

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BURTON S. SULTAN, M.D., P.C.	:	DECISION
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 816394
Corporate Franchise Tax under Article 9-A of the Tax	:	
Law for the Years 1990 and 1991.	:	

Petitioner Burton S. Sultan, M.D., P.C., 200 Old Country Road, Suite 130, Mineola, New York 11501, filed an exception to the determination of the Administrative Law Judge issued on July 8, 1999. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, was heard on February 10, 2000 in New York, New York.

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

ISSUE

Whether the settlement of a Notice of Deficiency based on a New York State audit also included the final adjustments made on a Federal audit.

FINDINGS OF FACT

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

On November 23, 1992, the Division of Taxation (“Division”) issued to petitioner, Burton S. Sultan, M.D., P.C., a Statement of Franchise Tax Audit Changes based on the results of a field audit. The statement indicated that mortgage payments which had been deducted by petitioner as rent had been disallowed and, in the alternative, petitioner received credit for interest expenses and depreciation. All of the adjustments applied to the years 1990 and 1991.

On July 12, 1993, the Division issued to petitioner a Notice of Deficiency (Assessment ID L-007617930-1), asserting tax of \$84,912.00, plus penalty and interest, for a total amount due of \$114,294.99.

At the time that petitioner was under audit, Dr. Sultan was also under New York State audit as to his personal income tax liability for the years 1990 and 1991. In addition, the Internal Revenue Service was reviewing both petitioner’s and Dr. Sultan’s corporation tax and personal income tax responsibilities for those same years.

On November 23, 1994, Dr. Sultan, as president, consented to the corporation income tax audit findings of the Internal Revenue Service for the years 1990 and 1991 as indicated on the Department of the Treasury-Internal Revenue Service, Income Tax Examination Changes Form. The document indicates that the corporation income of petitioner was increased by \$678,210.00 in 1990 and by \$220,999.00 in 1991 and consisted of adjustments for rent and other employee benefit programs and credits for depreciation and interest. In addition, a 20 percent accuracy penalty was imposed pursuant to Internal Revenue Code § 6662(a) and (b). The corporation

income tax liability as indicated on the Income Tax Examination Changes Form was \$230,400.00 for 1990 and \$75,140.00 for 1991, plus penalty and interest for each year.

The Internal Revenue Service's Income Tax Examination Changes document for petitioner for the years 1990 and 1991 consisted of eight pages with the explanation of the adjustments made on the fourth and sixth pages.

On the same date, Dr. Sultan consented to the personal income tax audit findings of the Internal Revenue Service for the years 1990 and 1991 as indicated on the Department of the Treasury-Internal Revenue Service, Income Tax Examination Changes Form. This document indicates that the personal income of Dr. Sultan was increased by \$11,960.00 in 1990 and by \$15,964.00 in 1991 and consisted of adjustments for constructive dividends and itemized deductions.

Following the issuance of the Notice of Deficiency dated July 12, 1993, petitioner requested that the Bureau of Conciliation and Mediation Services ("BCMS") schedule a conference in such matter. A conference was scheduled by BCMS on November 14, 1994. The subject of the conference was to be the Notice of Deficiency issued on July 12, 1993 relating to the additional corporate franchise taxes assessed for the years 1990 and 1991. Prior to the conference, Dr. Sultan contacted the conferee, in Albany, New York, on behalf of petitioner and offered to pay the additional tax assessed in the Notice of Deficiency of July 12, 1993 if the Division agreed to abate the penalties. The Division accepted petitioner's offer and on December 7, 1994 issued a Consent to petitioner whereby petitioner agreed to pay the tax due as contained in the Notice of Deficiency dated July 12, 1993 (L-007617930-1), plus interest. The penalty was waived. The Consent was executed by Dr. Sultan on behalf of petitioner on

December 21, 1994 and received by BCMS on January 3, 1995. Accompanying the Consent was a check in full payment of the tax (\$84,912.00) and interest (\$28,389.01) due. Interest was computed to December 22, 1994.

While the corporate franchise tax matter had reached the BCMS stage in the appeal process, the personal income tax matter of Dr. Sultan remained with the Division's Nassau District Office. On December 1, 1994, the Division's Nassau District Office received from Dr. Sultan four pages of the Internal Revenue Service's Income Tax Examination Changes Form for the years 1990 and 1991. The first two pages related to Dr. Sultan's personal income tax liability and the next two pages related to the changes made to the corporation's tax liability. However, the pages relating to the corporation's Federal tax liability did not contain the explanation of the changes made.

Upon direct receipt of the complete Federal audit adjustments from the Internal Revenue Service, the Division issued to petitioner, on October 2, 1995, a Notice of Additional Tax Due (Assessment ID L-011134278-5) for the years 1990 and 1991 in the amount of \$16,718.00, plus penalty and interest. The notice explained that the additional tax was computed as follows:

The additional tax shown is based on an adjustment to federal taxable income as determined by the U.S. Treasury Department.

Section 211.3 of the New York State Corporation Tax Law requires that the taxpayer report all final federal determinations within 90 days from the date of such determination.

Penalties were imposed for failure to file a return (Tax Law § 1085[a][1][A]) and for a deficiency due to negligence (Tax Law § 1085[b][1]). In addition, penalty was imposed pursuant to Tax

Law § 1085(b)(2) whereby there was added to the tax an amount equal to 50 percent of the interest payable.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted the failure of petitioner to comply with the requirements of Tax Law § 211(3) and the regulation at 20 NYCRR 6-3.1(b) and 6-4.2 that a taxpayer whose income has been changed or corrected by the Internal Revenue Service (“IRS”) must report the change to the Division within 90 days on form CT-3360, accompanied by the revenue agent’s report. Although petitioner claimed that the settlement it reached before the BCMS conferee concerning a notice issued on July 12, 1993 (assessment number L-007617930-1) also resolved the issues related to the Notice of Additional Tax Due issued on October 2, 1995 which was based on the Federal adjustments, several facts belied such an allegation. First, neither the conferee nor the auditor had the final Federal changes before the original notice was settled and the Division was not informed of the changes until it received them from the IRS, since petitioner did not file a form CT-3360, report of change in taxable income by the IRS. Even though petitioner mailed parts of the Federal changes relating to the corporation to the Nassau District Office, it failed to include those pages containing the explanation of the adjustments. Therefore, without the full report of Federal changes, the Division was incapable of including those changes in its settlement of the July 12, 1993 assessment. Further, even though the conferee was handling the prior corporation franchise tax matter and petitioner’s request to settle was made to the conferee, petitioner never sent him any of the Federal change information. An additional point raised by the Administrative Law Judge was that petitioner’s mailing of the partial Federal change information to the Nassau District Office, received on December 1, 1994,

was only six days prior to the Division's consent to the settlement of the prior case on December 7, 1994. The Administrative Law Judge concluded that this was not enough time for the Division to have incorporated changes resulting from an examination of the changes. Since the amount of tax paid by petitioner pursuant to the settlement and consent was identical to the amount agreed to prior to the Federal changes, i.e., the full tax and interest thereon, and specifically set forth the notice number, date and the original amount due, there was ample notice to petitioner that the consent did not encompass the Federal changes.

ARGUMENTS ON EXCEPTION

On exception, petitioner continues to argue that it provided a copy of the Federal changes for the years 1990 and 1991 to the Division. It is petitioner's contention that the Division considered the changes prior to agreeing to settle the case with respect to assessment number L-007617930-1 and executing a consent to same. Petitioner maintains that the Division demanded a copy of the Federal changes as a prerequisite to closing the case.

OPINION

We agree with the Administrative Law Judge that the record is devoid of any credible evidence which supports petitioner's claims that the Division examined and analyzed the Federal changes for 1990 and 1991 for Burton S. Sultan, M.D., P.C. and took them into consideration when entering into the consent resolving assessment number L-007617930-1.

As indicated by the Administrative Law Judge, petitioner failed to file the requisite form CT-3360 with the signed revenue agent's report; failed to provide a complete copy of the Federal adjustments with an explanation of the changes; and failed to provide a full and complete copy of the adjustments and explanations therefor to the conferee. As a result, petitioner's consent

clearly was applicable to assessment number L-007617930-1 only and was in agreement to the payment of tax set forth on that deficiency as of July 12, 1993. The consent did not take into consideration the Federal changes determined in November, 1994, a fact which should have been apparent to petitioner when executing same.

Tax Law § 211(3) states that if the amount of taxable income is changed or corrected by the Commissioner of the Internal Revenue Service, the taxpayer shall report the change or correction to the Division within 90 days, conceding its accuracy or noting wherein it is in error. Tax Law § 1085(a)(1)(A) provides that if a report is not filed before the prescribed date and such failure is due to willful neglect, there shall be added to the tax due a penalty. In addition, Tax Law § 1085(b)(1) and (b)(2) provides for an additional deficiency due to negligence or intentional disregard of Article 9-A.

Petitioner herein was assessed the aforementioned penalty and interest for failing to file his Form CT-3360, report of Federal changes, in a timely manner. We believe that the facts of this matter establish reasonable cause for petitioner's failure (*see*, 20 NYCRR 2392.1[a][1]) in that the unique circumstances existent herein "would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect" (20 NYCRR 2392.1[d][5]).

Petitioner signed a consent to Federal changes for the years 1990 and 1991 on November 23, 1994 and filed same with the IRS on November 25, 1994. On December 1, 1994, it filed a copy of the two-page consent to the Federal changes with the Nassau District Office of the Division. The auditor testified that he was not aware of it and that he did not remember it.

However, the in-dated copy in the record vitiates any denial by the Division that it was, in fact, sent and received by the Division 20 days before petitioner executed the consent for BCMS.

Although the document sent may not have been analyzed by the Division prior to finalizing the BCMS consent, it provided the Division with ample notice that petitioner had completed a Federal audit and had consented to the changes made in its income for the same years as those under the Division's audit. Petitioner reasonably relied upon its report to the Division as notice of the Federal changes, as would any prudent and intelligent taxpayer under the same circumstances. Certainly, its actions were not meant to obfuscate or conceal, but to clarify and enlighten.

We are well aware that petitioner did not strictly comply with the Division's regulations in this instance, but the circumstances dictate that it has completely fulfilled the spirit and purpose of the statute and regulation. For this reason, we abate the additions to tax assessed pursuant to Tax Law § 1085(a)(1), (b)(1) and (b)(2).

In all other respects, we believe the Administrative Law Judge fully and correctly dealt with the issues and arguments raised below, and, since petitioner has raised no new arguments on exception, we affirm based upon the reasoning set forth in the determination with the exception of our modification for the abatement of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Burton S. Sultan, M.D., P.C. is granted to the extent that penalties assessed pursuant to Tax Law § 1085(a)(1), (b)(1) and (b)(2) are abated, but in all other respects is denied;

2. The determination of the Administrative Law Judge is modified consistent with paragraph "1" above;
3. The petition of Burton S. Sultan, M.D., P.C. is granted to the extent indicated in paragraph "1" above, but in all other respects is denied; and
4. The Notice of Additional Tax Due, dated October 2, 1995, is sustained as modified by this decision.

DATED: Troy, New York
August 10, 2000

/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