

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ESTATE OF ANDREA DUNHAM BURT :

DECISION
DTA NO. 818708

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, 1979 and 1980. :

Petitioner¹ Estate of Andrea Dunham Burt, c/o Edward Gasthalter, P.C., 445 Park Avenue, 15th Floor, New York, New York 10022, filed an exception to the determination of the Administrative Law Judge issued on May 8, 2003. Petitioner appeared by Edward Gasthalter, P.C. The Division of Taxation appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner did not file a brief in support of its exception. The Division of Taxation filed a letter in opposition to the exception. Petitioner filed a letter in reply. Petitioner's request for oral argument was denied.

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

¹The petition in this matter was filed by Andrea Dunham Burt who is now deceased. Consequently, for purposes of this decision, the term "petitioner" refers to the estate of Andrea Dunham Burt.

ISSUE

Whether additional taxes asserted due by the Division of Taxation as the result of the disallowance of certain losses, generated by investment tax shelters under investigation by the Internal Revenue Service, should be abated on the basis of innocent spouse relief granted by the Internal Revenue Service.

FINDINGS OF FACT

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

Approximately 20 years ago, on April 8, 1983, the Division of Taxation (“Division”) issued a Notice of Deficiency asserting additional New York State and City income tax due in the amount of \$48,282.00² plus interest against Andrea Dunham Burt (“Ms. Dunham Burt”) and her husband, Michael Burt, for the years 1979 and 1980. Just over a month later, on May 25, 1983, the Division issued two additional notices of deficiency against Ms. Dunham Burt and her husband. One asserted additional New York State and City income tax due in the amount of \$3,601.00 plus interest for the year 1977, and the other asserted additional New York State and City income tax due in the amount of \$11,530.00 plus interest for the year 1978. Penalties were not asserted due for any of the years at issue.

Ms. Dunham Burt and her husband late filed their 1977 and 1978 New York State and City personal income tax returns on October 8, 1980. On their 1977 return, filed under the status “married filing joint return,” they reported New York taxable income of “none” and claimed a

² The copies of the notices of deficiency in the record are extremely light and the amounts (especially cents) noted therein are not easily deciphered. However, in her affirmation dated November 29, 2002, attorney Neri set forth the dollar amounts of the deficiencies, and since they have not been challenged by the timely filing of opposing papers, they have been accepted.

refund in the amount of \$11,755.73 representing the total amount of State and City taxes withheld and estimated taxes paid as follows:

Prepayments	Amount
State tax withheld	\$ 2,790.00
State estimated tax paid	7,005.73
City tax withheld	1,260.00
City estimated tax paid	700.00
Total	\$11,755.73

On their 1978 return, filed under the status “married filing separately on one return,” they reported New York taxable income for Mr. Burt of \$6,016.00 and for Ms. Dunham Burt of \$33,068.00 and calculated State and City income taxes for 1978 of \$4,646.24 consisting of \$304.12 on Mr. Burt’s taxable income and of \$4,342.12 on Ms. Dunham Burt’s taxable income. They claimed a refund in the amount of \$9,909.49 after subtracting their calculation of tax due for 1978 of \$4,646.24 from \$14,555.73, which represented the total amount of State and City taxes withheld and estimated tax paid as follows:

Prepayments	Amount
State tax withheld	\$ 2,080.00
State estimated tax paid	11,755.73
City tax withheld	720.00
Total	\$14,555.73

Ms. Dunham Burt and her husband timely filed their 1979 and 1980 New York State and City personal income tax returns pursuant to extensions to file (until 10/15/80 for the 1979 return and

until 10/15/81 for the 1980 return) duly obtained by the taxpayers. On their 1979 return, filed under the status “married filing joint return,” they reported New York taxable income of \$3,402.00 and calculated State and City income taxes for 1979 of \$105.10. They claimed a refund in the amount of \$10,209.88 after subtracting their calculation of tax due for 1979 of \$105.31 from \$10,315.19, which represented the total amount of State and City taxes withheld and estimated tax paid as follows:

Prepayments	Amount
State tax withheld	\$ 405.50
State estimated tax paid	9,909.49
City tax withheld	.20
Total	\$10,315.19

On their 1980 return, filed under the status “married filing joint return,” they reported New York taxable income of “none” and claimed a refund in the amount of \$10,809.88 representing the total amount of State tax withheld and estimated tax paid as follows:

Prepayments	Amount
State tax withheld	600.00
State estimated tax paid	10,209.88
Total	\$10,809.88

Most of the income reported on the tax returns for the years at issue was Ms. Dunham Burt’s income and not her husband’s. She had the following wages, reported on W-2 forms for

each of the years at issue, from D & M Research Corp., located at W 61 Glen Ave., Paramus, New Jersey³:

Year	Dunham Burt's wages from D & M Research Corp.
1977	\$62,000.00
1978	42,000.00
1979	51,750.00
1980	55,000.00

The tax returns include only two W-2 forms for Mr. Burt as follows:

Year	Employer	Amount
1979	Saint Luke's Lutheran Church	\$ 20.00
1980	City Center of Music & Drama, Inc.	\$1,753.28

The 1978 tax return also details what Mr. Burt categorized as his "business income" from the following "fees"⁴ he received:

Source of Income	Amount
Dunham & Marcus ⁵	\$10,135.00
Eastern Opera	1,305.00
Brockton Symphony	200.00
Handel & Hayden Society, Boston	500.00

³ This Paramus, New Jersey address for petitioner's employer corresponds to the "home address" used by Ms. Dunham Burt and her husband on their State and City income tax returns at issue. In fact, Ms. Dunham Burt's home address during the period at issue was 530 Park Avenue, New York, New York.

⁴ It appears that Mr. Burt received income as a musician.

⁵ This item of income seems unrelated to Mr. Burt's musical performances.

Lake George Opera Festival	850.00
Long Island Concert Society	250.00
Goldovsky Opera Theater	1,000.00
Trinity Church Manhattan	120.00
Seton Hall University, New Jersey	100.00
New York Grand Opera	200.00
New Mexico Symphony	500.00

For each of the years at issue, Ms. Dunham Burt included on her tax returns substantial investment losses. All of these losses were generated through brokerage or trading accounts which she owned and maintained although Mr. Burt might have directed or effectuated the actual transactions. In correspondence from Vincent Tese, a New York attorney, to Samuel Bloom⁶ at the Paramus, New Jersey address noted above, the following investment losses⁷ in Ms. Dunham Burt's name are detailed:

Type of loss	Brokerage or trading firm ⁸	Amount of loss
1977		
Ordinary loss	Pershing	(\$105,470.00)
Short term capital loss	Competex	(99,180.00)
Short term capital loss	Competex	(3,116.00)
1978		
Ordinary loss	Pershing	(117,862.00)

⁶ Mr. Bloom was petitioner's former accountant.

⁷ Gains included in this correspondence have not been noted in the chart below.

⁸ These firms appear to trade in silver futures and Treasury Bill futures.

1979		
Ordinary loss	Arbitrage Management	(138,164.00)
Short term loss	Competex S.A.	(255,874.73)
1980		
Long term capital loss	Competex S.A.	(143,430.64)
Ordinary loss	Arbitrage Management	(342,925.00)
Short term capital loss	Competex S.A.	(724,956.48)

As noted above, the notices of deficiency were issued approximately 20 years ago, and an undated petition challenging the notices was duly filed. Soon thereafter, on February 17, 1984, a conference in the former Tax Appeals Bureau was held in this matter. The conferee placed the matter in a suspended file to await the final determination from the Internal Revenue Service (“IRS”) with respect to the verification and explanation of the losses which generated the deficiencies at issue. In turn, the IRS issued a deficiency notice dated February 10, 1986 against Ms. Dunham Burt and her husband for the years at issue. By a petition dated May 7, 1986⁹ filed with the United States Tax Court, Ms. Dunham Burt sought to challenge the Federal notice which had also disallowed the investment losses detailed above. Approximately four years later on September 17, 1990, a conference was scheduled by the Bureau of Conciliation and Mediation Services (“BCMS”), but Ms. Dunham Burt failed to appear and a default order was issued. At her request, the default order was vacated but she failed to appear at the next scheduled conference. Further, during the period from 1994 through 2000, this matter was held

⁹ Eight years later in 1994, Ms. Dunham Burt amended her petition in the United States Tax Court by adding a claim for innocent spouse relief.

in abeyance at Ms. Dunham Burt's request. Yet, the Division monitored the delay by requesting frequent updates from Ms. Dunham Burt concerning the status of the Federal litigation.

In January of 2000, Ms. Dunham Burt entered into a Stipulation of Settled Issues with the IRS whereby it was agreed that under the innocent spouse provisions of Internal Revenue Code (IRC) § 6015, she was not liable for the deficiencies in income tax for the years 1977 through 1981.¹⁰ Subsequent to the settlement of her Federal tax case, the Division scheduled a BCMS conference on October 24, 2000, and by a conciliation order dated June 8, 2001, the notices of deficiency were sustained. By a petition dated August 27, 2001, Ms. Dunham Burt contended that the Division is barred from enforcing the notices at issue based on the innocent spouse relief granted by the IRS and that the Division's delay in assessing and collecting the taxes due constituted laches and a violation of the Statute of Limitations.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that pursuant to section 3000.9(b)(1) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et. seq.) a motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Relying on applicable case law, the Administrative Law Judge stated that as petitioner did not timely respond to the Division's motion, petitioner was deemed to have conceded that no question of fact exists which would require a hearing to resolve.

¹⁰ The year 1981 is not at issue herein although it was a year at issue in the Federal proceeding.

The Administrative Law Judge observed that the innocent spouse provisions of IRC § 6015 vary from the innocent spouse provisions of Tax Law former § 651(b)(5). As a result, the Administrative Law Judge concluded that even though petitioner was not held liable for the deficiencies in income tax for the years 1977 through 1981 under the innocent spouse provisions of IRC § 6015, the Division was not bound by that determination.

The Administrative Law Judge noted the specific provisions of Tax Law former § 651(b)(5)(i) for the years at issue and concluded that petitioner was not eligible for innocent spouse treatment. Specifically, the Administrative Law Judge found that for the year 1978, since Ms. Dunham Burt filed separately on one return with her husband, she did not file a joint return, as required for innocent spouse protection. The Administrative Law Judge noted that Ms. Dunham Burt owned the disallowed tax shelter investments and it was a veritable impossibility to confer innocent spouse status under the applicable New York law on her for the remaining years at issue. The Administrative Law Judge found that it could not be concluded that Ms. Dunham Burt did not benefit directly or indirectly from the investment losses when she owned such investments. Additionally, the Administrative Law Judge stated that petitioner would have a difficult time establishing that Ms. Dunham Burt neither knew nor should have known of the understated income as she was employed at the same address as her accountant, to whom notice and information regarding her investment losses were sent.

The Administrative Law Judge also rejected petitioner's position that the Division was barred by laches from continuing to assert any liability against it because any delay in resolving the petition at hand was caused primarily by petitioner's request to await resolution of the related Federal matter.

Finally, the Administrative Law Judge rejected petitioner's contention that the statute of limitations bars the assessments at issue. The Administrative Law Judge noted that the notices of deficiency were issued in the spring of 1983, within the period of limitations based upon the filing dates of the tax returns at issue.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge erred in granting the Division's motion for summary determination. Petitioner believes that its untimely response to the Division's motion should have been considered by the Administrative Law Judge and should be considered a part of the record to be reviewed on exception. Petitioner asserts that Ms. Dunham Burt was an "innocent spouse" and that the Division's failure to act on this matter with due diligence to collect the claimed deficiency should bar the Division from now seeking to collect the assessments at issue.

In opposition, the Division argues that the Administrative Law Judge correctly granted the Division's motion for summary determination in its favor. The Division also objected to petitioner's submission of documents on exception after the record was closed.

OPINION

We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (*see, Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). We agree with the conclusion of the Administrative Law Judge that petitioner did not timely respond to the Division's motion for summary determination. As a

result, we reject petitioner's attempts on exception to assert as facts matters which were not made part of the record.

By failing to timely respond to the Division's motion, petitioner is deemed to have conceded that the facts as presented in the affidavit submitted by the Division are correct (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667; *Whelan by Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170). However, in determining a motion for summary determination the evidence must be viewed in a manner most favorable to the party opposing the motion (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177; *see also, Weiss v. Garfield*, 21 AD2d 156, 249 NYS2d 458).

After reviewing the record in its entirety, we find that petitioner has offered no evidence below and no argument on exception which demonstrates that the Administrative Law Judge's determination to grant the Division's motion for summary determination in its favor is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Estate of Andrea Dunham Burt is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of the Estate of Andrea Dunham Burt is denied; and

4. The Notice of Deficiency dated April 8, 1983 and the two notices of deficiency dated May 25, 1983 are sustained.

DATED: Troy, New York
January 8, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner