STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN J. AND LAURA BARKER	:	DECISION DTA NO. 822324
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 2002, 2003 and 2004.	:	

Petitioners, John J. and Laura Baker, filed an exception to the determination of the Administrative Law Judge issued on November 19, 2009. Petitioners appeared by Hodgson Russ, LLP (Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Kevin R. Law, Esq., of counsel). Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on July 14, 2010 in Troy, New York.

The Tax Appeals Tribunal issued a decision in this matter on January 13, 2011, which sustained the underlying deficiency but remanded the case to the Administrative Law Judge for a supplemental determination on the issue of penalties. The Administrative Law Judge issued a determination on remand on April 7, 2011, which sustained the assessment of penalties against petitioners.

Petitioners filed an exception to the determination on remand of the Administrative Law Judge issued on April 7, 2011. Petitioners appeared by Hodgson Russ, LLP (Timothy P. Noonan, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Michelle Helm, Esq., of counsel). Petitioners filed a brief in support of their exception. The Division of

Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners filed a letter brief in lieu of a formal reply brief.

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

ISSUE

Whether petitioners established reasonable cause for the abatement of penalties imposed pursuant to Tax Law § 685(b)(1), (b)(2) and (p) and whether the record in this matter demonstrates a reasonable basis for petitioners' claim that they did not maintain a permanent place of abode in New York State as reflected on their tax returns for the years in issue.

FINDINGS OF FACT

We find the facts as determined in our January 13, 2011 decision. We also find the supplemental findings of fact as determined by the Administrative Law Judge on remand. The supplemental findings of fact of the Administrative Law Judge are set forth below.

By letter, dated March 16, 2005, the Division of Taxation (Division) informed petitioners that they were being audited for the years in issue and enclosed a nonresident audit questionnaire. The questionnaire contained the following question:

> "5. For the tax years indicated, did you own, rent, lease or otherwise maintain living quarters in New York State?"

Petitioners answered the question in the affirmative and supplied the address and telephone number. They also added in handwritten notes:

> "Taxpayer spent approximately 12-15 days on an annual basis, weekends only."

In question 9 of the same questionnaire, in answer to the question of how many non-working days they spent in New York State, petitioners answered:

> "Physically present in New York State for non-working days 12-15 days per year at summer home in Amaganset [***sic***]."

Petitioners submitted the questionnaire on or after April 30, 2005, which is after they signed their 2004 New York State Nonresident Income Tax Return, on which they indicated that they did not maintain living quarters in New York State in 2004.

As noted in the Tax Appeals Tribunal's modified Finding of Fact 24, petitioners answered "no" to the question of maintaining living quarters in New York State on each of the income tax returns they filed for the audit period. An affirmative answer to the question would have required petitioners to complete schedule B of form IT-203-ATT, which asks for the address of the living quarters and the number of days spent in New York State during the year. Petitioners did file form IT-203-ATT for all tax years under audit for the purpose of claiming the New York State itemized deduction, but left schedule B blank.

Petitioners raised no arguments for the abatement of penalties before the Administrative Law Judge.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioners failed to establish reasonable cause for the abatement of penalties. The Administrative Law Judge observed that petitioners failed to argue for the abatement of the asserted penalties during the initial hearing and that the record did not demonstrate a reasonable basis for their error, which was the position that they did not maintain a permanent place of abode in New York State.

The Administrative Law Judge noted that petitioners indicated on their tax returns that they did not maintain living quarters in New York State but on audit indicated that they owned and maintained the Napeague property. The Administrative Law Judge found that, as a result of their

representations, petitioners avoided having to complete schedule B of the IT-203-ATT, which would have disclosed petitioners' New York property and days spent within the State. The Administrative Law Judge found these facts to be very important in determining that petitioners did not merit the abatement of penalties and ruled accordingly.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the record presents reasonable grounds for the abatement of penalties. In support of their position, petitioners contend that a differing well-supported interpretation of the law, though incorrect, may serve as grounds for abating penalties. Petitioners cite to ***Matter of Evans*** (Tax Appeals Tribunal, June 18, 1992) as support for their theory on penalties and to ***Matter of Feldman*** (Tax Appeals Tribunal, December 15, 1998) as evidence that they reasonably interpreted Tax Law § 605(b)(1)(B) and the relevant regulations (20 NYCRR § 105.20[e]). Specifically, petitioners stress that they only spent approximately 12-15 days during the summer months at their Napeague property and they considered that property a summer vacation cottage for purposes of their actual use, not a permanent place of abode. They stress their opinion that the Napeague property had very limited utility outside of the summer months, the property lacked many of the amenities they would otherwise prefer in a regular home, and that it was not unreasonable for petitioners to perceive the property as a summer "camp or cottage," thus falling under an exception to the permanent place of abode classification for residency purposes.

The Division argues that the Administrative Law Judge properly determined that petitioners failed to present reasonable grounds for the abatement of penalties. In its letter brief, the Division notes that petitioners bear the burden of proof and failed to adduce clear and

convincing evidence for the abatement of penalties. The Division also notes that, contrary to petitioners' assertions, advancing a different interpretation or theory of a statute is, by itself, insufficient grounds to abate penalties.

The Division argues that the Administrative Law Judge properly distinguished the instant case from the ***Matter of Evans, supra***. The Division contends that, in order for a different interpretation to provide grounds for the abatement of penalties, a taxpayer must introduce sufficient law and facts such that the erroneous interpretation appears reasonable to a person of ordinary prudence and intelligence. The Division argues that the Administrative Law Judge properly determined that no fact in the record could reasonably support petitioners' position that they did not own a permanent place of abode in New York.

OPINION

In the instant matter, the Division has imposed penalties pursuant to Tax Law § 685(b)(1), (b)(2), and (p). Tax Law § 685(b)(1) and (2) provide for the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 of the Tax Law or the regulations thereunder. Tax Law § 685(p) provides for the imposition of penalty where there is a substantial understatement of the amount of income tax required to be shown on the return.

Penalties imposed pursuant to Tax Law § 685(b)(1), (b)(2) and (p) may be abated upon a showing of clear and convincing evidence that the taxpayer exercised reasonable cause and did not act with willful neglect (***see e.g. Matter of Erikson***, Tax Appeals Tribunal, March 22, 1990; 20 NYCRR 2392.1). In this case, petitioners argue that grounds exist under 20 NYCRR § 2392.1(d)(5), which provides that reasonable grounds include:

> Any other ground for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly

indicates an absence of willful neglect may be determined to be reasonable cause.

Petitioners argue that they reasonably interpreted the term "permanent place of abode" in Tax Law § 605(b)(1)(B) and did not include their New York home on their tax returns because petitioners themselves only used it approximately 12-15 days of the year. It is petitioners' contention that the property in question is not completely worthy of winter use, and an ordinary person would not consider a property that he or she utilizes personally as only a summer vacation home to be a permanent place of abode.

In our January 13, 2011 decision, we remanded this case on the issue of whether petitioners established reasonable cause or a lack of willful neglect in order to abate the penalties. In his determination on remand, the Administrative Law Judge reviewed the record and the relevant case law, and concluded that petitioners failed to carry their burden to have the penalties abated. We now also sustain the imposition of penalties.

To prevail, petitioners needed to prove that their conclusion that they did not possess a permanent place of abode in New York was due to reasonable cause (20 NYCRR 2392.1[a][1]; Tax Law § 685[c]). It has been held that good faith in an incorrect legal interpretation does not constitute reasonable cause (***Matter of Auerbach v. State Tax Commn.***, Sup. Ct, Albany County, July 7, 1987, Williams, J. ***affd*** 142 AD2d 390 [1988]). We find that petitioners have failed to establish that their error in determining that they did not own a permanent place of abode in New York State was due to reasonable cause. Although petitioners themselves only stayed at the property for a few days a year during the summer months, the costs of maintaining the property were paid for by petitioners, the property itself had many amenities and facilities ordinarily found in a dwelling, it had significant upgrades and had multi-seasonal use (as evidenced by the fact

that petitioners' relatives stayed at the property extensively throughout the year [including the winter months]). These factors should lead one to the realization that the subject property was not a mere summer camp or cottage. The fact that petitioners did not themselves utilize the subject property to its fullest extent does not convert the property into a summer camp or cottage. As stated by the Appellate Division in ***Matter of Stranahan v. New York State Tax Commn.***, 68 AD2d 250 (1979), a permanent place of abode is a dwelling that ". . . is suitable for other uses than vacations, although it might be used by a person of considerable means only for activities which might be considered vacation purposes." Petitioners (nor their representatives who prepared the subject tax returns) have not sufficiently met their burden of proof establishing that they had reasonable cause to take the tax position they did, in light of the authority on point.[1]

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John J. and Laura Barker is denied;

2. The determination, dated November 19, 2009 and the determination on remand, dated April 7, 2011, are affirmed as modified herein;

3. The petition of John J. and Laura Barker is denied; and

[1] As a separate issue, petitioners argue that use of the "intentionally obfuscatory" and "willfully negligent" language in the November 19, 2009 determination of the Administrative Law Judge was inappropriate. Petitioners concede that they made errors for the years at issue, but strongly object to the characterization that any intentional wrongdoing or malice motivated their failure to indicate that they maintained living quarters in New York State on their tax returns. In this regard, we note that the Division now indicates that it does not object to the removal of the subject characterization of petitioners' actions from the conclusions found. Moreover, based upon the type of penalties asserted by the Division in this case, we are not required to find conclusions to these particular characterization questions in order to resolve the matter. We uphold the penalties for the grounds articulated above and otherwise note that the Administrative Law Judge's analysis was thorough.

4. The Notice of Deficiency, dated May 8, 2008, including the asserted penalty, is sustained.

DATED:Troy, New York
January 26, 2012

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner