

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BURTON S. SULTAN, M.D., P.C. : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 816394
Corporate Franchise Tax under Article 9-A of the Tax :
Law for the Years 1990 and 1991. :

Petitioner, Burton S. Sultan, M.D., P.C., 200 Old Country Road, Suite 130, Mineola, New York 11501, filed a petition for redetermination of a deficiency or for refund of corporate franchise tax under Article 9-A of the Tax Law for the years 1990 and 1991.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 9, 1998 at 10:30 A.M., with all briefs to be submitted by February 5, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether the settlement of a Notice of Deficiency based upon a New York State audit also included the final adjustments made on a Federal audit.

FINDINGS OF FACT

1. On November 23, 1992, the Division of Taxation (“Division”) issued to petitioner, Burton S. Sultan, M.D., P.C., a Statement of Franchise Tax Audit Changes based on the results of a field audit. The statement indicated that mortgage payments which had been deducted by

petitioner as rent had been disallowed and, in the alternative, petitioner received credit for interest expenses and depreciation. All of the adjustments applied to the years 1990 and 1991.

2. On July 12, 1993, the Division issued to petitioner a Notice of Deficiency (Assessment ID L-007617930-1), asserting tax of \$84,912.00, plus penalty and interest, for a total amount due of \$114,294.99.

3. At the time that petitioner was under audit, Dr. Sultan was also under New York State audit as to his personal income tax liability for the years 1990 and 1991. In addition, the Internal Revenue Service was reviewing both petitioner's and Dr. Sultan's corporation tax and personal income tax responsibilities for those same years.

4. On November 23, 1994, Dr. Sultan, as president, consented to the corporation income tax audit findings of the Internal Revenue Service for the years 1990 and 1991 as indicated on the Department of the Treasury-Internal Revenue Service, Income Tax Examination Changes Form. The document indicates that the corporation income of petitioner was increased by \$678,210.00 in 1990 and by \$220,999.00 in 1991 and consisted of adjustments for rent and other employee benefit programs and credits for depreciation and interest. In addition, a 20 percent accuracy penalty was imposed pursuant to Internal Revenue Code § 6662(a) and (b). The corporation income tax liability as indicated on the Income Tax Examination Changes Form was \$230,400.00 for 1990 and \$75,140.00 for 1991, plus penalty and interest for each year.

The Internal Revenue Service's Income Tax Examination Changes document for petitioner for the years 1990 and 1991 consisted of eight pages with the explanation of the adjustments made on the fourth and sixth pages.

On the same date, Dr. Sultan consented to the personal income tax audit findings of the Internal Revenue Service for the years 1990 and 1991 as indicated on the Department of the

Treasury-Internal Revenue Service, Income Tax Examination Changes Form. This document indicates that the personal income of Dr. Sultan was increased by \$11,960.00 in 1990 and by \$15,964.00 in 1991 and consisted of adjustments for constructive dividends and itemized deductions.

5. Following the issuance of the Notice of Deficiency dated July 12, 1993, petitioner requested that the Bureau of Conciliation and Mediation Services ("BCMS") schedule a conference in such matter. A conference was scheduled by BCMS on November 14, 1994. The subject of the conference was to be the Notice of Deficiency issued on July 12, 1993 relating to the additional corporate franchise taxes assessed for the years 1990 and 1991. Prior to the conference, Dr. Sultan contacted the conferee, in Albany, New York, on behalf of petitioner and offered to pay the additional tax assessed in the Notice of Deficiency of July 12, 1993 if the Division agreed to abate the penalties. The Division accepted petitioner's offer and on December 7, 1994 issued a Consent to petitioner whereby petitioner agreed to pay the tax due as contained in the Notice of Deficiency dated July 12, 1993 (L-007617930-1), plus interest. The penalty was waived. The Consent was executed by Dr. Sultan on behalf of petitioner on December 21, 1994 and received by BCMS on January 3, 1995. Accompanying the Consent was a check in full payment of the tax (\$84,912.00) and interest (\$28,389.01) due. Interest was computed to December 22, 1994.

6. While the corporate franchise tax matter had reached the BCMS stage in the appeal process, the personal income tax matter of Dr. Sultan remained with the Division's Nassau District Office. On December 1, 1994, the Division's Nassau District Office received from Dr. Sultan four pages of the Internal Revenue Service's Income Tax Examination Changes Form for the years 1990 and 1991. The first two pages related to Dr. Sultan's personal income tax

liability and the next two pages related to the changes made to the corporation's tax liability. However, the pages relating to the corporation's Federal tax liability did not contain the explanation of the changes made.

7. Upon direct receipt of the complete Federal audit adjustments from the Internal Revenue Service, the Division issued to petitioner, on October 2, 1995, a Notice of Additional Tax Due (Assessment ID L-011134278-5) for the years 1990 and 1991 in the amount of \$16,718.00, plus penalty and interest. The notice explained that the additional tax was computed as follows:

The additional tax shown is based on an adjustment to federal taxable income as determined by the U.S. Treasury Department.

Section 211.3 of the New York State Corporation Tax Law requires that the taxpayer report all final federal determinations within 90 days from the date of such determination.

Penalties were imposed for failure to file return (Tax Law § 1085[a][1][A]) and for a deficiency due to negligence (Tax Law § 1085[b][1]). In addition, penalty was imposed pursuant to Tax Law § 1085(b)(2) whereby there was added to the tax an amount equal to 50 percent of the interest payable.

CONCLUSIONS OF LAW

A. Tax Law § 211(1) imposes a duty upon every taxpayer required to file a report under Article 9-A of the Tax Law to transmit whatever reports, facts and information the Commissioner of Taxation may require for the administration of Article 9-A. Tax Law § 211(3) states that a taxpayer whose taxable income has been changed or corrected by the IRS must report the change or correction to the Division within 90 days after the final determination of such change or correction. The Commissioner's regulation at 20 NYCRR 6-3.1(b), provides in

relevant part that “[a] change in Federal taxable income must be reported on form CT-3360. Form CT-3360 must be accompanied by a copy of the revenue agent's report and copies of all other pertinent information.” Form CT-3360 is entitled “Report of Change in Taxable Income by U.S. Treasury Department.” There is nothing in the record to indicate that petitioner ever filed such form.

B. Petitioner claims that the settlement reached with the conferee concerning the Notice of Deficiency issued on July 12, 1993 (ID L-007617930-1) also resolved the issues covered by the Notice of Additional Tax Due issued on October 2, 1995 (ID L-011134278-5), which was based upon the final Federal adjustments. Dr. Sultan bases this claim upon the allegation that as the conferee and the auditor had the final Federal changes when the original notice was settled, this settlement must include the final Federal changes made for the years at issue.

C. Petitioner’s position fails for several reasons. Most importantly, petitioner failed to file Form CT-3360 with the Division concerning the Federal changes and attach all pertinent information. Petitioner mailed to the Nassau District Office only the first two pages of the Federal changes relating to the corporation adjustments. The Federal corporation changes consisted of eight pages, with the explanation of the adjustments contained on the fourth and sixth pages. The Division never received the explanation of the adjustments until they were received directly from the Internal Revenue Service. This failure to file Form CT-3360 with all relevant documents attached precluded the Division from examining the Federal changes in a manner which would have allowed the settlement to include such changes.

At no time did petitioner file with the BCMS conferee a copy of the Federal corporation tax changes, partial or otherwise. Although the conferee was handling the corporate franchise tax matter and Dr. Sultan made petitioner’s request to settle this matter to the conferee, he forwarded

the incomplete Federal changes relating to the corporation as well as the Federal changes relating to his own personal income tax matter to the Nassau District Office. Since such a short period of time elapsed between the mailing of the Federal changes to the Nassau District Office and the offer of settlement to the BCMS conferee in Albany, New York, it was unreasonable to assume that the settlement encompassed both the original Notice of Deficiency and any deficiency resulting from the Federal audit changes.

Finally, it is noted that the amount of tax paid by petitioner as the result of the settlement (which was to pay the tax due if the penalties were waived) was identical to the amount of tax assessed on the first Notice of Deficiency dated July 12, 1993. In addition, the Consent signed by Dr. Sultan referred to the Notice of Deficiency (by ID number), date (July 12, 1993) and the original amount of tax due. These facts alone should have alerted petitioner that the settlement reached was only for the Notice of Deficiency issued on July 12, 1993 and could not have included the partial Federal changes sent to the Nassau District Office.

D. The petition of Burton S. Sultan, M.D., P.C. is denied and the Notice of Additional Tax Due dated October 2, 1995 is sustained.

DATED: Troy, New York
July 8, 1999

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE