

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THOMAS REEVES	:	DECISION
	:	DTA NO. 819086
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 Year 1994.	:	

Petitioner Thomas Reeves, 10 Downing Street, 2-R, New York, New York 10014, filed an exception to the determination of the Administrative Law Judge issued on February 12, 2004. Petitioner appeared by David N. Milner, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. 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 petitioner has established that the amount shown as compensation paid to him by American Futures Group Holding Company, Inc. in 1994 was either an erroneous listing on such company's tax return or, alternatively, was not taxable compensation but rather represented the repayment of loans petitioner made to such company.

II. Whether petitioner has established any basis warranting reduction or abatement of penalties imposed.

FINDINGS OF FACT

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

American Futures Group, Inc. (“AFG”) was a commodities futures brokerage company founded in or about 1984 by George Perk and petitioner, Thomas Reeves.¹ Prior to, as well as during the year in issue, 100 percent of the shares of AFG were owned by American Futures Group Holding Company, Inc. (“AFG Holding”), a corporation which had been formed on or about November 11, 1992. In turn, George Perk and petitioner were the only shareholders and officers of AFG Holding during the year in issue, with George Perk owning 52 percent of the stock of AFG Holding and Thomas Reeves owning the remaining 48 percent of the stock of AFG Holding. Petitioner held the office of treasurer and secretary of AFG Holding, and was president of AFG.

On his 1994 U.S. Individual Income Tax Return (Form 1040), petitioner reported total income in the amount of \$77,673.00, consisting of \$33,000.00 of wage income, \$4,368.00 of dividend income, and \$40,305.00 of business income. Attached to petitioner’s Form 1040 was Form W-2 (Wage and Tax Statement), indicating that the wage income of \$33,000.00 was paid by AFG. Also attached to petitioner’s return was Schedule C (Profit or Loss From Business), which reflects gross sales or receipts of \$84,000.00 and a net profit (business income) of \$40,305.00 as having been earned by petitioner under the principal business or profession of

¹ AFG was founded as American Energy Corp. and at some point thereafter changed its name to AFG.

“commodities broker.” The business address listed on petitioner’s Schedule C is 214 E. 82nd Street, New York, New York. After reducing his reported total income by \$2,251.00 (one-half of self-employment tax), petitioner reported Federal adjusted gross income in the amount of \$75,422.00. The transcript of petitioner’s 1994 New York State and City of New York Resident Income Tax Return (Form IT-201) also reflects this same amount, \$75,422.00, as petitioner’s total New York income.

The Division of Taxation (“Division”) conducted a withholding tax audit of AFG, and thereafter also conducted an audit of petitioner’s 1994 personal income tax return. In the course of its audits, the Division reviewed the U.S. corporation income tax returns (Form 1120) for AFG and for AFG Holding for the year 1994. The Form 1120 for AFG Holding reports, at Schedule E (Compensation of Officers), total compensation of \$544,950.00 paid to George Perk and Thomas Reeves, in the respective amounts of \$283,374.00 and \$261,576.00. Such total amount (\$544,950.00) is also shown on page one of AFG Holding’s Form 1120 as a deduction reducing AFG Holding’s total income (and hence its tax liability). The balance sheet (Schedule L) attached to AFG Holding’s Form 1120 for 1994 does not reflect any loans or advances to or from shareholders. The Division concluded, based on such Form 1120 in comparison to petitioner’s personal income tax return, that petitioner failed to report the compensation income he received from AFG Holding in the amount of \$261,576.00. Accordingly, the Division increased petitioner’s New York taxable income by such amount and recalculated his tax liability for 1994.

Petitioner was not directly involved in preparing his personal income tax returns, but rather engaged the services of an accountant. He typically placed all of his tax information in an

envelope and sent the same to his accountant, who would prepare and thereafter send back the completed tax returns for petitioner's signature. In the same manner, petitioner was not directly involved in the preparation of Form 1120 for AFG or for AFG Holding. The Form 1120 for AFG Holding, as well as that for AFG, are each dated May 15, 1995. Each return reflects the preparer to be Michael Coglianese, CPA, and each includes his address, social security number, and signature. The returns do not bear the signature of anyone else on behalf of either corporation (AFG Holding or AFG). The Division's auditor accepted the information and amounts set forth on Form 1120 and accompanying schedules for AFG Holding, without modification or resort to additional audit verification or corroboration. The auditor did not independently verify with the Internal Revenue Service ("IRS") that the Form 1120 for AFG Holding on which she relied had, in fact, been filed with the IRS.

On April 9, 2001, the Division issued to petitioner, Thomas Reeves, a Notice of Deficiency asserting additional New York State and New York City personal income tax due for the year 1994 in the respective amounts of \$21,638.81 and \$12,039.88 (totaling \$33,678.69), plus penalties for negligence (Tax Law § 685[b]) and for substantial understatement of liability (Tax Law § 685[p]), plus interest. Petitioner, for his part, disputes the receipt of compensation from AFG Holding in the amount of \$261,576.00, as well as the additional tax asserted as due thereon.

At hearing, petitioner provided the testimony of George Perk. Mr. Perk explained that both he and petitioner made periodic short-term loans (advances) to AFG Holding. In turn, AFG Holding would allegedly infuse cash into AFG, as needed, in order to enable AFG to meet the ongoing net capital requirements imposed by the Commodities Futures Trading Commission, the

Federal regulatory agency governing AFG's business. According to Mr. Perk, the cash infusions were repaid by AFG to AFG Holding and, in turn, AFG Holding repaid the advances which had been made by Mr. Perk and by petitioner. In support of this claim, Mr. Perk produced a one-page handwritten sheet of paper, titled "GJP-1994," reflecting four columns listing, respectively, dates (from January through December), letters (possibly initials), dollar amounts, and letter (e.g., "WT" for wire transfer) or number listings (possibly referencing check numbers).

Mr. Perk described the one-page sheet, allegedly prepared by AFG's treasurer, Richard MacIntosh, as a listing of the disbursements from AFG Holding to Mr. Perk over the course of the year 1994. The foot of the column listing dollar amounts totals \$299,512.00. Mr. Perk focused specifically on two items, dated January 3 (in the amount of \$59,900.00) and January 7 (in the amount of \$52,112.00), totaling together \$112,012.00. Mr. Perk claimed that these amounts were wire transfer repayments of cash advances he had previously made to AFG Holding. He went on to state that he subtracted such \$112,012.00 amount from the total disbursements amount of \$299,512.00, to arrive at \$187,500.00, which he allegedly reported as compensation income on his Federal and (New Jersey) State income tax returns for 1994. He did not offer any explanation concerning the \$95,874.00 difference between such \$187,500.00 compensation amount allegedly reported as income from AFG Holding and the \$283,374.00 amount shown as compensation paid to him on Schedule E of Form 1120 for AFG Holding.

Mr. Perk also noted that a similar one-page disbursements sheet was prepared by Mr. MacIntosh for petitioner Thomas Reeves. Although such a sheet for petitioner was not offered in evidence, Mr. Perk claimed that he had seen the same and that the net income, after alleged repayment of advances by AFG Holding to Mr. Reeves, was "around \$120,000.00." He also

noted, in explaining his recall of this dollar amount, that he was “quite embarrassed” over the difference between his compensation and that of Mr. Reeves, noting that “[t]hey should have been much closer We didn’t have a formal agreement, but our compensation tended to be similar, but I remember that number well.”

Petitioner also testified at hearing. Although, as noted, he did not furnish a “disbursement sheet” similar to that furnished with respect to Mr. Perk, he described the same scenario with regard to making short-term cash advances to AFG Holding which were subsequently repaid. Petitioner also provided certain statements from his Merrill Lynch Cash Management Account to substantiate his claim that he made such advances and was, in turn, repaid by AFG Holding. In this regard, petitioner pointed to two transactions in particular, totaling \$73,318.00, as follows:

- An entry showing a check (#1669) in the amount of \$63,318.00 to AFG Holding dated 12/31/93, which cleared on 01/12/94, together with an entry showing funds received by wire transfer (payor not specified) in the same \$63,318.00 amount on 01/11/94.
- An entry showing a check (#1676) in the amount of \$10,000.00 to AFG Holding dated 01/31/94, which cleared on 02/04/94, together with an entry showing funds received by wire transfer (payor not specified) in the same \$10,000.00 amount on 02/22/94.

Petitioner stated that there “may have been” other such transactions in 1994, but that he did not have any additional statements or other records to show the same.²

There were no notes or other loan agreements between petitioner and AFG Holding executed for any of the advances made. Although both witnesses alluded to corporate board resolutions and other documents (corporate minutes, ledgers, journals or audited financial

² Petitioner pointed to a third entry showing a check (#1580) in the amount of \$20,000.00 to AFG Holding dated 11/30/93, which cleared on 12/01/93, followed by an entry showing funds received by wire transfer (payor not specified) in the same \$20,000.00 amount on 12/02/93. Although this transaction precedes the year in issue, petitioner points to the same to establish an ongoing pattern of advances and repayments.

statements) which would reflect the periodic advances, no such documents were offered in evidence.

Petitioner submitted his annual Social Security Statement (prepared and issued to him by the U.S. Social Security Administration) dated March 18, 2003. This statement reflects, among other things, petitioner's estimated social security benefits payable under various possible scenarios, as well as a listing of petitioner's earnings record (in this case covering the years 1959 through 2001). For the year in issue, 1994, petitioner's Taxed Medicare Earnings as reflected on his Social Security Statement totaled \$70,222.00.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge observed that a Notice of Deficiency issued by the Division was presumed to be correct until the contrary was established. Further, he noted that the burden of showing that such a notice was incorrect rested upon the petitioner. The Administrative Law Judge concluded that petitioner had failed to provide evidence to support the cancellation or modification of the Notice of Deficiency at issue herein.

The Administrative Law Judge rejected petitioner's argument that the lack of an officer's signature on the 1994 Form 1120 for AFG Holding and the lack of any proof that the Form 1120 was, in fact, filed with the IRS must result in cancellation of the Notice of Deficiency based on it. The Administrative Law Judge found that the Form 1120 was obtained and reviewed as part of the Division's audit of AFG and the Division was clearly entitled to rely upon it. Moreover, the Administrative Law Judge concluded that petitioner, as one of the two officers of AFG Holding, was presumably in a position to have obtained a verified copy or transcript of the return of AFG Holding filed with the IRS for 1994, and to have been able to show if, and how, such

return differed from that relied upon by the Division. However, as the Administrative Law Judge pointed out, no such information was presented.

The Administrative Law Judge also rejected petitioner's assertion that he did not receive the amount of compensation listed in the AFG Holding Form 1120 for 1994 because the amount listed as compensation may have been nontaxable disbursements to petitioner made in repayment of advances made by petitioner to AFG Holding. The Administrative Law Judge found that even if petitioner had made periodic loans to AFG Holding and the wire transfers shown on the Merrill Lynch statements were repayments made by AFG Holding to petitioner, there was no evidence that such repayments were erroneously reflected by AFG Holding on its tax return as taxable compensation to petitioner. Further, the Administrative Law Judge noted that such transfers totaled only \$73,318.00, which amount was far less than the \$261,576.00 of compensation shown as having been paid to petitioner and deducted by AFG Holding on its tax return.

The Administrative Law Judge observed that there were no corporate minutes, resolutions, notes or other loan documents, ledgers or journals, evidence of loan collateralization or payments of interest, or other documents offered in evidence to support petitioner's claim that loans were made. The Administrative Law Judge concluded that there was nothing beyond speculation that the alleged repayments were incorrectly reflected by AFG Holding on its Form 1120 as compensation, or that such amounts were in any manner linked to the amount of compensation shown on AFG Holding's Form 1120.

The Administrative Law Judge pointed out that petitioner's witness, George Perk, testified that petitioner had received taxable compensation of approximately \$120,000.00 from AFG

Holding in 1994. However, this \$120,000.00 compensation from AFG Holding was entirely unaccounted for by petitioner on his personal income tax return.

Finally, the Administrative Law Judge concluded that petitioner had offered no argument or evidence to support a reduction or abatement of penalties. Based on all of the foregoing, the Administrative Law Judge sustained the Notice of Deficiency.

ARGUMENTS ON EXCEPTION

In support of his exception, petitioner acknowledges that he has the burden of proving that the Notice of Deficiency asserting additional tax, penalty and interest is incorrect. However, petitioner contends that the Division had no rational basis for issuing the Notice of Deficiency. Petitioner maintains that the Division's assertion of tax is improper insofar as it is based on the Form 1120 for AFG Holding, noting in this regard that the copy of such Form 1120 in evidence is unsigned and the Division did not verify that such return either accurately reflected the affairs of AFG Holding or that it was filed with the IRS.

Petitioner asserts that the testimony of petitioner and his business partner, George Perk, as well as the evidence presented supports, at least in part, petitioner's position that the additional income sought to be included in petitioner's income was a series of loan transactions between AFG Holding and petitioner.

Petitioner sought, by motion on exception, to have the 1994 general ledger of AFG Holding introduced as newly discovered evidence. Petitioner's motion was denied by order of the Tax Appeals Tribunal on September 2, 2004.

The Division, in opposition, argues that the Administrative Law Judge correctly determined that petitioner failed to meet his burden of proving that the amount shown as

compensation paid to him as an officer of AFG Holding in 1994 was erroneous or represented repayment of loans made by petitioner to AFG Holding.

OPINION

Petitioner has presented substantially the same arguments on exception as were considered and rejected by the Administrative Law Judge. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Thomas Reeves is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Thomas Reeves is denied; and
4. The Notice of Deficiency dated April 9, 2001 is sustained.

DATED: Troy, New York
February 24, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner