

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HIPOLITO VERAS :
for Redetermination of a Deficiency or for Refund of : DETERMINATION
New York State and New York City Personal Income : DTA NO. 817215
Taxes under Article 22 of the Tax Law and the New York :
City Administrative Code for the Year 1994. :

Petitioner, Hipolito Veras, 820 West 180th Street, New York, New York 10033, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1994.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 29, 2000. Petitioner's reply brief was received on June 9, 2000, which date began the six-month statutory period for the issuance of this determination.¹ The Division of Taxation appeared by Barbara G. Billett, Esq. (Margaret T. Neri, Esq., of counsel). Petitioner represented himself.

ISSUES

I. Whether petitioner has demonstrated that he was entitled to claim head of household status on his 1994 personal income tax return.

¹ Both the Division of Taxation and petitioner attached additional documentary evidence to their briefs. Inasmuch as the record in this matter was closed at the end of the hearing, this evidence was not considered by me in arriving at a determination.

II. Whether petitioner was entitled to claim two dependent exemptions on his 1994 personal income tax return.

III. Whether petitioner substantiated certain rental expenses claimed on his 1994 personal income tax return.

IV. Whether the Division of Taxation wrongly seized funds from a bank account belonging to petitioner and applied those funds to an outstanding tax liability.

FINDINGS OF FACT

1. Petitioner, Hipolito H. Veras, timely filed a 1994 New York State and City personal income tax return showing his filing status as head of household. On that return, he claimed a standard deduction and two dependent exemptions totaling \$1,000.00.

2. Petitioner attached a Federal Schedule E, a Supplemental Income and Loss statement ("schedule E"), to his 1994 return. On the schedule E, he reported rental income of \$15,000.00 from property located at 109-33 Guy R. Brewer Boulevard, Jamaica, Queens. He reported expenses associated with that property of \$30,968.00, including advertising expenses of \$3,000.00; cleaning and maintenance expenses of \$15,500.00; legal and professional fees of \$5,000.00; repairs of \$5,000.00; taxes of \$128.00; and utilities of \$1,500.00. He also claimed depreciation of \$5,150.00, yielding total expenses of \$36,118.00 and total losses of \$21,118.00.

3. For 1994, petitioner reported wage and salary income of \$29,471.00; interest income of \$1,615.00; and losses from rentals of \$21,118.00, resulting in Federal adjusted gross income of \$9,968.00. From this, he subtracted a standard deduction of \$7,000.00 and two dependent exemptions totaling \$1,000.00 to calculate New York taxable income of \$1,968.00. Tax due on this amount was \$79.00. He subtracted a household credit of \$75.00 to determine total New York State tax due of \$4.00. New York City resident tax was determined to be \$50.00. He

subtracted a household credit of \$100.00 from this amount to arrive at total New York City income tax due of zero. Total New York State and City income taxes withheld by petitioner's employers amounted to \$956.00. Thus, petitioner claimed a refund of \$952.00.

4. Petitioner's address as shown on the 1994 personal income tax return is P.O. Box 7723, New York, New York 10116. The same address is shown on two miscellaneous income statements filed with the return, each of which was issued to Hipolito H. and Inocencia Veras. The paid preparer of the return is identified as Hipolitas Veras, Income Tax Service, and the address given is P.O. Box 7723, New York, New York. The return is dated March 16, 1995. Two wage and tax statements (W-2 forms) are attached to petitioner's return. They show his address as 820 W. 180th Street, Apt. 4, New York, NY 10033. Petitioner's wife, Inocencia Veras, filed a separate New York State personal income tax return for 1994 where she claimed the couple's three children as dependents. The address shown on her return is the same as the address shown on petitioner's W-2 forms, 820 W. 180th Street, Apt. 4, New York, New York.

5. On June 13, 1997, Elizabeth Smeltzer, a Tax Technician II in the Audit Division of the Division of Taxation ("Division"), sent a letter to petitioner at the address shown on his return informing him that an audit was being conducted of his 1994 tax return and asking him to answer certain questions or provide information as follows:

1. What is your legal marital status?
2. Please provide the name of the individual who qualifies you for the Head of Household filing status and state that person's relationship to you.
3. Complete and return one (1) copy of the enclosed questionnaire in regard to the cost of maintaining your household.
4. Send a copy of your rental lease or property tax and mortgage interest statements.

5. Send a copy of your 1995 federal income tax return including all schedules and attachments.

6. Send a copy of the birth certificate for every dependent which you are claiming.

7. Please send documentation to support the rental expenses claimed. The documentation must show:

- a. Name and address to whom paid.
- b. Amount paid and date paid.
- c. Photocopies of paid receipts or cancelled checks.
- d. Computation of depreciation and a copy of the depreciation schedule.
- e. Expenses must be broken down and listed by type of expense as shown on Schedule E.

6. The Division received no reply to the request for information. On January 12, 1998, the Division issued a Statement of Proposed Audit Changes to petitioner, mailing it to the address shown on the 1994 personal income tax return. It notes that petitioner did not reply to the Division's letter of June 13, 1997 and that, as a result, petitioner's filing status was changed to single, his dependent exemptions were disallowed and all schedule E deductions were disallowed. In addition, two penalties were imposed: a negligence penalty of 5% pursuant to Tax Law § 685(b)(1) and a penalty equal to 50% of any interest due on the deficiency pursuant to Tax Law § 685(b)(2). As a result of these adjustments, the Division computed an additional tax due of \$4,335.00, interest of \$1,062.32 and penalty of \$785.29, resulting in a total due of \$6,182.61. Petitioner was informed that he had until February 11, 1998 to agree or disagree with the Division's findings. No response was received from petitioner; therefore, the Division issued to petitioner a Notice of Deficiency (assessment number L-014573446-5), dated March 19, 1998, asserting a tax deficiency as shown in the Statement of Proposed Audit Changes plus interest and penalty.

7. The Notice of Deficiency was addressed to petitioner at the same address as shown on his 1994 personal income tax return, P.O. Box 7723, New York, New York.

8. Petitioner filed a request for a conciliation conference in the Bureau of Conciliation and Mediation Services (“BCMS”), and a conference was held on March 18, 1999. As a result, BCMS issued to petitioner a Conciliation Order, dated May 28, 1999, sustaining the Notice of Deficiency.

9. The Conciliation Order is addressed to petitioner at 820 West 180 Street, Apt. 4, New York, New York 10033. A petition was filed in the Division of Tax Appeals on July 19, 1999 showing the same address. This is the address shown on his wife’s 1994 income tax return and petitioner’s own W-2 forms.

10. The petition is confusing because of petitioner’s lack of facility with English. He appeared to make two assertions in the petition: first, that he was legally entitled to claim two dependents on his 1994 tax return, and second, that the Division wrongly took \$4,372.71 out of a bank account maintained either by petitioner or by his wife.² At the beginning of the hearing in this matter, petitioner raised two additional issues. He claimed that he had never received the Division’s letter of June 13, 1997 or the Statement of Audit Changes, and he introduced evidence to support the expense deductions he had claimed on his 1994 tax return.

Filing status and dependent exemptions

11. The W-2 forms attached to petitioner’s 1994 tax return indicate that petitioner lived with his wife and children in 1994. The address that appears on those forms is the same as the address shown on his wife’s 1994 personal income tax return, 820 West 180th Street, Apt. 4,

² The petition states: “Bureau of Conciliation and Mediation Services take out my account from my wife to amount the money \$4372.71.”

New York, New York 10033. As noted, petitioner also listed this address on his petition to the Division of Tax Appeals, and the Conciliation Order issued to petitioner was mailed to this address.

12. Petitioner did not claim his children as dependents on his 1994 personal income tax return; rather, he claimed his mother and father as his dependents. Petitioner's testimony regarding his living arrangements in 1994 were vague and confusing. Under questioning from the Administrative Law Judge, petitioner testified as follows:

Administrative Law Judge: I'm trying to find out what household you were the head of. So who were you living with, friends, relatives, with wife, with mother?

Petitioner: I living with my mother at that time.

Administrative Law Judge: And this is 1994?

Petitioner: '94

Administrative Law Judge: Did you live with her the whole year?

Petitioner: Yeah.

Administrative Law Judge: And where did she live?

Petitioner: The same address.

Administrative Law Judge: Well, she doesn't live in a post office box?

Petitioner: No. 820 West *184th* Street.

* * *

Administrative Law Judge: Did anybody else live there besides you and your mother?

Petitioner: Me and my mother, we live there.

Administrative Law Judge: Just the two of you?

Petitioner: Yes.

* * *

Administrative Law Judge: And where you put two here you were claiming your mother?

Petitioner: And my father.

Administrative Law Judge: And were they both living together in the same place?

Petitioner: At that time, yes, at that time, yes.

Administrative Law Judge: So the three of you were living on 184th Street?

Petitioner: Yes.

13. Petitioner's mother, Rosa Soto, received monthly social security benefits during 1994.

14. Pursuant to State Administrative Procedure Act § 306(4), official notice is taken of the following facts: Petitioner mailed a response to the Division's brief to this Administrative Law Judge. The envelope containing that response is postmarked June 7, 2000. The return address shown on the envelope is Hipolito H. Veras, P.O. Box 7723, New York, New York 10116.

Substantiation of deductions

15. At the hearing, petitioner submitted an amended 1994 personal income tax return prepared by Luis Rodriguez, a certified public accountant. The return was prepared and signed shortly before the hearing.

16. The originally-filed 1994 tax return and the amended return contain the following differences:

(a) The original return showed interest income of \$1,615.00; the amended return shows no interest income.

(b) Petitioner claimed an IRA deduction of \$1,000.00 on the amended return which was not claimed on the original return.

(c) The schedule E filed with the original 1994 return shows rental income of \$15,000.00 and expenses of \$36,118.00 yielding total losses of \$21,118.00. The amended return shows rental income of \$17,7445.00 and expenses of \$23,121.00, including mortgage expenses of \$11,683.00, repairs of \$7,138.00, taxes of \$243.00 and depreciation of \$4,057.00 yielding losses of \$5,676.00.

(d) Petitioner did not claim either a New York State or New York City household credit on the amended return, as he did on the original return.

(e) Petitioner's total 1994 taxable income is shown as \$14,795.00 on the amended return, with total State and City taxes due of \$1,082.00. Petitioner subtracted taxes withheld of \$956.00 to calculate total taxes owed of \$126.00. On the original return, petitioner reported New York taxable income of \$1,968.00 and sought a refund of \$952.00.

17. To support the deductions taken in connection with the rental property at Guy R. Brewer Boulevard, petitioner submitted certain documents.

(a) Petitioner submitted a mortgage dated July 18, 1992 given by "HIPOLITO VERAS and INOCENCIA VERAS, his wife, residing at 109-33 Guy R. Brewer Boulevard, Jamaica, New York" to an unrelated individual identified by petitioner as the former owner of the property. The amount of the mortgage is \$13,000.00, and the property securing the mortgage is the Guy R. Brewer Boulevard house.

(b) Petitioner submitted a commitment letter from Kadilac Mortgage Bankers, Ltd, dated May 8, 1992. The letter is addressed to Hipolito and Inocencia Veras at "16 Broadway Terrace,

New York, NY 10040.” The letter informs petitioner and Mrs. Veras of approval of a mortgage for the property located at 109-33 Guy Brewer Boulevard.

(c) Petitioner submitted a Statement of Payment from the New York City Housing Authority dated March 1, 1995. It shows one month of rental payments made by the City on behalf of two tenants. The landlord is identified as Hipolito H. Veras and Inocencia Veras. The landlord’s address is shown as P.O. Box 7723, New York, New York 10116. The rent is \$726.75 for one apartment and \$727.00 for the other apartment. Both apartments are located in the building at 109-33 Guy Brewer Boulevard.

(d) A computer generated amortization schedule was submitted to prove the amount of petitioner’s monthly mortgage expense for the Guy R. Brewer Boulevard property. It appears that the schedule was produced by petitioner’s accountant.

(e) Petitioner submitted a copy of two separate receipts from Unlimited Hardware, Inc., 4193 Broadway, New York, New York, which show sales made to Hipolito Veras, 109-33 Guy R. Brewer Boulevard, Jamaica. The two receipts are consecutively numbered, numbers 0003379 and 0003380. They bear the same order number, 11433-295. Each receipt lists a large quantity of building materials, for example, two by fours, paint and plaster. The date on the original copy of receipt number 0003379 appeared to be December 7, 1994; however, petitioner testified that this purchase was actually made on December 18, 1994 and that the clerk made a mistake on the date. The date on receipt number 0003380 appears to be December 7, 1994.³ The total of the two receipts is \$6,564.00.

³ The copies placed in evidence are mostly illegible, and the originals, which were compared with the copies at hearing, were also difficult to read. This Administrative Law Judge noted on the record that the original copy of receipt number 0003379 appeared to bear a date of December 7, 1994.

The bank payment

18. The Division submitted copies of two documents generated from its Case and Resource Tracking System (“CARTS”). CARTS maintains records of each assessment issued by the Division as well as all payments made by taxpayers. Ms. Smeltzer submitted an affidavit explaining how to read the two documents. The first document shows that a bank payment of \$4,372.71 was applied as payment for assessment L-013784172 issued to petitioner. Ms. Smeltzer states that the second document “indicates that [assessment L-013784172] is an outstanding deficiency for the 1995 tax year.” However, the second document, entitled Assessment Summary, does not explicitly state the tax year involved. It refers to assessment L-013784172 5, and it identifies the assessment as an assessment of personal income tax.

SUMMARY OF THE PARTIES’ POSITIONS

19. Petitioner claims that he never received the Division’s letter of June 13, 1997 or the Statement of Proposed Audit Changes. He did not deny that the address to which that letter was sent, P.O. Box 7723, New York, New York 10116, was his actual address in 1994, but he claimed that the postal service often lost his mail during that period.

20. Petitioner claimed that he lived with his mother and father in 1994 and contributed to their household expenses.

21. Petitioner argued that he had substantiated the expenses incurred in connection with the Guy R. Brewer property. He stated that documents relating to that property had been lost. However, he testified that the monthly rent he received in 1994 was the same as that received in March 1995 under a contract with the City, \$1,453.75 per month.

22. Petitioner claims that interest income shown on his original 1994 return was actually income received by his son.

23. Petitioner claims that the Division seized funds from his bank account which should have been used to satisfy the 1994 tax deficiency. The Division argues that the bank levy did not involve the 1994 assessment (assessment number L-014573446-5) in issue in this proceeding.

24. The Division contends that none of the documents submitted by petitioner substantiate the rental expenses claimed on the 1994 income tax return he originally filed, or the expenses shown on the amended 1994 return.

25. The Division takes the position that petitioner was not entitled to claim head of household status or to take two dependent exemptions because he has not shown that he contributed more than half the cost of his parents' living expenses in 1994.

CONCLUSIONS OF LAW

A. It is well established that a presumption of correctness attaches to a properly issued Notice of Deficiency which in itself provides the rational basis for the assessment (*see, Matter of Land Transport Corporation*, Tax Appeals Tribunal, June 29, 2000; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). In proceedings for review of a properly issued notice of deficiency, the burden of proof is on the taxpayer to demonstrate that the deficiency assessment is erroneous (Tax Law § 689[e]).

B. Petitioner has not established that he was entitled to claim a head of household filing status in 1994. This status is for an unmarried person who paid over half the cost of maintaining a home for another qualifying person such as a child or parent (IRC § 2[b]). Petitioner may have been separated from his wife and children in 1994, but according to his own testimony he was

still married.⁴ Furthermore, petitioner did not prove that he lived with his parents in 1994. Many documents were submitted by petitioner and the Division in connection with this proceeding, and many of them included an address for petitioner. Three addresses appear over and over again: P. O. Box 7723, New York, New York; 820 West 180th Street, New York, New York; and 109-33 Guy Brewer Boulevard, Queens, New York. On the petition submitted in connection with this proceeding, petitioner asserted that his address was 820 West 180th Street. There is no document in the record that shows petitioner's address as 820 West *184th* Street, purportedly his parents' address in 1994. Accordingly, petitioner did not prove that he lived in an apartment on 184th Street in 1994. Even if petitioner lived with his mother and father in 1994, there is no evidence in the record that he paid over half the cost of maintaining their home. Accordingly, he was not entitled to claim head of household status.

C. Petitioner was not entitled to claim his mother and father as dependents. Five tests must be met before a taxpayer may claim an exemption for a dependent: (1) the dependent must have less than \$2,450.00 of gross income for the calendar year in which the tax year of the taxpayer begins; (2) over half of the dependent's total support for that calendar year must have been furnished by the taxpayer; (3) there must be a qualifying relationship between the taxpayer and the claimed dependent (a mother or father qualifies); (4) the dependent must not have filed a joint return with his or her spouse; and (5) the dependent must be a citizen, national or resident of the United States, Canada or Mexico at some time during the calendar year (IRC § 152[b][2]).

Petitioner has not proven that he satisfied any of these five tests, except number three. He testified that his mother received social security benefits in 1994 which strongly suggests that her

⁴ Petitioner testified that he was separated from his wife in 1994, but he also testified that he is still married to Inocencia Veras and separated from her "last year" (tr., p. 35), presumably one year before the hearing or 1999.

income was more than \$2,450.00 in that year. Petitioner stated that he contributed to household expenses, but he did not even claim to have supplied over half of his parents' support in 1994, and there is no evidence that he did so. Since petitioner utterly failed to satisfy the first two tests, it is not necessary to consider the remaining two.

D. An amended 1994 return was submitted at the hearing. This return was accepted as a statement of petitioner's position regarding the items in dispute and as a concession regarding the amount of tax actually owed by petitioner. The primary differences between the originally filed return and the amended return relate to expenses incurred in connection with the Guy R. Brewer Boulevard property. Neither the amended return nor the documents submitted with it provide any basis for modifying the Division's Notice of Deficiency.

In cases involving a taxpayer's entitlement to a deduction it has been held that once a taxpayer proves his entitlement to some amount of deduction the court may allow a portion of the deduction claimed even though the exact amount has not been proved (*Cohan v. Commr.*, 39 F2d 540). In making the approximation of the deduction the court may bear heavily upon the taxpayer whose inexactitude is of his own making (*Cohan v. Commr.*, *supra*). This is commonly known as the *Cohan* rule. Recent court decisions, however, have held that an expense deduction may not always be allowed based on a mere finding that a taxpayer has shown that he is entitled to some deduction (*Lerch v. Commr.*, 877 F2d 624). Rather, in situations where the taxpayer has refused to provide evidence upon which an estimation could reasonably be based, courts have denied the deduction claimed altogether (*Lerch v. Commr.*, *supra*; *Pflugger v. Commr.*, 840 F2d 1379; *see also, Matter of Schneier*, Tax Appeals Tribunal, November 9, 1989). In the present case petitioner has failed to provide the evidence necessary for me to allow a portion of any of the deductions claimed.

In *Lerch*, the taxpayers sought to deduct depreciation, mortgage interest and other expenses related to rental income property but failed to submit supporting documentation. The court disallowed the deductions altogether stating that the *Cohan* rule would not be invoked where the unsubstantiated deductions are of a kind for which the taxpayer could, and should, be expected to maintain the necessary records. Here, the documentation which would support petitioner's deductions is of a nature that any taxpayer could be expected to maintain: evidence of mortgage payments, tax payments, insurance payments, and repair expenses. Petitioner had ample opportunity to offer such documentation and he failed to do so. Accordingly, I find it inappropriate to apply the *Cohan* rule in this case.

Petitioner has not established that he is entitled to take a deduction for mortgage interest paid in connection with the Guy R. Brewer property. He did not claim a mortgage interest expense on his original 1994 schedule E, and he produced no documents to establish that he paid such an expense in 1994. The mortgage dated July 18, 1992 was given to an unrelated individual, not a bank, and there is no evidence of any interest expense paid on this mortgage in 1994. The commitment letter from Kadilac Mortgage Bankers, Ltd. is not evidence that petitioner paid any mortgage expense in 1994. The amortization schedule is not a bank or official document showing expenses actually paid. Anyone with a computer can generate such a document. It would appear that petitioner's accountant, Mr. Rodriguez, used a computer program to estimate mortgage interest paid in 1994 based on the Kadilac Mortgage Bankers, Ltd. commitment letter. However, a commitment letter is not evidence that a mortgage was actually paid. Since petitioner provided no evidence of any actual payments made in 1994, such as bank checks or bank statements, he has not shown that he is entitled to any deduction for this expense.

Likewise, petitioner did not produce any evidence that he paid taxes on the Guy R. Brewer property, and it is not known how he, or his accountant, calculated the depreciation expense. Accordingly, petitioner has not shown that he is entitled to any deduction for these claimed expenses.

Petitioner offered two receipts from Unlimited Hardware, Ltd. as evidence of repair expenses totaling \$6,554.00. I find this evidence unreliable and lacking in credibility for the following reasons. First, it is apparent that the amounts claimed by petitioner on his filed 1994 Federal schedule E, were a fabrication. On that schedule, petitioner claimed advertising expenses of \$3,000.00, cleaning and maintenance expenses of \$15,500.00, insurance expenses of \$840.00, legal and professional expenses of \$5,000.00, and utility expenses of \$1,500.00. He claimed none of these expenses on the amended return. I can only conclude that petitioner knowingly claimed expenses that were never incurred or inflated the amounts that were expended.

Second, petitioner's testimony regarding his residence in 1994 — where he lived, who he lived with, whether he was separated from his wife in that year, who he helped support — was evasive and, I am convinced, at least partially untrue. Thus, petitioner's past behavior and his testimony raise questions about his veracity. Therefore, to allow deductions for repairs, I would have to be thoroughly convinced of the credibility and reliability of the evidence offered. I am not convinced of the reliability of the receipts from Unlimited Hardware. The total of the two receipts, \$6,554.00, is actually more than the amount claimed on the originally filed schedule E, \$5,000.00. The two receipts are consecutively numbered, numbers 0003379 and 0003380, and appeared to be dated the same date, December 7, 1994. However, petitioner testified that the purchases were made on separate dates, December 7, 1994 and December 18, 1994. In light of

other false statements made by petitioner and his failure to provide substantiation for items that should be easily substantiated, such as receipts for taxes, insurance and mortgage payments, I doubt his assertion that he expended \$6,554.00 in an 11-day period at the end of 1994 for building materials to repair the Guy R. Brewer Boulevard property.

E. Tax Law § 685(b)(1) provides for the imposition of a penalty equal to five percent of the deficiency if any part of the deficiency is due to negligence or intentional disregard of the Tax Law or the regulations promulgated pursuant to the Tax Law. An additional amount equal to 50% of the interest due on the deficiency may be imposed on that portion of the underpayment which is attributable to negligence or intentional disregard of the Tax Law or regulations (Tax Law § 685[b][2]). In this case, petitioner failed to provide any documentation to show that he was a head of household in 1994 and that he was entitled to claim his parents as dependents in that year. He also failed to provide records to substantiate the expense claims related to the Guy R. Brewer Boulevard property. His failure to offer such documents leads me to conclude that he was either negligent in maintaining the appropriate records or that any documentation he might have offered would have defeated his claims. Accordingly, I find no reason to cancel or abate the penalties imposed.

F. I find no basis to modify the Notice of Deficiency based on petitioner's claim that he never received the Statement of Proposed Audit Adjustment or the Division's letter of June 13, 1997. The evidence shows that these documents were mailed to a post office box maintained by petitioner in 1994, that petitioner listed that post office box as his address on his 1994 income tax return and that petitioner continues to use the post office box for receipt of mail. Moreover, petitioner had ample opportunity at hearing to present the information requested in the Division's letter and failed to do so.

G. The Division has established that the bank levy of \$4,372.71 was applied to an outstanding assessment, L-013784172. Petitioner presented no evidence to show that the application of this payment was inappropriate.

H. The petition of Hipolito Veras is denied, and the Notice of Deficiency, dated March 19, 1998, is sustained.

DATED: Troy, New York
November 22, 2000

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE