STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL J. BLAKE AND KATHLEEN T. BLAKE	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Nonresident Earnings Tax under Title U of the Administrative Code of the City of New York for the Years 1981 through 1983.	:	

Petitioners, Michael J. Blake and Kathleen T. Blake, 3948 West 50th Street, Edina, Minnesota 55424, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City nonresident earnings tax under Title U of the Administrative Code of the City of New York for the years 1981 through 1983 (File No. 802739).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on October 16, 1989 at 1:30 P.M., with all additional evidence and briefs to be submitted by May 31, 1990. Petitioner Michael J. Blake appeared pro se and for Kathleen T. Blake. The Division of Taxation appeared by William F. Collins, Esq., (Andrew Haber, Esq., of counsel).

ISSUES

I. Whether petitioners' distributive shares of certain partnership income and losses were properly included in New York income.

II. Whether petitioners substantiated the existence and amount of business deductions taken in connection with a hanger manufacturing business.

III. Whether petitioners substantiated the amount of certain interest expenses deducted from New York income.

IV. Whether petitioner Michael J. Blake properly allocated New York income to days worked in and out of New York State.

V. Whether petitioners have established that the deficiencies asserted were not due to negligence or intentional disregard of the Tax Law.

FINDINGS OF FACT

Petitioners, Michael J. Blake and Kathleen T. Blake, residents of New Jersey, timely filed joint New York State and New York City nonresident personal income tax returns for 1981, 1982, and 1983.[1]

The Division of Taxation conducted an audit of petitioner's tax returns for the years 1981 through 1983. The audit began in September 1984 and ended in June 1985. As a result of the audit, the Division made several adjustments to petitioner's returns.

(a) Petitioner claimed interest expense deductions of $22,338.00 in 1981 and $75,686.00 in 1982. The Division disallowed, as unsubstantiated, interest expenses of $2,526.00 in 1981 and $2,426.00 in 1982.

(b) In 1981, petitioner allocated wage and salary income to New York based on a claim of having worked outside New York on 69 days. The Division disallowed this allocation because of lack of documentation to substantiate the claim.

(c) In 1981 and 1982, petitioner reported net income from a business which manufactured clothing hangers. Federal Schedules C, attached to the New York returns, showed gross receipts and deductions from gross receipts for cost of goods sold and other expenses of doing business. As petitioner presented no records of the hanger manufacturing business, the Division disallowed all deductions, amounting to $118,704.00 in 1981 and $44,166.00 in 1982.

(d) A portion of petitioner's 1982 deduction for interest expenses was disallowed on the ground that the expenses were incurred to purchase United States Treasury obligations and,

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[1]Petitioner Kathleen T. Blake had no separate income during the audit years and is involved in this proceeding solely by reason of filing joint tax returns with Michael J. Blake. Accordingly, the term "petitioner" as used in this determination refers only to Michael J. Blake.

hence, were not deductible from New York income. The amount of the disallowance was $42,214.00.

(e) Petitioner's distributive shares of certain partnership income and losses were eliminated from the calculation of his 1982 and 1983 income on the ground that the partnerships were not carrying on business in New York.

On May 5, 1985, the Division issued to petitioners two statements of audit adjustment showing the Division's recalculation of petitioner's New York taxable income as follows:

	1981	1982	1983	
Reported		$106,260.00	$ 39,794.00	-0-
Audited		283,752.00	435,784.00	$197,466.00

New York State and New York City income tax due on the recalculated income was then computed as follows:

	1981	1982	1983	
Reported		$ 8,881.00	$ 4,026.00	-0-
Audited		34,161.45	57,766.59	$23,629.61
Tax Due		25,280.45	53,740.59	23,629.61

In addition to the tax deficiencies, the Division asserted a negligence penalty under Tax Law § 685(b) for each of the three audit years.

On January 3, 1985, petitioners executed a consent extending the period of limitation for assessment of personal income tax for the year ended December 31, 1981 to April 15, 1986.

The Division submitted in evidence two notices of deficiency addressed to petitioner. The first notice (assessment number A8506094071), dated August 16, 1985, was for the years 1981 and 1982 and asserted a tax deficiency of $79,021.04 plus penalty and interest. The second notice (assessment number A8506094081) was for 1983 and asserted a deficiency of $23,629.61 plus penalty and interest.

By his petition, petitioner denied receipt of the notice issued for 1981 and 1982, stating:

> "Taxpayer has no record of and no recollection of receiving assessment letters for 1981 and 1982.... Since Taxpayer has not received such 1981 and 1982 assessment notices and was informed by [the Division] that replacement assessments are not available, Taxpayer is protesting certain of the Agent's determinations for 1981 and 1982 based on information shown on the Agent's preliminary report. Taxpayer is

> filing this protest as if the 1981 and 1982 assessments have been properly filed by the State Tax Commission. However, Taxpayer does not agree that valid assessments of tax exist for 1981 and 1982.

As evidence of the timely mailing of the notice numbered A8506094071 the Division submitted an affidavit of a principal clerk employed by the Division. The relevant portions state:

> "I am fully familiar with the mailing practices of the Department of Taxation and Finance in regard to mailing of Notices of Deficiencies for Income Tax.
>
> Based on the records of the Department of Taxation and Finance, Notice of Deficiency A8506094071 for the New York State Personal Income Tax and New York City Non-Residents Earnings Tax for the years 1981 and 1982 were mailed by Certified Mail under certified mailing number 549182 on August 16, 1985 from Albany, New York to Michael J. and Kathleen Blake at 11 Rowan Road, Chatham, New Jersey 07928."

The Division offered no other evidence to establish the fact or date of mailing of a Notice of Deficiency for the years 1981 and 1982.

Petitioner filed amended New York State and City nonresident income tax returns for the years 1979, 1980, 1981, 1982 and 1983. They were received by the Division on or about November 18, 1985.

During the audit years, petitioner was an employee of Reliance Group Holdings, Inc. (the "Reliance Group"), a corporation located and doing business in New York. In addition to his salary income from the Reliance Group, petitioner incurred income and losses from various business ventures and investments.

Partnership Income and Losses

Petitioner was a partner in a number of partnerships, in and outside of New York, some of which were actively engaged in the business of exploring for and producing oil and gas, primarily in Oklahoma and Texas. The oil and gas partnerships reviewed geological reports, selected sites for drilling, entered into agreements for the leasing of property, contracted with drilling operators, and hired managers for the properties. Each of the oil and gas partnerships was registered in the state where the physical properties were located. At times, the oil and gas partners entered into partnerships with unrelated groups with expertise in drilling and

exploration or management of oil and gas properties.

Petitioner, along with another executive of the Reliance Group, Herbert Wender, organized all of the oil and gas partnerships in issue, and all of the general and limited partners were employees of the Reliance Group. The oil and gas partnerships were managed by petitioner and Mr. Wender. Petitioner testified that his activities were conducted from the Reliance Group's business offices in New York and that all partnership clerical and administrative tasks were performed by employees of the Reliance Group. He presented no other testimony or documents evidencing the nature of the relationship between the Reliance Group and the oil and gas drilling partnerships.

Federal partnership returns filed by the partnerships during the audit period show the address of each partnership as 1300 South Main, Tulsa, Oklahoma. Petitioner explained that the partnerships filed returns from the taxing jurisdiction which they believed had the greatest experience with gas and oil exploration. It is not known whether the partnerships maintained a regular place of business or had an agent in Tulsa. The partnerships used petitioner's home address in New Jersey as their regular business address. Petitioner explained that this was done because he was fearful that mail addressed to the oil and gas partnerships at the Reliance Group offices in New York would be lost or misdirected.

Petitioner did not report income from the oil and gas partnerships on his 1981 State and City tax return. In 1982, petitioner reported income of $92,335.00 as his distributive share of partnership income from all partnerships doing business in New York. This was calculated by subtracting total partnership losses of $443,888.00 from partnership income of $536,223.00. The Division eliminated from the calculation of New York income those losses derived from the gas and oil partnerships. In doing so, the Division calculated taxable income from all partnerships of $432,195.00.

In 1983, petitioner reported a loss of $68,989.00 as his distributive share of partnership income and S corporation income from businesses in New York. A worksheet attached to the 1983 return shows the following calculation of petitioner's distributive share of all partnership

income and losses (including partnerships doing business and not doing business in New York):

Partnership/S Corporation	Income/Loss
Chatham Energy	($ 5,693.00)
Okmulgee Ltd. Partners	-0-
National Ventures (Stamford, Conn.)	(8,211.00)
Wender & Blake	209,042.00
February Associates	(33,233.00)
Author Associates	(44,581.00)
B-W 1982 Energy Partners	(16,612.00)
Lincoln Ltd. Partners	(3,600.00)
Qwik Cap Company	(8,800.00)
Reliance Associates	1,724.00
Reliance Figueroa	(86,049.00)
Reliance Capital Advisors	(167,236.00)
Total	($163,249.00)

Two of the above items were eliminated in petitioner's calculation of New York income: a loss of $8,211.00 from National Ventures and a loss of $86,049.00 from Reliance Figueroa. In its recalculation of petitioner's New York income, the Division further eliminated losses derived from the gas and oil partnerships plus the loss derived from Reliance Capital Advisors, thus calculating a net income of $124,152.00.

Petition's reported income and losses from the oil and gas partnerships as reported on its originally filed returns is summarized as follows:

Partnership	1981	1982	1983	
Chatham Energy Company			($108,453.00)	($ 5,693.00)
Okmulgee Ltd. Partners			(2,685.00)	-0-
B-W 1982 Energy Partners			(175,893.00)	(16,612.00)
Lincoln Ltd. Partners			(43,399.00)	(3,600.00)
STB Energy Company			(9,430.00)	

The Certificate of Agreement of Limited Partnership of Lincoln Limited Partners was placed in evidence as being typical of the partnership agreements entered into by petitioner. Petitioner is identified as the only general partner and his address is shown as Chatham, New Jersey. Among the purposes, powers and obligations of the general partner described are: the management and control of the affairs of the partnership; the marketing and sale of all oil and gas produced from partnership lands; the hiring and employment of attorneys, accountants, auditors, geologists, consultants and any other necessary employees; the right to expend all or

part of the capital of the partnership; and the opening, maintenance and closing of bank accounts.

The Hanger Manufacturing Business

Prior to the audit years, petitioner entered into an agreement with a manufacturer of clothing hangers which was experiencing financial difficulties. Under the terms of the agreement, petitioner purchased steel molds used in the manufacture of hangers, paying the manufacturer $25,000.00 for the molds and signing a promissory note for an additional amount of approximately $225,000.00. Petitioner also agreed to pay the manufacturer to produce hangers, using petitioner's molds, and a corporation affiliated with the manufacturer agreed to purchase the hangers from petitioner at a set price. Thus, petitioner was guaranteed a return on his initial investment.[2]

Petitioner reported net income from the hanger business of $13,386.00 in 1981 and the same amount in 1982. These amounts were calculated on attached Federal Schedules C as follows:

	1981	1982	
Gross receipts	$132,090.00		$57,552.00
Cost of goods sold	72,038.00	-0-	
sub-total	60,052.00		57,552.00
Deductions[3]	46,666.00		44,166.00
Net profit	$ 13,386.00		$13,386.00

[2]Petitioner's relationship to the hanger manufacturing business is not clearly explained in the record. Under the authority of the State Administrative Procedure Act § 306(4), official notice is being taken of the record of Matter of George E. and Carol L. Bello, a proceeding before the Division of Tax Appeals which indicates that petitioner was one of several investors, including other executives of Reliance Group Holdings, Inc.

[3]Deductions included: a depreciation expense of $30,111.00 and an interest expense of $14,055.00 in 1981; and a depreciation expense of $30,111.00 and an interest expense of $11,550.00 in 1982.

On audit, petitioner was unable to produce books and records substantiating the claimed deductions, including those for cost of goods sold. Therefore, the Division disallowed all deductions from gross receipts, effectively increasing petitioner's income by the amount of the deductions in each year.

Petitioner maintains that the oil and gas partnerships carried on a regular and systematic course of business in New York. He testified that most of his activities as the manager of these partnerships took place in the offices of the Reliance Group in New York and that the administrative and clerical activities of the partnerships were performed in New York by employees of the Reliance Group.

Petitioner included with his petition an amended New York State tax return for 1981, claiming partnership losses from two oil and gas drilling partnerships of $139,808.00. He also included an amended 1983 return which eliminated the partnership loss of $167,236.00 from Reliance Capital Advisors, as reported on the original return. Petitioner conceded that this partnership did no business in New York and that the Division properly eliminated the amount of the loss from the calculation of New York income. Petitioner claimed additional losses of $86,049.00 as his distributive share of income from Reliance Figueroa Associates. No information was included about this partnership other than the assertions that the partnership conducted business in New York City and that petitioner erroneously failed to include losses from this partnership in calculating his New York income. By his amended petition, petitioner claimed total partnership income of $12,198.00 in 1983.

Petitioner presented none of the books and records of the hanger manufacturing business explaining that these records were kept by the manufacturer and were no longer attainable. He argued that New York treatment of income and loss from the hanger business should conform to the Federal treatment.

Petitioner's Federal income tax returns were audited by the Department of the Treasury, Internal Revenue Service ("IRS") for the years

1977 through 1980. As a result of the audit, the IRS determined that petitioner was not actually engaged in the business of manufacturing hangers. It concluded that the transaction between petitioner and the hanger manufacturer was essentially a loan of $25,000.00. (Apparently, petitioner never delivered on the promissory note of $225,000.00.) To reflect the reality of the transaction, the IRS treated the initial $25,000.00 investment as an investment loss incurred in 1979. The effect was to eliminate all reported losses and income attributable to the hanger manufacturing business in all other years.

Petitioner filed amended 1981 and 1982 Federal returns, reducing originally reported income in the amount of $13,386.00 in each year. Petitioner also filed amended New York 1981 and 1982 returns, eliminating the income from the hanger manufacturing business from his calculation of New York income.

Petitioner claims that he worked outside New York on 69 days in 1981. He allocated his wage and salary income accordingly on his 1981 State and City tax return. He also claims that he worked outside New York State on 37 days in 1983. He filed an amended 1983 State and City return allocating his salary income accordingly. Petitioner testified that as the tax manager of the Reliance Group he traveled outside New York on a limited basis. He submitted a list of days spent in other states in 1981 and 1983; however, no other documents or records were submitted in evidence to substantiate his claim of days worked outside New York.

Petitioner maintained a brokerage account with Salomon Brothers which enabled him to purchase securities on a margin. A percentage of these purchases related to United States Treasury obligations. In reporting his 1982 New York itemized deductions, petitioner failed to make the required New York modification to reflect interest expenses on these purchases. The Division disallowed all interest expenses attributable to the Salomon Brothers account on the ground that the expenses were incurred for the purchase of U.S. Treasury obligations. The total amount disallowed by the Division was $42,214.00. Petitioner claims that only $5,192.00 of this amount is

attributable to the purchase of Treasury obligations. Petitioner offered no direct evidence to support this claim; however, he requested that official notice be taken of the record of Matter of George E. and Carol L. Bello, a proceeding now before the Division of Tax Appeals. As indicated in Footnote 2 (supra), this was done. George E. Bello was also an employee of the Reliance Group. He entered into evidence at his hearing copies of Salomon Brothers brokerage account statements. This account was in the name of George E. Bello. It shows interest expenses incurred on the purchase of securities, including, but not limited to, United States Treasury obligations. He also offered a worksheet apparently prepared by a Division auditor, analyzing transactions in the Salomon Brothers account. The worksheet shows that 12.3 percent of total income from the Salomon Brothers account was attributable to United States Treasury obligations. Based on this evidence, petitioner argues that only 12.3 percent of the interest expenses associated with his Salomon Brothers account and claimed on his 1982 return were not deductible (12.3% x $42,214.00 = $5,192.00).

Petitioner claimed entitlement to additional interest expense deductions of $2,526.00 in 1981 and $2,426.00 in 1982, but he offered no evidence in support of this claim.

Petitioner did not itemize deductions on his originally filed 1983 State and City tax return. He filed an amended 1983 New York State and City income tax return claiming itemized deductions of $75,195.00, calculated as follows:

Taxes	$ 12,218.00
Interest expenses	109,897.00
Contributions	3,639.00
Misc.	912.00
Subtotal	$126,666.00
State, local and foreign income taxes	(6,103.00)
Subtotal	$120,563.00
Other adjustments	(45,368.00)
Total deductions	$75,195.00

Petitioner argues that there was no negligence involved in his reporting and payment of New York State and City income taxes and requests the cancellation of all penalties.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) empowers the Division of Taxation to mail a notice of deficiency to a taxpayer, if upon examination of the taxpayer's return it determines that that there is a deficiency of income tax. "A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state" (Tax Law § 681[a]). "After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition under section six hundred eighty-nine" (Tax Law § 681[b]). "No assessment of a deficiency in tax and no levy or proceeding in court for its collection may be made...until a notice of deficiency has been mailed to the taxpayer, nor until the expiration of the time for filing a petition contesting such notice" (Tax Law § 681[c]).

Petitioners assert that valid notices of deficiency for the 1981 and 1982 tax years were never mailed by the Division. As proof that a notice was mailed, the Division offered a copy of the notice of deficiency (assessment number A8506094071) and an affidavit of a Division employee, indicating that her review of the Division's records showed that the notice was mailed to petitioner by certified mail on August 16, 1985. No mailing logs or other documents were offered in evidence.

Essential elements of proof necessary to show mailing include an authenticated mailing log, a return receipt, evidence as to the Division's regular course of business or office practice or other probative evidence to establish both the fact and date of mailing (see, Matter of T.J. Gulf v. State Tax Commission, 124 AD2d 314, 508 NYS2d 97; Matter of Maclean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Matter of Mildred Colon, State Tax Commission, March 11, 1987). Here, the Division's affiant failed to describe the Division's routine office procedures with regard to mailing, and the Division did not offer a mailing log, return receipt, or any other document showing mailing of the notice. Therefore, it failed to prove that a notice

was mailed to petitioner in conformity with Tax Law § 681(a). The Tax Appeals Tribunal has held that such a failure of proof results in the determination that the notice of deficiency was improperly issued and cannot serve as the basis for a valid assessment (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). The Tribunal's decision was based on Federal case law interpreting the parallel Federal provision, 26 USC § 6212, on which Tax Law § 681(a) is based (see, Agosto v. State Tax Commn., 68 NY2d 891, 508 NYS2d 934).

Where the issue before the Tax Court is whether the Commissioner of Internal Revenue has mailed the taxpayer a timely notice of deficiency as required by law, the Tax Court has required the Commissioner to submit evidence establishing both the fact and date of mailing (see, Magazine v. Commr., 89 TC 321; Trimble v. Commr., 57 TCM 419). If the government has not submitted sufficient evidence to establish both the fact and date of mailing, the case will be dismissed on the ground the notice of deficiency was improperly issued and cannot serve as the basis for a valid assessment (see, Pietenza v. Commr., 92 TC 729; Magazine v. Commr., supra; United States v. Wright, 658 F Supp 1, 86-1 US Tax Cas ¶ 9457). To the extent that it addresses the 1981 and 1982 tax years, this case must be dismissed on jurisdictional grounds, based on the Division's failure to prove that it mailed a valid notice of deficiency for those years pursuant to Tax Law § 681(a).

B. In light of the above conclusion, this determination must be limited to issues raised by petitioner with regard to the 1983 tax year. The first of these is whether losses derived from the oil and gas partnerships were properly disallowed by the Division on the basis that these partnerships were not carrying on a business with a fair measure of permanency and continuity in New York State and New York City.

For the year in issue, Tax Law former § 637(a)(1) provided that "[i]n determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission

consistent with applicable rules of section six hundred thirty-two." Former section 632(b)(1)(B), insofar as is relevant here, states: "[i]tems of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to: ...a business, trade, profession or occupation carried on in this state." Pursuant to Administrative Code of the City of New York former § U46-2.0, a tax was also imposed on the net earnings from self-employment, within the city, of every nonresident individual.

20 NYCRR 134.1(a) provides that a nonresident partner shall include in New York income his distributive share of partnership income, gain, loss and deduction to the extent such items are derived from or connected with a business carried on in New York State, as determined under, among others, sections 131.3(b) and 131.4(a). 20 NYCRR 131.3(b) provides that: "The New York adjusted gross income of a nonresident individual does not include items of income, gain, loss and deduction attributable to the ownership of any interest in real or tangible personal property located outside New York State". 20 NYCRR 131.4(a)(2) provides that: "A business, trade, profession or occupation (as distinguished from personal services as an employee) is carried on within New York State by a nonresident when such nonresident occupies, has, maintains or operates desk space, an office, a shop, a store, a warehouse, a factory, an agency or other place where such nonresident's affairs are systematically and regularly carried on, notwithstanding the occasional consummation of isolated transactions without New York State."

Essentially, the Division argues that losses from the oil and gas partnerships were attributable to ownership interests in real property located outside New York State and, therefore, not deductible from New York income, while petitioner's position is that the losses were derived from a business systematically and regularly carried on in New York State and, therefore, deductible as derived from a New York source.

The cases cited by the Division in support of its position rely on section 707(e) of the Tax Law which related to the tax on unincorporated businesses and not to the tax on personal income (see, Matter of Baird, State Tax Commission, October 6, 1982, [TSB-H-82(270)-I];

Matter of J & L Partnership, State Tax Commission, March 13, 1981, [TSB-H-81(118)-I]). Nonetheless, the underlying concepts of those cases are not dissimilar from those which govern here. In each of the cited cases, it was held that losses derived from oil leases of property not located in New York State were losses from interests in real property and, as such, were not deductible from New York income. The Division argues that these cases are determinative of the outcome of this case.

In Matter of Voght v. Tully (53 NY2d 580), the court held that in determining whether an enterprise is carrying on business in New York State and New York City, within the meaning of Tax Law § 637(a)(1) and Title U of the Administrative Code, an essential factor to be weighed is whether the management of partnership assets located outside of New York is passive or active. In that case, a New York limited partnership, Endeavor Car Company ("Endeavor"), purchased, financed and leased railroad tank cars. PPG, a Pennsylvania corporation engaged in producing resin and basic chemicals, used a great number of tank cars to transport its products. Endeavor was formed to purchase tank cars and lease them to PPG. Endeavor owned over 600 tank cars, all of which were located outside of New York and were operated by PPG as lessee and not by Endeavor. All of Endeavor's business activities were conducted in New York by one of Endeavor's two general partners, Charles A. Lee, at the offices of his employer, First Boston Corporation. The State Tax Commission found: that Mr. Lee devoted approximately 30 percent of his time to partnership activities; that the partnership's books and records were maintained in New York; that the partnership's statutory business address was in New York; that clerical, administrative and other services were provided to the partnership by First Boston Corporation on a contractual basis under a compensatory arrangement between the partnership and First Boston; and that the partnership had no other offices either inside or outside New York. Based on the factual findings of the State Tax Commission, the court held that the business of the partnership was not passive only and that the business was "systematically and regularly carried on...with a fair measure of permanency and continuity" (20 NYCRR 131.4[a][2]) in New York.

Petitioner maintains that the oil and gas partnerships were not passive investment instruments, but rather active business enterprises managed and carried on by the partners. The agreement of Lincoln Ltd. Partners, along with petitioner's testimony, is clear and convincing evidence that this was so. The partnership selected sites for drilling; hired geologists, engineers and other specialists; leased real property; contracted with drilling operators; and managed producing wells. The determinative issue then is whether the oil and gas businesses conducted by the partnerships were conducted in New York.

The mere fact that partnership assets are located outside New York is not determinative of whether an enterprise is carrying on business in New York for tax purposes. "[A]n enterprise is carrying on business in New York...where there exists a reasonably systematic and continuous transactional nexus between this State and the enterprise" (Matter of Ausbrooks v. Chu, 66 NY2d 281, 287, 496 NYS2d 969, 972). Whether such a nexus exists, by necessity, entails a factual inquiry, and the burden of proof to show a systematic and regular course of business rests with petitioner (Tax Law § 689[e]).

Documents relating to the gas and oil partnerships did not evidence a New York connection. The partnership agreement of Lincoln Limited Partners shows the general partner's address as petitioner's residence in New Jersey. There is nothing in the agreement that indicates that any of the partnership's activities were to be carried on in New York. Each partnership filed Federal partnership returns, showing its address as 1300 South Main, Tulsa, Oklahoma. This would indicate that the partnerships had either an office or agent in Oklahoma, and petitioner offered no explanation to counter this logical assumption. All of the partnerships were formed under the laws of other states, and all of the partnerships' assets were located outside New York. Of course, much of the actual business of the partnerships, exploring and drilling for oil and natural gas and managing the producing wells, occurred outside New York. Petitioner conceded that partnership mail was delivered to him in New Jersey. These facts establish no transactional nexus between New York and the oil and gas partnerships. Opposed to these facts is petitioner's testimony. Petitioner claimed that he was actively engaged in

managing and supervising the partnerships and that most of his activities were carried on in New York. Petitioner well understood the importance of establishing that the business of the oil and gas partnerships was carried on in New York with a measure of permanence and continuity, yet he offered no evidence to prove this ultimate fact, other than his own testimony. In light of documentation which tended to show that the business of the partnerships was not carried on in New York, petitioner's testimony to the contrary is not sufficient to sustain his burden of proof.

C. Petitioner failed to carry his burden of proof with regard to all other issues raised in the petition, including facts alleged by his 1983 amended return. He presented no evidence whatsoever to show that Reliance Figueroa carried on business in New York. The only evidence submitted with regard to days worked outside of New York was a listing of the number of days purportedly worked in other states. No documents were submitted in support of that listing. Petitioner provided no evidence to substantiate the existence or amount of the itemized deductions claimed on his 1983 amended return. Accordingly, there is no basis for modifying the Notice of Deficiency issued for 1983.

D. Tax Law § 685(b) provides for an addition to tax "[i]f any part of a deficiency is due to negligence or intentional disregard" of the Tax Law or rules and regulations promulgated under the authority of the Tax Law. Petitioner was given an opportunity at the time of the audit and at hearing to present documents substantiating his claims with regard to the partnership losses, days worked outside of New York and other issues raised in his petition. Petitioner presented no records or documents with regard to his various claims for the 1983 tax year, the only year at issue here. It can only be concluded that petitioner was either negligent in maintaining such records or that any records he might have offered would not support his claims. Therefore, the penalty imposed under Tax Law § 685(b) is sustained.

E. The petition of Michael J. Blake and Kathleen T. Blake is granted to the extent indicated in Conclusion of Law "A", and, in all other respects, the petition is denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE