STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHELDON AND EMILY LANDAU	:	ORDER DTA NO. 818514
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1994 and 1995.	:	

Petitioners, Sheldon and Emily Landau, c/o Fisher Brothers, 299 Park Avenue, New York New York 10017, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1994 and 1995.

Petitioners, by their representative, Timothy P. Noonan, Esq., filed a motion dated January 30, 2002 for an order (i) granting partial summary determination on the grounds that the statute of limitations bars the Division of Taxation from assessing tax due for year 1994 or (ii) bifurcating the hearing in order first to resolve the issue of whether the Notice of Deficiency was timely in assessing tax due for 1994 before addressing the merits of the case on a subsequent hearing day. The Division of Taxation represented by Barbara G. Billet, Esq., (Michelle M. Helm, Esq., of counsel) filed reply papers, dated March 14, 2002, to the motion. Based upon the motion papers, the attorney affirmations and documents filed therewith, which included the

pleadings[1] in this matter, Frank W. Barrie, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. Petitioners, Sheldon and Emily Landau, filed a petition dated May 11, 2001 and signed by their representative. In this petition, they contested their liability for New York State and New York City personal income taxes of $670,276.16, plus penalty and interest, asserted due against them for the years 1994 and 1995.

2. Petitioners asserted that the Division of Taxation ("Division") erred in determining that they were taxable as residents of New York State and City during 1994 and 1995 because they were not domiciled in New York State or City. Petitioners also asserted the affirmative defense that any assessment for 1994 was barred by the three-year statute of limitations or, in the alternative, that any assessment for the period January 1, 1994 and ending October 9, 1994 was barred by the three-year statute of limitations. Further, petitioners asserted that the Division of Taxation bore the burden of proving that they were domiciled in New York City during 1994 and 1995 "[s]ince Mr. and Mrs. Landau were longtime domiciliaries of Rye, New York."

3. The Division in its answer dated July 19, 2000 denied that the assessment for 1994 was barred by the statute of limitations although it admitted that the Notice of Deficiency assessing additional tax for 1994 was issued after October 15, 1998 while petitioners' tax return for 1994 was filed before October 15, 1995. The Division further pleaded that it lacked knowledge or information sufficient to form a belief concerning the following allegations set forth by petitioners in their petition:

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[1]The petition attached to the motion dated January 30, 2002 did not include pages two and three which nonetheless have been considered in rendering this order.

(i) Paragraph "36" of petitioners' attachment to their petition ["the attachment"] that "During the audit, Mr. and Mrs. Landau signed a consent to extend the period of limitations for assessment for the tax period beginning October 10, 1994 and ending December 31, 1994";

(ii) Paragraph "37" of the attachment that "Mr. and Mrs. Landau did not execute any document extending the period of limitations for the tax period beginning January 1, 1994 and ending December 31, 1994";

(iii) Paragraph "38" of the attachment that "Mr. and Mrs. Landau did not execute any document extending the period of limitations for the tax period beginning January 1, 1994 and ending October 9, 1994";

(iv) Paragraph "39" of the attachment that "At the time the Waiver was executed, Mr. and Mrs. Landau and their representatives were aware that the Waiver was limited to the period beginning October 10, 1994 and ending December 31, 1994";

(v) Paragraph 40 of the attachment that "Upon information and belief, the Division was also aware that the Waiver was limited to the period beginning October 10, 1994 and ending December 31, 1994."

The Division also stated in its answer that petitioners spent more than 183 days in New York State and City and that they were domiciled in New York State and City so that they were liable for New York State and City personal income tax as "resident individuals."

4. In its papers responding to petitioners' motion, the Division asserted that the Notice of Deficiency dated September 23, 1999 for the years at issue was timely issued because petitioners "did in fact sign a waiver,[2] extending the period of time in which to assess the 1994 tax year until October 15, 1999." According to the Division, the typographical error in the waiver which indicated that the taxable period for the 1994 tax year was "10/10/94 through 12/31/94" instead of "01/01/94 through 12/31/94" was a harmless error and that petitioners have "not claim[ed]

[2] Attached to its responding papers was a copy of a Consent Extending Period of Limitation for Assessment of Personal Income Taxes which appears to have been signed and dated August 21, 1998 by Sheldon and Emily Landau.

that their intent[3] was anything other than to include the full 1994 tax year." Further, the Division maintains that petitioners' intent to include the full 1994 tax year is demonstrated by "approximately 18 months of discussions and correspondence from the auditor, where the full years 1994 and 1995 were always referenced."

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted,

> if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Summary determination is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue (***see, State Bank of Albany v. McAuliffe***, 97 AD2d 607, 467 NYS2d 944, ***appeal dismissed*** 61 NY2d 758).

B. In order to determine whether the assessment against petitioners for 1994 is barred by the statute of limitations, it is necessary to determine whether the consent extending the statute of limitations may be reformed to correct the typographical error noted above in the Findings of Fact so as to conform the consent to the parties' actual agreement (***see, Woods v. Commissioner of Internal Revenue***, 92 TC 776). Such determination requires a close examination of the intent as well as the actions of the parties. An examination into the intent or state of mind of the parties is a particularly complicated matter that cannot be resolved on the basis of the motion papers. As noted above, the Division pleaded a lack of knowledge and information concerning paragraphs "39" and "40" of the attachment to the petition. These paragraphs, which have not

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[3] Petitioners in paragraph "39" of the attachment to their petition pleaded that they were aware that the waiver was limited to the period noted therein of October 10, 1994 to December 31, 1994. It appears that the Division is maintaining the position that although petitioners were aware of the shortened period designated in the waiver when they signed it, their intent was nonetheless to include the full 1994 tax year in the consent.

been admitted or denied by the Division, pertain to the "awareness" of the petitioners and the Division of the shortened period within 1994 designated in the consent. They are at the heart of any determination of the actual agreement between the parties when they executed the consent to extend the period of assessment.[4] Consequently, petitioners' motion for partial summary determination is denied (***see, Matter of Dooley***, Tax Appeals Tribunal, March 21, 2002).

C. Petitioners' request, in the alternative, to bifurcate the hearing so as to first have a hearing on the issue of whether the consent dated September 23, 1999 extended the statute of limitations so that the Division's assessment for 1994 was timely before a hearing is held on the merits is also denied. The complaint that a hearing on the merits will "require a detailed presentation, review and analysis of voluminous documents, records, testimony and other proof substantiating not only Petitioners' domicile over a multiyear [*two* year] period but also Petitioners' physical location during each and every day in 1994" may well be true given the length of the administrative hearing in similar matters which were also unamenable to settlement during the audit stage, at conciliation, or prior to hearing with the Division of Taxation's Office of Counsel (***see, e.g., Matter of Tamagni***, Tax Appeals Tribunal, November 30, 1995, ***confirmed***, 230 AD2d 417, 659 NYS2d 515, ***affd*** 91 NY2d 530, 673 NYS2d 44, ***cert denied*** 525 US 931, 142 L Ed 2d 280 [wherein the hearing before the administrative law judge concerning the taxpayers' days in and out of New York over a *three*-year period took two days]; ***Matter of Siskind***, Division of Tax Appeals, March 11, 1999 [wherein the hearing before the administrative law judge concerning the taxpayers' days in and out of New York over a *three*-

[4] Petitioners have attempted to prove their state of mind when they signed the waiver in question by the introduction, not of their own affidavits, but an affidavit dated March 15, 2002 of Joan S. Trimble, one of their representatives. Submitted after the Division's responsive papers, it arguably is not properly considered on this motion. But that procedural issue need not be addressed because said affidavit of one of petitioners' accountants, in fact, serves to bolster the conclusion that the very factual issue concerning the intent of the petitioners is best addressed at hearing, where presumably petitioners will be present.

year period took four days]). However, there is no basis in the Tax Law or regulations to bifurcate the hearing, which is a *sui generis* request. Although bifurcation of the hearing might result in a more efficient presentation by petitioners, assuming they prevail on the issue concerning the validity of the consent to extend the period of assessment for 1994, it would not result in a speedier resolution of the overall matter, but rather would delay the complete and final resolution of this matter by at least several months. It is important to note that the *jurisdiction* of the Division of Tax Appeals is not at issue, which does justify the holding of a hearing solely on the issue concerning the timeliness of a petition prior to a hearing on the merits (***see, e.g.,*** ***Matter of Katz***, Tax Appeals Tribunal, November 14, 1991).

D. This matter will be set down for hearing on June 12 and 13, 2002, as previously agreed by the parties as noted in the Division's letter dated February 14, 2002, and a Notice of Hearing will be issued in due course.

DATED: Troy, New York
April 25, 2002

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE