STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

ROBERT L. AND DOROTHY CALLICUTT : AMENDED DETERMINATION DTA NO. 811636

for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1988. :

Petitioners, Robert L. and Dorothy Callicutt, 3156 Nassau Road, Oceanside, New York 11572, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1988.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 3, 1994 at 1:15 P.M., with all briefs to be submitted by August 17, 1994.[1] Petitioners, appearing by Dollinger, Gonski, Grossman, Permut & Hirschhorn, Esqs. (Matthew Dollinger, Esq., of counsel), submitted a brief on June 20, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel), submitted a letter in lieu of a brief on July 28, 1994. Petitioners submitted a letter in lieu of a reply brief on August 18, 1994.

ISSUES

I. Whether the Division of Taxation should be defaulted because its answer was filed more than 60 days from the acknowledgement of receipt of the petition in proper form.

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[1]The Division of Taxation requested and received additional time, until June 2, 1994, in order to search its records for the partnership returns filed by 225 Parkside Associates. Petitioners were given until June 23, 1994 to respond to any additional information submitted by the Division of Taxation. By letter dated May 27, 1994, the Division of Taxation notified the Administrative Law Judge that it was unable to find the partnership return.

II. Whether petitioner Robert L. Callicutt had additional unreported income from the partnership of 225 Parkside Associates.

III. If petitioner had unreported income from 225 Parkside Associates, whether the Division of Taxation properly included it in petitioners' 1988 adjusted gross income.

FINDINGS OF FACT

A Private Offering Memorandum ("offering memorandum") dated November 9, 1979, for 225 Parkside Associates ("the partnership"), a New York limited partnership, was distributed to petitioner Robert L. Callicutt.[2] According to the offering memorandum, this was a private offering consisting of 15 preformation limited partnership units at a cost of $35,000.00 per unit, consisting of cash and notes with a total offering of $525,000.00. The partnership was going to acquire, develop, renovate and operate a residential apartment building in Brooklyn, New York, which consisted of 126 dwelling units and 10 commercial units, known as 225 Parkside Avenue. According to the offering memorandum, the work was to be done through affiliated construction and management companies. The offering memorandum stated that it involved a high degree of risk.

According to the offering memorandum, the general partners of the partnership were Messrs. James N. Bottari, Paul A. Edgerton and Abraham Salomon (the "general partners"). Mr. Salomon served as the managing general partner.

Under the terms of the offering memorandum, the capital subscriptions of the limited partners were to be due on the closing date, on a per-unit basis, as follows:

> "(a) by payment of a check to the partnership in the amount of $6,667.00; and,
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> "(b) by the delivery by each limited partner of his promissory note in the principal amount of $28,333.00 (the 'Note'), dated the closing date, which shall bear interest at the rate of 8-½% per annum, and which shall be payable in annual installments of principal, with interest on each such installment, in the amount of $7,500.00 payable on March 15, 1980, $7,500.00 on March 15, 1981, $7,500.00 on March 15, 1982 and $5,833.00 on March 15, 1983 (the 'Note')."

The note was to be secured as to payment by a confirmed, irrevocable, negotiable and divisible

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[2]The offering memorandum was submitted by petitioners as their Exhibit "1".

letter of credit in form and substance satisfactory to the managing general partner.

According to the offering memorandum, the partnership agreement provided:

> "that all items of income, deduction, loss or credit arising from the Partnership's operations shall be allocated 96% to the Limited Partners, 2% to the Managing General Partner and 1% each to the remaining General Partners. Prior to the recoupment by the Limited Partners of their investment in the Partnership, cash flow shall be allocated among the Partners in the same proportion. Following such recoupment, cash flow shall be allocated 50% to the Limited Partners. Of the remaining cash flow, if any, 25% shall be allocated to the Managing General Partner and a maximum of 12-½% each to the remaining General Partners, which percentages among the General Partners may be adjusted."

The offering memorandum provided that:

> "the interest of individual Limited Partners in the income, gain, loss, deduction, credit and capital of the Partnership will be determined by using as a numerator the amount of the Capital Subscription of the Limited Partner, and using as a denominator the amount of the Capital Subscription of all Limited Partners in the Partnership, determined immediately following the termination of the offering. This ratio (the 'Sharing Ratio') will determine each Limited Partner's participation in the allocations set forth in the Partnership Agreement."

The "Partnership Purposes and Objectives" were as follows:

> "The Partnership will be formed to provide a vehicle for prospective investors to engage in acquiring, renovating and managing the Property with limited liability, to enable such investors to realize the potential economic benefits flowing from such investment on a basis whereby a substantial portion of the investment therein can be deducted for Federal income tax purposes.
>
> "Partnership income and expenses will be allocated to the Limited Partners' Capital Accounts. The Partnership's net income, if any, in excess of the Partnership's reasonable needs for business and working capital purposes, as determined by the Managing General Partner in this sole discretion, will be distributed to the Limited Partners at least annually. Revenues, if any, from the Partnership's program may be affected by a broad variety of factors. Even if the Renovations are completed on schedule and the dwelling units are rented, the net income available for distribution to the Limited Partners still may not be sufficient to assure the return of the Limited Partners' investment in the Partnership."

The offering memorandum provided that there were to be no additional assessments or calls for funds from the limited partners. The capital subscription made by each limited partner was to constitute his entire contribution to the partnership. The managing general partner, however, did have the right to cause the partnership to retain partnership net income or to borrow funds on a non-recourse basis for partnership operations.

According to the offering memorandum, the fiscal year of the partnership was to be the

calendar year and the books and records of the partnership were to be kept on the cash receipts and disbursements basis. Limited partners were to receive annual reports containing financial statements of the partnership.

Petitioner Robert Callicutt testified that, after reviewing the offering memorandum, he purchased one share (tr., pp. 29-30).

Petitioners submitted as their Exhibit "2" a copy of a page entitled "Limited Partner's Signature Page". This page contained the following information:

"(1) Number of Units subscribed for: ($35,000 per Unit)		1
(2) Amount of check enclosed:	$6,667	
(3) Promissory Note Attached:	$28,333	
(4) Letter of Credit Attached:	NONE	
(5) Taxpayer identification or Social Security number		xxx-xx-xxxx (redacted)
(6) Name & Residence Address:		

Robert L. Callicutt[3]
3156 Nassau Rd.
Oceanside, N.Y. 11572"

Robert Callicutt testified that, at some point in December 1979, he signed the "Recourse Promissory Note", which was submitted as petitioners' Exhibit "3", in the amount of $28,333.00. He testified that he also paid $6,667.00 in cash at that time (tr., p. 32).

According to the terms of the offering memorandum:

> "Under Section 706(c)(2)(B) of the Code, a partner is allocated those items of income or loss attributable to only that portion of the partnership's taxable year in which he is a member of the partnership. The partnership may choose to allocate ratably on a
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> daily basis, or separate the partnership's taxable year into two or more segments and allocable items to each segment.
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> "The Partnership intends to allocate items of income or loss on a ratable daily basis

[3]Robert L. Callicutt's name is printed. Mr. Callicutt testified that he did not sign the limited partner's signature page (tr., p. 31).

to all Partners of the Partnership. Since all deductible items to be incurred by the Partnership in connection with the purchase of the Property will be incurred following the admission into the Partnership of the Limited Partners who are purchasing Units pursuant to this Memorandum, the varying interest rule of Section 706(c)(2)(B) should not affect the amount of any items allocated to a Limited Partner."

The offering memorandum terms provided that:

"A Limited Partner may not sell, assign, transfer, pledge or otherwise encumber his Units in the Partnership and an assignee may not become a substituted Limited Partner without the prior written consent of the Managing General Partner. Such consent can be withheld for any reason within the sole discretion of the Managing General Partner. (Section 8.2) Upon the death, bankruptcy, or adjudicated incompetence of a Limited Partner, his representatives will have the rights and obligations of a Limited Partner, but cannot become a substituted Limited Partner without the prior written consent of the Managing General Partner. (Section 6.4)"

Attached to the offering memorandum as Appendix "A" was the "Agreement of Limited Partnership of 225 Parkside Associates" ("agreement"). Article 6.2 of the agreement provided that a limited partner was not personally liable for any debts, obligations or losses of the partnership in excess of his capital contribution and his share of undistributed profits of the partnership. Article 6.3 of the agreement provided that a limited partner was not entitled to a return of his capital contribution to the partnership:

"except to the extent that distributions are made to him or are deemed made to him pursuant to this Agreement during the term of the Partnership or upon the dissolution of the Partnership."

Article 6.4 provided that:

"The death, bankruptcy or incompetency of a Limited Partner shall not cause a dissolution of the Partnership. Upon the death, bankruptcy or adjudicated incompetency of any Limited Partner (or, in the case of a Limited Partner that is a trust, partnership, corporation, association or joint venture, the dissolution thereof), the rights of such Limited Partner to share in the profits and losses of the Partnership, to receive distributions of partnership funds and to assign his Units pursuant to Article VIII hereof shall devolve upon his personal representative, guardian or successor in interest, or upon the death of one whose Units are held in joint tenancy, shall pass to the surviving joint tenant, subject to the terms and conditions of this Agreement. The estate of the deceased Limited Partner or such surviving joint tenant, as the case may be, shall be liable for all the obligations of the deceased Limited Partner. In no event shall such personal representative, guardian, successor in interest, or surviving joint tenant become a substituted Limited Partner, except with the consent of the Managing General Partner in accordance with Section 8.2."

Article 8.2 contained the provisions concerning the assignment of a limited partner's

interest, which stated, in pertinent part, as follows:

> "(a) A Limited Partner may not sell, assign, transfer, pledge or otherwise encumber (hereinafter sometimes an 'Assignment') his interest in the Partnership, and no assignee of an interest of a Limited Partner shall have the right to become a substituted Limited Partner, except as provided herein:
>
> "(i) No assignment shall be effective unless the Managing General Partner consents in writing to the Assignment, which consent may be given or withheld in the sole discretion of the Managing General Partner;
>
> "(ii) No Assignment shall be effective if such Assignment would, in the opinion of the Managing General Partner, result in the termination of the Partnership or jeopardize the status of the Partnership as a partnership for Federal income tax purposes;
>
> "(iii) No Assignment shall be effective if the Assignment would, in the opinion of the General Partner, violate the provisions of any applicable state securities law;
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> * * *
>
> "(v) An instrument of Assignment in form and substance satisfactory to the Managing General Partner and executed by both the assignor and the assignee, and any other instrument the Managing General Partner may deem proper, shall be delivered to the Managing General Partner;
>
> "(vi) The assignor shall pay any reasonable transfer fee required of him by the Partnership as the Managing General Partner shall determine, including all reasonable expenses, if any, connected with the admission of an assignee to the Partnership as a substitute Limited Partner. An Assignment shall be effective as of the first day of the succeeding calendar month immediately following the date the Managing General Partner consents in writing to such Assignment.
>
> "(b) Unless the conditions set forth for an Assignment are met, no such attempted Assignment shall be binding upon the Partnership. If the conditions set forth in this Article for an Assignment are not met, whether by operation of law or otherwise, any payment by the Managing General Partner to the assignor, the assignee, or to his executor, administrator, legal representative or successor in interest shall release the General Partners and the Partnership of liability, to the extent of such payment, to any other person who may be interested in such payment . . . ."

Pursuant to Article 8.3, in order to voluntarily withdraw from the partnership, a general partner or a limited partner must make an effective and valid assignment of his interest or units in the partnership.

At the hearing, Mr. Callicutt testified that he made one payment in 1980 (tr., p. 33).

On August 5, 1981, petitioners filed a Chapter 7 petition in the U.S. Bankruptcy Court

for the Eastern District of New York. A portion of the bankruptcy petition was filed as petitioners' Exhibit "4".[4] One of the schedules submitted as part of this exhibit was Schedule A-3 entitled "Creditors Having Unsecured Claims Without Priority", upon which was listed the following:

"225 Parkside Associates 1324 Avenue J Brooklyn, N.Y. 11230"	One share in interest in limited partnership	$20,833.00

Petitioners submitted as their Exhibit "5" the order of the Honorable Boris Radoyevich, U.S. Bankruptcy Judge for the Eastern District of New York, dated January 12, 1982, which provided that:

> "1. The debtor is released from all dischargeable debts.
>
> "2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:
>
> "(a) debts dischargeable under 11 U.S.C. § 523;
>
> "(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. § 523(a):
>
> "(c) debts determined by this court to be discharged under 11 U.S.C. § 523.
>
> "3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from commencing, continuing or employing any action, process or act to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived."

Mr. Callicutt testified that, in 1986, the general partner, Mr. Salomon, sent him a document entitled "Assignment of Limited Partnership Interest" in order to remove him officially as a partner. He further testified that he signed it and sent it back to Mr. Salomon (tr., p. 37).

A copy of the "Assignment of Limited Partnership Interest" ("assignment") was

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[4]There was no schedule of assets owned by petitioners included with the documents submitted as Exhibit "4".

submitted as petitioners' Exhibit "6". The assignment recited that it was "made as of February 14, 1986, by Robert L. Callicutt ('Assignor') to Abraham Salomon ('Assignee')." The assignment provided, in pertinent part, that:

> "NOW, THEREFORE, in consideration of One Dollar ($1.00) and other good and valuable consideration to Assignor in hand paid by Assignee, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:
>
> "1. Assignor hereby assigns and transfers to Assignee all of Assignor's interest is [sic] the Partnership.
>
> "2. Assignor warrants and represents to Assignee that (a) Assignor owns such interest, (b) such interest has not been sold, assigned, encumbered, pledged or hypothecated, and (c) Assignor has full power and authority to assign such interest to Assignee.
>
> "3. This Assignment shall benefit and bind the parties hereto and their respective heirs, executors, administrators, personal representatives, successors and assigns."

The copy of the assignment submitted into evidence was unsigned. Petitioners' representative questioned Mr. Callicutt about the copy maintained by him, as follows:

Q. "This is a copy maintained by you?"

A. "Right. The original I signed and sent back to Mr. Solomon [sic]."

Q. "You didn't sign the copy you retained in your file?"

A. "I didn't bother to sign it."

Q. "This was prepared by Mr. Solomon [sic] and he requested you sign it?"

A. "I believe I have a letter to that effect, yes."

Q. "Did you sign it and mail it back or hand deliver it?"

A. "I believe I mailed it back to him" (tr., p. 38).

The Division of Taxation ("Division") submitted, as its Exhibit "G", petitioners' 1988 New York State Resident Income Tax Return which included: Forms IT-201, IT-201-ATT, NYC-203, IT-2105.9, Statement 1 - Dependent Children, Statement 2 - Income from Partnerships, Statement 50 - New York City Tax Recomputed as if Taxpayers were a New York City Resident, and four Form W-2's (two in the name of Dorothy Callicutt and two in the name of Robert Callicutt). Petitioners did not list any income from 225 Parkside Associates on

Statement 2, which they had submitted as part of their 1988 personal income tax return.

Mr. Callicutt testified that he "did not receive any income from the partnership in 1988" (tr., p. 39). He further stated that was the reason that the income tax return does not show any income from the partnership (tr., p. 39).

A 1988 Schedule K-1, Partner's Share of Income, Credits, Deductions, etc. ("schedule K-1"), was issued by 225 Parkside Associates to "R. Callicut [sic], 3156 Nassau Blvd, Oceanside, NY 11572."[5] The schedule K-1 contained the following information: the partner's identifying number is listed as xxx-xx-xxxx (redacted).[6] Items "A" through "J" were completed as follows:

"A) Is this partner a general partner? No

"B) Partner's share of liabilities:
Nonrecourse _____
Other _____

"C) What type of entity is this partner? Individual

"D) Is this partner a domestic or a foreign partner? [The box next to domestic was checked.]

	(i) Before decrease or termination	(ii) End of Year
"E) Enter partner's percentage of:		
Profit sharing	6.4%	0%
Loss sharing	6.4%	0%
Ownership of capital	6.4%	0%

"F) IRS center where partnership filed return? Holtsville, NY

"G) Tax Shelter Registration Number [none listed]

"H[1] Did the partner's ownership interest in the partnership change after Oct. 22, 1986? No

"[2] Did the partnership start or acquire a new activity after Oct. 22, 1986? No

"I) Check here if this partnership is a publicly traded partnership as defined in

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[5]A copy of the schedule K-1 was submitted as the Division's Exhibit "H". It is handwritten and slightly illegible.

[6]Handwritten near this number is "wrong SS#".

section 469(k)(2).

"J) Check here if this is an amended Schedule K-1."

Neither box for items "I" and "J" was checked. Item "K" was entitled "Reconciliation of partner's capital account" and contained the following:

"(a) Capital account at beginning of year	(b) Capital contributed during year	(c) Income (loss) from lines 1, 2, 3 and 4 below	(d) Income not included in column (c) plus unallowable deductions	(e) Losses not included in column (c) plus unallowed deductions
-89,282			126599	

(f) Withdrawals and distributions	(g) Capital account at end of year
37,317	-0-"

The schedule of distributive share items of income, deductions and credits contained only one entry. The entry under "Income (Loss)" was "6. Net gain (loss) under section 1231 (other than due to casualty or theft) 126599."

During the hearing, Mr. Callicutt, when asked whether he ever received a schedule K-1 for the calendar year 1988 which evidenced that he received any income from the partnership, responded in the negative (tr., p. 40).

A letter dated July 19, 1990 was sent by Barbara Audi, Tax Technician, Audit Division - Central Income Tax Section, to petitioner Robert Callicutt regarding the 1988 tax year.[7] Ms. Audi wrote as follows:

> "The partnership distribution schedule of 225 Parkside Associates indicates you received sufficient income to require the filing of New York State Resident Income Tax Return(s) for the year(s) shown
>
> above. However, a search of our files fails to locate a return(s) filed under your name and social security number.

[7]The letter was addressed to "R. Callicot [sic]" and referenced File Number - 11-2516948; S.S. Number - xxx-xx-xxxx (redacted); Case Number - A21285; and Audit Division - AG-6-GT. It was submitted as the Division's Exhibit "B".

"If you have previously filed a return(s) for the year(s) in question, please furnish a photocopy of the return(s). Also, include a photocopy of your cancelled check(s) or money order(s) in payment of tax due. The cancelled check should show our deposit serial number stamped across the front. If payment was made by money order it will be necessary for you to go to the office where purchased to obtain a copy which will show our deposit serial number.

"IF YOU DID NOT FILE, please send ALL of the following information:

"1. State in detail your reason(s) for not filing.

"2. Complete and file your return(s) at this time. We have enclosed forms for your convenience.

"3. A payment of tax due should be included with your return(s). Upon receipt of the return(s) you will be advised of the interest due plus any applicable penalties.

"In either situation, it will be necessary for you to provide a complete copy of your federal return with all supporting schedules for each year shown above."

Ms. Audi requested a response within 20 days.

As its Exhibit "I", the Division submitted two documents entitled "Interview or Conference Report" ("interview report") which were prepared by the examiner, B. Audi. The first interview report dated August 9, 1990 lists the taxpayer's name as 225 Parkside Associates and its representative as "Josh Tannenbaum (managing partner)".[8] The following notations appear on this interview report:

"Called Mr. Tannenbaum for verification of K-1 addresses & SS#'s since they are handwritten & very illegible. He will call back."

"8/9/90
He called with info. which has been entered on K-1's. He also said Mr. Callicot [sic] rec'd. the gain on the K-1."

The second interview report is dated March 27, 1991 and lists the taxpayer's name as "Robert Callicut [sic]". Lines have been drawn through "Taxpayer Represented by"; however, that box contains "Josh Tannenbaum represents partnership." The following notations appear on this interview report:

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[8]The interview report lists File No. 11-251694_. The last number is torn off; only the bottom half of the number is visible. The tax year is listed as 1988.

"Called Josh Tannenbaum, Managing Partner of 225 Parkside Associates. He said in 1981 the partnership attempted to sue Mr. Callicut [sic] because he did not make his capital contributions. But before the suit went thru [sic], Mr. Callicut [sic] had his debts discharged in Bankruptcy. The partnership feels the Bankruptcy was not legal because it did not list this debt.

"In 1988 Mr. Callicut [sic] found out the p/s was selling the building & he wanted his share of the gain. So they took his share (the gain reported on K-1) and netted out what he owed them. He received a check for the balance of $7,726.00."

During the hearing, Mr. Callicutt was asked whether he knew a person by the name of Joshua Tannenbaum. His response was "no" (tr., p. 40). He was also asked if he knew whether Mr. Tannenbaum was the managing partner of 225 Parkside Associates. His response was, "No. I do not know that. Abraham Solomon [sic] is the only name that I recall" (tr., p. 40).

Petitioners' representative questioned Mr. Callicutt about the information on the March 27, 1991 interview report as follows:

Q. "Division's J [sic], which is an interview or conference report -- did you ever get sued by this partnership?"

A. "No."

Q. "Mr. Tannenbaum told Ms. Audi that the partnership attempted to sue Mr. Callicutt because he didn't make his capital contributions. Was that true?"

A. "No, he did not sue me."

Q. "But before the suit -- I'm reading from Division's J [sic] -- Mr. Callicutt had his debts discharged in bankruptcy. That was true, wasn't it?"

A. "Yes, that was true."

Q. "The partnership feels, oh that the bankruptcy was not legal because it had not listed this debt, what we have marked in evidence? Petitioner's [sic] 4, your bankruptcy schedules. And that's the debt that's on the second page, item four, correct?"

A. "Correct, yes."

Q. "So, Mr. Tannenbaum wasn't right that you didn't schedule that debt, was he?"

A. "That's correct."

Q. "Did you find out -- Mr. Tannenbaum says in Division's J [sic] in 1988 that you found out that the partnership was selling the building and you wanted your share of the gain. Did you find that out?"

A. "No."

Q. "The interview or conference report, Division's J [sic], goes on to say, so they took his share (the gain) reported on K-1 but netted out what he owed them. He received a check for the balance of $7,726. Now sir, did you know that this took place?"

* * *

Q. "Do you know anything about what Mr. Tannenbaum has to say in this matter?"

A. "No" (tr., pp. 40-42).

Mr. Callicutt testified that he did not recall ever talking to Ms. Audi or anybody from the Tax Department. He further stated that nobody ever called him asking for any information (tr., p. 42).

On September 10, 1990, a Statement of Proposed Audit Changes (L-002020646-1) was issued to petitioners for personal income taxes for the tax year 1988.[9] The proposed additional amount due was $12,019.75. The "Computation Section" contained the following statement:

"Available information indicates that you received income and/or capital gains for the following partnership(s):
225 Pkside Assoc. 11-2516948

"You did not report capital gains from the partnership on your New York return.

"Interest is due for late payment or underpayment at the applicable rate. Interest is mandatory under the New York State Tax Law."

The following computation appeared in this section as well:

"Total New York Income Previously Stated:	$140,642.00
Capital Gain Distributions:	$126,599.00
Total New York Income Corrected:	$267,421.00
Total New York Income:	$267,241.00
Less New York Standard/Itemized Deductions:	$19,512.00
Balance:	$247,729.00
Less Exemptions:	$1,000.00
New York Taxable Income:	$246,729.00
Tax on Corrected New York Taxable Income:	$19,792.05
Tax on Unearned Income:	$38.00
Total Tax:	$19,830.05
Less Tax Previously Stated:	$9,227.00
Additional Tax Due:	$10,603.05

[9]This document was submitted as part of the Division's Exhibit "E".

Tax Per Taxpayer:	9,227.00
Tax Per Dept of Tax & Finance:	19,830.05
Timely Payments/Credits:	9,265.00
Late Payments:	0.00
Amount Previously Assessed/Refunded:	38.00-
BALANCE:	10,603.05
Tax Assessed:	10,603.05
Interest Assessed:	1,416.70
Penalty Assessed:	0.00
Total Amount Assessed:	12,019.75"

On October 25, 1990, the Division issued to petitioners, Robert and Dorothy Callicutt, a Notice of Deficiency (L-002020646-4) for the year 1988. The notice asserted a tax deficiency of $10,603.05 and interest of $1,559.12, for a total balance due of $12,162.17.

Petitioners timely requested a conciliation conference.

In a letter dated April 1, 1991, Ms. Audi informed petitioners' representative that she had reviewed petitioners' income tax file and Request for Conciliation Conference and she found that the Division's notice was correct as issued.[10] She wrote:

> "Mr. Callicutt's 1988 Partnership K-1 Form from 225 Parkside Associates shows he received a net long term gain of $126,599.00. The disagreement based on the fact the partnership ignored the bankruptcy by netting out what he owed them and payment [sic] him a check for the balance of $7,726.00, is a matter to be resolved between Mr. Callicutt and the partnership.
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> "The entire amount of the partnership distribution is therefore considered to be reportable for New York income tax purposes."

A Bureau of Conciliation and Mediation Services ("BCMS") conference was held on August 6, 1992. Petitioners appeared by Matthew Dollinger, Esq. A Conciliation Order (CMS No. 110589), dated November 13, 1992, was issued which denied the request and sustained the statutory notice.

Petitioners, by their authorized representative, Matthew Dollinger, timely filed a petition dated February 4, 1993. The petition was received by the Division of Tax Appeals on

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[10]This letter was submitted as the Division's Exhibit "D". The letter references Robert and Dorothy Callicutt, 1988 Personal Income Tax Return, Assessment #L002020646; CMS Number 110589.

February 5, 1993.

Petitioners are seeking redetermination of a deficiency of personal income taxes for 1988. Petitioners alleged that the Commissioner of Taxation and Finance erroneously concluded that they were responsible for taxes based on the inclusion in their 1988 tax year income of capital gains from the partnership. They contend that they:

> "are not partners of 225 Parkside Associates and are not responsible for any part or portion of that Partnership's capital gains tax obligation, let alone 100% of that tax liability."

Petitioners asserted the following facts:

> 1. "On November 28, 1979, Mr. Callicutt executed an agreement to become a limited partner of the Partnership and subscribed for one (1) unit at $35,000.00 per unit. His total capital contribution was to be paid over a period of five (5) years. He paid the first installment in the sum of $6,667.00 and executed a Promissory Note in the sum of $28,333.00 for the balance due, to be paid in three (3) consecutive annual installments commencing March 15, 1980 and ending March 15, 1982, with all unpaid principal and interest to be paid on March 15, 1983. The second installment in the amount of $7,500.00 was paid on March 6, 1980. Thereafter, no further payments were made."
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> 2. "In August, 1981, the debtors filed a joint Petition in bankruptcy in the United States Bankruptcy Court, Eastern District of New York, under Chapter 7, Case No. 881-82606, entitled 'In re Robert Lemar Callicutt and Dorothy Callicutt'."
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> 3. "Properly memorialized on the Callicutts' 'Schedule A-3-Creditors Having Unsecured Claims Without Priority' was 225 Parkside Associates, 1324 Avenue J, Brooklyn, New York 11230, wherein the Callicutts listed their one (1) share interest in the limited Partnership and a claim in the sum of $20,833.00."
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> 4. "By Order dated January 12, 1982, the Honorable Boris Radoyevich, Bankruptcy Judge, granted the debtors, Robert Lemar Callicutt and Dorothy Callicutt, a discharge in bankruptcy, discharging them from all debts properly listed in the Bankruptcy Petition, including the debt to the Partnership set forth above."
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> 5. "As a result of petitioners' failure to make all payments required as a participant in the Partnership and as a result of the petitioners' discharge in bankruptcy, any relationship the petitioners had with 225 Parkside Associates was terminated. In fact, though the Partnership had, prior to the bankruptcy, sent notices of installments due, those notices stopped when the Bankruptcy Petition was filed. Further, by letter dated April 4, 1989, Abrams, Here & Merkel, certified public accountants, advised Mr. Callicutt in reference to 225 Parkside Associates, as follows:
>
> > Please note that as per Josh Tannenbaum, you are not considered a partner in the above limited partnership (retroactive to the date of your bankruptcy). Therefore, I am not picking up anything for 225 Parkside on your 1988 Tax Return.

All prior years Tax Returns since the year of your Bankruptcy, should be amended to exclude the effect of 225 Parkside operations" (emphasis in original).

6. "The failure of Mr. Callicutt to pay his share of the Partnership capital or otherwise to carry out Partnership obligations was treated by the Partnership and its representatives, as a forfeiture of his interest in the Partnership."

7. "Any claim that the Partnership may have had against Mr. Callicutt for his breach of the Limited Partnership Agreement as a result of his failure to contribute the full amount required and by his filing for bankruptcy and receiving a discharge, have been lost by the Partnership as a result of the discharge. The Partnership could not then, and cannot now, and may not ever attempt in any manner to collect on the money owed to the Partnership by Callicutt. To do so would be in violation of a Court Order. The Bankruptcy Court was a Court of competent jurisdiction to determine Mr. Callicutt's liability vis-a-vis the Partnership. The Partnership and all other entities, including the New York State Department of Taxation and Finance are bound to abide by the terms of this lawful Court Order."

8. "Despite the foregoing, the Partnership, for some unexplained reason, made a determination to include Mr. Callicutt in a final K-1 Statement as a full partner and allocated to him 100% of the gain realized years after he was no longer a partner and years subsequent to his Discharge in Bankruptcy. This unilateral act on the part of the Partnership is not controlling or dispositive of the rights of the parties" (emphasis in original).

9. "The Partnership's belated attempt to treat Mr. Callicutt as a limited partner by attributing Partnership capital gains to him is improper and unlawful as (i) it is in violation of the Court Order discharging the debt, and (ii) it is belied by the acts of the Partnership, as well as its partners, since the issuance of the discharge."

10. "Based upon the foregoing, the determination of the Commissioner of Taxation and Finance is erroneous and in contravention of the law."

By letter dated February 10, 1993, the Division of Tax Appeals acknowledged receipt of the petition deemed to be in proper form. On or about February 10, 1993, the petition was forwarded to the Division for an answer.

An answer, dated October 21, 1993, was served by the Division. In its answer, the Division stated, inter alia, that: (1) petitioners' 1988 New York State income tax return was selected for audit by the Division; (2) the Division determined that petitioners should have reported additional partnership income resulting in additional tax liability for the year 1988; (3) the Notice of Deficiency issued to petitioners asserted that they were liable for additional income tax of $10,603.05, plus interest, for the year 1988; and (4) petitioners have not established that the assessment issued by the Division was erroneous or improper.

During the hearing, petitioners' representative made a motion to declare the Division in default in this proceeding on the ground that it failed to timely serve an answer within 60 days. Petitioners' representative argued that his clients were prejudiced because of the imposition of penalties and interest. The Administrative Law Judge took the arguments under advisement and stated that the motion would be the first issue addressed in her determination (tr., pp. 4-10, 17-18 and 28).

During the hearing, petitioners' representative asked Mr. Callicutt whether he received any money from 1982 through and including December 31, 1988. Mr. Callicutt responded in the negative. He did testify that he received some money from the partnership, he believed, in 1989 (tr., pp. 36-37).

The Division's representative questioned Mr. Callicutt about his receipt of some money from the partnership. His questions and the responses are as follows:

Q. "Mr. Callicutt, you started to address what I believe was some money received from the 225 Parkside Associates partnership, I believe you started referring to April of '89. Did you, in fact, receive some money from the partnership at that time?"

* * *

Q. "Did you get the question, Mr. Callicutt?"

A. "About when did I receive money?"

Q. "Yes. I believe you started saying, I believe it was April of '89 that you referenced that you received money from 225 Parkside Associates?"

A. "My recollection is I received a check in the late spring or early summer of '89."

Q. "And it was from the 225 Parkside Associates partnership?"

A. "Yes."

Q. "Okay. Do you recall what the amount of that check was?"

A. "It was seven thousand and change."

Q. "Okay. What did you do with that check?"

A. "I called my accountant and I deposited the check."

Q. "You mentioned you contacted your accountants?"

A. "And my lawyer as well."

Q. "Okay."

A. "To find out what this was all about."

Q. "And did you do anything at that point or did you just deposit it and that was it?"

A. "I deposited the check. I deposited the check."

Q. "Did you ever contact the partnership to see why they had given you that money at that point in time?"

A. "I presumed it was the return of my capital. I paid fifteen thousand into the partnership and they gave me back seven, so I figured that was part of my initial capital contribution."

Q. "Well, --"

A. "Return of that. I don't know what you call it."

Q. "Were you aware that, as I think you testified, that your liability to the partnership had been discharged in bankruptcy?"

A. "Yes. I was discharged in bankruptcy, correct."

Q. "And so you realized that you had an outstanding liability to the partnership, I believe the amount was $20,000?"

A. "No, I had no further liability to the partnership."

Q. "Right. But that liability of approximately $20,000 --"

A. "I was discharged from that liability, so I had no obligation or any liability to the partnership."

Q. "And you also mentioned that, I think one of the documents in evidence was the unsigned copy of assignment of the partnership interest that you had, I guess, assigned any rights to any moneys from the partnership back to the partnership, is that correct?"

A. "I don't know. I would have to read the document again. All I know, it just assigned my interest in the partnership back to -- I don't know if it's Mr. Solomon. I don't recall now."

Q. "So, you had supposedly assigned your rights to the partnership, you had the liability to the partnership discharged, but yet when they sent you a check for over seven thousand dollars in April of '89 you deposited the check and that was it?"

A. "I deposited the check since I felt this was the return of my capital. I don't know what they called it, but that's what I felt."

Q. "Did you ever contact the partnership before you received that check to request any distribution from the partnership?"

A. "No."

Q. "Did there come a time that you were aware that the partnership had issued a K-1 indicating that you were entitled to a net gain or income of $126,599 for 1988?"

A. "Yes."

Q. "And do you recall when you became aware of that?"

A. "When the New York State Tax Department sent me that notice."

Q. "Did you ever contact the partnership to request a revised K-1 or to -- go ahead."

A. "I have made no contact with the partnership."

Q. "You never contacted the partnership to protest the inaccuracy of that K-1?"

A. "My accountant and my lawyer have been handling that."

Q. "To your knowledge, did the partnership ever issue a revised K-1?"

A. "I don't know."

Q. "Did you ever sue the partnership in order to try to obtain a revised K-1?"

A. "No." (Tr., pp. 43-46.)

Mr. Callicutt was asked by petitioners' representative whether he caused any research to be done to determine if there was any statutory method to make an entity or an individual who filed an improper K-1 with the Division to rescind or withdraw it. He responded in the affirmative and further stated that he had caused Mr. Dollinger to do research. He further testified that, as a result of that research, no lawsuit was started (tr., p. 47).

Prior to closing arguments, petitioners' representative made the following statement:

> "Briefly. In an effort to -- the only person we knew from this partnership was the gentleman named Abraham Solomon [sic], who is the general partner referred to in the petition. A subpoena was served upon him to appear here today with his records. The original affidavit is here with a copy of the subpoena and the necessary hundred and some odd dollars representing the witness fee required. Mr. Solomon [sic] did not ignore the subpoena. He caused his attorney, a Stanley Fudderman of Leathertown, New York, to communicate with me I believe last Thursday -- could have been Friday, I believe Thursday -- to advise me that unfortunately Mr. Solomon [sic] is out of the country, was out of the country on the date of the service of the subpoena pursuant to the provisions of Section 3082 of

> the CPLR upon his wife, who was at home, and a copy mailed to his address, last known residence. And, in fact, he is out of the country, Mr. Fudderman indicated, for at least an additional three week period of time, which is the reason he's not present. Thank you." (Tr., p. 49.)

Administrative Law Judge Winifred M. Maloney asked Mr. Dollinger whether he wanted to get an affidavit from Mr. Salomon (tr., p. 49). He responded as follows:

> "I have never in my life spoken to Mr. Solomon [sic]. I don't know what he'd have to say. I'm not asking for an adjournment, I'm just trying to indicate to the Court that in fact we made the only effort we could make to get somebody here from this partnership" (tr., p. 50).

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the Division erroneously assessed additional personal income taxes against them based on its conclusion that they had failed to report income derived from the partnership for the 1988 tax year. They argue that the evidence which they submitted at the hearing establishes that Mr. Callicutt was no longer a partner in the partnership. Petitioners assert that the Division did not establish that Mr. Callicutt was a partner. They maintain that Mr. Callicutt was not a member of the partnership in 1988 and he did not hold himself out to be a partner. They further argue that their discharge in bankruptcy relieved Mr. Callicutt "from liability and the parties clearly intended that Callicutt has forfeited his interest in the Partnership" (Petitioners' reply letter, p. 3).

Petitioners assert that the schedule K-1 is erroneous and should carry little weight in determining whether or not a partnership existed. They maintain that Mr. Callicutt did not receive income/capital gains from the partnership for the tax year 1988. They assert that Mr. Callicutt deposited the check he received in 1989 from the partnership after he contacted his attorney and his accountant and based on his belief that the money represented a return of his initial capital contribution.

Petitioners request that the Notice of Deficiency be cancelled and their petition be granted.

Petitioners argue that the Division failed to timely serve its answer. They contend that "the Law Bureau's answer, dated October 21, 1993 is more than six (6) months after the

required due date" (emphasis in original; Petitioners' reply letter, p. 5). They assert that they have been substantially prejudiced by the Division's delay in answering. They maintain that the "Law Bureau's failure to Answer the subject Petition within the prescribed period of time mandates the granting of a Judgment in favor of Petitioners on Default" (Petitioners' reply letter, p. 5).

The Division contends that:

> "petitioners did receive income from 225 Parkside Associates in 1989 for the 1988 tax year and failed to report their distributive share of the income on their New York Income Tax Return" (emphasis in original; Division's letter, p. 1).

It asserts that petitioners' $126,599.00 distributive share from the partnership should have been reported as taxable income. The Division maintains that:

> "Petitioners cannot claim that their bankruptcy proceeding discharged their liability to the partnership and then claim that the bankruptcy also sheltered their partnership distribution from taxation. Petitioners must accept the income tax consequence of their partnership distribution" (Division's letter, p. 2).

It asserts that the money which Mr. Callicutt received in April of 1989 represented his net distributive share of partnership income from the sale of a building in 1988. The Division further contends that:

> "Mr. Callicutt's reluctance to accurately testify to the facts of this matter coupled with Mr. Dollinger's excessive leading questions combined to make Mr. Callicutt an incredible witness" (Division's letter, p. 2).

Lastly, the Division asserts that petitioners incorrectly contend that their petition must be granted because the Division did not timely respond to the petition. The Division maintains that it has been held that the regulation pertaining to the answer of the Division is suggestive rather than mandatory. Citing relevant case law, the Division asserts:

> "that an agency's failure to act within a specified period will not result in dismissal of the agency's action without a showing of substantial prejudice as a result of the delay" (Division's letter, p. 3).

The Division argues that it never received a request from petitioners or was never advised by them that they were being prejudiced in any way by the late answer. It maintains that "petitioners still have not shown 'substantial prejudice' by reason of the delay in filing the answer" (Division's letter, p. 3).

The Division requests that the petition be dismissed and the assessment sustained.

CONCLUSIONS OF LAW

A. During the hearing, petitioners' representative made a motion to declare the Division in default in this proceeding on the ground that it failed to timely serve an answer within 60 days as required by 20 NYCRR 3000.4(a)(1). The motion was taken under advisement at that time (see, Finding of Fact "39"). I will address this issue first.

B. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

> "The Law Bureau shall serve an answer on the petitioner or the petitioner's representative, if any, within 60 days from the date the supervising administrative law judge acknowledged receipt of a petition in proper form" (20 NYCRR 3000.4[a][1]).

Petitioners argue that a default determination should be granted in their favor because of the Division's failure to serve an answer within the required time period. It is noted that New York courts have recognized that the time period imposed upon an administrative agency for a responsive pleading is directory rather than mandatory (see, Matter of Geary v. Commr. of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494, affd 59 NY2d 950, 466 NYS2d 304). Petitioners' default determination will not be granted based solely on the Division's failure to timely answer (see, Matter of Macbet Realty, Tax Appeals Tribunal, May 17, 1990). When an agency fails to act within a specified time period, petitioners must show that the delay resulted in substantial prejudice to their position before a default determination will be granted (see, e.g., Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115 [1986]; Matter of Geary v. Commr. of Motor Vehicles, supra; Matter of Maggin, Tax Appeals Tribunal, March 8, 1990).

C. Petitioners assert that they have been substantially prejudiced by the delay in answering in that interest and penalties continued to accrue to their detriment. They further assert that:

> "as a result of the delay, the individual who Petitioners had subpoenaed from the partnership to testify on their behalf -- Mr. Abraham Solomon [sic] -- was out of the country and not able to testify" (Petitioners' reply brief, p. 6).

I find that petitioners have not demonstrated substantial prejudice in this matter.

Petitioners have not shown that the Division's delay "significantly and irreparably handicapped" petitioners' efforts to develop their case (Matter of Cortlandt Nursing Home v. Axelrod, supra, 495 NYS2d at 927, 934). Petitioners make two assertions, the first of which is that interest and penalties continued to accrue to their detriment, and the second is that because of the delay Abraham Salomon, whom petitioners had subpoenaed to testify on their behalf, was out of the country and was unavailable to testify. In Matter of Framapac Delicatessen (Tax Appeals Tribunal, July 15, 1993), the Tribunal stated:

> "[W]ith respect to any interest that may have accrued, we have already held that interest represents the cost to the taxpayer for the use of the funds during the period of protest and does not constitute substantial prejudice (Matter of Rizzo, Tax Appeals Tribunal, May 13, 1993)."

In the instant case, petitioners have chosen not to pay the tax asserted due and have had the use of the funds throughout this period. Petitioners' second assertion is meritless. Petitioners' representative, Matthew Dollinger, stated shortly before the close of the hearing that Mr. Salomon was out of the country and unavailable to testify. I asked Mr. Dollinger, on the record, if he would like to get an affidavit from Mr. Salomon. Mr. Dollinger declined (see, Finding of Fact "43").

Petitioners have failed to show that they were substantially prejudiced by the Division's delay in answering their petition. There is no basis to default the Division because its answer was filed approximately six months late.

D. Tax Law § 601(f) provides that:

> "A partnership as such shall not be subject to tax under this article. Persons carrying on business as partners shall be liable for tax under this article only in their separate or individual capacities."

E. Tax Law § 611(a) provides that:

> "The New York taxable income of a resident individual shall be his New York adjusted gross income less his New York deduction and New York exemptions as determined under this part."

Tax Law § 612(a) provides that:

> "The New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with the modifications specified in this section."

F. Tax Law § 689(e) provides that, in general, the burden of proof is upon petitioners.

G. Petitioners contend that the Division erroneously assessed additional personal income taxes against them based upon its conclusion that they had failed to report income derived from the partnership for the 1988 tax year. They assert that the Division's position is contrary to the evidence which they submitted at the hearing. Petitioners argue that Mr. Callicutt breached the agreement by his failure to contribute the required sum for his limited partnership. They claim that, prior to the year in question, Mr. Callicutt assigned:

> "whatever interest he had, if any, in the Limited Partnership to Abraham Salomon by Assignment of Limited Partnership Interest made as of February 14, 1986" (emphasis in original; Petitioners' reply letter, p. 1).

In addition, petitioners contend that they were:

> "granted by Court Order (i) a Discharge of his debt to the Partnership and others and (ii) an injunction prohibiting the partnership and others from 'commencing, continuing or employing any action, process or act to collect, recover or offset any such debt . . ." (Petitioners' reply letter, p. 2).

Petitioners assert that the Division's position is in violation of a court order and is clearly erroneous. They claim that the partnership was prohibited by court order from recovering or offsetting the debt formerly owed by Mr. Callicutt to the partnership since the debt was discharged by order of the Bankruptcy Court. Petitioners argue that:

> "[T]he Bankruptcy Court was a Court of competent jurisdiction to determine Callicutt's liability vis-a-vis the partnership. The Partnership and all other entities, including the New York State Department of Taxation and Finance are bound to abide by the terms of this lawful Court Order" (Petitioners' reply letter, p. 3).

Petitioners maintain that the Division failed to establish that Mr. Callicutt was a partner. They contend that Mr. Callicutt was not a member of the partnership in 1988 and did not hold himself out as such. They further assert that his discharge in bankruptcy relieved him from liability and that the parties clearly intended that Mr. Callicutt had forfeited his interest in the partnership. Furthermore, petitioners claim that the other partners did not consider Mr. Callicutt to be a partner in the limited partnership since his bankruptcy. Petitioners maintain that the schedule K-1 "is erroneous and carries little weight in determining whether or not a partnership existed" (Petitioners' reply letter, p. 3). They assert that Mr. Callicutt did not receive

income/capital gains from the partnership for the tax year 1988. They argue that Mr. Callicutt testified that he "received no money whatsoever from the Partnership during the tax year 1988" (Petitioners' reply letter, p. 3). Petitioners assert that Mr. Callicutt deposited the check he received in 1989 from the partnership after he contacted his attorney and accountant and based on his belief that it was a return of his initial capital contribution.

H. I will first address petitioners' argument that Mr. Callicutt was not a member of the partnership. Petitioners' position is without merit. Their discharge in bankruptcy did not mean that Mr. Callicutt no longer had a limited partnership interest in the partnership. They were discharged from their debts, not their ownership of property. Limited partnership interests are personal property (see, Partnership Law § 107). The terms of the offering memorandum and the agreement do not state that a limited partner ceases to be a limited partner if he declares bankruptcy (see, Findings of Fact "13" and "14"). The terms do state that a successor in interest of a bankrupt limited partner:

> "will have the rights and obligations of a Limited Partner, but cannot become a substituted Limited Partner without the prior written consent of the Managing General Partner" (see, Findings of Fact "13" and "14").

There is no indication in the record that the bankruptcy trustee ever became the successor in interest of this limited partnership interest or formally became the substituted limited partner. Petitioners have submitted an unexecuted copy of an assignment in support of their position that Mr. Callicutt had ceased to have a limited partnership interest prior to the year in question. I do not give this evidence much weight. Mr. Callicutt's testimony about this document was extremely vague. It is unclear whether this document was ever executed and returned to the partnership. According to Article 8.2 of the agreement, the assignment must be executed by both the assignor and assignee, and the written consent of the managing general partner must also be obtained (see, Finding of Fact "14"). The record does not contain any evidence of valid assignment of Mr. Callicutt's interest in the limited partnership. It should also be noted that the partnership issued a 1988 schedule K-1 to Mr. Callicutt and sent him a check for approximately $7,726.00 in 1989. These acts by the partnership indicate that Mr. Callicutt continued to be a

limited partner of the partnership (see, Findings of Fact "20", "26", "40" and "41"). It also appears from the record that petitioners had reported distributions from the partnership on their tax returns for years prior to the year in question and subsequent to the bankruptcy. There are allusions to that effect in their petition (see, Finding of Fact "36").

Petitioner Robert Callicutt had a limited partnership interest in the partnership in 1988.

I. Since I have found that Mr. Callicutt had a limited partnership interest in 1988, I will address whether the Division properly included additional unreported income from the partnership in petitioners' 1988 adjusted gross income.

According to the offering memorandum, the partnership was on the calendar year basis (see, Finding of Fact "8"). A partner includes partnership tax items for the partnership year or years ending with or within the partner's taxable year (see, Internal Revenue Code § 706[a]). According to the schedule K-1 issued by the partnership, the sale of the building took place in 1988 (see, Finding of Fact "23"). The partnership is not taxed on the gain from the sale of the building; each partner is responsible for the tax to the extent of his interest in the partnership (see, Tax Law § 601[f]). Since Mr. Callicutt was a limited partner at the time of the sale, petitioners were required to report his share of the net gain on the sale of the building, $126,599.00, on their 1988 income tax return (see, Tax Law §§ 611[a]; 612). Petitioners' contention that they did not receive any money in 1988 and therefore nothing should be reported on their 1988 income tax return is without merit. They were required to report Mr. Callicutt's share of the gain on their 1988 income tax return. Petitioners did receive the net proceeds from the partnership in 1989. Mr. Callicutt testified that he cashed the $7,726.00 check sent to him by the partnership in April 1989. He further testified that he made no effort to contact the partnership to find out why this money was being sent to him or to get a revised schedule K-1. His testimony that he believed it was a return of a portion of his initial capital contribution is not credible in light of Article 6.3 of the agreement and the fact that this was considered a high risk investment (see, Findings of Fact "14", "40" and "41"). As for petitioners' argument that because of their discharge in bankruptcy they do not have to report income on their income tax

return, I can find no authority to support their argument and they have not pointed me to any such authority. Therefore, I find petitioners' argument to be without merit.

Petitioners have failed to prove that income from Mr. Callicutt's limited partnership interest should not be included in their adjusted gross income for 1988. The Division properly included this income in their 1988 adjusted gross income.

J. The petition of Robert L. and Dorothy Callicutt is denied and the Notice of Deficiency dated October 25, 1990 is sustained.

DATED: Troy, New York
February 27, 1995

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE