #L-007493533 reflecting an amount due of $5,700.00 (which presumably relates to the April 7, 1993 letter, *supra*) and further described in an attached Notice and Demand dated June 23, 1993 addressed to Joel Levin. Listed as "currently under review" was Notice #L-001131077, the assessment at issue in this proceeding. Under the caption "Tax Amount Assessed" was listed $38,272.47, which did not reflect petitioners' $18,000.00 payment.

Included with this mailing was an unsigned letter from the Division's Revenue Opportunity Division stating:

> [t]he accompanying Notice is only to advise you of the determination by the Department of Taxation and Finance of the tax(es) asserted due for the period(s) indicated thereon. The Notice is the equivalent of a Federal notice of tax deficiency and does not create a lien on the property of the estate. Under the New York State Tax Law, the amount(s) of tax asserted due may be challenged through a hearing process and would ordinarily be final unless an application for a hearing was filed with the Department of Taxation and Finance within 90 days from the date of the notice, or unless the Commissioner of Taxation and Finance redetermined the tax(es). But notwithstanding provisions of the State Tax Law, no liability for the tax(es) may become finally and irrevocably fixed unless and until allowed. This is pursuant to the Bankruptcy code, which stays and supersedes operation of the State Tax Law. No demand for payment is made for the tax(es) listed in the accompanying notice. The Debtor should ignore any demand or statement on the Notice which is inconsistent with this statement.

The accompanying notice referred to in the letter was the Notice and Demand for assessment #L-007493533 in the amount of $5,700.00, not the notice at issue in these proceedings. Assessment #L-007493533 was the only notice specifically set

> forth in the heading of the letter, and the letter did not refer to the Consolidated Statement of Tax Liabilities.[8]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> On November 2, 1993, the United States Bankruptcy Court, Southern District of New York, issued an Order in the matter of Joel Levin. The Order of the Bankruptcy Court states, in pertinent part, that no complaint objecting to discharge of the debtor had been filed with the Court, and that the "debtor is released from all dischargeable debts"; and
>
> > [a]ny judgment heretofore or hereafter obtained in any court other than this [bankruptcy] court is null and void as a determination of the personal liability of the debtor with respect to any of the following:
> >
> > (a) debts dischargeable under 11 U.S.C. sec. 523;
> >
> > * * *
> >
> > (c) debts determined by this court to be discharged.[9]

On December 9, 1993, the Division's Audit Division - Central Office issued to Joel Levin a Notice of Assessment Resolution specifically informing him that the $18,000.00 payment had been applied to assessment #L-001131077, the notice at issue in these proceedings. Also issued on this date was a Consolidated Statement of Tax Liabilities listing a new amount of tax due for this assessment of $20,272.47, and assessment #L-007493533 with no tax due, but a penalty due of $5,700.00.

On January 4, 1994 Joel Levin wrote to the Division's Bankruptcy Special Processing Unit attaching a copy of the November 2, 1993 Order of the United States Bankruptcy Court

---

[8]We modified finding of fact "8" of the Administrative Law Judge's determination to more completely reflect the record.

[9]We modified finding of fact "9" of the Administrative Law Judge's determination to more completely reflect the record.

discharging the debtor. The letter expressed his opinion that petitioners were released from all dischargeable debts including assessment #L-001131077 in the amount of $51,579.29.

On January 10, 1994, the Division's Audit Division - Central Office issued to both petitioners a Notice of Deficiency (assessment #L-001131077) showing tax due for 1985, exclusive of penalties and interest, of $17,121.27 and $3,151.20 (presumably for New York State and New York City respectively). This equals the tax due of $20,272.47 set forth in the December notices and therefore continued to reflect a crediting of petitioners' previous $18,000.00 payment.

On February 2, 1994 the Division's Tax Compliance Division responded to Joel Levin's January 4, 1994 letter (explaining that he had received a discharge in bankruptcy) by informing him assessment #L-007493533 had been discharged pursuant to the Bankruptcy Code. The letter did not mention the notice at issue in this proceeding.

On July 19, 1994, the Division's Audit Division - Income Tax Desk Audit sent a letter to petitioners (separate letters at their respective addresses) explaining that petitioners' file and request for conciliation conference had been reviewed and the Division believed its notice to be correct. It went on to state that the Division had no record of the 1985 return being filed, and that therefore, tax may be assessed at any time because there is no statue of limitations for nonfiling. The letter explained that each petitioner was jointly and severally liable for joint returns filed prior to their divorce. Finally, it stated that petitioners could withdraw their request for conciliation conference upon payment of $53,696.84 within 20 days.

A Conciliation Order was issued in this matter on June 2, 1995, and on August 28, 1995 a petition contesting that order was received by the Division of Tax Appeals.

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

> Mercedes Bograd Levin submitted an affidavit in support of her position that she is entitled to relief under the "innocent spouse" provisions of the Tax Law. Mrs. Levin explains that her husband moved out of their home in 1984 and that they have not lived together since that time. She states that she was not privy to Joel Levin's financial affairs and had no knowledge of his income or his finances. She continued:
>
> > [w]hat money Joel earned he kept for his own account. He said he needed it for his business; to make investments; to pay back loans. I never knew what he did with his money. Joel always treated me as if I was not competent or intelligent enough to be involved in his business dealings. . . . During our marriage, when I did sign tax returns, I assumed that Joel filed properly and legally. It would never have occurred to me that he would do otherwise. With respect to the 1985 returns, Joel repeatedly assured me that there was no problem, that no tax was owed, that there was instead an error and that he had proof of having paid his taxes in the form of a cancelled check. Therefore, I had no knowledge that we owed any tax to the State of New York. . . .
> >
> > I did not benefit directly or indirectly from this matter. I was not living with Joel in 1985 or thereafter; I was not going around the world with Joel [as he did in 1985]; I was not operating Joel's business or sharing in his investments. In addition, I have been separated from Joel for over a decade during which time I received no marital settlement, no assets, no home, no savings and only scanty and intermittent child support. Joel was benefitting from those monies, not me.
> >
> > . . . I feel that I should not be penalized for a situation over which I had no knowledge or control and from which I did not benefit. Joel is now remarried to a Vietnamese citizen. The possibility of being burdened with Joel's tax liability from a tax return of ten years ago is a cruel irony.

> Sometimes I feel that I am in a never-ending nightmare. . . .
>
> Mrs. Levin also attached a copy of page 15 of what is allegedly the divorce settlement between the parties wherein Joel Levin agrees to be responsible for all taxes that are not due through any fault of Mercedes Bograd Levin.[10]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted at the outset that petitioners were required to file a 1985 New York State personal income tax return (Tax Law former § 651[a]). Throughout these proceedings, petitioners maintained that a 1985 New York personal income tax return was timely filed. However, petitioners produced no evidence of certified mailing of the return. Petitioners' direct evidence on the issue of the mailing of the return consisted entirely of statements made by Mr. Levin in correspondence with the Division and his testimony at the hearing.

Therefore, the Administrative Law Judge concluded that Joel Levin's evidence was legally insufficient, without proof of certified mailing, to prove that petitioners' 1985 New York State personal income tax return was filed (***citing Matter of Schumacher***, Tax Appeals Tribunal, February 9, 1995, ***Matter of Savadjian***, Tax Appeals Tribunal, December 28, 1990).

Joel Levin also argued that from the facts of this case, in particular the almost eight years it took for the Division to credit the $18,000.00 estimated tax payment to petitioners' 1985 liability, it could be inferred that petitioners mailed their 1985 return and the Division simply misplaced it. The thrust of petitioners' argument here was that they had presented sufficient evidence of mailing to shift the burden to the Division to prove that it did not receive the return.

In support of petitioners' assertion are the following facts: 1) petitioners filed a Federal return for 1985; 2) it took the Division from January of 1986 until December of 1993 to apply

---

[10]We modified finding of fact "16" of the Administrative Law Judge's determination to more completely reflect the record.

petitioners' $18,000.00 tax payment to their 1985 tax liability; 3) the Division knew by February of 1989 that a payment in the amount of $18,000.00 had been made by petitioners, but apparently mistakenly applied the payment to 1984 instead of 1985; and 4) there were liabilities for other tax years included in much of the correspondence between petitioners and the Division.

The Administrative Law Judge concluded that even assuming these facts could be used to infer that the Division lost petitioners' return, such an inference relates to the issue of whether the Division received the return and not whether petitioners proved that they mailed it. The Administrative Law Judge concluded she could not reach the issue of whether the Division received the return unless petitioners first showed that they mailed the return.

Petitioners had the burden to prove that their New York return was filed (***see***, Tax Law § 689[e]). The Administrative Law Judge concluded that, petitioners having not proven that they mailed the return, the issue of whether the Division received the return did not arise.

Having found that no return was filed, the Administrative Law Judge concluded that the Notice of Deficiency was timely issued by the Division and, based on Mr. Levin's concession at hearing, his discharge in bankruptcy did not discharge his liability for New York State personal income taxes for 1985 (Tax Law § 683[c][1][A]; 11 USC § 523[a][1][B]).

The Administrative Law Judge found that it "appears that Mr. Levin is appearing on behalf of himself and his former wife" (Determination, finding of fact "1"). In a footnote, the Administrative Law Judge concluded that "if it is found that Mr. Levin is not appearing on behalf of his former wife, Mrs. Levin will be deemed to not have appeared since she did not sign the petition" (Determination, finding of fact "1"). In any event, the Administrative Law Judge permitted Mr. Levin to appear on behalf of his former wife because the Notice of Deficiency was for the tax year 1985 when petitioners were married but living apart.

Next, the Administrative Law Judge addressed the issue of whether Mercedes Bograd Levin is entitled to relief under the so-called "innocent spouse" provisions of Tax Law former § 651(b)(5).[11]

The Administrative Law Judge concluded that the "innocent spouse" provision of Tax Law former § 651(b)(5) is meant to protect a spouse where the other spouse has control over and access to the financial records and substantially understates income on a jointly filed return. The first requirement to be met in obtaining relief under this section is that there must have been a joint return filed. Since it was found that no return was filed in this case, the Administrative Law Judge concluded that Mercedes Bograd Levin was not entitled to relief under the "innocent spouse" provision.

Together with her affidavit, Mercedes Bograd Levin submitted into evidence what she described as a page from petitioners' divorce settlement. This page states that Joel Levin will be responsible for all joint tax liabilities, except those caused by Mercedes Bograd Levin. The Administrative Law Judge concluded that even if the entire divorce settlement document were in evidence, it merely constitutes an agreement between the parties and does not include or bind the Division. Thereupon, the Administrative Law Judge denied the petition and sustained the Notice of Deficiency dated January 10, 1994.

ARGUMENTS ON EXCEPTION

Joel Levin continues to argue that he filed a 1985 New York personal income tax return. Petitioners assert that the fact that it took the Division from 1986 to December of 1993 to credit petitioners with their $18,000.00 estimated tax payment is evidence that supports the conclusion that the Division misplaced their return.

---

[11]The statutory requirements of proving entitlement to "innocent spouse" relief are essentially the same in Tax Law former § 651(b)(5) and current Tax Law § 651(b)(5)(A).

Petitioners argue that in the event it is found that a return was not filed, Mercedes Bograd Levin should be entitled to "innocent spouse" relief because the parties lived apart at the time the return was due and Mercedes Bograd Levin had no knowledge of, nor benefitted from, the failure to file the return.

The Division argues that petitioners have failed to prove that their 1985 return was ever filed and that, therefore, the Notice of Deficiency was timely issued. Further, the Division argues that Joel Levin's bankruptcy did not discharge his 1985 income tax liability because he failed to prove he filed his 1985 New York income tax return (11 USC § 523[a][1][B]).

The Division also argues that Mercedes Bograd Levin is not entitled to be treated as an innocent spouse under Tax Law former § 651(b)(5).

Finally, the Division argues that Mrs. Levin is jointly liable for the income taxes asserted as due for 1985 because she and her then-husband filed a joint Federal income tax return for that year making her jointly liable for any taxes due the State of New York (Tax Law § 651[b][2]).

OPINION

We agree with the Administrative Law Judge, for the reasons stated in her determination, that petitioners have failed to prove that they filed their New York resident income tax return for 1985. Accordingly, it follows that the Administrative Law Judge correctly concluded that the Notice of Deficiency was not barred by the statute of limitations.

We can generate little sympathy for Joel Levin's claim that this case arises from the negligence of the Division in properly crediting his $18,000.00 estimated tax payment to 1985. While it is true that the Division was slow in crediting his payment to the correct tax year, the Division's failure is directly related to Mr. Levin's failure to file. We can, however, sympathize

with Mrs. Levin. Mr. Levin was clearly no more forthcoming with her regarding their tax matters than he was with the Division.

While recognizing Mrs. Levin's plight, we must address a threshold procedural matter as to her. A proceeding is commenced in the Division of Tax Appeals by the filing of a petition. Among the items that are required to be included in such a petition is the signature of the petitioner (20 NYCRR 3000.3[b][7]). The petition in this matter was filed with the Division of Tax Appeals in 1995. Joel Levin signed the petition, but Mercedes Levin did not. Further, the exception filed with this Tribunal was signed by Joel Levin, but not by Mercedes Levin. While the rules of the Tax Appeals Tribunal and the Division of Tax Appeals permit an individual to appear on behalf of his/her spouse (20 NYCRR 3000.2[a]), at the time the instant petition was filed, Joel and Mercedes Levin were divorced. No power of attorney was signed by Mercedes Levin authorizing Joel Levin to appear on her behalf. Even if such a power existed, Joel Levin is not an attorney or tax professional specified in our rules as authorized to appear for a taxpayer in the Division of Tax Appeals. Accordingly, it was error for the Administrative Law Judge to permit Mr. Levin to appear on behalf of Mercedes Levin.

Given the fact that Mercedes Levin never signed the petition or the exception in this matter, the Division of Tax Appeals never acquired personal or subject matter jurisdiction over her. Although not raised as an issue by either party on exception, jurisdictional issues may be raised at any time by either party, or by the Tax Appeals Tribunal, *sua sponte* (***Matter of Eaton Assocs. v. Egan***, 142 AD2d 330, 535 NYS2d 998; ***Robinson v. Oceanic Steam Nav. Co.***, 112 NY 315). We, therefore, dismiss the instant petition as to Mercedes Bograd Levin for lack of jurisdiction (20 NYCRR 3000.9[a][ii], [vii]).

We now address the Division's argument that Joel Levin's bankruptcy did not discharge the tax asserted as due for 1985 because petitioners failed to file their New York income tax return for that year. Here, the Division is relying on 11 USC § 523(a)(1)(B) which provides, generally, that taxes for a year where no return has been filed will not be discharged. We have already concluded that a return for 1985 was not filed, and Joel Levin conceded at hearing that if such a conclusion was reached, then his 1985 tax debt is not one that would have been discharged in bankruptcy. Accordingly, we conclude that the tax and additions to tax asserted by the Notice of Deficiency in this case were not discharged by the Bankruptcy Court.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joel M. Levin is denied, and the exception of Mercedes Levin is dismissed for lack of jurisdiction;

2. The determination of the Administrative Law Judge is modified, in part, but is otherwise affirmed;

3. The petition of Joel M. Levin is denied and the petition of Mercedes Levin is dismissed for lack of jurisdiction; and

4. The Notice of Deficiency dated January 10, 1994 is sustained.

DATED: Troy, New York
April 16, 1998

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

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

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner