

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BRUCE H. ROSWICK** : DECISION  
for Redetermination of a Deficiency or for Refund of : DTA NO. 819930  
Personal Income Tax under Article 22 of the Tax Law :  
and the New York City Administrative Code for the :  
Years 1992, 1993, 1994, 1995 and 1996. :

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Petitioner Bruce H. Roswick, 500 East 85<sup>th</sup> Street, #6A, New York, New York 10028, filed an exception to the determination of the Administrative Law Judge issued on November 18, 2004. Petitioner appeared *pro se*. 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 filed a reply brief. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether the Administrative Law Judge properly granted the Division's motion for summary determination.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and we make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

During tax years 1992 through 1999, petitioner, a New York State and New York City resident, earned income and owed a New York State and New York City income tax liability in the total sum of \$92,720.72, exclusive of penalties and interest.

Petitioner failed to file New York State and New York City personal income tax returns for the years 1992 through 1996.

On January 30, 2003 petitioner pled guilty in New York County Supreme Court to one count of repeated failure to file personal income and earnings tax returns, a class "E" felony, in violation of Tax Law § 1802(a). His plea was based on his admission that he failed to file returns for the three consecutive years 1994, 1995 and 1996.

On March 20, 2003 petitioner was sentenced to five years probation, a \$30,000.00 fine and to pay restitution to the New York State Department of Taxation and Finance in the sum of \$160,563.92. The restitution consisted of tax due in the sum of \$92,720.72, plus interest in the sum of \$67,843.20 computed through January 30, 2003.

The terms of the plea and sentence were set forth in a plea agreement dated January 30, 2003 and signed by petitioner, his attorney and the prosecutor. The agreement provided that petitioner would execute a confession of judgment in favor of the New York State Department of Taxation and Finance in the amount of \$183,744.12 and file New York State and New York City personal income tax returns for tax years 2000 and 2001, and pay the liability due thereon. The

agreement also provided that it was not binding on the New York State Department of Taxation and Finance, the State of New York or the New York City Department of Finance.

On January 30, 2003 petitioner executed an affidavit for judgment by confession in favor of the New York State Department of Taxation and Finance, confessing judgment in the sum of \$183,744.12, including interest and penalties under the Tax Law, and expressly authorizing the Department, as plaintiff, to “finally and irrevocably fix and assess and enter a judgement for said sum against me.”

On January 30, 2003 petitioner executed eight consents to tax pursuant to Tax Law § 681(f), one consent for each of the years from 1992 through 1999, and setting forth New York State and New York City income and earnings taxes, along with section 685(a)(1)(A) penalty for failing to file returns, plus interest computed through January 30, 2003, as follows:

Year	NYS/NYC tax	Penalty	Interest	Total
1992	\$16,848.13	\$ 4,212.04	\$17,619.83	\$ 38,680.00
1993	21,916.33	5,479.09	20,309.30	47,704.72
1994	13,571.85	3,392.96	10,718.39	27,683.20
1995	13,800.65	3,450.16	9,080.38	26,331.19
1996	4,928.66	1,232.17	2,591.39	8,752.22
1997	12,509.93	3,127.48	5,117.35	20,754.76
1998	3,639.56	909.90	1,153.94	5,703.40
1999	5,505.61	1,376.40	1,252.62	8,134.63
Totals	\$92,720.72	\$23,180.20	\$67,843.20	\$183,744.12

On June 23, 2003 or June 30, 2003 the Division issued five notices and demands for payment of tax due to petitioner as follows:

Year Ending	Date Issued	NYS/NYC Tax	Interest	Payments	Balance Due
12-31-92	6-23-03	\$16,847.20	\$17,887.42	\$600.00	\$ 34,134.62
12-31-93	6-30-03	\$21,923.80	\$20,704.55	00	\$ 42,628.35
12-31-94	6-23-03	\$13,447.01	\$10,813.13	00	\$ 24,260.14
12-31-95	6-30-03	\$13,661.62	\$ 9,079.09	00	\$ 22,740.71
12-31-96	6-23-03	\$ 4,916.48	\$ 2,645.25	00	\$ 7,561.73
totals		\$70,796.11	\$61,129.44	\$600.00	\$131,325.55

Each notice and demand includes a statement that informs petitioner that he is being assessed based on his sentence by the court to pay restitution to the New York State Department of Taxation and Finance, and that a separate notice of deficiency will be issued for fraud penalty.

We find the following additional finding of fact.

Petitioner filed a petition for a redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1992, 1993, 1994, 1995 and 1996. Pursuant to 20 NYCRR 3000.9(b) and by a notice of motion dated July 26, 2004 with a supporting affirmation, the Division of Taxation moved for summary determination on the grounds that there were no material and triable issues of fact presented by the pleadings or supporting documents, and the facts mandated a finding in the Division's favor. Petitioner filed an affidavit in opposition to the motion on August 19, 2004.

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

In his determination, the Administrative Law Judge noted that a motion for summary determination shall be granted if, upon all the papers and proof submitted, the Administrative Law Judge finds that no material and triable issue of fact is presented and, as a matter of law, a determination can be issued in favor of any party. However, the motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact.

The Administrative Law Judge rejected petitioner's assertion that the income taxes assessed by the Division for the years in question have been discharged in bankruptcy. The Administrative Law Judge found that petitioner failed to provide any documentary proof that he had filed a petition in bankruptcy and, further, the Administrative Law Judge noted that 11 USC § 523(a)(1)(B) prohibits the discharge of an individual debtor respecting a tax debt for which no return has been filed.

The Administrative Law Judge held that petitioner failed to set forth any reason to conclude that the consents to tax signed by him were in any manner ineffective as a basis to fix petitioner's liability for the tax deficiencies stated.

The Administrative Law Judge recited petitioner's argument that the consents to tax signed by him cannot be given any collateral estoppel effect because they were never actually litigated and determined in a prior action or proceeding, as well as case law contrary to that argument. The Administrative Law Judge noted that in his affidavit for judgment by confession, petitioner admitted that he failed to file New York State and New York City income tax returns for the years 1992 through 1999 and, as a result, he owes the Tax Department \$183,744.12. The Administrative Law Judge observed that this was the precise amount set forth in the consents to tax for the same span of years executed by petitioner on the date of the guilty plea.

The Administrative Law Judge found petitioner's claim of laches on the part of the Division to be devoid of merit. The Administrative Law Judge stated that under Tax Law §§ 651(a) and 652(a), petitioner has the duty to timely file his income tax returns and pay the sums reported due therein. However, the Division has no duty under the Tax Law to remind petitioner of his responsibilities to file and pay.

The Administrative Law Judge found no material and triable issues of fact requiring a hearing and granted the Division's motion for summary determination.

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

Petitioner argues in support of his exception that the Administrative Law Judge erred in holding that petitioner is collaterally estopped from challenging the tax at issue based on his guilty plea and conviction. Petitioner argues that as he entered into a plea agreement, there was nothing that was actually litigated in his criminal proceeding and, therefore, collateral estoppel does not apply.

Petitioner argues that the Division of Tax Appeals has no jurisdiction to adjudicate whether or not his tax obligations could have been discharged in bankruptcy. Further, petitioner maintains that since the Division could have sought the tax which he did not report or pay for the years at issue during his bankruptcy proceeding, the Division is now estopped from doing so and guilty of laches.

### ***OPINION***

Section 3000.9 of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides, in part, that 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]).

That section further provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a

matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

Generally, to defeat a motion for summary judgment, the opponent must produce evidence in admissible form sufficient to raise an issue of fact requiring a trial (CPLR 3212[b]).

Unsubstantiated allegations or assertions are insufficient to raise an issue of fact (*Alvord & Swift v. Muller Constr. Co.*, 46 NY2d 276, 413 NYS2d 309).

While petitioner has proffered creative legal arguments, he has failed to offer any evidence below, nor any argument on exception, that demonstrates that the Administrative Law Judge’s determination is incorrect. Instead, the record is replete with sworn statements by petitioner admitting that he failed to file income tax returns for the years at issue and acknowledging his liability for the amount of tax and interest due and owing for those years. Contrary to petitioner’s argument, the Administrative Law Judge did not grant the Division’s motion for summary determination based on a finding of estoppel. Rather, after reciting petitioner’s and the Division’s arguments relative to collateral estoppel, the Administrative Law Judge pointed out that in his affidavit for judgment by confession, petitioner admitted that he failed to file New York State and New York City income tax returns for the years 1992-1999, and that he owed the Division \$183,744.12, which was the precise amount set forth in the consents to tax for the same years which petitioner executed on the date he entered his guilty plea. These facts remained unrefuted by petitioner.

Notwithstanding petitioner’s assertion, the Administrative Law Judge did not adjudicate that petitioner’s tax obligations were not subject to discharge in bankruptcy. Rather, the

Administrative Law Judge relied on the provisions of 11 USC § 523(a)(1)(B) for his conclusion, which section provides that an individual debtor is not discharged from any debt for a tax with respect to which a return was not filed. If petitioner possessed any evidence that would raise an issue of fact as to whether or not his tax obligations had been discharged in bankruptcy, it was incumbent on petitioner to introduce such evidence in opposition to the Division's motion for summary determination. Petitioner did not do so.

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 Bruce H. Roswick is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Bruce H. Roswick is denied; and
4. The notices and demands for payment of tax due, issued by the Division, are sustained.

DATED: Troy, New York  
June 30, 2005

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

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