

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>TERENCE G. HICKEY</b>	:	DECISION
	:	DTA NO. 818873
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1994, 1995 and 1996.	:	

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Petitioner Terence G. Hickey, 12 Thatch Pond Road, Smithtown, New York 11787, filed an exception to the determination of the Administrative Law Judge issued on September 18, 2003. Petitioner appeared by Bernard S. Mark, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. 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.

***ISSUES***

I. Whether the Division of Taxation properly determined petitioner's tax liability for the years 1994, 1995 and 1996.

II. Whether reasonable cause exists to abate the penalties assessed.

***FINDINGS OF FACT***

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

During the audit of another taxpayer's filed tax returns that bore Terence Hickey's signature as preparer, the Division of Taxation (the "Division") discovered that it had no record of Terence and Amy Hickey filing tax returns for the years 1994, 1995 and 1996. As a result, the Division assigned Jon Obert to conduct an income tax audit of Terence and Amy Hickey.

On September 11, 1998, Mr. Obert corresponded with petitioner, Terence Hickey, and his former spouse Amy Hickey<sup>1</sup> advising them that a search of the Division's files failed to disclose any New York State income tax returns filed under their names and address for the years 1994 through 1996. The letter requested copies of the New York State income tax returns for those years, if same were filed, and other pertinent information. It also requested copies of the Federal Form 1040, all schedules and forms W-2 for the years 1994 through 1996, if New York State returns for those years were not filed.

When petitioner failed to respond, the auditor sent petitioner a reminder letter dated October 5, 1998. That letter sought petitioner's cooperation in submitting the information previously requested in the September 11, 1998 letter so that "the proper direction of the audit" for the years 1994 through 1996 could be determined. The auditor enclosed a copy of the September 11, 1998 letter.

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<sup>1</sup> This letter, as well as numerous other documents issued by the Division was addressed to Terence and Amy Hickey. Terence Hickey and Amy Hickey were divorced in March 1997 prior to the issuance of the Notice of Deficiency at issue in this matter. The former Mrs. Hickey is not a party to this proceeding.

On or about October 5, 1998, the audit was reassigned to Kamalnayan Shah. Because petitioner had failed to respond to either the September 11, 1998 letter or the October 5, 1998 letter, Mr. Shah sent a “Second Reminder” letter dated October 28, 1998, in which he explained that petitioner’s case had been reassigned to him. The letter further advised petitioner that the information for the years 1994, 1995 and 1996 previously requested in the letters of September 11, 1998 and October 5, 1998 (copies of which were enclosed) had not yet been received. Petitioner’s response was requested by November 15, 1998.

On November 18, 1998, the auditor sent a “Third and Final Reminder” letter wherein he again requested the information on the filing of the New York State income tax returns for the years 1994 through 1996.

In correspondence<sup>2</sup> dated November 2, 1998 and received by the auditor on November 27, 1998, petitioner acknowledged receipt of the auditor’s letter requesting the tax returns for the years 1994 through 1996. He also acknowledged that he had been unable to complete these returns because his wife at the time, Amy Hickey, had moved to California after they had filed a separation agreement, which had ultimately resulted in their divorce in the fall of 1996.

Petitioner further stated that, due to the amount of time that had elapsed, he needed some time to gather the financial information and complete the tax returns for the years 1994 through 1996.

The auditor’s Tax Field Audit Record (“field audit record”) indicates that in a telephone conversation initiated by the auditor on December 9, 1998, petitioner advised the auditor that he was “busy with the yearend [sic] work” and he would “file all returns by middle of January

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<sup>2</sup> Mr. Hickey’s letter was written on stationery bearing the letterhead of “ALLMERICA FINANCIAL, Terence G. Hickey, MBA, MS, Representative.” Allmerica’s office address, telephone and fax numbers were printed at the bottom of the page.

1999,” but to “remind him by 1/1/99.” The field audit record indicates that on January 25, 1999, petitioner returned the auditor’s call of the same date and advised the auditor that he was “going to prepare all 3 years returns” that week and would forward them to the auditor in the “first week of February 1999.”

The Division searched its databases including Federal income tax system records. It did not find any Federal return information pertaining to petitioner and Amy Hickey for the years 1994, 1995 and 1996.

After a search of the Division’s files indicated that petitioner had failed to file his 1997 and 1998 New York State income tax returns, the audit period was expanded to cover the years 1994 through 1998. On March 29, 1999, the auditor sent “THE FINAL REMINDER” letter. That letter requested information on the filing of his New York State income tax returns for the years 1994 through 1996. The letter also advised petitioner that the audit period had been expanded to include the years 1994 through 1998, because the Division had not found any record of his New York State income tax returns for the years 1997 and 1998. It also requested information on whether petitioner had filed his income tax returns for 1997 and 1998. Petitioner’s response was requested by April 30, 1998.

Preparer information received from the Internal Revenue Service (“IRS”) under the Federal/State Agreement indicated that petitioner was the listed preparer of Federal income tax returns for: 24 individuals in the year 1996; 34 individuals in the year 1997; and 30 individuals in the year 1998.

Petitioner did not respond to the March 29, 1999 letter. The field audit record indicates that during a telephone conversation initiated by the auditor on August 27, 1999, petitioner

informed the auditor that he could not get all the information but he would expedite filing; however, he needed more time. Petitioner was asked to file within 30 days. The field audit record further indicates that, as a result of petitioner's continued failure to file his income tax returns, the auditor called petitioner's office and left messages on November 12, 1999 and January 10, 2000. Petitioner failed to return either telephone call.

Given petitioner's failure to respond, the auditor performed an indirect audit of petitioner's income for the years at issue. Based upon wage reporting information received from the IRS for the year 1997, the auditor determined that petitioner had wage income of \$122,561.00 from his employer, First Allmerica Financial. Using the 1997 wage information, the auditor estimated petitioner's yearly total income to be \$110,000.00 for the years 1994, 1995 and 1996. He also determined that petitioner's filing status was married filing joint return for each of the years at issue. The field audit record indicates that the audit for the years 1997 and 1998 was reassigned to another auditor because petitioner continued to be a nonfiler and his filing status had changed to single.

On January 11, 2000, the Division issued three statements of personal income tax audit changes to petitioner, one for each of the years in question. The Statement of Personal Income Tax Audit Changes for 1994 stated that New York State personal income tax was due in the amount of \$7,340.38, plus interest in the amount of \$3,199.73 and penalty in the amount of \$4,532.01, for a balance due of \$15,072.12. The statement reflected petitioner's New York State adjusted gross income as \$110,000.00 and thereafter reduced the same by \$9,500.00 (the New York married filing joint return standard deduction), to arrive at New York taxable income of \$100,500.00 and a New York State tax liability of \$7,340.38. The Statement of Personal Income

Tax Audit Changes for 1995 stated that New York State personal income tax was due in the amount of \$7,167.37, plus interest in the amount of \$2,321.96 and penalty in the amount of \$4,027.92, for a balance due of \$13,517.25. The statement reflected petitioner's New York State adjusted gross income as \$110,000.00 and thereafter reduced same by \$9,500.00 (the New York married filing joint standard deduction), to arrive at New York taxable income of \$100,500.00 and a New York State tax liability of \$7,167.37. The Statement of Personal Income Tax Audit Changes for 1996 stated that New York State personal income tax was due in the amount of \$6,539.56, plus interest in the amount of \$1,469.63 and penalty in the amount of \$3,350.63, for a balance due of \$11,359.82. The statement reflected petitioner's New York State adjusted gross income as \$110,000.00 and reduced same by \$12,350.00 (the New York married filing joint standard deduction), to arrive at New York taxable income of \$97,650.00 and a New York State tax liability of \$6,539.56.

The statements of personal income tax audit changes for 1994, 1995, and 1996 advised petitioner that the Division had not received his New York State tax returns for the years 1994, 1995, and 1996 and any additional information requested such as copies of his Federal income tax returns for the same years, even though petitioner's letter of November 2, 1998 indicated that, inasmuch as he had not filed his 1994 through 1996 New York State income tax returns, he was going to file same with the Division once he gathered his financial information. The Division further advised petitioner that, in the absence of his "W-2, bank statements, credit card statements etc.," it had estimated his New York State income for the years 1994, 1995, and 1996. For the years in question, in addition to the tax asserted to be due, the Division imposed penalties

pursuant to Tax Law § 685(a)(1)(a) for failure to file the return; Tax Law § 685(b) for negligence and Tax Law § 685(p) for substantial understatement of liability.

On February 14, 2000, petitioner corresponded with the Division. In that letter, petitioner informed the auditor that he disagreed with the findings in the statements of personal income tax audit changes and would be completing his returns for the years 1994 through 1996 and forwarding same to the auditor “within four - six weeks.” He also indicated that he had moved in June 1999 to 12 Thatch Pond Road in Smithtown, New York. The field audit record indicates that in a telephone conversation on February 15, 2000, petitioner advised the auditor that he would put together his New York State returns and call the auditor in a month’s time.

On March 24, 2000, the Division issued a Notice of Deficiency to petitioner asserting that the following amounts were due:

	<b>1994</b>	<b>1995</b>	<b>1996</b>
<b>TAX</b>	\$ 7,340.38	\$ 7,167.37	\$ 6,539.56
<b>INTEREST</b>	\$ 3,305.36	\$ 2,417.06	\$ 1,549.89
<b>PENALTIES</b>	\$ 4,814.06	\$ 4,075.47	\$ 3,390.76
<b>TOTAL</b>	\$15,459.80	\$13,659.90	\$11,480.21

The computation section of the Notice of Deficiency explained that the “tax is computed as a result of the recent audit of your records. This tax is being assessed in accordance with the Statement of Proposed Audit Adjustments previously sent to you.”

Petitioner challenged the Notice of Deficiency by requesting a conciliation conference with the Division’s Bureau of Conciliation and Mediation Services (“BCMS”). A conciliation conference was held on December 7, 2000 and, by a subsequent Conciliation Order (CMS No. 180898) dated October 12, 2001, the Notice of Deficiency was sustained in full.

Petitioner continued his challenge by filing a petition with the Division of Tax Appeals. In that petition, petitioner asserts that the Division's estimation of his income for the years 1994 and 1995 is incorrect because he changed careers and became an insurance salesman in 1994. He goes on to state that he is willing to open all his books and records to the Division of Tax Appeals to prove the true amount of taxable income for the years 1994 through 1996.

As indicated by a certification of nonfiling dated August 27, 2002 and signed by Karen McCarthy-Townsend, Assistant to the Commissioner of Regulatory Affairs, the Division searched its personal income tax files for petitioner and Amy Hickey's 1994, 1995 and 1996 personal income tax returns and did not locate such returns.

Petitioner possesses an MBA and an MS degree.<sup>3</sup> From October of 1989 through October of 1992, petitioner was employed by Citibank. On or about October 1992, as part of its downsizing, Citibank offered petitioner a buyout package. Petitioner accepted the package consisting of five months salary.

From 1991 up to the present, petitioner has supplemented his income by working as a part-time paid tax preparer and as a financial planner. While the Division was conducting its audit of petitioner, it also conducted an audit of one of his clients. Petitioner represented that client at the audit.

In March 1994, petitioner interviewed and accepted a job with State Mutual Insurance Company ("State Mutual"), now known as Allmerica Financial,<sup>4</sup> as a career agent. In August 1994, after passing his Series 6, Series 63 and life and health exams and obtaining his licenses,

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<sup>3</sup> The record is silent as to the specific subject matter in which petitioner received his Master of Science degree.

<sup>4</sup> In 1995, State Mutual changed its name to Allmerica Financial.

petitioner began working for State Mutual selling insurance and investment products. The record does not include petitioner's employment contract with State Mutual. However, it does include a copy of the Career Builder Supplemental Agreement ("supplemental agreement") that petitioner entered into with that company.<sup>5</sup> Under the terms of the supplemental agreement, State Mutual agreed to provide petitioner with an initial stipend of \$1,700.00 per month for the first three months of his contract, which amount was gradually phased out during months 4 through 12, as a training allowance. In the years 1995 and 1996, petitioner sold insurance and investment products for Allmerica Financial. His association with Allmerica Financial continues to the present day.

During 1994, Amy Hickey earned \$16,538.36 in wage income from Parr Development. Ms. Hickey received unemployment compensation in 1994 and 1995.

In 1994, petitioner and his former spouse sustained a casualty loss to their primary residence at 12 Fountain Road in Rocky Point, New York. That loss was the result of damage to the building, which required repairs to be made.

In 1995, petitioner supplemented his income by performing snow removal services. Petitioner's testimony did not include any information about the manner in which he conducted the snow removal business, such as, among other things, the services performed, the type of vehicle used, the location of the business bank account, and the expenses incurred.

In 1995, petitioner took a \$4,000.00 early distribution from his Individual Retirement Account. He also earned wages totaling \$562.05, as a telephone solicitor for Atlantic Telephone.

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<sup>5</sup> The supplemental agreement specifically references a Career Agent Agreement into which petitioner and State Mutual entered.

During the years at issue, petitioner's marriage to Amy Hickey deteriorated and ultimately ended in divorce. At some point, Amy Hickey moved to California.<sup>6</sup>

For the year 1994, petitioner submitted the following documents: a Form W-2 issued to petitioner by State Mutual reporting wages in the amount of \$8,151.73 and New York State income tax withheld in the amount of \$141.44; a Form W-2 issued to Amy Hickey by Parr Development Company, Inc. reporting wages in the amount of \$16,538.36 and New York State income tax withheld in the amount of \$571.60 and a Form 1099-G issued to A. J. Hickey reporting unemployment compensation in the amount of \$1,656.00; the proof of loss statement sent to Unigard Insurance Company for the August 12, 1994 wind and water damage to the Rocky Point property with an attached statement listing the amount of loss and damage to the building and its contents.

For the year 1995, petitioner submitted the following documents: a Form W-2 issued to petitioner by First Allmerica Financial Life ("First Allmerica") reporting wages in the amount of \$14,038.14 and New York State income tax withheld in the amount of \$496.24 and a Form W-2 issued to petitioner by Atlantic Telephone Management Inc. reporting wages in the amount of \$562.05; a Form 1099-G issued to A. J. Hickey reporting unemployment compensation in the amount of \$3,726.00 and a Form 1099-R issued to petitioner by Citibank reporting a taxable IRA distribution in the amount of \$4,000.00; a Form 1098 Mortgage Interest Statement issued by Columbia National, Inc. ("Columbia") to petitioner and Amy Hickey reporting mortgage interest received from the borrowers in the amount of \$7,364.95; points paid by borrowers in the amount of \$1,300.00 and town taxes paid in the amount of \$2,387.14.

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<sup>6</sup> The record is silent as to the exact date of Ms. Hickey's move to California.

For the year 1996, petitioner submitted the following documents: a Form W-2 issued to petitioner by First Allmerica reporting wages in the amount of \$23,999.93 and New York State income tax withheld in the amount of \$1,506.90; a Form 1099-Misc issued to petitioner by Allmerica Investments reporting nonemployee compensation in the amount of \$2,275.01 and a Form 1099-Misc issued to petitioner by First Allmerica reporting nonemployee compensation in the amount of \$24,748.12; a Form 1098 issued to petitioner and Amy Hickey by Columbia reporting mortgage interest paid by borrowers in the amount of \$9,517.29 and town taxes in the amount of \$2,387.13; and a Form 1098 issued to petitioner by Columbia reporting mortgage interest paid by the borrower in the amount of \$3,036.54 and town taxes paid in the amount of \$2,310.80.

At the conclusion of the hearing, petitioner requested and received additional time to submit the divorce decree, his business log for each year in issue, substantiation for the home improvement repairs made in 1994 and any additional documents supporting changes to the preliminary tax returns. At that time, the Division also requested and received additional time to review and respond to the documents submitted by petitioner at the hearing and petitioner's post-hearing documentary submission.

On October 17, 2002, petitioner hand delivered to the Division of Tax Appeals a box containing photocopies of numerous documents. Petitioner did not include any list, explanation or summary of the numerous documents. Nor did he include copies of his Federal income tax returns for the years in issue. On the same date, petitioner hand delivered the originals of the documents to the Office of Counsel.

On November 22, 2002, the Division submitted the affidavit of Kamalnayan Shah, the auditor assigned to conduct an income tax audit of petitioner for the years 1994 through 1996, as its response to the documentation submitted by petitioner at the hearing and on October 17, 2002. Mr. Shah performed a comprehensive review and analysis of all the documentation presented by petitioner at the hearing, as well as the original documents submitted by petitioner on October 17, 2002. He noted that bank statements and canceled checks for January 1994, June 1995, July 1995 and for the year 1996, as well as copies of petitioner's Federal 1040 returns for 1994, 1995 and 1996 were not submitted for review. Using the available bank statements, Mr. Shah prepared a schedule of the monthly deposits and withdrawals for the years 1994 and 1995. Based on his audit conclusions, Mr. Shah determined petitioner's income for the years 1994, 1995 and 1996, and recomputed the tax liability and penalties for each of the years.

For the year 1994, the auditor analyzed the deposits and withdrawals from petitioner's Citibank account and found total deposits for 11 months in the amount of \$53,977.57 and total withdrawals for 11 months in the amount of \$54,426.42. He then estimated the deposits and withdrawals for the 12-month period and arrived at total deposits of \$58,884.62 and withdrawals of \$59,374.28. Although an analysis of the canceled checks revealed credit cards and bank accounts in the Columbia and the Seaman banks, petitioner had not submitted any other bank statements or credit card statements. Because there was no substantiation for the sources of the bank deposits, the auditor used the 12-month estimate of the total bank deposits of \$58,884.62, subtracted \$15,217.02 (Amy Hickey's wages etc., income less taxes withheld) and determined petitioner's total income to be \$43,667.60. From a review of petitioner's Form W-2, the auditor determined that \$141.44 in New York State tax was withheld. On the preliminary income tax

return, petitioner claimed itemized deductions, including a casualty loss of \$9,569.00, totaling \$15,261.00. However, the auditor disallowed real estate taxes (\$2,297.00) and interest paid (\$2,400.00) deductions totaling \$4,697.00 because he determined that these items were claimed in 1995. Based on petitioner's filing status of married filing separately on separate forms, the auditor disallowed itemized deductions totaling \$5,282.00, which amount equals 50% of the remaining itemized deductions.

The Division adjusted the tax liability for the year 1994 asserted to be due in the Notice of Deficiency. It issued a Statement of Personal Income Tax Audit Changes, dated November 22, 2002, to petitioner which stated that additional New York State personal income tax for the year 1994 was due in the amount of \$2,522.68, plus interest in the amount of \$1,871.25 and penalties in the amount of \$2,087.54, for a balance due of \$6,481.47. The statement reflected petitioner's corrected New York State adjusted gross income as \$43,667.60 (as determined per the November 19, 2002 audit response) and thereafter reduced same by \$5,282.00 (corrected itemized deductions after modifications), to arrive at the corrected New York State taxable income of \$38,385.60. Based on the filing status of married filing separately on separate returns, the corrected New York State tax liability was computed as \$2,664.12, less tax previously paid of \$141.44, for additional New York State tax due in the amount of \$2,522.68. In addition to the tax asserted to be due, the Division imposed penalties pursuant to Tax Law § 685(a)(1)(a) for failure to file a return; Tax Law § 685(b)(1) and (2) for negligence and Tax Law § 685(p) for substantial understatement of liability.

With respect to the year 1995, the auditor analyzed the deposits and withdrawals from petitioner's Citibank account and found total deposits for 10 months in the amount of \$79,440.00

and total withdrawals for 10 months in the amount of \$76,035.37. He then estimated the deposits and withdrawals for the 12-month period and arrived at total deposits of \$95,329.08 and withdrawals of \$91,242.44. While the Division's files revealed that petitioner was a paid tax preparer, the auditor was unable to separately estimate his business income because petitioner failed to submit his business bank statements. The auditor's analysis of the canceled checks revealed that petitioner had credit cards and accounts in the Columbia and the Seaman banks for which no statements were supplied. As no substantiation was submitted for the sources of the bank deposits, the auditor used \$95,329.08 (the estimate of the total bank deposits), subtracted \$3,726.00 (Amy Hickey's unemployment benefits), added \$18,864.00 (mortgage payments to Columbia) and then subtracted \$7,969.30 (five mortgage payments reflected in bank withdrawals) and determined the total estimated income for the year 1995 to be \$102,497.78. From a review of petitioner's 1995 W-2, the auditor determined that \$496.24 in New York State tax was withheld. On the preliminary income tax return for 1995, petitioner claimed itemized deductions, including real property taxes in the amount of \$4,735.00, totaling \$17,055.00. The auditor calculated a \$213.19 adjustment to the claimed itemized deductions and allowed corrected itemized deductions in the amount of \$16,841.81. The auditor determined petitioner's filing status to be married filing separately on separate forms for the year 1995.

The Division adjusted the tax liability for the year 1995 asserted to be due in the Notice of Deficiency. It issued a Statement of Personal Income Tax Audit Changes, dated November 22, 2002, to petitioner which stated that additional New York State personal income tax for the year 1995 was due in the amount of \$5,732.55, plus interest in the amount of \$3,469.27 and penalties in the amount of \$4,202.63. The statement reflected petitioner's corrected New York State

adjusted gross income as \$102,497.78 (as determined per the November 19, 2002 audit response) and thereafter reduced same by \$16,841.81 (corrected itemized deductions after modifications), to arrive at the corrected New York State taxable income of \$85,655.97. Based on the filing status of married filing separately on separate returns, the corrected New York State tax liability was computed as \$6,228.79, less tax previously paid of \$496.24, for additional New York State tax due in the amount of \$5,732.55. In addition to the tax asserted to be due, the Division imposed penalties pursuant to Tax Law § 685(a)(1)(A) for failure to file a return; Tax Law § 685(b)(1) and (2) for negligence and Tax Law § 685(p) for substantial understatement of liability.

Petitioner did not submit bank statements and canceled checks for the year 1996. In addition, while petitioner was a paid tax preparer in 1996, he did not submit his business bank statements and the auditor was unable to separately estimate petitioner's business income. Using the average of the sum of petitioner's 1995 income plus 1997 W-2 income ( $[\$102,497.78 + \$110,000.00] / 2$ ), the auditor determined petitioner's 1996 income to be \$106,248.89. From a review of petitioner's W-2, the auditor determined that \$1,507.00 in New York State tax was withheld. On the preliminary income tax return for 1996, petitioner claimed itemized deductions totaling \$18,652.00. The auditor calculated a \$582.88 adjustment to the claimed itemized deductions and allowed corrected itemized deductions in the amount of \$18,069.12. Petitioner's filing status for the year 1996 was determined to be single.

The Division adjusted the tax liability for the year 1996 asserted to be due in the Notice of Deficiency. It issued a Statement of Personal Income Tax Audit Changes, dated November 22, 2002, to petitioner which stated that additional New York State personal income tax for the year

1996 was due in the amount of \$4,547.22, plus interest in the amount of \$2,204.84 and penalties in the amount of \$3,362.01. The statement reflected petitioner's corrected New York State adjusted gross income as \$106,248.89 (as determined per the November 19, 2002 audit response) and thereafter reduced same by \$18,069.12 (corrected itemized deductions after modifications), to arrive at the corrected New York State taxable income of \$88,179.77. Based on the filing status of single, the corrected New York State tax liability was computed as \$6,054.22, less tax previously paid of \$1,507.00, for additional New York State tax due in the amount of \$4,547.22. In addition to the tax asserted to be due, the Division imposed penalties pursuant to Tax Law § 685(a)(1)(a) for failure to file a return; Tax Law § 685(b)(1) and (2) for negligence and Tax Law § 685(p) for substantial understatement of liability.

Included as part of petitioner's October 17, 2002 submission are two additional forms 1099 issued to petitioner in the year 1996. The Form 1099-Misc issued by PMG Marketing Inc. reports nonemployee compensation in the amount of \$21,168.38 and the Form 1099-Misc issued by William Penn Life Insurance reports non-employee compensation in the amount of \$1,266.67.

Petitioner requested and received permission to submit additional documentation by January 7, 2003. On that date, petitioner submitted photocopies of numerous documents.

As noted above, after analyzing the available Citibank Account bank statements, the auditor recalculated petitioner's gross income and tax liability for the years at issue. In his second post-hearing submission, petitioner supplied Citibank Account bank statements for the periods June 19, 1995 through July 18, 1995 and December 18, 1995 through January 16, 1997. A spreadsheet outlining what petitioner claimed were the actual deposits to the Citibank Account for the period January 18, 1994 through December 31, 1996 is part of the record. Petitioner

claims that the auditor included returned checks in his calculations of the deposits for the years 1994 and 1995. Review of the bank statements reveals that the auditor did in fact include returned checks in his calculations of total deposits for a number of months. Review of petitioner's spreadsheet indicates that he omitted deposits for the period November 19, 1996 through December 16, 1996 totaling \$3,380.52 and made mathematical errors in his calculations of the total deposits for the years 1994, 1995 and 1996.

Analysis of Citibank Account bank statements in the record shows the following deposits for the years 1994, 1995 and 1996.

<b>1994</b>	<b>Deposits</b>	<b>1995</b>	<b>Deposits</b>	<b>1996</b>	<b>Deposits</b>
1/1 - 1/17	missing	1/1 - 1/17	\$ 4,199.92	1/1 - 1/17	\$ 1,080.00
1/18 - 2/13	\$ 1,550.79	1/18 - 2/14	4,090.40	1/18 - 2/15	9,367.00
2/14 - 3/15	2,740.83	2/15 - 3/15	2,031.38	2/16 - 3/17	3,254.87
3/16 - 4/13	2,315.82	3/16 - 4/17	4,279.28	3/18 - 4/15	3,325.06
4/14 - 5/15	3,438.65	4/18 - 5/16	38,551.56	4/16 - 5/15	6,514.80
5/16 - 6/15	2,568.25	5/17 - 6/18	missing	5/15 - 6/17	1,123.12
6/16 - 7/17	3,831.06	6/19 - 7/18	4,973.51	6/18 - 7/16	4,026.50
7/18 - 8/15	7,003.69	7/19 - 8/16	2,207.73	7/17 - 8/15	7,358.71
8/16 - 9/15	3,677.59	8/17 - 9/18	8,272.72	8/16 - 9/17	14,871.13
9/16 - 10/17	3,890.88	9/19 - 10/17	3,900.00	9/18 - 10/16	17,530.82
10/18 - 11/15	19,299.72	10/18 - 11/15	2,120.00	10/17 - 11/18	11,810.97
11/16 - 12/14	3,064.82	11/16 - 12/17	7,323.52	11/19 - 12/16	3,380.52
12/15 - 12/31	<u>1,380.64</u>	12/18 - 12/31	<u>4,020.00</u>	12/17 - 12/31	<u>0.00</u>
<b>Total 11½ months</b>	\$54,762.74	<b>Total 11 months</b>	\$85,970.02	<b>Total 12 months</b>	\$83,643.50

A review of documents in the record reveals that, during the year 1994, petitioner was an officer/director of American Money Management, Inc. and owned 50 percent of its stock. On or about July 18, 1994, petitioner sold his stock in American Money Management, Inc. to Edward DeCorsia for \$5,000.00, payable in monthly installments of \$500.00. On or about July 18, 1994, petitioner resigned as officer/director of American Money Management, Inc. The record does not contain any other information about American Money Management, Inc. or petitioner's association with that corporation.

A review of the bank statements and canceled checks reveals a Citibank Debit Ticket dated September 28, 1995 that shows a \$2,367.20 debit to petitioner's account for a "Bank Check and to Cover Business Chking [sic] A/C." The record includes a deposit slip for another Citibank checking account dated September 28, 1995, listing a cash deposit of \$66.71. The record does not contain any other information about this account.

A number of folders of miscellaneous documents are part of the record. Included in one folder is a schedule entitled "Revenue from Income Tax Preparation." The schedule contains four columns labeled "Client Name," "Tax Year 1994," "Tax Year 1995," and "Tax Year 1996." For each of the 48 names listed on the schedule, there is a specific dollar amount reported in one or more of the tax year columns. Neither a specific date nor the method of payment, i.e., cash or check, appears next to each dollar amount. The schedule also lists total revenue for the years 1994, 1995 and 1996 in the amounts of \$2,010.00 (received from 23 clients), \$3,195.00 (received from 30 clients), and \$3,255.00 (received from 29 clients), respectively. The record includes a copy of one invoice dated June 10, 1996 issued to McGregor & Baudin Consulting, Inc. requesting \$650.00 for petitioner's preparation of the "1995 U. S. Corporation Income Tax

Return - form 1120S & related schedules.” Neither the corporation’s name nor the fee appears on the schedule. The record does not include any invoices corresponding to the names listed on the schedule. A review of other papers in the record reveals that petitioner received either cash or checks from his tax preparation clients. The record does not include the business bank statements or any other books and records for petitioner’s tax preparation business.

Papers in the record reveal that petitioner performed snow removal services for commercial and residential customers during the years 1994 and 1995. The record contains only a limited number of invoices for the year 1994. The record does not include the business bank statements or any other books and records pertaining to the snow removal business.

The record includes a large number of deposit slips for the Citibank Checking Account for the years at issue. On many of these deposit slips, petitioner listed deposits of checks or a combination of cash and checks. While the amount of each check is separately listed on the deposit slips, the identity of the maker of each check is not.

A review of the Citibank Account bank statements in the record reveals that petitioner made large cash withdrawals from his checking account on numerous occasions during the years at issue.

The record includes copies of statements of business expenses for numerous months of each year in issue. Each statement contains petitioner’s name and a list of various expenses such as postage and supplies; however, it does not identify the preparer of the statement. The record also includes a summary schedule of business expenses for numerous months of the years at issue, as well as the total business expenses for 1994, 1995 and 1996 in the amounts of \$444.33, \$2,174.87 and \$3,641.75, respectively. The amount listed on the summary schedule as the

monthly total for each of the various expenses is not identical to the total sum of each expense listed on the individual statements. No supporting source documentation was supplied for any of the business expenses.

The record includes a summary schedule of repairs made to a Ford F250 pickup truck during the years in issue. According to the summary schedule, the pickup truck required repairs during 1994, 1995 and 1996 totaling \$1,959.41, \$4,932.04 and \$1,212.16, respectively. Review of the summary schedule reveals that petitioner included a repair made in 1995 in his computation of total repairs for the year 1994. Receipts, bearing various dates throughout the years in issue, for repairs made to the pickup truck were submitted into the record. The record also includes a February 1995 receipt for the purchase of a spreader.

The April 21, 1995 mortgage settlement statement in the record indicates that \$2,296.61, representing the second half of the 1994 - 1995 real property taxes due on the Fountain Road property, was paid to the town of Brookhaven from the April 1995 refinancing of that property.

On March 24, 1997, the Honorable Ralph F. Costello signed the Divorce Judgment dissolving the marriage of Terence and Amy Hickey. A copy of the Divorce Judgment is part of the record.

As noted above, petitioner submitted a number of folders containing numerous documents. Those documents include, among other items, various receipts and assorted personal papers, the significance of which has not been explained.

Petitioner did not file his New York State personal income tax returns for the years 1994, 1995 and 1996 with the Division prior to the close of the record. The record also does not include copies of petitioner's Federal income tax returns for the years in issue.

The record in this matter closed on January 7, 2003, the date on which petitioner made his second post-hearing submission of documentation. The Division did not request additional time to review and respond to petitioner's second post-hearing submission of documentation.

On January 24, 2003, petitioner submitted a binder containing a letter brief with attachments. The attachments consisted of five exhibits, three of which (Exhibits "2," "3" and "4") contained copies of documents already in the record as well as additional documents, while the remaining two exhibits (Exhibits "1" and "5") were additional exhibits. The record in this matter closed on January 7, 2003, the deadline set for petitioner's second post-hearing submission. The following exhibits were returned to petitioner with an explanation that no evidence could be submitted after the record was closed:

- (a) Exhibit "1" - the Credit Network Credit Report dated July 30, 1996;
- (b) Exhibit "3" - a single page of four photocopied checks issued on a Mortgage Closing Account, each bearing the date of April 26, 1995;
- (c) Exhibit "4" - 2 copies (an original and a copy) of the affidavit of Valerie Barnes dated January 23, 2003;
- (d) Exhibit "5" - 2 copies (an original and a copy) of the affidavit of Amy J. Butters (formerly Hickey) dated January 20, 2003;
- (e) Exhibit "5" - copies of petitioner and Ms. Hickey's signed 1994 joint Federal and New York State income tax returns;
- (f) Exhibit "5" - copies of petitioner and Ms. Hickey's signed 1995 joint Federal and New York State income tax returns;

(g) Exhibit “5” - copies of petitioner and Ms. Hickey’s signed 1996 joint Federal and New York State income tax returns.

The above documents were not considered in arriving at this determination.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge explained the basis for her rejection of the documents submitted by petitioner after the hearing record was closed. The Administrative Law Judge then noted the statutory authority for the Division to estimate a taxpayer’s New York taxable income and the tax due thereon from any information in its possession if a taxpayer fails to file an income tax return.

Based on petitioner’s failure to file his federal and state income tax returns for 1994, 1995 and 1996 as well as his failure to respond to the Division’s requests for documentation of his income, the Administrative Law Judge concluded that the Division was authorized to estimate petitioner’s personal income tax liability “from any information in its possession” (Tax Law § 681[a]). As the Division had in its possession wage reporting information for petitioner received from the IRS for the year 1997, the Administrative Law Judge found that the Division was authorized to use this information to estimate petitioner’s personal income tax liability for the years at issue.

The Administrative Law Judge noted that where the Division properly issues a Notice of Deficiency to a taxpayer, a presumption of correctness attaches to such notice and in proceedings for review of a properly issued notice of deficiency, the burden of proof is on the taxpayer to demonstrate that the deficiency assessment is erroneous.

The Administrative Law Judge observed that while petitioner failed to submit any documentation for the years 1994, 1995 and 1996 to the Division prior to the issuance of the Notice of Deficiency at issue in this matter, petitioner began submitting documentation at the hearing. The Administrative Law Judge left the record open for petitioner to submit additional documentation, which he did on both October 17, 2002 and January 7, 2003. The Administrative Law Judge concluded that the evidence submitted by petitioner consisted of vague, general statements about his sources of income and expenses during the years in issue. The Administrative Law Judge also found that petitioner failed to explain the manner in which he maintained the books and records for his financial planning, tax preparation and snow removal businesses. The Administrative Law Judge concluded that petitioner also had failed to identify the number and location of all bank accounts that he maintained during the years in issue.

The Administrative Law Judge noted the adjustments made to petitioner's 1994 tax liability by the Division based on documentary evidence submitted at the hearing and post-hearing. The Division determined that petitioner's corrected New York State adjusted gross income for 1994 was \$43,667.60 and his corrected itemized deductions after modifications were \$5,282.00.

The Administrative Law Judge reviewed petitioner's claims for income adjustments and deductions rejected by the Division. The Administrative Law Judge determined that petitioner was entitled to a further reduction of income for 1994 of \$273.50, which was the amount of a returned insurance premium. The Administrative Law Judge rejected the remainder of petitioner's claimed adjustments to income for 1994. Additionally, the Administrative Law

Judge found that petitioner did not prove that he was entitled to any further deductions from income for 1994 other than those allowed by the Division.

The Administrative Law Judge noted the adjustments made to petitioner's 1995 tax liability by the Division based on documentary evidence submitted at the hearing and post-hearing. The Division determined that petitioner's corrected New York State adjusted gross income for 1995 was \$102,497.78 and his corrected itemized deductions after modifications were \$16,841.81.

The Administrative Law Judge reviewed petitioner's claims for income adjustments and deductions rejected by the Division. The Administrative Law Judge determined that petitioner was entitled to a further reduction of income for 1995 of (a) the \$31,914.32 that he received from the April 1995 refinancing of the Rocky Point property; (b) the \$2,030.61 in loan proceeds received from Beneficial in May 1995; (c) the \$2,335.96 hold back insurance reimbursement received in August 1995; and (d) the \$3,000.00 escrow release received in December 1995 for a total of \$39,280.89. The Administrative Law Judge rejected the remainder of petitioner's claimed adjustments to income for 1995. However, the Administrative Law Judge found that petitioner was entitled to an additional deduction in the amount of \$2,296.61 for real property taxes paid in 1995.

The Administrative Law Judge noted the adjustments made to petitioner's 1996 tax liability by the Division based on documentary evidence submitted at the hearing and post-hearing. The Division determined that petitioner's corrected New York State adjusted gross income was \$106,248.89 and his corrected itemized deductions after modifications were \$18,069.00.

The Administrative Law Judge reviewed petitioner's claims for income adjustments and deductions rejected by the Division. The Administrative Law Judge determined that petitioner was entitled to a further reduction of income for 1996 of certain funds deposited into the Citibank Account which were not income to him: (a) the \$2,224.87 insurance reimbursement in March 1996; (b) the \$700.00 cash advance from Master Card in April 1996; (c) the \$116.12 escrow overage refund in June 1996; (d) the \$5,681.92 in loan proceeds received from Beneficial in August 1996; (e) the \$2,792.49 received from refinancing the Rocky Point property in September 1996; and (f) the \$1,416.68 escrow release for the Rocky Point property in September 1996 for a total of \$12,932.08. The Administrative Law Judge rejected the remainder of petitioner's claimed adjustments to income for 1996. Additionally, the Administrative Law Judge found that petitioner did not prove that he was entitled to any further deductions from income for 1996 other than those allowed by the Division.

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the Division relied on incorrect information as the basis for its estimation of petitioner's income for the years at issue. Petitioner maintains that his testimony and evidence was sufficient to satisfy his burden of proof with respect to the derivation of his income and the validity of his claimed business expenses. Petitioner asserts that despite the Administrative Law Judge's acceptance of some of petitioner's documentation, the failure of the Administrative Law Judge to accept all of petitioner's explanations of his income and deductions was an error.

Specifically, petitioner argues that the Administrative Law Judge failed to accept that a certain 1994 bank deposit represented an insurance reimbursement, the Administrative Law

Judge accepted the inclusion of petitioner's mortgage payments as part of his 1995 income and failed to accept the documentation of his business expenses for that year, and overstated petitioner's income for 1996 by at least \$50,000.00. Further, petitioner argues that the Administrative Law Judge should have abated the penalties imposed because petitioner had reasonable cause for not timely filing his income tax returns due to personal and matrimonial problems. Petitioner maintains that the correct amount of his income for 1994, 1995 and 1996 is \$39,022.77, \$38,398.81 and \$53,883.90, respectively.

In opposition, the Division argues that petitioner has not demonstrated entitlement to any adjustments to the Notices of Deficiency other than those provided by the Administrative Law Judge. The Division asserts that it was petitioner's failure to timely file his income tax returns for the years at issue that caused the Division to estimate his tax liability. The Division points out that petitioner bears the burden to demonstrate that the Division's estimate is incorrect.

The Division maintains that petitioner was properly assessed penalties for failure to file his returns, negligence and substantial understatement of tax liabilities. The Division argues that petitioner has failed to establish that he had reasonable cause for not timely filing his tax returns for the years at issue.

### ***OPINION***

Tax Law § 681(a) provides, in pertinent part, as follows:

If a taxpayer fails to file an income tax return required under this article, the tax commission is authorized to estimate the taxpayer's New York taxable income and tax thereon, from any information in its possession, and to mail a notice of deficiency to the taxpayer.

When the Division properly issues a Notice of Deficiency to a taxpayer, a presumption of correctness attaches to such notice (*see, Matter of Land Transport Corp.*, Tax Appeals Tribunal,

June 29, 2000; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). In proceedings for review of a properly issued notice of deficiency, the burden of proof is on the taxpayer to demonstrate that the deficiency assessment is erroneous (Tax Law § 689[e]).

A review of the evidence presented by petitioner and the Division indicates that the Administrative Law Judge gave careful consideration to petitioner's claims and made appropriate adjustments to petitioner's taxable income and allowable deductions for the years at issue based on relevant law. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the Administrative Law Judge's determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Terence G. Hickey is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Terence G. Hickey is granted to the extent indicated in conclusions of law "G," "H" and "I" of the Administrative Law Judge's determination, but is otherwise denied;

and

4. The Division of Taxation is directed to modify the Notice of Deficiency dated March 24, 2000 in accordance with paragraph "3" above and the findings of fact as set forth in the determination of the Administrative Law Judge, but is otherwise sustained.

DATED: Troy, New York  
August 12, 2004

/s/Donald C. DeWitt  
Donald C. DeWitt

President

/s/Carroll R. Jenkins

Carroll R. Jenkins

Commissioner