

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
FRANK PANUCCIO : DECISION
for Redetermination of a Deficiency or for Refund of : DTA NO. 820138
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 1996. :

Petitioner Frank Panuccio, 23 Storyland Lane, East Setauket, New York 11733, filed an exception to the determination of the Administrative Law Judge issued on September 21, 2006. Petitioner appeared by Silberling & Silberling (Stephen P. Silberling, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division filed a brief in opposition and petitioner filed a brief in reply. 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 by clear and convincing evidence that the Notice of Additional Tax Due issued to him by the Division of Taxation based upon unreported Federal audit changes was incorrect or improper.

FINDINGS OF FACT

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

On March 24, 2003, the Division of Taxation ("Division") issued a Notice of Additional Tax Due to Frank Panuccio and Debbie Panuccio¹ which asserted additional New York State personal income tax due in the amount of \$32,287.57, plus interest, for a total amount due of \$48,922.18 for the year 1996. The Notice of Additional Tax Due indicated that petitioner's Federal adjusted gross income had been increased from \$115,901.00 to \$564,061.00, which resulted in the additional tax due. An explanation provided as follows:

Our records indicate that the Internal Revenue Service has made changes to your federal return. Section 659 of the New York State Tax Law requires that federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.

A search of our files indicates that you did not report these changes to New York State.

* * *

When you do not report federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by section 683(c) of the New York Tax Law.

* * *

The federal audit changes show an adjustment was made to your distributive share of partnership income/loss from the following partnership(s): ALCAZAR HOMES & ALLSTATE TELCOM.

¹ In a letter attached to its amended answer filed on April 11, 2005, the Division stated that by correspondence from the Division's Bureau of Conciliation and Mediation Services ("BCMS") dated June 15, 2004, Debbie Panuccio was granted innocent spouse status and, accordingly, her name was removed from the Notice of Additional Tax Due.

On their 1996 New York State personal income tax return, petitioner and his wife, Debbie Panuccio, reported total Federal gross income in the amount of \$115,901.00. Pursuant to an audit conducted by the Internal Revenue Service (“IRS”), Federal adjusted gross income for 1996 was increased to \$564,061.00 and Federal taxable income was determined to be \$543,941.00 based upon petitioner’s distributive share of partnership income from Alcazar Homes and Allstate Telcom.

At the hearing held in this matter, petitioner introduced into evidence an account transcript from the IRS which indicated that as of November 28, 2005, there was no account balance for the 1996 tax year. However, the account transcript indicated that petitioner’s adjusted gross income for the year 1996 was \$564,061.00 and taxable income was \$543,941.00. There was no explanation provided on the IRS document as to the reason for the zero balance as of November 28, 2005.

Petitioner also introduced into evidence correspondence between petitioner and the IRS during the months of May and June of 2005 in which petitioner noted that the sum of \$3,345.00 of overpaid tax from the 2004 return had been applied to the 1996 tax year (which petitioner stated was currently being disputed) rather than to the 2000 and 2001 years as was desired by petitioner. In its response, the IRS informed petitioner that until the dispute over the 1996 taxes is settled, the overpayment was going to be applied to “the oldest year you owe.”

We find the following additional finding of fact.

At the conclusion of the hearing in this matter, petitioner was given an additional sixty days to provide documentation from the IRS to support his claim that the IRS had reduced his Federal adjusted gross income from the \$564,061.00 amount which was utilized by the Division as a basis for its Notice of Additional Tax Due. Such documentation was not provided.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge observed, at the outset, that if the amount of a taxpayer's Federal taxable income is changed or corrected by the IRS, the taxpayer must report such change or correction within 90 days of such change or correction and must either concede the accuracy of such determination or state wherein it is erroneous (Tax Law § 659). If a taxpayer fails to comply with section 659, New York State may assess a deficiency based upon the Federal change or correction by mailing to the taxpayer a notice of additional tax due (*see*, Tax Law § 681[e][1]). Tax, penalties and interest set forth in such a notice are deemed assessed on the date the notice of additional tax due is mailed unless within 30 days after the mailing of such notice, a report of Federal change, correction or disallowance or an amended return, where required by Tax Law § 659, is filed showing where such Federal determination and notice of additional tax due are erroneous (*see*, Tax Law § 681[e][1]).

The Administrative Law Judge pointed out that a properly issued notice of deficiency (including a notice of additional tax due) carries with it a presumption of correctness under the Tax Law, and a petitioner who fails to present any proof that the deficiency is incorrect surrenders to this presumption (*Matter of Suburban Carting Corp. v. Tax Appeals Tribunal*, 263 AD2d 793, 694 NYS2d 211; *Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383, *lv denied* 81 NY2d 704, 595 NYS2d 398). To rebut the presumption, a petitioner has the burden of proving that the deficiency is incorrect² by clear and convincing evidence (Tax Law § 689[e]; *Matter of Leogrande v. Tax Appeals Tribunal, supra*).

²Except in three situations none of which apply here.

The Administrative Law Judge observed that the adjusted gross income of a New York resident taxpayer is his Federal adjusted gross income with certain modifications not relevant here (Tax Law § 612[a]). The account transcript from the IRS, and offered in evidence by petitioner, reflects that petitioner's Federal adjusted gross income for the 1996 tax year was increased from \$115,901.00 to \$564,061.00. The Administrative Law Judge noted that while the account transcript also shows that as of November 28, 2005 there was no balance due for 1996, there is no explanation provided, by either the IRS document or by petitioner, as to the reason therefor.³

The Administrative Law Judge found that petitioner's mere allegation that an IRS employee failed to make the proper revisions on the account transcript was insufficient to sustain petitioner's burden of proof. The Administrative Law Judge noted that at the conclusion of the hearing, the record was left open sixty additional days to give petitioner time to provide documentation from the IRS to support his argument that the IRS had reduced his Federal adjusted gross income from \$564,061.00, the amount which was utilized by the Division in its Notice of Additional Tax Due. Petitioner failed to provide such documentation. Accordingly, the Administrative Law Judge found pursuant to Tax Law § 659 that the Division's issuance of the Notice of Additional Tax Due and the amount of additional tax due asserted therein were proper and the petition was denied.

ARGUMENTS ON EXCEPTION

Petitioner on exception continues to claim that the account transcript of the IRS shows that the IRS has reversed its original position with respect to the audit changes and has abated all

³The Administrative Law Judge pointed to petitioner's own documentary evidence (correspondence between petitioner and the IRS in May and June of 2005) which relates to overpayments in subsequent years which were applied to the balance due for 1996 and appears to provide a possible explanation for the zero balance for 1996. However, this was only speculation.

additional tax previously asserted to be due from petitioner for the year 1996. In order to abate all tax and show a zero balance, petitioner argues, his Federal adjusted gross income had to have been revised by the IRS, and petitioner contends that the fact that the account transcript still shows that amount to be \$564,061.00 is simply an error by the IRS employee who entered the information on the IRS's computer.

The Division urges that petitioner has failed to produce evidence that the notice of additional tax due was improperly issued or incorrect. The Division notes that petitioner's own documentary evidence concedes that the IRS increased his Federal adjusted gross income for tax year 1996 to \$564,061.00. The Division states that none of the evidence submitted by petitioner shows that this Federal change or the resulting change in New York State tax asserted by the Notice of Additional Tax Due, are erroneous.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. The record in this matter was kept open for sixty additional days after the hearing to give petitioner an opportunity to produce documentary evidence to support his argument that the IRS had reduced his Federal adjusted gross income from \$564,061.00, the amount which was utilized by the Division in its Notice of Additional Tax Due. Petitioner failed to provide such documentation and has failed to carry his burden of proof (*see*, Tax Law § 695[e]). The Administrative Law Judge has fully and correctly addressed the arguments raised by petitioner, and we can find no basis to modify his determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Frank Panuccio is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Frank Panuccio is denied; and
4. The Notice of Additional Tax Due dated March 24, 2003 is sustained.

DATED: Troy, New York
August 16, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner