STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JEFFREY KANEW	:	DETERMINATION DTA NO. 816717
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1977, 1981 and 1982.	:	

Petitioner, Jeffrey Kanew, c/o Louis F. Brush, Esq., 101 Front Street, Mineola, New York 11501-4402, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977, 1981 and 1982.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 28, 1999 at 10:30 A.M., with all briefs submitted by December 23, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Louis F. Brush, Esq. The Division of Taxation appeared by Barbara Billett, Esq. (Peter T. Gumaer, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation timely issued notices of additional tax due to petitioner.

II. Whether the Division of Taxation properly determined that all of the additional income determined on a Federal audit of petitioner, a nonresident of New York, was New York source income.

III. Whether, using the Federal audit adjustments and assuming that all additional income was New York source income, the Division properly calculated petitioner's taxable income for the years at issue.

FINDINGS OF FACT

1. On June 27, 1997, the Division of Taxation ("Division") issued to petitioner, Jeffrey Kanew, two notices of additional tax due which assessed additional income tax against petitioner, plus interest, for the following years and in the following amounts:

Year	1977	1981	1982
Tax Assessed	$44,524.00	$13,242.00	$11,389.00

2. Both of the notices issued to petitioner contained the following explanation:

> Our records indicate that the Internal Revenue Service has made changes to your federal return. Section 659 of the New York State Tax Law requires that federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.
>
> A search of our files indicates that you did not report these changes to New York State. If you have reported the federal audit changes, please send a copy of the report and a copy of both sides of the canceled check showing our deposit serial number stamped on the face of the check.
>
> When you do not report federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by section 683(c) of the New York Tax Law.
>
> Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under section 684(a) of the New York State Tax Law.

3. The Internal Revenue Service audited the joint Federal personal income tax returns of petitioner and his wife, Harriette Kanew, for the years 1977 through 1982. That audit resulted in

changes to petitioner's Federal taxable income for the years 1977, 1981 and 1982. Petitioner consented to such changes on July 10, 1990.

4. In late May and early June 1990, the Internal Revenue Service provided the Division with information regarding the changes it had determined in connection with its audit of petitioner.

5. The Division issued a letter to petitioner dated November 17, 1994 which provided, in part:

> Information furnished by the Internal Revenue Service, (under authorization of Section 6103(d) of the Internal Revenue Code), indicates they adjusted your Federal income tax return(s) for the year(s) [1977 through 1982]. This information also indicates an adjustment was made to your distributive share of partnership net income/loss.
>
> Federal audit changes must be reported to New York State within 90 days of the final federal determination. (Section 659 of the New York State Tax Law.)
>
> A search of our files fails to show that you reported the change(s) to New York State.

The letter further requested that petitioner provide the Division with certain information and to respond within 20 days.

6. Petitioner did not respond to the November 17, 1994 letter and the Division subsequently sent a follow-up letter requesting a response within 15 days. Petitioner's representative sent a letter to the Division dated December 18, 1995 requesting copies of petitioner's 1977-1982 Federal income tax returns. The Division responded by letter dated January 5, 1996 indicating that it would provide petitioner with copies of documents in its possession.

7. The Division calculated the income tax deficiencies against petitioner for the years at issue using the changes to petitioner's Federal taxable income as determined by the Internal

Revenue Service and as set forth on Federal forms 4549 (Income Tax Examination Changes). As noted previously, petitioner consented to these Federal changes. The Division calculated the difference between the amount reported on the forms 4549 as "Corrected taxable income" and Federal taxable income as reported on petitioner's original Federal returns. The notices of additional tax due referred to this difference as "Federal Adjustment." The Division deemed this "Federal Adjustment" amount to be New York source income and added this amount to reported New York taxable income [1] to reach "New York Taxable Income Corrected." The Division then calculated the income tax deficiencies accordingly.

8. For the year 1977, petitioner reported Federal taxable income of $110,032.00 on his original Federal return. Petitioner's corrected 1977 Federal taxable income as indicated by the form 4549 was $406,856.00.[2] The Division thus determined a Federal adjustment of $296,824.00. The Division's records indicate that petitioner reported New York taxable income of $146,209.00. Accordingly, the Division determined New York taxable income corrected of $443,033.00.

9. For the year 1981, petitioner reported Federal taxable income of $0 on his original return, while his corrected taxable income as shown on the form 4549 was $109,057.00. The Division thus determined a Federal adjustment of $109,057.00. The Division's records indicate that petitioner's 1981 deductions and exceptions exceeded his 1981 New York adjusted gross

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[1] The Division determined petitioner's reported New York taxable income for the years at issue from a review of microfiche transcripts of petitioner's New York nonresident income tax returns for the years at issue. Copies of such transcripts were entered into evidence at the hearing. The actual returns had been destroyed as part of the normal course of the Division's record keeping procedures.

[2] The Form 4549 for the 1977 year lists this amount under the heading "Corrected Adjusted Gross, Taxable or Tax Table Income." That this amount refers to taxable income is shown by a review of petitioner's amended 1977 Federal income tax return. Accordingly, questions raised in petitioner's brief as to whether this amount refers to adjusted gross, taxable or tax table income are without merit.

income by $4,185.00. After allowing for the full amount of petitioner's claimed deductions and exemptions, the Division determined 1981 New York taxable income corrected of $104,872.00.

10. For the year 1982, petitioner reported Federal taxable income of $214,311.00 on his original Federal return. Petitioner's corrected Federal taxable income as shown on the form 4549 was $295,726.00. The Division thus determined a Federal adjustment of $81,415.00. The Division's records show that petitioner reported 1982 New York taxable income of $204,998.00. The Division therefore calculated corrected New York taxable income of $286,413.00.

11. The Division's records indicate that petitioner reported $356,130.00 in adjusted gross income on his original 1977 Federal return and the same amount as his New York adjusted gross income for 1977. Petitioner reported $9,249.00 in adjusted gross income on his original 1981 Federal return and the same amount as his New York adjusted gross income for 1981. For 1982, petitioner reported $199,612.00 as his Federal adjusted gross income and $205,798.00 as his New York adjusted gross income.

12. Petitioner was a resident of Florida during the years at issue and filed nonresident New York State returns. Petitioner and his wife filed joint Federal returns and filed their New York nonresident returns separately on one return.

13. The Federal forms 4549 which summarize the Internal Revenue Service's audit findings with respect to its audit of petitioner list the following amounts as "Total Adjustments" for the years at issue: $169,950.00 (1977), $14,049.00 (1981) and $15,362.00 (1982). These adjustments equal the difference between corrected Federal taxable income and taxable income as reported on petitioner's Federal returns or as previously adjusted.

14. Petitioner filed amended Federal returns for the years 1977 and 1981, both dated December 30, 1986. Petitioner's amended 1977 Federal return reported taxable income of

$406,856.00. Petitioner's amended 1981 Federal return reported taxable income of $109,057.00. Petitioner did not file any amended New York returns.

15. Petitioner submitted proposed findings of fact along with his brief. These proposed findings, set forth in six unnumbered paragraphs, are rejected as unsupported by the record and as being more conclusions of law than findings of fact.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 659, petitioner was required to report to the Division the changes made by the Internal Revenue Service to his Federal taxable income for the years at issue within 90 days after the the final determination of such change. Petitioner failed to report such Federal changes. Where, as here, a taxpayer fails to report Federal changes as required under Tax Law § 659, "the tax may be assessed at any time" (Tax Law § 683[c][1][C]). The issuance of the notices of additional tax due to petitioner was therefore not barred by any statute of limitations.

Petitioner argued that the applicable period of limitations is one year from the date the Division received notice of the Federal changes from the IRS. Since the Division did not issue the notices of additional tax due within one year of such notice, petitioner asserted that the assessment was time-barred. This argument is without merit. As previously noted, Tax Law § 659 places the burden upon the taxpayer to report Federal changes to the Division. Where, as here, the taxpayer fails to comply with section 659, Tax Law § 683(c)(1)(C) permits the Division to assess the tax at any time.

In a related argument, petitioner noted that the Division's first communication with petitioner in this matter occurred approximately four and one-half years after the Federal matter was concluded. Petitioner asserted that there was no reason for him to keep his records for the

years at issue for another four and one-half years, and that under these circumstances, the notices of additional tax due should be canceled. This contention, too, is without merit, for as noted above Tax Law § 683(c)(1)(C) permits the assessment of tax at any time. As to the equitable component of petitioner's argument, there is no evidence in the record that petitioner discarded or destroyed any of his records. Accordingly, there is no basis to conclude that petitioner was disadvantaged in any way by the four and one-half year period between the conclusion of the Federal matter and the Division's first communication in this matter.

B. Pursuant to Tax Law § 601(e), the New York source income of a nonresident individual is subject to personal income tax. Tax Law § 631(a) provides that the New York source income of a nonresident individual includes the net amount of items of income, gain, loss and deduction reported in the Federal adjusted gross income that are "derived from or connected with New York sources." Petitioner bears the burden of proving that income was not secured or earned pursuant to activities connected with or derived from New York sources (***see***, ***Matter of Brophy***, Tax Appeals Tribunal, December 7, 1995).

Petitioner asserted that the assessment was in error because the additional income determined by the Internal Revenue Service was derived from or connected with Florida sources. Petitioner did not identify the activity upon which the income in question was earned (***see, Matter of Laurino***, Tax Appeals Tribunal, May 20, 1993), and offered neither documentation nor testimony to support his contention that the additional income had a Florida source. Petitioner thus failed to meet his burden to show that the additional income had a non-New York source. Furthermore, the evidence in the record supports the Division's determination that the Federal adjustments, in their entirety, were includible in New York income. Specifically, petitioner's New York returns indicate that, during the three years at issue, petitioner's New York

adjusted gross income was at least 100% of his Federal adjusted gross income (***see***, Finding of Fact "11"). The Division's determination that the additional income determined on the Federal audit was New York source income was thus consistent with petitioner's New York nonresident returns as filed and was therefore reasonable.

C. Petitioner also asserted that the Division's computation of additional tax was erroneous. Petitioner noted that the "Total Adjustments" amounts listed on the forms 4549 differ from the "Federal Adjustment" amounts listed on the notices of additional tax due (***see***, Findings of Fact "7" and "13"). Petitioner asserted that the Division had erroneously used the amounts designated Federal Adjustment in its calculation of additional tax due herein. This contention is also without merit. As noted previously, the amount determined as corrected New York taxable income equals New York taxable income as previously reported plus Federal Adjustments. Federal Adjustments, in turn, equal corrected taxable income per the form 4549 minus Federal taxable income as reported on petitioner's original Federal returns. This is a reasonable way to measure the Federal adjustments to petitioner's income and, consequently, to calculate petitioner's corrected New York taxable income.

The amounts designated "Total Adjustments" on the forms 4549 equal corrected Federal taxable income minus taxable income as reported on petitioner's Federal returns *or as previously adjusted* (***see***, Finding of Fact "13"). By definition, then, these "Total Adjustments" differ from the Federal Adjustments on the notices of additional tax due. While this may be a cause for confusion, it does not indicate an error in the Division's calculations.

D. The petition of Jeffrey Kanew is denied and the notices of additional tax due dated June 27, 1997 are sustained.

DATED: Troy, New York
April 6, 2000

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE