STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH AND DEBRA MARTELLI	:	DECISION DTA NO. 817523
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1995 and 1996.	:	

Petitioners Joseph and Debra Martelli, 15851 Lisbon Court, Wellington, Florida 33414-1277, filed an exception to the determination of the Administrative Law Judge issued on May 31, 2001. Petitioners appeared by Christopher B. Graham, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Peter B. Oswald, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners' request for oral argument was withdrawn.

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

ISSUES

I. Whether the Division of Taxation carries the burden of proof to establish the correctness of the Notice of Deficiency issued to petitioners.

II. Whether petitioners should have reported partnership income they received in 1995 and 1996 as New York income.

FINDINGS OF FACT

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

Petitioners, Joseph Martelli and Debra Martelli, filed joint New York State nonresident income tax returns for 1995 and 1996, the two years in issue. On those returns, both petitioners reported wage and salary income from Kay J. Operating Co., Inc., a New York company located in West Hempstead, New York, and they paid New York State personal income taxes on that income. Their New York State tax return and their wage and tax statements showed their address as Wellington, Florida.

Petitioners are the sole partners of Joseph Martelli & Co ("Martelli"), a traffic and warehouse consulting firm. From at least 1990 until 1994, Martelli filed New York State partnership tax returns, and petitioners filed New York State resident income tax returns reporting income from the Martelli partnership as New York income. In 1995 and 1996, petitioners filed Federal income tax returns reporting the receipt of partnership income from Martelli. That income was not reported on petitioners' New York State nonresident tax returns in 1995 and 1996.

The Division of Taxation ("Division") began an audit of petitioners' 1995 and 1996 tax returns to determine whether petitioners had changed their residence to Florida and whether the Martelli partnership income was allocable to New York. An audit letter and a residency questionnaire were mailed to petitioners on or about November 4, 1998.

On audit, petitioners were represented by Arthur Wigutow. Based on information provided by petitioners and their representative, the Division determined that petitioners

changed their residence from New York State to Florida in 1994. The Division also learned that petitioners worked for Kay J. Operating Company out of their home in Florida and reported to the New York office about once per week. Petitioners reported all income they received from Kay J. Operating Company as New York income.

Petitioners provided the Division with a copy of a Florida Department of State Certificate registering Joseph Martelli & Co. as a fictitious name as of May 5, 1995. The Division was unable to find a telephone listing for Martelli in any Florida telephone directory. Petitioners did not provide the Division with business records to substantiate that Martelli had no New York source income.

Mr. Wigutow provided the Division with copies of Martelli's Federal partnership returns (Schedule K-1, Form 1065) for 1995 and 1996. A review of the partnership returns showed that the partnership claimed expenses for overnight travel. Petitioners' representative stated that travel expenses were incurred when petitioners traveled to New York and other states to negotiate contracts with Martelli customers. Inasmuch as petitioners were in New York approximately once a week working for Kay J. Operating Company and traveled to New York on Martelli business, the Division concluded that all or a portion of the Martelli income was allocable to New York. The Division requested that petitioners submit an itemization of the gross receipts reported on the Form 1065 and documents to substantiate the source of those gross receipts. No information was provided. Accordingly, the Division concluded that 100 percent of the Martelli partnership income received by petitioners in 1995 and 1996 was allocable to New York.

Based on petitioners' Federal income tax returns, the Division determined that petitioners received income from Martelli of $235,720.07 in 1995 and $76,287.90 in 1996. These amounts were determined to be 100 percent New York income, and petitioners' New York taxable income was adjusted accordingly.

The Division issued to petitioners a Notice of Deficiency, dated March 1, 1999, asserting income tax deficiencies of $17,174.35 plus interest and penalty for 1995 and $5,117.45 plus interest and penalty for 1996.

This matter was originally scheduled for hearing on October 3, 2000. That hearing was adjourned at petitioners' request to enable their representative, at the time William H. Wishinsky, C.P.A., to secure documentation. Upon the agreement of Mr. Wishinsky and the Division, the hearing was rescheduled for November 3, 2000. On that date, Mr. Wishinsky appeared and moved for an adjournment explaining that he had obtained petitioners' approval to engage an attorney, Christopher B. Graham, Esq., on the preceding evening. Since Mr. Graham was not familiar with the facts of the case, petitioners sought an additional 30-day period to present their case. Administrative Law Judge Nero denied the motion but left the record open for the submission of documents by petitioners.

Following the hearing, petitioners submitted canceled checks from the First Union National Bank of Florida, drawn on the account of Joseph Martelli Co., Wellington, Florida. The checks were all dated in the period June 1, 1995 through December 31, 1995. No explanation was provided with the checks. Petitioners also submitted an undated letter on the letterhead of Joseph Martelli Co. Notations on the top of the document indicate that it was faxed to Mr. Graham on January 3, 2001. The letter states that Martelli has been based in Florida since

January 1995 and is operated out of petitioners' home in Florida. There is a description of the services provided by Martelli. Essentially, the company is a consolidator of storage and transportation services, identifying companies with excess capacity who are willing to sell at a discount. It is not clear whether Martelli actually purchased and resold the services of others or merely provided information to its customers. The letter ends as follows: "Unfortunately, due to the lack of clients and to Mr. Martelli's desire to retire the company has done poorly over the past several years. For that reason, Joseph Martelli & Co. has had limited and now no accounts receivables since 1995." The letter is not addressed to anyone, and it is unsigned. The Martelli letterhead bears a Florida address and telephone number.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge discussed the relevant income tax sections of the Tax Law and concluded that the Division had a rational basis for asserting that the Martelli partnership received income from a business carried on in New York State. The Administrative Law Judge rejected petitioners' argument that it was incumbent upon the Division to prove the correctness of the notice issued to petitioners in this case. Moreover, the Administrative Law Judge stated that, despite ample opportunity for petitioners to submit documentation in support of their case, they failed to demonstrate that they were entitled to any adjustments to the Notice of Deficiency. Accordingly, the Administrative Law Judge sustained the Notice of Deficiency in its entirety.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue the same issues that they presented to the Administrative Law Judge below. Petitioners state that their partnership did not maintain a physical presence within New York nor did they continue any employment relationship in New York after the year

1994. Petitioners also object to the finding of fact that they traveled to New York after 1994 as employees of Kay J. Operating Company or to negotiate contracts for the partnership. Petitioners claim that they ceased all employee/employer relationships with Kay J. Operating Company after 1994 and that the income received from Kay J. Operating Company was part of a severance package. Therefore, petitioners assert that no part of the partnership income is allocable to New York during the years 1995 and 1996. Additionally, petitioners continue to argue that the Division bears the burden of proof in this case to establish that the income at issue should be allocated to New York.

In opposition, the Division argues that, based upon Tax Law § 689(e), the Administrative Law Judge correctly found that petitioners bear the burden of proof in this case. Thus, the Division asserts that since petitioners did not sustain their burden, the Division properly allocated 100% of the partnership income received by petitioners from Joseph Martelli & Company to New York.

OPINION

Petitioners maintain that it is the Division's burden to demonstrate that its assessment of the additional tax due was proper. We reject this proposition. It is well settled that a properly issued Notice of Deficiency is presumed to be correct and that the taxpayer has the burden of demonstrating the incorrectness of such an assessment (***Matter of Phillips v. New York State Dept. of Taxation & Fin.***, 267 AD2d 927, 700 NYS2d 566, ***lv denied*** 94 NY2d 763, 708 NYS2d 52 [where the nonresident petitioner's general testimony, along with a one paragraph letter from his employer, failed to establish that he worked outside of New York State due to the necessity of his employer and failed to sustain his burden to show that the assessments were erroneous];

Matter of Leogrande v. Tax Appeals Tribunal, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398 [wherein the petitioner claimed that the Division had no basis for its estimations used in computing the notice, yet the petitioner submitted no evidence or testimony to sustain his burden of proof]). As the Appellate Division stated: "the failure of petitioner to produce any evidence demonstrating that the assessment was erroneous [left] standing the presumption of correctness which attached to the notice of deficiency" (***Matter of Leogrande v. Tax Appeals Tribunal***, ***supra***, 589 NYS2d, at 384, ***quoting Matter of Kourakos v. Tully***, 92 AD2d 1051, 461 NYS2d 540, ***appeal dismissed*** 59 NY2d 967, 466 NYS2d 1030, ***cert denied*** 464 US 1070, 79 L Ed 2d 215).

Petitioners also claim that the Administrative Law Judge's determination was in error because she reached her conclusion by relying on facts that do not exist. Specifically, petitioners argue that their partnership did not maintain a physical presence within New York and petitioners never worked in New York after 1994. However, petitioners failed to introduce any evidence to substantiate their claim, either through witness testimony or through the submission of documents. The evidence in the record indicates that during the audit, petitioners' representative claimed that certain overnight travel expenses were incurred by petitioners on trips they made to New York and other states to negotiate contracts with the partnership's customers (***see***, exhibit "H," § F [Tax Field Audit Record]). Moreover, petitioners stated in their completed Nonresident Audit Questionnaire that, for the years 1995 and 1996, they were physically present in New York for work purposes for approximately 60 days (***see***, exhibit "H," § N) . Therefore, considering these statements made by petitioners and their former representative and, in the absence of any evidence to the contrary, we find that the

Administrative Law Judge appropriately concluded that petitioners failed to demonstrate that the Division's assessment was in error. Thus, we agree with the Administrative Law Judge and sustain her determination in its entirety.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph and Debra Martelli is denied;

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

3. The petition of Joseph and Debra Martelli is denied; and

4. The Notice of Deficiency dated March 1, 1999 is sustained.

DATED: Troy, New York
June 13, 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