STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT L. COHEN AND JOYCE A. COHEN	:	DETERMINATION DTA NO. 807006
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1985 and 1986.	:	

Petitioners, Robert L. Cohen and Joyce A. Cohen, 5243 Beechnut Street, Houston, Texas 77096, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 and 1986.

Petitioners, appearing pro se, and the Division of Taxation, by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel) executed a consent to have the controversy determined on submission of documents without hearing. The record was left open to December 9, 1991 for the submission of documentary evidence and arguments. Upon review of the complete record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

I. Whether the Division of Taxation properly disallowed deductions claimed by petitioners for employee business expenses, interest expenses and automobile depreciation.

II. Whether the Division of Taxation properly disallowed an investment tax credit claimed by petitioners in 1985.

III. Whether the Division of Taxation properly excluded a claimed farm loss in its calculation of petitioners' 1985 New York adjusted gross income.

IV. Whether petitioners are entitled to a default determination against the Division on the ground of a late answer to the petition.

FINDINGS OF FACT

Petitioners, Robert L. Cohen and Joyce A. Cohen, filed 1985 and 1986 New York State

resident income tax returns under the status married filing separately on one return.[1]

On his 1985 return, petitioner calculated his total New York income by including a farm loss of $32,017.00 from an entity identified as G & B Nursery Farm (the "Farm") and business losses of $3,403.00 in connection with a business identified on an attached schedule C as Robert L. Cohen, Public Accountant. He also claimed an investment tax credit of $1,606.00. The business losses were calculated by subtracting unreimbursed employee business expenses, "in connection with salaried position as senior V.P.", of $4,003.00 from gross income of $600.00. There is no information on the schedule C to indicate whether the income and expenses flowed from the same business. Petitioner attached a Federal depreciation schedule (Form 4562) to his State return. It shows a total depreciation of $3,125.00 on a 1984 Oldsmobile. Petitioner claimed 60 percent business use of the vehicle thus claiming total depreciation in 1985 of $1,875.00. Petitioner itemized his New York deductions, and he included in those deductions interest payments of $10,891.00. Attached to petitioner's return is a 1985 wage and tax statement from L.F. Rothschild, Unterberg and Towbin, showing

wages paid to petitioner of $94,739.53. This amount was reported by petitioner on his 1985 State income tax return as income from salary or wages.

On his 1986 return, petitioner reported a business loss of $6,925.00 (a schedule C was not attached to the return offered in evidence), and he included in his calculation of itemized deductions interest payments of $15,741.00. A wage and tax statement attached to his 1986 return shows wages, tips and other compensation of $77,101.49 from L.F. Rothschild, Unterberg and Towbin of New York City.

In August of 1988, the Division of Taxation ("Division") began an audit of petitioner's 1985 and 1986 returns. A letter was sent to petitioner scheduling an audit in the offices of the

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[1]Petitioner Joyce Cohen is included in these proceedings by virtue of having filed a joint return with her husband, Robert L. Cohen; she had no separate income. Therefore, this determination is concerned only with facts applying to Mr. Cohen, and all references to petitioner should be understood to apply to Robert L. Cohen.

Division on September 20, 1988 (this letter was not placed in evidence; therefore, its precise contents are unknown).

On September 19, 1988, petitioner telephoned the Division and spoke with the auditor assigned to this audit, Felipe Rivera. Petitioner stated that he was now living in Texas and provided Mr. Rivera with his new address and telephone number. There is some dispute between Mr. Rivera and petitioner with regard to agreements made by them in this telephone conversation. Petitioner's understanding of the conversation is set forth in a letter to Mr. Rivera dated September 19, 1988. In that letter, he objected to the audit on the ground that his 1981 tax return had been audited. According to petitioner, that audit resulted in substantiation of the 1981 income tax return as filed, except that an additional refund was determined on the basis of additional unclaimed business expenses. Petitioner stated his belief that auditing three out of six tax returns amounted to unwarranted harassment. As the only categories not audited in 1981 were the farm loss and related investment tax credit, he offered to provide information on these items only. He also made the following statements:

> "I have contacted the administrative group for the 'G & B Nursery Farm 1985.' They told me that I should ask you to wait for data since they are presently in the midst of a Federal audit of the nursery. When the audit is completed the state will be notified regarding any changes."

Petitioner provided Mr. Rivera with the telephone number of the Farm's accountant so that he could verify that information if he wished to.

A letter dated September 21, 1988 from Mr. Rivera to petitioner evidences Mr. Rivera's understanding of his telephone conversation with petitioner. The body of the letter states:

> "Pursuant to your request, the audit of your income tax returns for the years 1985 and 1986 may be conducted through the mail.
>
> For that purpose, please remit to us evidence that substantiates the following items checked in our letter of August 18.
>
> Interest Expense
> Farm Loss
> Investment Credit
> Schedule C Expenses
>
> As indicated in said letter, the evidence may be in the form of receipts, cancelled checks, records, or other documents. We will review them and give you credit for

whatever amount you substantiate.

Please also send us copies of the federal income tax returns for said years.

The documentation must be received in this office by October 20, 1988.

Thank you for your cooperation in this matter."

Petitioner responded somewhat angrily to Mr. Rivera's letter. By letter dated September 27, 1988, he denied agreeing to have the audit conducted by mail (since, in effect, he objected to the audit being conducted at all). He also stated that he had just moved to his new residence and had 20 cartons of papers and records to unpack in order to find the records for 1985 and 1986. Petitioner reasserted his willingness to provide information about the farm loss. Finally, petitioner requested that Mr. Rivera contact him by telephone so that they could "establish a dialogue".

By letter dated September 29, 1988, Mr. Rivera advised petitioner that the previous audit of his 1981 return "has no bearing on the present years audit". He also asked petitioner to send a written statement from the Farm confirming the Federal audit and providing the location of the farm. Petitioner responded to this letter with a letter dated October 18, 1988. In this letter, he objected to what he saw as Mr. Rivera's ignoring statements made in the earlier letter. Specifically, he objected to Mr. Rivera's failure to call him to discuss the audit procedure and to Mr. Rivera's failure to verify statements regarding the Federal audit by contacting the Farm's accountant (see Finding of Fact "5"). He once again asked that Mr. Rivera discuss the procedure for conducting the audit with him.

Mr. Rivera sent another letter to petitioner, dated November 2, 1988, in which he stated:

> "In our letter of September 21, 1988 we informed you that the audit of your income tax returns for the year[s] 1985 and 1986 might be conducted through the mail. We requested that you submit by October 20th the evidence substantiating certain items. In addition, on September 29, 1988 we requested a specific document also pertinent to the audit.
>
> To this date, however, you have failed to supply the documentation requested.
>
> Since this is the fourth letter we have sent to you requesting substantiation, we must soon make a determination in this case. If the substantiation requested is not forthcoming, we will have to disallow the deductions you took on the items checked in our letter of August 18, 1988 and assess the corresponding tax liability."

Dissatisfied with his communications with Mr. Rivera, petitioner sent a letter to then Commissioner of Taxation and Finance, Roderick Chu. In that letter, he reiterated his objection to having both his 1985 and 1986 returns audited and requested that the audit encompass only one of the two years. If this request was denied, he asked to be supplied with the reasons for its denial. Petitioner then asked to have more time to supply documents and records, since he was not fully unpacked from his move to Texas and had moved twice since filing his 1985 return. Statements made in petitioner's letter indicate that Mr. Rivera previously sent and asked him to execute a consent to extend the period of time for assessment of the 1985 tax year, with instructions to return the form within 10 days of its mailing to him (which was November 2, 1988 according to the letter).[2] Petitioner pointed out that he did not receive the consent form until November 9, 1988 and, therefore, had almost no time to respond. His letter indicates that he interpreted Mr. Rivera's letter, coupled with the request that he execute the consent form, as a threat to issue an unwarranted assessment. Finally, petitioner requested that the matter be transferred "to Albany", apparently meaning to the Division's central offices in Albany.

Commissioner Chu referred petitioner's letter to John B. Langer, Deputy Commissioner for Operations. Commissioner Langer replied to petitioner by letter dated December 7, 1988. In that letter, he stated that petitioner's 1985 and 1986 returns were selected for audit "by a routine manual screening process" and stated that it is a common practice for the

Division to audit several years at the same time "for cost effectiveness to the state as well as the taxpayer." Commissioner Langer stated that additional time to gather and provide documents would be granted to petitioner, if he signed and returned the consent form sent to him on November 2, 1988. The letter directed petitioner to send the consent form directly to Commissioner Langer.

On December 23, 1988, the Division issued to petitioner two statements of audit

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[2]The auditor's contact sheet also shows that on November 2, 1988 petitioner was sent a consent to extend the statute of limitations for assessment of the 1985 tax year.

changes for the years 1985 and 1986, respectively. The statement for 1985 disallowed petitioner's claimed business losses, farm losses and deductions for interest expenses and asserted additional tax due for 1985 of $6,005.44, plus penalties and interest. The statement for 1986 disallowed petitioner's claimed business losses and deductions for interest expenses and asserted additional tax due of $4,064.38 plus penalty and interest. Each statement includes a section showing that it was issued from the Maiden Lane office of the Division, in New York City.

Apparently, petitioner had not received the statements of audit changes when he replied to Commissioner Langer's letter of December 7, 1988, for he makes no mention of them in his own letter of December 31, 1988. In that letter petitioner expressed a great deal of dissatisfaction with the Division's audit procedures in general and Commissioner Langer's letter in particular. One paragraph is adequate to convey the tone of petitioner's letter and his most repeated complaint about the audit.

> "It is clear that I, as a citizen, misread the nature of your mandate. I had thought it was 'compliance' of the taxpayers--not one of revenue raising as a prime directive. Since most taxpayers tax lines are patterned--containing similar income and deductions from year to year--your 'cost effective' 2 year at a time screening process guarantees the audit group the ability to harass taxpayers with a continuous audit of 100% of the returns filed. Further, the Federal IRS requests that if a taxpayer has been audited previously, for the same deduction claimed for the year under review, that you bring that matter to the attention of the service. Mr. Rivera and your letter reiterate that previous audits have no bearing on the current audits--leaving the State Dept of Taxation in the position to harass as well as abuse the taxpayer."

In this letter, petitioner offered to provide the Division with a "restricted" extension of time to assess tax for 1985, meaning an extension that would apply only to the audit of the farm loss and associated investment tax credit. Since the only substantial difference between his 1981 income tax return (audited by the Division) and his 1985 and 1986 returns was the farm related items claimed in 1985, petitioner believed that auditing other items was unnecessary. Petitioner made several other points in this letter. Most notably, he requested that the Division "rescind the threat" to disallow all deductions if he did not sign the consent form sent to him by Mr. Rivera and again requested that the Division select either 1985 or 1986 for audit. In this

letter, petitioner also stated that he had finally "found" his 1985 return and expected to be able to send the Division documentation supporting his deductions and expenses by February. This, his letter states, would include Federal tax schedules related to the Farm which were originally prepared by the Farm's accountant.

By January 11, 1989, petitioner was in receipt of the statements of audit changes. In his letter to Commissioner Langer of this date, petitioner stated that he did not accept the findings shown in the statements and that he would not communicate further with Mr. Rivera. He again requested that the audit be extended while he continued to gather information.

Petitioner forwarded to Commissioner Langer, with a cover letter dated January 30, 1989, the following documentation applicable to 1985: federal schedules F, 4562, and 3468 (regarding the farm loss and investment tax credit); bank and other creditor statements establishing payments of interest expenses; and invoices, canceled checks and worksheets relating to business expenses. He advised Commissioner Langer that he expected to be able to submit information with regard to the 1986 tax year by February 16, 1989. His letter states that he was at that time still awaiting a reply to his letters of December 31, 1988 and January 11, 1989.

Without replying to petitioner's letters, the Division issued to petitioner a Notice of Deficiency for the 1986 tax year, dated February 10, 1989, asserting a tax deficiency of $4,064.38, plus penalty and interest. It would appear that several of the letters exchanged between Commissioner Langer and petitioner after this date crossed in the mail.

Upon receipt of the Notice of Deficiency for 1986, petitioner wrote to Commissioner Langer by letter dated March 3, 1989. Petitioner strongly suggested that the Division's issuance of the 1986 Notice of Deficiency was precipitous and motivated by the Division's desire to issue an assessment before petitioner had an opportunity to submit substantiation of his 1986 expenses and deductions. With this letter, petitioner enclosed various records and documents to substantiate deductions claimed on his 1986 return.

By letter dated February 22, 1989, Commissioner Langer responded to petitioner's letters

of December 31, 1988, January 4, 1989 and January 11, 1989. This letter indicates that by this time Commissioner Langer had also received the letter of January 30, 1989, with its submissions. Replying directly to one of petitioner's major concerns, namely repetitious audits, Commissioner Langer stated:

> "In your situation, your 1985 and 1986 New York State tax returns were selected for audit. This is four tax years after your 1981 audit. Additionally, new issues arose from your previous audit; namely the investment tax credit and farm loss."

Commissioner Langer also explained that Mr. Rivera's request for an extension of time for assessment of the 1985 tax year, concededly made well before the time period for assessment was due to expire, was necessitated by changes in the Division's automated accounting system. The remainder of Commissioner Langer's letter states:

> "By the time you receive this letter you will likely have received a Notice of Deficiency setting forth the amounts due shown on the Statement of Audit changes; therefore, the waiver originally requested by Mr. Rivera will no longer be of necessity.[3] We have taken the steps necessary to stop the maturing of this Notice to the collection stage pending adjustments to the audit findings when substantiation is submitted.
>
> With respect to your 'restrictive extension', we do not require an extension for any items that are under Federal audit because you are required to notify New York State of Federal audit changes within ninety days of the final determination. The extension we previously requested would have covered all other issues raised on audit.
>
> I am sorry that you viewed Mr. Rivera's letter of November 2, 1988 as a threat. I can assure you, it was merely his intention to inform you of the consequences of not responding by either substantiation of the items requested or signing of the waiver to extend the statute.
>
> In view of the fact that your audit will be completed through correspondence, we are granting your request for transfer of your case to Albany. You will be contacted in the near future by a Central office tax technician who will be assigned to your case. In the meantime, if you have any questions regarding your audit, you may contact Howard Parsons, Tax Audit Administrator.... We have received the material you sent on January 30, 1989 and February 6, 1989 will forward it along with your case file to Mr. Parsons for reassignment.
>
> We are sorry for any misunderstanding or inconvenience caused you. I'm sure this matter can be resolved with mutual cooperation."

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[3] This statement indicates that Commissioner Langer believed that the Notice of Deficiency issued on February 10, 1989 was for the 1985 tax year.

The second Notice of Deficiency, asserting a tax deficiency for 1985 of $6,005.44, plus penalty and interest, was issued to petitioner on March 16, 1989, after his receipt of Commissioner Langer's letter of February 22, 1989. He replied to the notice with a letter to Commissioner Langer dated March 20, 1989. In it, petitioner stated:

> "Contrary to what was said in your letter to me of February 22, 1986, I have now received an additional notice of deficiency (dated 3/16/89) this time for the year 1985 (prior notice 1986) assessment #A88122543251" (emphasis in original).

In addition, he complained that the Division had adequate time to review the documents submitted in January 1989 but issued the notice, disallowing all expenses and deductions for 1985, without discussing the adequacy of the submitted documents. He also contended that the issuance of the 1985 notice was inconsistent with the statements made in Commissioner Langer's letter of February 22.

Petitioner filed a petition protesting the 1985 and 1986 notices of deficiency on June 5, 1989.

In this proceeding, petitioner submitted a schedule of Farm Income and Expenses (Federal schedule F) for 1985. It shows Robert Cohen as the sole proprietor of G & B Nursery Farm. A net loss of $32,017.00 is calculated by subtracting deductions of $32,645.00 from income of $628.00. The location of G & B Nursery Farm and petitioner's relationship to that enterprise (other than the listing of his name as sole proprietor) is not shown on the return. A Federal form 3468 shows the calculation of an investment tax credit of $2,677.00 on property with a cost basis of $26,767.00. The property, somehow associated with the Farm, is not identified and the situs of the property is not known. The schedules submitted were also filed with petitioner's 1985 New York income tax return.

Petitioner submitted bank statements, cancelled checks, an installment contract and other documents showing interest expenses for 1985 of $11,118.90 and interest expenses for 1986 of $16.034.87.

Petitioner submitted documents showing his purchase of a 1984 Oldsmobile on October

11, 1983 and his purchase of a 1987 Oldsmobile on December 30, 1986. Cash paid for the 1984 automobile was $8,940.93 (retail price minus trade-in). He depreciated the cash cost of the automobile over a period of three years, claiming depreciation of $1,704.00 for 1984 and depreciation of $3,125.00 for each of the next two years. Petitioner claimed a business use of the automobile of 60 percent. Thus, he claimed a deduction in 1985 of $1,875.00 based upon automobile depreciation.

Petitioner computed the cost basis of the 1987 Oldsmobile by adding the "book value" of the 1984 Oldsmobile at the time it was traded for the purchase of the 1987 Oldsmobile ($6,787.63) to the cash cost to him of the 1987 Oldsmobile ($11,924.11). This resulted in a cost basis of $18,711.74. He determined that total depreciation for 1986 was $9,541.00. He claimed 62.7 percent business usage of the automobile, thus calculating a deduction of $5,915.42.

Petitioner also submitted documents showing expenses related to the maintenance and repair of both automobiles, including insurance and motor vehicle registration costs. Petitioner claimed total automobile expenses for 1985 of $918.55 and business usage of 60 percent resulting in deductible expenses of $551.13. He submitted cancelled checks substantiating total expenses of $796.30. For 1986, petitioner claimed total automobile expenses of $1,441.11, 62.7 percent of which was claimed as business usage, yielding deductible expenses of $893.48.

For 1985, petitioner submitted a schedule of "Employee Expenses" totalling $4,213.89, calculated as follows:

Passport		$ 35.00*
Passport		8.00
Insurance--Nat'l Assoc. of Accountants	93.79*	
Insurance--Nat'l Assoc. of Accountants	234.48	
Nat'l Luggage--Attache case		58.44*
Real Estate Tapes		295.00
Airline Upgrade		111.00*
Business Meeting/Meal		
Drexel Burnham	62.30*	
NASD		34.75
Lord Abbott		42.00
8 round trips to New York City		
53 gallons of gasoline		53.00
8 parking fees	120.00	

8 bridge tolls	16.00
Christmas Party for employees	624.00
Allocated automobile expenses	551.13
Allocated depreciation expense	1,875.00
Total	$4,213.89

* These expenditures were documented with cancelled checks or guest checks.

Petitioner subtracted these expenses from income of $600.00 to calculate a business "loss" of $3,613.89.

For 1986, petitioner submitted a schedule of business losses calculated as follows:

Nat'l Assoc. of Accts. Insurance	$ 578.40*
Christmas Party for employees	158.85*
Belated 1985 Secretary's lunch	35.00
1986 Secretary's lunch	31.00
Reardon Security Analyst Lord Abbott	29.50
Lorelli asst cashier Drexel Burnham	60.67*
Morea VP NASD	50.00*
Real Estate Investment Seminar (telephone expense)	1.50
Six trips to New York City	
33 gallons of gasoline	33.00
Parking and tolls	108.00
Allocated auto expenses	893.48
Allocated depreciation	5,915.42
Total	$7,894.82

* These expenditures were documented.

On workpapers, petitioner subtracted expenses from income of $600.00 to calculate a business loss of $7,294.82.

SUMMARY OF PRIOR PROCEEDINGS

On or about June 5, 1989, petitioner filed a single petition protesting both notices of deficiency. On or about October 5, 1989, petitioner brought a motion for determination on default on the ground that the Division failed to file an answer to the petition within 60 days. The Division filed an affidavit in opposition to the motion on or about October 30, 1989. In conjunction with its affidavit, the Division filed an answer to the petition. On November 9, 1989, Assistant Chief Administrative Law Judge Daniel J. Ranalli issued a short form order denying petitioner's motion. In a letter to the Supervising Administrative Law Judge, dated

November 20, 1989, petitioner stated:

> "I...do believe that the Administrative Law Judge in issuing his short form order in this matter has not considered all the facts touched upon in my petition in arriving at his decision to deny me a default judgment against the Tax Dept.
>
> a. The failure of the Tax Dept. to meet time restraints as well as to respond to previous taxpayer's repeated attempts to gain a response from the department have denied me the opportunity to exhaust avenues in a normal review-and I feel this has been so consistently applied against petitioner as to leave little doubt as to its deliberate nature.

By letter dated December 11, 1989, Judge Ranalli replied to petitioner. He did not respond directly to petitioner's contention that the motion was wrongly decided, but he explained that petitioner still had a right to a hearing. The letter states, in material part:

> "The order only means that the Department's failure to file its answer promptly will not result in your petition's being granted. You may still present all your evidence and arguments at hearing."

By its answer, the Division asserted that the petition in this matter was untimely with respect to the Notice of Deficiency issued for 1986. The administrative law judge severed the timeliness issue from the other issues raised by the pleadings and, on July 25, 1991, issued a determination deeming the petition timely for both years and remanding for a determination on the merits. Following the issuance of that determination, both parties were given an opportunity to submit additional evidence and arguments of law. The Division did not except to the administrative law judge's determination.

Based on the documents submitted by petitioner to substantiate claimed interest expenses, the Division concedes that petitioners were entitled to interest deductions of $11,119.00 for 1985 and $16,035.00 for 1986.

SUMMARY OF THE PARTIES' POSITIONS

The Division asserts that petitioner has not proved entitlement to the farm loss or investment tax credit claimed for 1985. The Division claims that petitioner is not entitled to the investment tax credit under section 606 of the Tax Law because the situs of the farm is not in New York State. Petitioner advised the Division that the Internal Revenue Service is conducting an audit to determine whether the farm loss should be allowed. The Division asserts

that the farm loss should be excluded from the calculation of New York income until the IRS makes a final determination.

It is the Division's position that petitioner has not provided sufficient evidence to verify the nature of the direct expenses claimed as employee or business expenses. The Division is willing to make some allowance for automobile expenses and depreciation in 1986. Petitioner used the automobile to attend a real estate seminar in 1986, and the Division allocated 360 miles of total automobile usage for this purpose.[4] Using this figure, the Division has calculated that 2.4 percent of total automobile usage was business related (360 divided by 15,100). The Division applied this figure to total automobile expenses ($1,441.11) to determine deductible automobile expenses of $35.00. The Division claims that pursuant to IRS rules petitioner's automobile, purchased in 1986, must be depreciated over five years using the straight line method with half year convention. Thus, total depreciation for 1986 amounts to $954.00 (10% of the cash cost of the automobile), of which 2.4%, or $23.00, may be allocated to business use. Thus, the Division agrees to allow total expenses of $58.00 for 1986.

Petitioner claims that the Division's actions have been abusive and punitive. He believes that the Division denied him adequate time to provide documentation and then ignored the documentation that was supplied. He points out that during the course of the audit he requested additional time to gather documents requested by the Division, that he repeatedly asked the Division to discuss the audit procedure with him and that he requested transfer of the audit to the Division's offices in Albany. As he sees it, he was cooperating with the Division's audit by supplying documents to substantiate his expenses when the Division groundlessly issued the two notices of deficiency completely eliminating all deductions. Petitioner believes that inasmuch as the Division did not review the documents he

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[4]The billing invoice for this seminar shows that it was conducted in New York City on August 13, 14 and 15, 1986. Petitioner estimated the distance from his home to New York City to be 80 miles round trip. This seems to be the basis for the 360 mile estimate. There is no evidence in the record that attendance at the seminar was required as a condition of petitioner's employment.

submitted before issuing the assessments the notices are baseless. It is especially distressing to petitioner that the Notice of Deficiency for 1986 was issued after he had advised the Division that he soon would submit documentation for that year and well before the statute of limitations for issuing an assessment had expired. He believes that the Division intended to issue a Notice of Deficiency for 1985, because the statute of limitations was about to expire, and mistakenly issued a notice for 1986. Based on this belief, he claims that the 1986 Notice of Deficiency was issued "in error". Petitioner requests that both notices be cancelled in their entirety, since, as he sees it, they resulted from the Division's arbitrary actions.

Petitioner claims that the 1985 and 1986 tax years are time barred. In his view, the 1985 Notice of Deficiency was issued because the statute of limitations was due to expire and without any other basis, and the 1986 Notice of Deficiency was issued prematurely. Consequently, he believes that the notices should be deemed untimely.

Petitioner alleges that the business deductions claimed for 1985 and 1986 were similar to deductions claimed for 1981. He further alleges that the 1981 deductions were allowed following an audit. As a consequence, he maintains that the Division should never have audited his business deductions for 1985 and 1986 and that the Division should not be allowed to question the nature of those expenses. Moreover, petitioner states that his former employer is no longer doing business and for that reason it would be impossible for petitioner to obtain information to substantiate the business nature of the expenses.

Petitioner asks that Judge Ranalli's order, denying his motion for a determination on default, be reconsidered. In that order, Judge Ranalli stated:

> "Where an administrative agency fails to meet a time constraint established by its own regulations, the petitioners must show that the delay resulted in substantial prejudice to their position".

He concluded that petitioner had not established prejudice to his position by the Division's delay in answering. In response to this, petitioner submitted a statement describing certain illnesses and accidents suffered by his family since 1988. He believes that the Division's delay in auditing the documents submitted to Commissioner Langer in February 1989 have caused him

and his family to suffer from emotional stress and that this stress has contributed to his and his family's health problems. Petitioner does not distinguish between the Division's delay in answering the petition and its failure to take immediate action with regard to the documents submitted by him. He views both of these actions as part of a concerted effort by the Division to delay and cause harm to petitioner.

Petitioner claims that the Division has shown no reason for disallowing the claimed farm loss. It is his position that the Division has no right to await the results of an IRS determination before determining whether to allow the loss as claimed but is obligated to perform its own audit of the Farm or allow the loss.

CONCLUSIONS OF LAW

A. The New York adjusted gross income of a resident individual is his Federal adjusted gross income as defined in the laws of the United States for the applicable year, with those modifications set forth in section 612 of the Tax Law (Tax Law § 612). Likewise, the starting point for calculating New York itemized deductions of a resident individual is Federal itemized deductions (Tax Law § 615[a]). As material to this proceeding, the term adjusted gross income is defined in the Internal Revenue Code as gross income minus all deductions allowed under Chapter 1 of the Code "which are attributable to a trade or business carried on by the taxpayer" (IRC § 62[1]). For the years in issue, the Internal Revenue Code limited deductions from gross income (so-called above-the-line deductions) to expenses covered by a reimbursement or allowance arrangement with the employer, travel expenses paid or incurred while away from home in connection with the performance of services as an employee, transportation costs incurred by the taxpayer in connection with the performance by him of services as an employee and outside salesperson's expenses (IRC former § 62[2]). Employee business expenses other than those enumerated in section 62(1) were to be treated as below-the-line deductions and deducted from adjusted gross income to calculate taxable income (IRC former § 63[a]).[5]

[5]A business is carried on by an employee when he performs services for an employer so that any expenses incurred by an employee may be deducted if they meet other requirements (see, e.g., Stemkowski v. Commissioner, 690 F2d 40, 82-2 US Tax Cas ¶ 9589).

Moreover, to qualify for the employee business deduction the expenditures must have been "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" (IRC § 162[a]).

The burden of proof in this proceeding was upon petitioner (Tax Law § 689[e]); consequently, it was incumbent upon him to prove the material facts which would establish his entitlement to the business deductions claimed. Schedules submitted by petitioner show that he calculated the business losses claimed in each year by subtracting certain enumerated expenses from an income of $600.00. The source of the $600.00 income is unknown, and it would appear from the record that petitioner had no income

separate from wages received as an employee. If any of the expenditures made by petitioner were related to a trade or business carried on by him other than as an employee, there is no evidence in the record to show it. Likewise, there is no evidence in the record to establish that the travel and automobile expenses were incurred in connection with his services as an employee. Indeed, the record is devoid of any facts which would relate these expenditures to a business purpose. Accordingly, there is no basis for treating these expenses as deductions for the purpose of calculating petitioner's adjusted gross income. Some of the expenditures claimed may have been deductible from adjusted gross income (such as the 1986 Christmas parties for employees), but petitioner offered no evidence to establish that these were "ordinary and necessary" expenses. It is petitioner's position that since the Division allowed similar expenses upon audit of his 1981 income tax return it should be prohibited from disallowing the expenses claimed here. Inasmuch as petitioner never established that an audit was conducted in 1981 or that business expenses claimed in 1981 were similar to those claimed in 1985 and 1986 or that the audit results were favorable to petitioner's position, petitioner's argument does not have a factual basis upon which it can be considered.

Similarly, petitioner claimed an investment tax credit on equipment but failed to provide

a description of the equipment and has not established that the equipment is located in New York. Since the credit is only available to property with a situs in New York State (Tax Law § 606[a][2][A]) and the location of the property is unknown, the credit must be denied.

The Division disallowed the farm loss claimed by petitioner for 1985 pending the results of an audit by the Internal Revenue Service which would establish whether petitioner is entitled to include the losses in his calculation of New York adjusted gross income. Petitioner claims that the Division is required to perform an independent audit of the Farm before making any adjustment to his calculation of New York income. By his claim petitioner is attempting to shift the burden of proof to the Division. The filing of a tax return is not evidence of the statements made upon the return. Inasmuch as petitioner included the farm loss in his calculation of New York income, he was required to substantiate the loss when it was challenged by the Division. He failed to do so; consequently, the Division was warranted in disallowing the full amount claimed. It had no independent duty to conduct an audit of G & B Nursery Farm before doing so, and its exclusion of the loss in the calculation of petitioner's 1985 New York State income is sustained.

B. The Division concedes that petitioner is entitled to claim deductions for interest expenses of $11,119.00 for 1985 and $16,035.00 for 1986. The Division has also agreed to allow automobile depreciation and expenses in the amount of $58.00 for 1986. The tax deficiency asserted for each year will be recalculated accordingly.

C. Petitioner argues that the notices of deficiency for 1985 and 1986 should be cancelled in their entirety because the Division failed to accord him a fair and complete audit. This argument is essentially a request to estop, or preclude, the Division from collecting taxes for these years on the ground of fairness. The Division takes the position that it is inappropriate to address petitioner's claims that Division personnel acted in an arbitrary and hostile fashion and has requested that petitioner's allegations to that effect be stricken from the record. Moreover, the Division has refrained from submitting affidavits or testimony from the individuals involved in this audit; consequently, there is no evidence in the record of their intent or of the decision-

making process which led to the issuance of the disputed notices. In view of the fact that petitioner has repeatedly requested that the notices be cancelled because of the Division's alleged arbitrary behavior, the issues of fairness raised in his petition and in other documents cannot be avoided.

It appears that from the onset of the audit petitioner has misunderstood the relative duties and obligations of the Division and the taxpayer. Section 681(a) of the Tax Law provides:

> "If upon examination of a taxpayer's return under [article 22] the [Commissioner of Taxation and Finance] determines there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer".

It follows from this that the Division of Taxation has the authority to conduct an audit for the purpose of ascertaining the correctness of a filed return (Tax Law § 697[a], [b]). Moreover, a presumption of correctness attaches to a Notice of Deficiency properly issued under the Tax Law (Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 760, 431 NYS2d 174, 175). Accordingly, when a credit, expense deduction or other item is challenged by the Division, the burden of proof is on the taxpayer to show the correctness of the return (Tax Law § 689[e]).

On the other hand, it is true that a Notice of Deficiency which has no rational basis must be set aside (Matter of Donahue v. Chu, 104 AD2d 523, 479 NYS2d 889, 892; Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990). The record simply does not support petitioner's contention that these notices of deficiency have no rational basis. Petitioner made a number of claims on his 1985 and 1986 returns which became the subject of the disputed audit. Based upon a review of petitioner's tax returns, the Division determined that petitioner was not entitled to claim a business loss for 1985 in connection with G & B Nursery Farm, an investment tax credit for the same year, employee business expenses for 1985 and 1986 and interest expenses for both years. The Division's determinations in each area may have been incorrect (and the Division has conceded that in some areas the determinations were incorrect), but the disallowance of the deductions from income certainly was not irrational.

The heart of petitioner's contention that the notices were issued without a rational basis is his allegation that the Division failed to review the documents he sent to Commissioner Langer

before issuing notices of deficiency. The record indicates that the Division had some of the documents it requested and might have made some adjustments to the statements of audit changes before issuing the notices of deficiency; however, to justify cancellation of the notices, the record must establish that the notices had no rational basis whatsoever. In light of the spate of letters addressed to Commissioner Langer in December 1988 and January 1989, petitioner's initial refusal to cooperate with the Division, and petitioner's refusal to execute a consent to extend the period of limitation for assessment of taxes, it was not unreasonable for the Division to issue the notices of deficiency as it did. It should be noted that petitioner never submitted all of the information requested and has never submitted information to substantiate the farm loss, the investment tax credit, or the business nature of the claimed business expenses. The Notice of Deficiency for 1986 was issued before any documents for that year were submitted by petitioner. The Notice of Deficiency for 1985 was issued after documents were submitted, but, as found above, those documents substantiated only the claimed interest expenses. Apparently, the Division originally intended to make any adjustments to the notices of deficiency warranted when, and if, petitioner made a complete submission of documentation (see Commissioner Langer's letter of February 22, 1989, Finding of Fact "18"). One may disagree with the approach taken by the Division, but the record does not establish that the notices were issued without any basis.

The only remaining ground under which petitioner's claims might be granted is the theory of estoppel. Equitable estoppel is usually applied to a situation where one party is denied the right to plead or prove an important fact because of the acts or representations of another party. "The sine qua non of estoppel is some inequitable or fraudulent conduct engaged in by the party sought to be estopped which is reasonably relied upon by the other party to his detriment" (57 NY Jur, Estoppel, § 13; emphasis added). As a general proposition, the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (Matter of Sheppard-Pollack v. Tully, 64 AD2d 296, 298, 409 NYS2d 847).

Petitioner claims that the Division issued the 1986 Notice of Deficiency with the intention of misleading petitioner so that he would not file a timely petition. In fact, the petition protesting the 1986 Notice of Deficiency was not filed within 90 days of the issuance of the notice, and the Division requested that the petition be dismissed. However, in the prior proceeding, it was determined that petitioner's reasonable reliance on representations made by the Division was responsible for the late filing, and the petition was deemed timely. The question here is whether, on the same set of facts, the Division may be precluded from collecting taxes properly assessed under the Tax Law.

There is no evidence in this record that representations made to petitioner by the Division prevented him from presenting proof of the deductions, expenses and losses claimed on his returns or otherwise denied him the opportunity to prove facts which were his burden to prove. The Division made at least four written requests for documents substantiating his claimed losses, deductions and expenses (see Findings of Fact "4", "6", "8" and "9"); petitioner was asked on two occasions to sign consents waiving the period of limitation for assessment of income taxes (see Findings of Fact "10" and "11"); and he was warned that failure to submit the requested information would result in the issuance of notices of deficiency (see Finding of Fact "9"). These communications from the Division produced a flurry of letters from petitioner, and it would not be surprising if there was some confusion in the Division which led to the Notice of Deficiency for 1986 being issued before the one for 1985. However, it is inconceivable that petitioner was misled by the Division's statements. Rather, petitioner's communications with the Division show that between September 1988 and January 1989 he resisted the Division's requests for substantiation of his returns, repeatedly insisted that the audit be conducted on his timetable, refused to execute the requested consents and stubbornly persisted in questioning the Division's authority to audit the business expenses claimed on his 1985 and 1986 return. Petitioner interpreted the Division's insistence upon performing an audit as harassment, but there is no evidence that the audit was anything more than a routine attempt to substantiate petitioner's entitlement to deductions and losses which on the face of the returns appear

somewhat out of the ordinary. In short, the Division did not offer or promise petitioner anything to induce him to act in such a way as to harm his own case. Without such an inducement, there cannot be an estoppel (see, Matter of Eastern Tier, Tax Appeals Tribunal, December 6, 1990).

D. Section 3000.5(a) of the Tax Appeals Tribunal's Rules permit an application (or motion) for an order provided such motion is appropriate under the CPLR. Petitioner's request for reconsideration of his motion for a determination on default may be treated as a motion to reargue which in civil practice is controlled by CPLR 2221. CPLR 2221 provides that a motion to reargue a prior motion may be made, on notice, to the judge who signed the order (a motion made to other than the proper judge must be transferred to the proper judge). The motion to reargue contains no offer of new proof but merely seeks to convince the judge that the decision was in error. Petitioner was served with a copy of Judge Ranalli's order on November 9, 1989. He protested that order in a letter dated November 20, 1989. In a letter dated December 11, 1989, Judge Ranalli reaffirmed the order. There is no provision in the Tax Appeals Tribunal Rules and Regulations which would enable one administrative law judge to set aside the order of another judge. Therefore, I am without authority to reconsider petitioner's motion for a determination on default here.

Section 3000.5(a)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal provides that:

> "[a]n order of an administrative law judge on any motion which does not finally determine all matters and issues contained in the petition, for purposes of review by the tribunal, shall not be deemed final and conclusive until the administrative law judge shall have rendered a determination on the remaining matters and issues".

Since the order denying a default determination did not finally resolve all matters raised in the petition, Judge Ranalli's order is deemed not to have been final and conclusive. Petitioner's remedy is to take an exception to Judge Ranalli's order to the Tax Appeals Tribunal within thirty days of the issuance of this determination (Tax Law § 2006.7).

E. The petition of Robert L. Cohen and Joyce A. Cohen is granted to the extent indicated in Conclusion of Law "B"; the notices of deficiency issued on March 16, 1989 and February 10,

1989 shall be modified accordingly; and in all other respects, the petition is denied.

DATED: Troy, New York

2/28/92

ADMINISTRATIVE LAW JUDGE