STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH AND MARILYN CHIRA	:	DETERMINATION DTA NO. 815602
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1978 through 1986.	:	

Petitioners, Joseph and Marilyn Chira, 1045 East 8th Street, Brooklyn, New York 11230, filed a petition for redetermination of a deficiency or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1978 through 1986.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 15, 1997 at 10:15 A.M., with all briefs to be submitted by December 17, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Kalnick, Klee & Green, P.C. (Allen Green, Esq., of counsel) and Schneider Ehrlich & Wengrover, LLP (Jerry Schneider, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether petitioners, Joseph and Marilyn Chira, are entitled to a refund of interest paid with respect to deficiencies of personal income tax arising from tax years 1978 through 1986, based on the alleged delay of the Division of Taxation in resolving this matter.

FINDINGS OF FACT

1. Joseph Chira ("petitioner")[1], was a limited partner in various investment partnerships which were under audit by the New York State Department of Taxation and Finance and the Internal Revenue Service ("IRS"). Such investments spanned tax years 1978 through 1986, and, on income tax returns filed by petitioners for such tax years, partnership losses, interest and other deductions arising from such investments were reported.

2. A Statement of Audit Changes dated March 26, 1986 was issued to petitioner reflecting modifications to petitioner's 1982 and 1983 New York State income tax returns pursuant to Tax Law § 612. The statement reflected additional tax due for the two tax years in a total amount of $124,846.46, plus penalties and interest.

3. The Division of Taxation ("Division") issued a Notice of Deficiency dated April 11, 1986 for tax years 1982 and 1983, asserting additional tax due in the amount of $124,846.46, plus penalties and interest. The notice advised petitioner that the deficiency would become subject to collection by the Division with interest to the date of payment, unless he filed a petition within 90 days of April 11, 1986, or by July 10, 1986.

4. Although petitioner did not file a formal petition with the former Tax Appeals Bureau to protest the Notice of Deficiency, petitioner's representative, Jerry Schneider, CPA,

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[1]Marilyn Chira is named in this matter solely by reason of having filed a joint tax return with her husband. All references to "petitioner" shall refer to Joseph Chira.

corresponded with the Division on May 14, 1986, in protest of the notice of April 11, 1986, and requested details of the assessments in order to resolve them. Mr. Schneider testified at the hearing that when petitioner received the Notice of Deficiency from the Division, he was unaware of the source of the assessments. Sometime later, it became clear that the examination of tax issues relating to investment partnerships was the source of the additional taxes due.

5. The Division issued notices and demands for payment of income tax due dated August 29, 1986, for the collection of $124,846.46, plus penalties and interest for tax years 1982 and 1983.

6. On June 17, 1987, the Division issued a tax warrant covering the 1982 and 1983 assessments in addition to a small penalty assessed for the 1981 tax year.

7. By correspondence dated July 20, 1987, petitioner's representative requested detailed information concerning the warrants and the reasons for the assessments.

8. In correspondence dated November 10, 1987, petitioner's representative acknowledged that, in fact, some of petitioner's investments were under audit, and since there was a pending appeal before the IRS on the same matter, petitioner was requesting that any collection efforts and proceedings resulting from the issuance of the warrants be suspended until the case was resolved at the IRS level.

On or about December 3, 1987, petitioner filed a Notice of Petition with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules requesting that the warrants be annulled on the basis that the IRS was conducting an audit of the partnership associated with the modification adjustments which formed the basis of the Division's Notice of Deficiency in issue. Petitioner assured prompt reporting of the outcome to the Division when the Federal audit was finalized. Mr. Schneider indicated that the Article 78 proceeding was instituted in order to get a

reaudit by the Division.

The filing of the Article 78 proceeding prompted contact between Jerry Schneider, petitioner's CPA, and the New York State Office of the Attorney General. Mr. Schneider corresponded with the Attorney General's office on December 14, 1987, providing in great detail information about petitioner's investments in various partnerships, including the specifics of the deductions taken. Mr. Schneider offered, on behalf of petitioner, to post a bond or make a payment in the amount of $25,000.00 during the period that the matter was being resolved.

9. Mr. Schneider next corresponded with Arnold Glass, Esq., representing the Division, in a letter dated January 29, 1988. Mr. Schneider provided petitioner's IRS contact person and indicated reasonable certainty that the case was very near settlement at the Federal level. He requested additional review by the Division of the New York State tax assessments.

10. On May 5, 1989, the Division received amended New York State income tax returns for tax years 1978 through 1986. The amended returns for 1978 through 1983 reflected a balance due, and the returns for 1984 through 1986 resulted in refunds. The accompanying correspondence stated that such returns were prepared in accordance with closing agreements entered into with the IRS and requested that petitioners be billed directly for the net amounts due including appropriate interest. No payment was submitted with these returns.

11. On August 27, 1990, petitioners again submitted the New York amended tax returns for 1978 through 1986, and made a payment in the amount of $30,000.00.

12. Although the Division maintained the position that it would not accept any IRS agreements for investment partnership cases since it had its own agreements which were substantially different from the IRS agreements, at the Division's audit level the case was put on hold awaiting final Federal audit changes.

13. Petitioner's case was assigned to David Tubbs, a tax auditor of the Division, with the goal of settling the Article 78 proceeding. On December 9, 1991, Mr. Tubbs commenced review of the case and analyzed the amended returns submitted to the Division by petitioner.

14. Petitioners' representative received correspondence from the Division dated November 5, 1992, prepared by David Tubbs, stating that the time lag experienced by petitioners to resolve this matter was due to several things beyond his control: major changes in auditing personnel, a major overhaul of the Division's computer systems, and a high volume of investment partnership cases under review. Mr. Tubbs reviewed the amended returns submitted by petitioner and he was in substantial agreement with such filings, with the exception of tax years 1982 and 1983, where there existed some disagreement with the Division's calculations. At that time Mr. Tubbs projected interest to December 15, 1992 and presented petitioner with an amount due of $58,449.94.

15. In March 1993, petitioner's case was reassigned to Linda Goot who also made contact with Mr. Schneider regarding petitioner's case.

On April 28, 1993 a courtesy conference was held and Ms. Goot, Mr. Tubbs and Mr. Schneider met to discuss settlement of petitioner's case. Mr. Schneider indicated at that time that petitioner was still being audited by the Internal Revenue Service and that he was still in disagreement with the IRS audit. During the conference, it was recommended to Mr. Schneider that petitioner sign the settlement agreement relating to the 1982 and 1983 years and send in payment to reduce the interest and penalty. During the next few months, the parties agreed that petitioner would sign a settlement agreement for 1982 and 1983, and by doing so, be released for any liability for 1978 through 1986, and not be precluded from protesting interest on the assessment.

16. On August 5, 1993 the Division received the signed settlement agreement for 1982 and 1983, in addition to statements of personal income tax audit changes for tax years 1978 through 1985, signed by petitioner and his wife. Petitioner also enclosed a $10,000.00 payment on account. In December 1993 the case was closed and the assessments which were the basis of the Article 78 proceeding were adjusted and amounts due determined. Although both the affidavit of Mr. Tubbs and the tax field audit record of Ms. Goot indicated that the case was closed in December 1993, the closing settlement agreement was signed by the Division's representative on March 7, 1994. Petitioner claims he did not receive the signed copy until October 1994, but did not introduce into evidence the envelope he claimed bore such mailing.

17. Final payment of the balance due was received by the Division on November 1, 1994. Petitioner received correspondence from the Division dated November 15, 1994 confirming that all liabilities resulting from the investment partnership audit for tax years 1978 through 1986 were paid in full.

18. Petitioner filed a refund claim with respect to the interest paid on the assessments in issue in January 1995. The Division denied the claim in its May 8, 1995 Notice of Disallowance on the basis that petitioner had not shown that there was undue delay by the Division in resolving the case. On or about July 17, 1995, petitioner filed a request for a conciliation conference, appealing the denial of the refund. A conciliation conference was held before the Bureau of Conciliation and Mediation Services on April 24, 1996, and by a Conciliation Order dated November 29, 1996 (CMS No. 14910), the refund denial was sustained.

19. A petition was filed with the Division of Tax Appeals on January 22, 1997 contesting the refund denial.

20. The Federal audit was completed on or about March 1997.

21. The Division submitted 22 proposed findings of fact, all of which were incorporated into this determination in pertinent part.

SUMMARY OF THE PARTIES' POSITIONS

22. Petitioner maintains that the Division delayed the resolution of this matter such that petitioner is entitled to an abatement of interest from October 15, 1987 to the time of final payment November 1, 1994 in the amount of $54,769.40.

23. The Division takes the position that petitioners did not experience any delay resulting from the actions of or inaction by the Division which would support abatement of the interest assessed on petitioner's former tax liabilities.

CONCLUSIONS OF LAW

A. Tax Law § 3008(a) (as amended by L 1997, ch 577)[2] allows for the abatement of interest attributable to unreasonable errors and delays by the Division. It provides as follows:

> (1) In the case of any assessment or final determination of interest on:
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> (A) any deficiency or any tax finally determined to be due attributable in whole or in part to any unreasonable error or delay by an officer or employee of the department (acting in his or her official capacity) in performing a ministerial or managerial act, or
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> (B) any payment of any tax to the extent that any unreasonable error or delay in such payment is attributable to such officer or employee being erroneous or dilatory in performing a ministerial or managerial act, the commissioner may abate the assessment or final determination of all or any part of such interest for any period.
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> (2) For purposes of paragraph one of this subdivision, an unreasonable error or delay shall be taken into account only if no significant aspect of such

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[2]Tax Law § 3008(a) was recently amended, effective September 10, 1997, to provide for the abatement of interest accruing on a tax deficiency which resulted from *unreasonable* error or delay by an employee of the Department of Taxation and Finance in performing a *managerial* act (as well as a ministerial act as under the prior law) (***see***, L 1997, ch 577, § 26). However, this new law is applicable to interest accruing after the effective date of September 10, 1997 (***see***, L 1997, ch 577, § 56[f]).

> unreasonable error or delay can be attributed to the taxpayer involved, and after the department has contacted the taxpayer in writing with respect to such deficiency, tax finally determined to be due or payment. The commissioner shall determine what constitutes timely performance of various ministerial or managerial acts performed under or pursuant to the authority of this chapter, the general city law and section 27-0923 of the environmental conservation law. Any regulations adopted with respect to other provisions of this subdivision shall conform, to the extent practicable, with corresponding federal regulations under the comparable provisions of the laws of the United States. Administrative and judicial review of abatements under this subdivision shall be limited to review of whether failure to abate would be widely perceived as grossly unfair.

Tax Law § 3008(a) became effective on December 1, 1992, and the Laws of 1992 (ch 770 , § 23) provided the following additional information pertinent to its application:

> [Tax Law § 3008(a)] shall apply to interest accruing with respect to deficiencies, amounts of tax due or payments for taxable years, periods, incidences or events (whichever is applicable to the tax involved) beginning or occurring on or after [December 1, 1992] with respect to articles . . . twenty-two (but not including part five thereof [pertaining to withholding taxes]), . . . thirty. . . of this chapter. . . [and other articles not applicable herein].

B. The statutory provision sought to be applied by petitioner to abate the accrued interest, in fact, has no application to this matter. An income tax assessment is one which is asserted for a particular tax year or years. Thus, the application of Tax Law § 3008 to this matter applies to interest accruing with respect to a deficiency for a taxable year, which the statute requires must begin on or after December 1, 1992. In petitioner's case, the tax year beginning after that date would be 1993. Accordingly, as to the interest which accrued on deficiencies for the years in issue, tax years 1978 through 1986, Tax Law § 3008 has no application.

C. Even if Tax Law § 3008 is viewed as having proper application in this case, the record does not support a conclusion that interest has accrued on the underlying deficiency by the error or delay of a Division employee.

In April 1986, the Division issued a Notice of Deficiency for tax years 1982 and 1983, and

by November 1987, perhaps sooner, petitioner acknowledged awareness of the source of the audit resulting in the additional assessment by the Division. Since there was an appeal pending at that time before the IRS on the same investment partnership investments, petitioner requested that any collection efforts be suspended until the case was resolved at the Federal level. Certainly petitioner's representative was aware that suspension of any collection effort by New York State would not halt the accrual of interest.

Although petitioner's representative believed that a timely resolution of the IRS matter would result, petitioner was free to pay amounts due and owing at any time to avoid further accrual of interest. Petitioner instead sought review of the assessments by the Division which he believed were worthy of some adjustment. Although entitled to do so, the consequence for doing so is an interest charge, which represents the cost to the taxpayer for the use of the funds during the period of protest (***Matter of Rizzo***, Tax Appeals Tribunal, May 13, 1993). In addressing similar arguments, as noted by the Division, the Tax Appeals Tribunal has stated:

> [I]nterest assessed may be viewed as a quantification of the risk assumed by a taxpayer when appealing an assessment without paying it. . . . Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due (***Matter of Rizzo, supra***).

In May 1989, the Division received amended New York State income tax returns that purportedly were prepared in accordance with closing agreements entered into with the IRS. Although the amendments for tax years 1978 through 1983 reflected balances due, amended returns for tax years 1984 through 1986 reflected refunds due to petitioner. The net effect of all the amended returns submitted, however, was a balance due of $16,460.00. It was not until petitioner submitted the same amended returns to the Division a second time in August 1990 that

a payment in the amount of $30,000.00 was made. What, if any, action was taken by the Division between May 1989 and August 1990, is not reflected by the record. However, the Division was steadfast in its position that it would not necessarily adopt the IRS settlement agreements, though at the audit level the case was put on hold awaiting Federal changes. The time lag, however, in no way amounts to a delay on the part of the Division, since it was at petitioner's request that the IRS audit be given an opportunity to be resolved. In addition, petitioner could have saved a significant amount of interest if the same $30,000.00 was submitted 13 months earlier.

During 1991 and 1992, there was additional review of petitioner's assessments by the Division in an attempt to reach some agreement. The Division explained that a portion of the time lag petitioner experienced in his attempt to resolve the matter was due to changes in auditing personnel, major changes in the Division's computer system, and an extremely high volume of investment partnership cases under review. What may have been viewed as a delay was clearly explained by the Division as the time needed for the unit to handle this matter and the explanation was reasonable in nature. In April 1993, petitioner was granted a courtesy conference to further discuss the settlement of petitioner's case. The IRS audit was still pending at that time and the Division's representatives recommended payment by petitioner to reduce the accrual of interest.

In August 1993, the Division received the signed settlement agreement and in December 1993, the case was considered closed. However, the settlement agreement was not signed by the Division until March 1994 and petitioner claims he did not receive it until October 1994, which prompted petitioner's final payment in November 1994.

D. There is no question that this matter was delayed in its ultimate resolution. However, it

is also very clear that petitioner's request to have the Federal matter resolved first contributed to much of the delay. Although the Division accommodated such request for a substantial period of time, the Division ultimately settled the case by its own standards and agreement about two and one-half years before the resolution of the IRS case. An error or delay by the Division, if it exists, will only be taken into account if "no significant aspect of such error or delay can be attributed to the taxpayer involved" (Tax Law § 3008[a][2]). Furthermore, a review of abatements pursuant to Tax Law § 3008 (a) is limited to a review of whether failure to abate the interest charges would be "widely perceived as grossly unfair." Based on the facts of this case, any delay that might have been attributed to the Division is negated by the actions of petitioner. Even if this were not true, it is highly unlikely that a failure to abate would be widely viewed as "grossly unfair."

E. The petition of Joseph and Marilyn Chira is denied, and the Notice of Disallowance dated May 8, 1995, is hereby sustained.

DATED: Troy, New York
May 21, 1998

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE