STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

SARAH REITER

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1991 and 1992.

DETERMINATION
DTA NO. 817621

Petitioner, Sarah Reiter, 65 Insbrook Court, East Amherst, New York 14051, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1991 and 1992.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 77 Broadway, Buffalo, New York on June 20, 2002 at 1:15 P.M. Petitioner Sarah Reiter appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Ronald Pastwick).

Since neither party herein elected to reserve time to submit post-hearing briefs, the three-month period for the issuance of this determination commenced as of the date the hearing was held.

ISSUES

I. Whether the Division of Taxation, through the use of a source and application of funds audit to reconstruct income, properly determined that petitioner had $73,369.46 of additional taxable income for the 1992 tax year.

II. Whether the deficiency for 1992, if any, was due to negligence, thus subjecting petitioner to the negligence penalties imposed pursuant to Tax Law § 685(b)(1) and (2).

FINDINGS OF FACT

1. Petitioner herein, Sarah Reiter, together with her spouse, Albert Reiter,[1] filed joint New York State personal income tax returns for the years 1991 and 1992. The return for 1991, filed sometime in 1995, reported $8,061.00 of interest income, $28.00 of rental income and $707.00 of other income. Said return also reported itemized deductions of $32,223.00, which amount consisted of $12,436.00 for real estate taxes and $19,787.00 for mortgage interest. The 1992 return, which was timely filed, reported a net loss of $3,267.00 consisting of $1,369.00 of interest income and a $4,636.00 rental loss. Itemized deductions for 1992 totaled $25,514.00, $10,245.00 for real estate taxes and $15,269.00 for mortgage interest

2. In mid 1995 the Division of Taxation ("Division") commenced a field audit of petitioner's 1991 and 1992 personal income tax returns. Using a source and applications of funds audit to reconstruct petitioner's income, the Division determined that petitioner's applications of funds exceeded her known sources of funds by $173,884.79 for 1991 and $206,667.46 for 1992. The Division considered the overapplication of funds for each year as additional taxable income and, on April 1, 1996, it issued a Notice of Deficiency to petitioner and her spouse asserting that $11,612.30 and $13,885.22 of tax was due for 1991 and 1992, respectively. The Notice of Deficiency also asserted that penalties for failure to file a return, negligence and substantial understatement of tax was due together with interest.

3. Petitioner timely protested the Notice of Deficiency by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On

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[1] Although he filed joint returns with petitioner and his name appears on the Notice of Deficiency dated April 1, 1998, Albert Reiter did not protest said notice and therefore he is not a party to this proceeding.

December 17, 1999, BCMS issued a Conciliation Order to petitioner wherein the tax due for 1991 and 1992 was reduced from $25,497.52 to $19,557.17. The Conciliation Order also sustained the Division's assessment as it relates to the imposition of penalties and interest. Petitioner disagreed with the revisions made pursuant to the Conciliation Order by filing a petition with the Division of Tax Appeals and this proceeding subsequently ensued.

4. Prior to the small claims hearing held herein petitioner provided additional documentation to the Division which resulted in significant revisions to the source and application of funds analysis for both years. The following table sets forth the overapplication of funds as revised by the Division on June 10, 2002:

ITEM	**1991**	**1992**
Source of funds	$163,284.57	$111,408.07
Application of funds	179,307.10	184,777.53
Overapplication of funds	$16,022.53	$73,369.46

5. For the 1991 tax year the parties have stipulated that although there is a small overapplication of funds for said year there is no tax, penalty or interest due for 1991 since allowable itemized deductions of $32,223.00 exceed audited New York adjusted gross income of $24,818.53 ($8,796.00 [income per return] + $16,022.53 [overapplication of funds per audit]).

For the 1992 tax year, the Division has recomputed the deficiency to be $2,636.34 based on the revised source and application of funds analysis which determined an overapplication of funds of $73,369.46. The Division also seeks to impose negligence penalties for 1992 pursuant to Tax Law § 685(b)(1) and (2) and interest. In its revised computations for 1992 the Division no longer seeks to impose penalties for failure to file a return and substantial understatement of liability.

6. Petitioner is a Canadian citizen who moved from Toronto, Canada to the Buffalo, New York area in mid 1991. Prior to her move to New York State, petitioner and her husband owned and operated since 1968 a successful transportation company engaged in long distance trucking. Upon her relocation to New York State, petitioner and her daughter formed Spirit Express of WNY, Inc. ("Spirit"), a long distance trucking company. For the 1991 tax year Spirit reported sales of $499,880.00 and a net operating loss of $4,117.00. Although Spirit's sales for 1992 increased to $1,414,992.00, it still reported a net operating loss of $8,920.00 for said year.

7. Petitioner maintained bank accounts in both New York and Canada and she frequently transferred funds between said accounts. In most instances, the Division's auditor was able to trace the transferred funds to various accounts and was thus able to account for these transaction in the source and application of funds analysis. However, there were two withdrawals from petitioner's Canada Trust bank account on March 10, 1992, in the sums of $8,500.00 and $51,000.00, which could not be traced to other accounts and were therefore considered as additional applications of funds in the Division's source and application of funds analysis for 1992.

8. Petitioner was unable to produce any documentary evidence to establish an audit trail with respect to the $8,500.00 and $51,000.00 withdrawals made from the Canada Trust bank account on March 10, 1992. In fact, petitioner presented no documentary evidence at the hearing concerning any aspect of the Division's source and application of funds analysis for 1992 and her entire defense in this matter was based on her testimony that she and her spouse had no additional taxable income in 1992. It is petitioner's position that funds accumulated in Canada in prior years were used in 1992 to pay for all expenses incurred and that the only taxable income they received in 1992 was the income reported on their return. Although petitioner

readily concedes that she has no documentary evidence to proof otherwise, she steadfastly believes that the Division's source and application of funds audit for 1992 is erroneous and that she had no additional taxable income for the 1992 tax year.

CONCLUSIONS OF LAW

A. Tax Law § 689(e) provides that, except in certain instances not present in the instant matter, "the burden of proof shall be upon the petitioner. . . ." The Tax Appeals Tribunal in ***Matter of Atlantic & Hudson Ltd. Partnership*** (Tax Appeals Tribunal, January 30, 1992) held that:

> [a]lthough a determination of tax must have a rational basis in order to be sustained upon review (***see***, ***Matter of Grecian Sq. v. New York State Tax Commn.***, 119 AD2d 948, 501 NYS2d 219), the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (***see***, ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174; ***Matter of Leogrande***, Tax Appeals Tribunal, July 18, 1991, ***confirmed Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398).

B. Here the Division properly issued a Notice of Deficiency to petitioner based on its source and application of funds analysis and petitioner bears the burden of proof to demonstrate that the basis for the assessment was unreasonable or that the amount of tax assessed was incorrect (***Matter of Micheli Contr. Corp. v. New York State Tax Commn.***, 109 AD2d 957, 486 NYS2d 448). Petitioner's entire case in this matter consists solely of her testimony and, while said testimony was forthright and sincere, it is in my view insufficient, without corroborating evidence, to sustain her burden of proof to show either the unreasonableness of the assessment or the incorrectness of the tax assessed.

C. Turning next to the Division's assertion of negligence penalties pursuant to Tax Law § 685(b)(1) and (2), I conclude that the deficiency herein was not due to petitioner's negligence

or intentional disregard of the Tax Law. Petitioner utilized the services of a certified public accountant for the preparation of her income tax returns and except for the unfortunate fact that she was unable to establish a paper trail for two transaction in 1992, she quite possibly could have shown that there was no deficiency in tax for said year. Under these circumstances it cannot be found that the deficiency was due to negligence or intentional disregard of the Tax Law and therefore the penalties asserted pursuant to Tax Law § 685(b)(1) and (2) are canceled.

D. The petition of Sarah Reiter is granted to the extent that the tax, penalties and interest as assessed for the 1991 tax year are canceled in full; that for the 1992 tax year the deficiency in tax is reduced to $2,636.34, plus interest; that all penalties are canceled for 1992; and, that, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
September 19, 2002

/s/ James Hoefer
PRESIDING OFFICER