

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MEYER AND CYNTHIA COHEN	:	DECISION
	:	DTA NO. 817062
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the Administrative Code of the City of New York	:	
for the Years 1977, 1978, 1980 and 1981.	:	

Petitioners Meyer and Cynthia Cohen, 1060 East 22nd Street, Brooklyn, New York 11210, filed an exception to the determination of the Administrative Law Judge issued on January 11, 2001. Petitioners appeared Sy Schnur, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception, the Division of Taxation filed a brief in opposition and petitioners' filed a reply brief. Petitioners' request for oral argument was withdrawn.

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

ISSUE

Whether petitioners have demonstrated that certain Federal audit changes were imposed in error thereby deeming improper the Division of Taxation's assertion of additional New York State and City personal income taxes based upon such Federal audit changes.

FINDINGS OF FACT

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

1. Neither the Division of Taxation (“Division”) nor petitioners presented the testimony of any witnesses at the hearing held in this matter. Rather each side attempted to establish their respective positions by the introduction of documents only.

2. The Division issued two notices of additional tax due, each dated September 17, 1990 with a payment due date of September 27, 1990, against petitioners for 1977 and 1978, respectively, which asserted additional New York State and City personal income tax. The notice for 1977, with an “Assessment ID” of L-002028248-5, asserted additional State personal income tax due of \$2,377.50 plus interest and City resident income tax due of \$681.55 plus interest, for a total tax due of \$3,059.05, plus interest. This additional tax due was based upon an increase of \$15,850.00 to petitioners’ previously stated New York taxable income of \$45,046.00 for 1977. The notice for 1977 included the following explanation:

Section 659 of the New York State Tax Law requires taxpayers to report federal changes to New York State within 90 days after final federal determination. This provision of the Tax Law is outlined in the instructions for preparation of New York State income tax forms.

Section 683(c) of the New York State Tax Law provides for assessment at any time when a taxpayer fails to comply with Section 659.

The federal audit changes show an adjustment was made to your distributive share of partnership income/loss from the following partnership(s):
RAINBOW GROUP

Partnership/trust/small business income on your New York return has been corrected to include the federal adjustment.

Interest is required by Section 684(a) of the New York State Tax Law. Interest is mandatory under the Tax Law and cannot be waived.

The notice for 1978, with an “Assessment ID” of L-002028247-6, asserted additional State personal income tax due of \$13,855.60 plus interest and City resident income tax due of \$4,904.05 plus interest, for a total tax due of \$18,759.65 plus interest. This additional tax due was based upon an increase of \$121,735.00 to petitioners’ previously stated New York taxable income of \$2,360.00 for 1978. The notice for 1978 included the following explanation:

Section 659 of the New York State Tax Law requires taxpayers to report federal changes to New York State within 90 days after final federal determination. This provision of the Tax Law is outlined in the instructions for preparation of New York state income tax forms.

Section 683(c) of the New York State Tax Law provides for assessment at any time when a taxpayer fails to comply with Section 659.

Partnership/trust/small business income on your New York return has been corrected to include the federal adjustment.

The maximum tax benefit has been allowed in the computation of your New York State tax.

Your minimum income tax has been adjusted to reflect the change to your New York personal income tax.

The household credit is not allowed since your total combined household gross income is \$25,000 or more.

Interest is required by Section 684(a) of the New York State Tax Law. Interest is mandatory under the Tax Law and cannot be waived.

3. The Division also issued a Notice of Additional Tax Due dated June 28, 1993, with a payment due date of July 8, 1993, against petitioners¹ for 1981, which asserted additional New York State and City personal income tax. This notice, with an “Assessment ID” of L-007520864-8, asserted additional State personal income tax due of \$1,435.00 plus interest and

¹ Separate notice of additional tax due, each dated June 28, 1993, were issued to Meyer Cohen and Cynthia Cohen, respectively. Both notices had the same Assessment ID of L-007520864-8 and contained the same information.

City resident income tax due of \$865.00 plus interest, for a total tax due of \$2,300.00 plus interest. This additional tax due was based upon an increase of \$34,191.00 to petitioners' previously stated New York taxable income of \$50,738.00 for 1981. The notice included the following explanation:

Our records indicate that the Internal Revenue Service has made changes to your federal return. Section 659 of the New York State Tax Law requires that Federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.

A search of our files indicates that you did not report these changes to New York State. If you have reported the Federal audit changes, please send a copy of the report and a copy of both sides of the cancelled check showing our deposit serial number stamped on the face of the check.

When you do not report Federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by Section 683(c) of the New York Tax Law.

Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under Section 684(a) of the New York State Tax Law.

4. The petition dated April 13, 1999 by petitioners, which commenced this proceeding, did not include copies of any of the notices of additional tax due. Instead, petitioners attached to their petition a copy of a Consolidated Statement of Tax Liabilities dated August 9, 1993 which listed the following four liabilities:

Assessment ID	Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Current ² Balance Due
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² "Current" means as of August 9, 1993, the date of the Consolidated Statement of Tax Liabilities.

L-002028248-5	12/31/77	\$ 3,059.05	\$ 7,703.71	\$ 519.52	\$ 11,282.28
L-002028247-6	12/31/78	18,759.65	43,619.12	3,188.86	65,567.63
L-000730361-9	12/31/80	7,253.22	14,380.54	2,138.91	23,772.67
L-007520864-8	12/31/81	2,300.00	3,784.21	0.00	6,084.21
TOTALS		\$31,371.92	\$69,487.58	\$ 5,847.29	\$106,706.79

No basis, statutory or otherwise, was noted by the Division for the assertion of penalty, and as noted in Findings of Fact “2” and “3”, penalty was not asserted in any of the three notices of additional tax due.

5. The Division was unable to find a copy of a Notice of Additional Tax Due for the year 1980 in its records. Instead, the Division’s representative indicated that utilizing the Assessment ID for 1980 shown in the Consolidated Statement of Tax Liabilities attached to the petition, he “personally accessed the client’s computer system yesterday and entered [the Assessment ID of L-000730361-9] and produced [the assessment summary for 1980]” which he introduced into evidence (tr., p. 14). This summary, which appears to be a printout of a computer screen or screens, showed total New York State and City personal income tax due for 1980 of \$7,253.22 plus penalty and interest. It also showed a “NOT DEMAND DATE” of July 21, 1989, which the Division’s representative interpreted to mean the date on which a Notice of Additional Tax Due for 1980 was issued by the Division. In addition, this summary also showed an “ASMT REASON ORIG” of “PARTNERSHIP FED ADJU,” which suggests the additional tax due resulted from some type of federal adjustment to partnership income or loss, as in the other years at issue.

6. The only tax returns filed by petitioners during the years at issue introduced into the record were their Federal returns (i) for 1977 dated April 14, 1978 by Mr. Cohen and (ii) for

1978 dated June 15, 1979 by Mr. Cohen. Looking closely at the return for 1978, as an example, petitioners were sophisticated taxpayers who filed a complex tax return which sheltered substantial wage income. For example, petitioners reported Federal adjusted gross income for 1978 of \$26,646.00 calculated as follows:

Line Description	Amount
Wages, salaries, tips, and other employee compensation ³	\$ 169,000.00
Interest income	12,821.00
Dividends subject to tax after applicable exclusion	88.00
State and local income tax refunds	3,324.00
Business loss from Schedule C	(31,389.00)
Capital gain from Schedule D	30.00
Partnership losses from Schedule E	(120,693.00)
Total Income	33,181.00
Employee business expenses from Form 2106	(6,535.00)
Federal adjusted gross income	\$ 26,646.00

The business loss of \$31,389.00⁴ shown on the Schedule C attached to the 1978 Federal tax return was from Mr. Cohen's lithography business conducted as a sole proprietorship.

Lithographic plates purchased in 1977 for a reported \$132,000.00 provided a depreciation deduction of \$25,284 in 1978. The partnership loss of \$120,693.00 shown on the Schedule E attached to the 1978 tax return was reported as generated by the following three entities:

³ Mr. Cohen described his occupation on the tax returns in evidence as a "sales executive."

⁴ In addition, in 1977, petitioners claimed a loss from Mr. Cohen's lithography business of \$18,222.00.

Name	Amount
Del Sol Properties, a partnership	(\$2,170.00)
Rainbow Group, a partnership	(15,223.00)
Meyer Cohen Trust	(103,300.00)
Total	(\$120,693.00)

In comparison to 1978, on their 1977 Federal income tax return, petitioners included a Schedule E which reported a partnership loss of \$29,266.00 calculated as follows, with one of the following three entities generating a small gain:

Name	Amount
Bayshore Properties, a partnership	\$ 3,096.00
Rainbow Group, a partnership	(31,627.00)
Del Sol Properties, a partnership	(735.00)
Total	(\$29,266.00)

7. Included in the record are photocopies of what appear to be printouts of computer screens apparently obtained by the Division from the Internal Revenue Service which summarize what are labeled “transactions” with regard to each of the years at issue (as well as for 1979, which is not at issue in this proceeding). Each of these summaries include a “transaction” by the Internal Revenue Service assessing additional income tax against petitioners for each of the years at issue as follows:

Year	Transaction Date	Money Amount	Explanation
1977	April 21, 1986	\$ 21,205.00	Additional tax assessed by examination
1978	April 21, 1986	52,790.00	Additional tax assessed by examination

1980	October 8, 1987	46,391.00	Additional tax assessed by examination
1981	June 11, 1990	8,536.00	Additional tax assessed by examination

8. The Division also obtained from the Internal Revenue Service a photocopy of a document dated April 1986, with the specific date not decipherable, which shows that petitioners and the Internal Revenue Service “disposed” of the tax years, 1977 and 1978, by “stipulation” which allowed petitioners to claim the following adjustments to income:

Adjustment to income	1977	1978
Partnership loss- Rainbow Group	(\$21,400.00)	-0-
Lithographs	(12,600.00)	(2,250.00)
Meyer Cohen Trust	-0-	(20,000.00)
Total adjustments	(\$34,000.00)	(\$22,250.00)

Based upon the above adjustments, petitioners and the IRS stipulated that additional tax was due from petitioners for 1977 and 1978 of \$21,205.00 and \$52,790.00, respectively, as noted in the table in Finding of Fact “7”. It appears that the IRS initially had disallowed *all* losses from the Rainbow Group, Mr. Cohen’s lithograph proprietorship, and the Meyer Cohen Trust. As noted in Finding of Fact “6”, petitioners on their tax returns reported losses from the Rainbow Group of \$31,627.00 in 1977 and \$15,223.00 in 1978; losses from Mr. Cohen’s lithography business of \$18,222.00 in 1977 and \$31,389.00 in 1978; and a loss from the Meyer Cohen Trust of \$103,300.00 in 1978. Pursuant to the above stipulation, the IRS had agreed to allow some lesser part of these claimed losses as follows:

	Loss claimed	Loss allowed by stipulation
1977 Rainbow Group partnership loss	\$31,627.00	\$21,400.00

1977 loss from lithographs	18,222.00	12,600.00
1977 Meyer Cohen Trust loss	-0-	-0-
1978 Rainbow Group partnership loss	15,223.00	-0-
1978 loss from lithographs	21,389.00	2,250.00
1978 Meyer Cohen Trust loss	103,300.00	20,000.00

Petitioners' Failure to Respond to Inquiries

9. By a letter dated October 11, 1989, the Division advised petitioners as follows:

Information available indicates the Internal Revenue Service has adjusted your Federal income tax return(s) for [1976-1979]. This information also indicates that the net income/loss from the partnership, Rainbow Group, of which you are a member partner, was adjusted.

A search of our files fails to show that you reported these changes to New York State. . . .

* * *

If you did not report the federal change(s), please provide [information as listed].

By a hand-written note dated October 21, 1989, with Meyer Cohen's name preprinted, Mr. Cohen advised the Division that he forwarded the October 11, 1989 letter to his accountant, Morris Nadjar. With no further response from petitioners or their accountant, the Division by a letter dated March 5, 1990 provided petitioners with another opportunity to "provide the information needed to complete the review of [petitioners' returns from 1976-1979]." The record does not disclose any response by petitioners to this renewed request. Approximately, six months later, as detailed in Finding of Fact "2", the Division issued two notices of additional tax due each dated September 17, 1990 against petitioners for 1977 and 1978.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Initially, the Administrative Law Judge determined that the Division of Tax Appeals had jurisdiction to hear petitioners' petition, which sought to vacate a consolidated statement of tax liabilities, which included three notices of additional tax due and a notice and demand, because he deemed the notices of additional tax due the equivalent of notices and demands (***Matter of Yampol***, Tax Appeals Tribunal, August 28, 1997).

The Administrative Law Judge then noted the taxpayers' duty to report changes to their Federal taxable income within ninety days after the final determination of the change (Tax Law § 659) and their concession that Federal changes were made for the years in issue and the evidence establishing that the Internal Revenue Service ("IRS") assessed additional tax for the years in issue. The Administrative Law Judge found that the additional New York State and City taxes assessed by the Division was grounded in a rational reliance on the Federal audit changes (***Matter of Karayannides***, Tax Appeals Tribunal, March 13, 1997).

The Administrative Law Judge noted that petitioners had the burden of proving by clear and convincing evidence that the assertion of tax due by the Division was in error and failed to do so. Petitioners' main argument was that the Federal audit changes were issued after expiration of the statute of limitations, even though they failed to produce sufficient evidence that the issue was raised on audit. Since a statute of limitations defense is waived if not raised (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109; ***Matter of Pittman***, Tax Appeals Tribunal, February 20, 1992), the argument was deemed waived.

The Administrative Law Judge canceled penalty assessed for the year 1980 because no basis for same was stated on the summary of petitioners' account, as it had been on each of the notices of additional tax due for the years 1977, 1978 and 1981. Without a stated basis for the penalty, the Administrative Law Judge concluded that there was no rational basis for the assessment of penalty.

ARGUMENTS ON EXCEPTION

On exception, petitioners continue to argue that the IRS failed to obtain an extension of the statute of limitations and, therefore, the Federal changes were not timely assessed. Therefore, petitioners conclude that New York did not have the right to proceed against them for additional tax based on erroneous Federal changes.

The Division counters this argument by pointing out that the record does not support a finding that the Federal assessments were untimely. It argues that petitioners' actions contradicted their argument since petitioners continued to treat the Federal assessments and adjustments as timely and made additional payments after the date they contend the statute expired.

The Division contends that there was no indication of a statute of limitations issue in the many IRS documents in the record. Noting that the petitioners have the burden of proof and that a presumption of correctness attaches to assessments which must be rebutted by petitioners, the Division maintains that petitioners have not demonstrated that the four assessments issued to them by the Division were incorrect or erroneous.

OPINION

We affirm the determination of the Administrative Law Judge. Petitioners failed to carry their burden of proof before the Administrative Law Judge and have not raised any new arguments on exception which demonstrate that the determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented and find that there is no basis to modify the conclusions set forth in the determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Meyer and Cynthia Cohen is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Meyer and Cynthia Cohen is granted to the extent indicated in conclusion of law "E" (wherein the Administrative Law Judge canceled the penalty assessed for the year 1980), but in all other respects is denied; and
4. The Consolidated Statement of Tax Liabilities, dated August 9, 1993, is sustained.

DATED: Troy, New York
February 21, 2002

/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