

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
M. HEIDI OTTO	:	DECISION
	:	DTA NO. 818778
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1989 through 1998.	:	

Petitioner M. Heidi Otto, 329 North Tower Hill Road, Millbrook, New York 12545, filed an exception to the determination of the Administrative Law Judge issued on November 20, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUE

Whether petitioner has established any errors warranting reduction or cancellation of the tax, penalties or interest asserted as due by the Division of Taxation for the years in question.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact “8” which has been modified and findings of fact “2” through “7” and “14” through “18” which have been deleted. We have also made an additional finding of fact. The Administrative

Law Judge's findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

Petitioner, M. Heidi Otto, did not file New York State personal income tax returns in a timely manner for any of the years spanning 1989 through 1998. In 1998, the Division of Taxation ("Division") commenced an audit of Ms. Otto for such years. By letters dated September 29, 1998 and December 12, 1998, respectively, the Division requested of Ms. Otto copies of her tax returns and canceled checks showing payment of income taxes for the ten years in question. Petitioner did not respond to either of these letters. In addition, the Division sought but was not able to obtain information from the Internal Revenue Service ("IRS") regarding Ms. Otto's income, since she had not filed income tax returns with the IRS for such years.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

As the result of an audit, the Division calculated the following estimated income amounts for each of the years in issue:¹

Year	Base Employment Income	Interest and Dividend Income	Rental Income	Other Income	Income from Sale of Villas	Total Estimated Income
1989	589,992.00	4,800.00	75,308.00	-----	-----	670,100.00
1990	589,992.00	4,800.00	75,308.00	-----	-----	670,100.00
1991	589,992.00	4,800.00	75,308.00	-----	-----	670,100.00
1992	589,992.00	4,800.00	75,308.00	-----	400,000.00	1,070,100.00
1993	648,991.20	5,280.00	82,838.80	-----	400,000.00	1,137,110.10
1994	713,890.32	5,808.00	91,122.68	-----	400,000.00	1,210,821.00
1995	785,279.35	6,388.80	100,234.95	-----	400,000.00	1,291,903.76

¹This fact has been modified to properly reflect the record.

1996	399,999.96	3,446.52	-----	105,884.28	400,000.00	909,330.76
1997	439,999.96	4,170.29	-----	116,472.21	-----	560,263.84
1998	483,999.95	4,170.29	-----	128,119.98	-----	616,290.22

On April 18, 2000, the Division issued to petitioner a Statement of Personal Income Tax Audit Changes showing New York State and New York City personal income tax deficiencies for each of the years 1989 through 1998 in the following amounts:

YEAR	NEW YORK STATE TAX	NEW YORK CITY TAX
1989	51,939.13	22,397.40
1990	51,939.13	25,742.31
1991	52,297.88	29,361.86
1992	83,797.88	47,201.86
1993	89,074.91	50,190.51
1994	94,879.65	53,478.02
1995	97,602.70	57,099.52
1996	64,262.57	40,044.11
1997	37,864.32	24,483.27
1998	41,702.13	26,982.04

The Statement of Audit Changes also reflected the imposition of interest and penalties with respect to each of the years in issue, and was accompanied by a letter explaining that the income upon which the tax was calculated had been estimated based on information supplied by third parties under subpoena. The letter also advised that petitioner had until May 16, 2000 to submit records to the Division for review. Petitioner did not respond to this statement or accompanying letter, or supply any records for review.

On July 17, 2000, the Division issued to petitioner a Notice of Deficiency asserting personal income tax due for the years 1989 through 1998 in the aggregate amount of \$1,042,341.00, plus interest, plus penalties pursuant to Tax Law § 685(a)(1)(A); (b), (i). This notice was based on the calculations underlying the Statement of Audit Changes described above.

Petitioner challenged the Notice of Deficiency by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). This request, dated September 28, 2000 was accompanied by New York State personal income tax returns for petitioner for the years 1989 through 1998. The returns submitted with petitioner's request for conference reported a loss (i.e., negative income) for each of the years in issue.

Petitioner opted to have the conciliation conference, scheduled for July 27, 2001, handled via correspondence rather than in person. As agreed to by the conciliation conferee, the auditor and petitioner (and confirmed in a letter dated June 25, 2001), the auditor agreed to meet with petitioner at petitioner's Park Brook Farms premises for three days, spanning July 31, 2001 through August 2, 2001, to review documents. The letter listed certain relevant documents which petitioner was to provide to the auditor in support of the information shown on the tax returns which had been filed at the time of her conciliation conference request.

Two Division auditors traveled to petitioner's Millbrook, New York location and spent three days attempting to review some 14 boxes of documents made available to them by petitioner. The auditors were unable to reconcile such documents to the information contained on the tax returns, noting that the documents in the boxes were in no particular order but rather were disorganized and haphazardly filed, included canceled checks and other information

apparently pertaining to both business and personal matters, included years other than those in issue, and in some instances had suffered water damage. Ultimately, the auditors made no changes to the Notice of Deficiency as issued. In turn, by a Conciliation Order dated September 7, 2001, petitioner's request was denied and the Notice of Deficiency was sustained.

We find the following additional finding of fact.

Petitioner filed a petition for a hearing with the Division of Tax Appeals on October 19, 2001. A hearing was scheduled and held on February 27, 2003. At the hearing, petitioner appeared and testified that she had filed a petition in bankruptcy under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York on July 25, 2002. A copy of her petition in bankruptcy was accepted into evidence. Petitioner also testified that despite the fact that her bankruptcy proceeding was still pending, she wanted to proceed with the hearing.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge concluded that petitioner failed to provide such evidence as would support any adjustments or reductions to the Notice of Deficiency, save for that conceded by the Division with regard to the gain on the sale of the villas in Acapulco, Mexico and, thus, the notice must be sustained.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge's determination was incorrect.

OPINION

Section 362(a) of the Bankruptcy Code (11 USC 362) provides that in the case of voluntary, joint and involuntary bankruptcy proceedings, the filing of a bankruptcy petition creates an automatic stay, applicable to all entities, of:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title

Subsection (b) of section 362 provides various exceptions to the rule found in subsection

(a). However, none of the exceptions would apply to the instant tax appeals proceeding.

It appears from the testimony offered at the hearing that petitioner and the Division were under the impression that the automatic stay could be waived by the agreement of the parties. This was an incorrect assumption. The automatic stay created by section 362 becomes effective immediately upon the filing of the petition in bankruptcy (*Matter of Florida Dairy*, 22 Bankr 197). Judicial proceedings taken in violation of the automatic stay are void (*Matter of Stringer*, 847 F2d 549). Therefore, the determination issued in this matter is a nullity.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter be remanded to the Administrative Law Judge for a hearing after the conclusion of the bankruptcy proceeding or after the automatic stay is lifted by Order of the Bankruptcy Court, whichever may occur first.

DATED: Troy, New York
September 2, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner