

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HARRY CORIN	:	DECISION
	:	DTA NO. 818674
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 Year 1982.	:	

Petitioner Harry Corin, Old Post Mall Apartments, 40-B Rosilia Lane, Fishkill, New York 12524, filed an exception to the determination of the Administrative Law Judge issued on April 17, 2003. Petitioner appeared by Lloyd W. Winfield, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner has established that the Notice of Additional Tax Due issued to him based upon federal audit changes was incorrect or improper.

FINDINGS OF FACT

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

The Division of Taxation (“Division”) received notice from the Internal Revenue Service (“IRS”) of Income Tax Examination Changes dated October 16, 1995, concerning Harry and Frances Corin,¹ indicating an upward adjustment to income for tax year 1982 from Riviera Investments, a tax motivated transaction, in the amount of \$16,841.00. The income adjustment resulted in an underpayment of federal income tax of \$6,425.00.

Page one of an IRS generated document, dated August 20, 1997 and entitled 8212-TMT* Interest on Tax, was introduced into evidence. It shows tax in the amount of \$6,425.00, subject to interest commencing April 15, 1983, with a balance due on September 30, 1993 of \$10,088.65, after including payments in the amount of \$2,031.00 and \$3,400.00. Beside the \$2,031.00 payment entry is a handwritten notation made by petitioner’s representative indicating this amount was derived from a 1984 refund. Next to the \$3,400.00 entry a handwritten notation indicates it is for “payment with 1040X.” No additional pages were submitted with this interest calculation.

The Division’s audit file recorded the following exchange between its office and petitioner concerning the reported federal change:

On March 27, 1997 the Audit Division sent a letter to the taxpayer informing them that information available indicated that the Internal Revenue Service adjusted their Net Income from the Partnership, Riviera Investments of which they were partners. The letter also informed the taxpayers to report Federal Audit Changes to New York State. The letter informed the taxpayer that if they

¹ The Notice of Additional Tax Due was issued solely to Harry Corin and, thus, any reference to petitioner will only refer to Mr. Corin.

did report the Federal Audit Changes to submit a copy and a copy of the cancelled check or money order showing our deposit serial number stamped on the face. If the taxpayer did not report the Federal Audit Changes to New York State the letter instructed them to file a Report of Federal Audit Changes with New York State at that time along with a copy of the original 1982 New York State Income Tax Return they filed.

On April 17, 1997 the taxpayer's accountant responded to the Audit Division's letter. He indicated that his clients did not report any Federal Changes to New York State since the entire IRS assessment was being disputed and a reaudit with the IRS was requested. The taxpayers representative indicated that they will not report anything to New York State until the dispute with the IRS is settled.

On April 23, 1998 the Audit Division sent a follow up letter to the taxpayer. The letter informed the taxpayer that considerable time had passed since their accountant sent the letter of April 17, 1997. The letter requested that the taxpayer submit a copy of the Federal Audit Report if a Final Federal Determination had been made. Also, the taxpayer was instructed to complete a New York State Report of Federal Examination Changes and submit it along with payment of tax, penalty and interest due.

If a final federal determination had not yet been made the taxpayer was instructed to give the Audit Division the current status.

The taxpayer failed to reply to the Audit Division's letter.

After the aforementioned communication with petitioner and based upon the information shown in the federal audit changes, the Division issued a Notice of Additional Tax Due to petitioner dated November 16, 1998, concerning tax year 1982, increasing income by the federal adjustment of \$16,841.00, resulting in additional New York State and City income tax due in the amounts of \$1,980.00 and \$471.00, respectively, totaling \$2,451.00, plus interest of \$6,102.95, for a grand total of \$8,553.95.

The Division's audit file reveals the following additional facts:

The taxpayer's representative protested the Notice of Additional Tax Due on November 24, 1998. The representative claims that the adjustment in 1982 was only one part of a 3 year period including 1983 and 1984. The taxpayer

claims that the New York State Tax Returns for 1983 and 1984 will show increased income of \$5,197 which applied against the 1982 adjustment of \$16,841 leaves a net balance for 1982 of \$8,672. However the taxpayer's representative indicated that the matter was still in dispute with the IRS.

On March 1, 1999 the Audit Division sent a follow up letter to the taxpayer. The letter asked the taxpayer the status of the Federal Audit.

On March 9, 1999 the taxpayer's representative responded indicating that the matter had not yet been resolved with the IRS.

On October 18, 1999 the taxpayer's representative contacted the Audit Division and indicated that the matter had been resolved with the IRS.

The information submitted by the taxpayer's representative showed that the IRS abated some of the interest imposed on their 1982 and 1983 IRS assessments.

The taxpayer did not submit any documentation showing that the Internal Revenue Service made changes to the Federal Audit Adjustment for the 1992 [sic] Tax Year to the Adjustments to income for Riviera Investments in the amount of \$16,841.

The only documentation submitted showed that the IRS made an adjustment to the interest imposed.

On August 16, 2000 the taxpayer's representative filed a Request for Conciliation Conference. The taxpayer did not submit any documentation to show that an adjustment should be made to his client's 1982 Notice of Additional Tax Due.

Upon review of this matter, the Division's advocate found an error was made in the computation of petitioner's New York City tax due shown on the Notice of Additional Tax Due, and corrected the computation to show additional New York City tax due of \$599.22, compared to the originally computed \$471.00.

A conciliation conferee sustained the notice in issue by Conciliation Order CMS No. 182219. The Order noted, however, that a refund credit in the amount of \$574.00 had been applied to Notice L015856246.

The IRS corresponded with petitioner by a document entitled Notice of Final Partnership Administrative Adjustment, dated March 30, 1987. The tax year listed on the notice is 1983. However, in a different type font appears “& 1982.” In addition, petitioner’s representative added in his own handwriting “& 1984 which allows original investment as a cost & offset of the 3 years.” The substance of the correspondence was to give petitioner an opportunity to enter into a binding settlement to treat certain partnership items consistent with the treatment of items on the partnership return (depicted in a schedule that was not attached to the correspondence) as modified by the final partnership administrative adjustment. The effect of accepting the offer of settlement is that petitioner would not have been affected by a later judicial determination on the partnership items.

With regard to petitioner’s contact with the IRS over the matter in issue, on or about September 5, 1997, petitioner’s representative filed Form 843, Claim for Refund and Request for Abatement, requesting an abatement of interest in the amount of \$15,145.14 for tax year 1982, due to IRS errors and delays. Form 843 was filed pursuant to Revenue Procedure 87-42, which provides the procedure by which a taxpayer may request the abatement of interest, when the taxpayer has been charged interest that is attributable in whole or in part to any error or delay by an IRS officer or employee.

Petitioner’s Form 843 explained that petitioner had entered into a tax shelter partnership which resulted in a tax saving of \$5,155.00 in 1982 and excess taxes paid in 1983 and 1984 of \$1,893.00, which when disallowed, resulted in a net tax due of \$3,262.00. A check in the amount of \$3,400.00 was paid to the IRS, which petitioner maintained should have settled the

net tax due. Petitioner and his representative sent to the IRS a TEFRA settlement agreement and thereafter claimed to have heard nothing from the IRS between 1987 and 1997.

Petitioner received an IRS notice dated September 29, 1997, entitled “Reminder of Overdue Tax” indicating that petitioner had an amount unpaid from prior notices of \$15,145.14, for tax year 1982, possibly including tax, penalties and interest.

Petitioner received correspondence dated August 16, 1999 from the IRS, attached to which was Form 906, with respect to the abatement of interest. Form 906, entitled “Closing Agreement on Final Determination Covering Specific Matters,” was executed by both petitioner and the IRS, and stated:

Whereas, a dispute has arisen between the parties to this agreement as to whether any interest should be abated under the provisions of section 6404(e)(1) of the Internal Revenue Code for the tax years 1982 and 1983.

Whereas, the parties wish to determine with finality, the period of time for which interest should be abated.

Now it is hereby determined and agreed for Federal Income Tax purposes that:

1. Interest in the amounts of \$13,967.00 and \$3,078.00 will be abated under the provisions of IRC section 6404(e)(1) for the tax years ending December 31, 1982 and December 31, 1983, respectively.

2. No interest accrued or accruing for any other period will be abated under the provisions of IRC 6404(e)(1) for the tax years ending December 31, 1982 and December 31, 1983.

The Division introduced the affidavit of Peggy Joyce, who was formerly employed in the Division’s Audit Bureau where she was responsible for reviewing information provided by the Internal Revenue Service regarding federal audit changes of personal income tax returns. Her search of the Division’s records failed to show that petitioner reported the federal audit changes in issue to the Division.

The Division also introduced a certification by the Division's Assistant to the Commissioner for Regulatory Affairs, who is authorized to authenticate copies of all papers and documents in the possession and custody of the Commissioner of Taxation and Finance, that a search of all documents in the Division's possession was made of personal income tax files for personal tax returns for tax year 1982 of Harry Corin, and that no Report of federal audit Changes, Form IT-115, was located.

Petitioner could not produce evidence of a canceled check in the amount of \$54.00, the amount claimed by petitioner to be the net amount of tax due to New York State for 1982, 1983 and 1984 stemming from the federal changes for such years.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that pursuant to Tax Law § 659, if a taxpayer's federal taxable income is changed or corrected by the United States Internal Revenue Service, the taxpayer must report the change or correction within 90 days after the final determination of such change or correction. The taxpayer must either concede the accuracy of such determination or state wherein it is erroneous. The Administrative Law Judge also observed that Tax Law § 681(e)(1) provides that if a taxpayer fails to comply with section 659, a deficiency may be assessed by mailing to the taxpayer a Notice of Additional Tax Due. The deficiency is deemed assessed on the date the notice is mailed unless within 30 days after the mailing of such notice, the taxpayer files a report of federal change, correction or disallowance or an amended return showing where such federal determination and notice of additional tax due are erroneous (Tax Law § 681[e][1]).

The Administrative Law Judge pointed out that a presumption of correctness arises with respect to a notice of additional tax due properly issued under the Tax Law, and a petitioner who fails to present any proof as to the incorrectness of the deficiency surrenders to this presumption. The Administrative Law Judge observed that petitioner has the burden of proof to demonstrate the incorrectness of the deficiency in order to rebut the presumption.

The Administrative Law Judge found that petitioner attempted to meet his burden by claiming that the IRS settled the matter of tax due for 1982, by combining it with tax years 1983 and 1984, and accepting a net amount of tax due, in addition to a waiver of interest for some period of time. The Administrative Law Judge allowed that there may have been a “mishandling or delay of petitioner’s IRS settlement.” However, the Administrative Law Judge concluded that the evidence did not support that a settlement of three tax years occurred that should guide the Division to a conclusion that the notice of additional tax due is erroneous.

The Administrative Law Judge stated that the Division of Tax Appeals only has jurisdiction to address tax year 1982 and even if petitioner demonstrated that the IRS settled tax years 1982 through 1984 with regard to the tax shelter adjustments, the Division is not bound to settle the case in the same manner. Further, the Administrative Law Judge noted that there is no jurisdiction to net an adjustment of 1982 with tax years that are not the subject of this proceeding.

The Administrative Law Judge rejected petitioner’s claim that his representative filed a report of federal changes (Form IT-115) in 1987 when the IRS settled the matter for the three tax years. The Administrative Law Judge found that this assertion was contradicted by the communication recorded in the Division’s records where petitioner’s representative indicated on

April 17, 1997 that petitioner had not reported the federal changes and had no intention of doing so until the dispute with the IRS was settled. The Administrative Law Judge found no evidence in the record of any notification to the Division by petitioner at any time before he was contacted by the Division in March 1997, long after the alleged settlement with the IRS in 1987. Further, the Administrative Law Judge noted that the Division was unable to locate Form IT-115, or any such report of the federal changes, after a diligent search nor could a canceled check for the net amount petitioner claims is due to the Division (\$54.00) be located by petitioner.

As a result, the Administrative Law Judge concluded that petitioner failed to present sufficient evidence to meet his burden of proof to show that the federal audit changes upon which the Division based the Notice of Additional Tax Due were erroneous.

ARGUMENTS ON EXCEPTION

Petitioner asserts that the IRS permitted him to settle 1982 with 1983 and 1984 with respect to the tax liability arising from the partnership investment and maintains that the Division should be guided by how the IRS handled this matter. Petitioner maintains that if the Division netted the amendments for 1982, 1983 and 1984 with regard to the partnership investment, the net tax due would be \$54.00.

The Division argues that pursuant to the federal/state information exchange program, the Division was notified by the IRS of federal audit changes to petitioner's income for tax year 1982. The Division asserts that petitioner was required to report such changes to New York State pursuant to Tax Law § 659, which petitioner failed to do. It is the Division's position that petitioner failed to establish by clear and convincing evidence that the Notice of Additional Tax Due is improper or erroneous and, thus, his petition should be denied. Further, the Division

maintains that petitioner has failed to present evidence that the IRS actually netted tax years 1982, 1983 and 1984 in the alleged 1987 settlement. The Division argues that even if the IRS did net those three tax years together in a settlement, it would be irrelevant for purposes of petitioner's New York State tax for 1982. The Division maintains that the Division of Tax Appeals has no jurisdiction to net an adjustment of the tax year at issue with tax years not at issue.

OPINION

Tax Law § 659 provides that where a taxpayer's federal taxable income is changed or corrected by the Internal Revenue Service, the taxpayer must report such change or correction to the Division of Taxation within 90 days after the final determination of such change or correction and either concede the accuracy of the federal change or state the taxpayer's basis for asserting that the change or correction is erroneous. If the federal change or correction is not reported within the 90-day period, the Division is authorized by Tax Law § 681(e) to issue a notice of tax due. If a taxpayer fails to report the federal change or correction as required, such a notice may be issued at any time (*see*, Tax Law § 683[c][1][C]). The issuance of such a notice gives rise to a right to a hearing where the correctness of the notice may be challenged (*see*, *Matter of Jaffe*, Tax Appeals Tribunal, September 21, 1995).

In this case, petitioner did not file a report of the federal changes with the Division of Taxation within 90 days as he was required to do. Petitioner does not argue with the amount of the adjustment made to his federal income for 1982. Rather, he insists that such change should be "netted" with federal adjustments to his income for 1983 and 1984, thus producing, for New York State tax purposes, a net increase in his 1982 tax of \$54.00.

In the first instance, there is no evidence in the record that there was a federal change made for any year other than 1982. The failure of petitioner to timely report the 1982 change is what prompted the Notice of Additional Tax Due to be issued to petitioner and it is the only issue before us in this proceeding. In effect, petitioner asks to apply the doctrine of equitable recoupment, arguing that he is entitled to apply an overpayment of tax made in 1983 and 1984 as an offset to a tax deficiency for an underpayment in 1982. This doctrine permits recoupment of an overpayment of taxes as an offset to a tax deficiency notwithstanding the fact that an independent demand for recovery of an overpayment may be barred by the statute of limitations (*see, Bull v. United States*, 295 US 247, 79 L Ed 1421).

However, the doctrine of equitable recoupment does not apply in this case. In *Matter of Turbodyne Corp.* (Tax Appeals Tribunal, July 3, 1996, *confirmed Matter of Turbodyne Corp. v. Tax Appeals*, 245 AD2d 976, 667 NYS2d 105, *lv denied* 91 NY2d 812, 671 NYS2d 715), we set forth criteria for the application of the doctrine of equitable recoupment. In that case, we stated that:

"[t]he doctrine of equitable recoupment allows a taxpayer against whom a deficiency is asserted to offset against that deficiency overpayments which are time barred for claiming a refund and (1) involve the same type of tax as the deficiency; (2) were paid during the period that comprises the deficiency; and (3) involve the same transaction as is the subject of the deficiency. . . ."

While credit for overpayment may be recouped against taxes for the same period on the same transactions under audit (*see, National Cash Register Co. v. Joseph*, 299 NY 200), overpayment of taxes in a previous year which is barred by the statute of limitations may not be recouped against taxes due for a different year on different transactions not under audit (*see, Matter of Mobil Oil Corp. v. State Tax Commn.*, 62 AD2d 668, 406 NYS2d 365). In short, the

doctrine of equitable recoupment cannot be applied on this record inasmuch as any overpayments for 1983 and 1984 were not made during the period that comprises the 1982 deficiency. Further, we are unable to grant any relief on such grounds in an income tax case because Tax Law § 689(g) specifically precludes us from determining that an overpayment was made for a year not otherwise in issue (*see, Matter of Hemmers*, Tax Appeals Tribunal, March 1, 1990), thus eliminating the application of the doctrine of equitable recoupment.

As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Harry Corin is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Harry Corin is denied; and
4. The Notice of Additional Tax Due dated November 16, 1998 is sustained.

DATED: Troy, New York
November 26, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner