STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| **HARRY CORIN** | : | DETERMINATION<br>DTA NO. 818674 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1982. | : | |

Petitioner, Harry Corin, Old Post Mall Apartments, 40-B Rosilia Lane, Fishkill, New York 12524, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1982.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 1, 2002 at 10:30 A.M., with all briefs to be submitted by October 18, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Lloyd W. Winfield, CPA. The Division of Taxation appeared by Barbara G. Billett, Esq. (Barbara J. Russo, Esq., of counsel).

## *ISSUE*

Whether petitioner has established that the Notice of Additional Tax Due was incorrect or improper, where the Division of Taxation determined that petitioner owed additional personal

income tax for 1982, based upon information the Division received from the Internal Revenue Service of Federal audit changes for that year.

## *FINDINGS OF FACT*

1. The Division of Taxation ("Division") received notice from the Internal Revenue Service ("IRS") of Income Tax Examination Changes dated October 16, 1995, concerning Harry and Frances Corin,[1] indicating an upward adjustment to income for tax year 1982 from Riviera Investments, a tax motivated transaction, in the amount of $16,841.00. The income adjustment resulted in an underpayment of Federal income tax of $6,425.00.

2. Page one of an IRS generated document, dated August 20, 1997 and entitled 8212-TMT* Interest on Tax, was introduced into evidence. It shows tax in the amount of $6,425.00, subject to interest commencing April 15, 1983, with a balance due on September 30, 1993 of $10,088.65, after including payments in the amount of $2,031.00 and $3,400.00. Beside the $2,031.00 payment entry is a handwritten notation made by petitioner's representative indicating this amount was derived from a 1984 refund. Next to the $3,400.00 entry a handwritten notation indicates it is for "payment with 1040X." No additional pages were submitted with this interest calculation.

3. The Division's audit file recorded the following exchange between its office and petitioner concerning the reported Federal change:

> On March 27, 1997 the Audit Division sent a letter to the taxpayer informing them that information available indicated that the Internal Revenue Service adjusted their Net Income from the Partnership, Riviera Investments of which they were partners. The letter also informed the taxpayers to report Federal Audit Changes to New York State. The letter informed the taxpayer that if they did report the Federal Audit Changes to submit a copy and a copy of the cancelled

[1] The Notice of Additional Tax Due was issued solely to Harry Corin, and thus, any reference to petitioner will only refer to Mr. Corin.

check or money order showing our deposit serial number stamped on the face. If the taxpayer did not report the Federal Audit Changes to New York State the letter instructed them to file a Report of Federal Audit Changes with New York State at that time along with a copy of the original 1982 New York State Income Tax Return they filed.

On April 17, 1997 the taxpayer's accountant responded to the Audit Division's letter. He indicated that his clients did not report any Federal Changes to New York State since the entire IRS assessment was being disputed and a reaudit with the IRS was requested. The taxpayers representative indicated that they will not report anything to New York State until the dispute with the IRS is settled.

On April 23, 1998 the Audit Division sent a follow up letter to the taxpayer. The letter informed the taxpayer that considerable time had passed since their accountant sent the letter of April 17, 1997. The letter requested that the taxpayer submit a copy of the Federal Audit Report if a Final Federal Determination had been made. Also, the taxpayer was instructed to complete a New York State Report of Federal Examination Changes and submit it along with payment of tax, penalty and interest due.

If a final federal determination had not yet been made the taxpayer was instructed to give the Audit Division the current status.

The taxpayer failed to reply to the Audit Division's letter.

4. After the aforementioned communication with petitioner and based upon the information shown in the Federal audit changes, the Division issued a Notice of Additional Tax Due to petitioner dated November 16, 1998, concerning tax year 1982, increasing income by the Federal adjustment of $16,841.00, resulting in additional New York State and City income tax due in the amounts of $1,980.00 and $471.00, respectively, totaling $2,451.00, plus interest of $6,102.95, for a grand total of $8,553.95.

5. The Division's audit file reveals the following additional facts:

The taxpayers's representative protested the Notice of Additional Tax Due on November 24, 1998. The representative claims that the adjustment in 1982 was only one part of a 3 year period including 1983 and 1984. The taxpayer claims that the New York State Tax Returns for 1983 and 1984 will show increased income of $5,197 which applied against the 1982 adjustment of $16,841

leaves a net balance for 1982 of $8,672. However the taxpayer's representative indicated that the matter was still in dispute with the IRS.

On March 1, 1999 the Audit Division sent a follow up letter to the taxpayer. The letter asked the taxpayer the status of the Federal Audit.

On March 9, 1999 the taxpayer's representative responded indicating that the matter had not yet been resolved with the IRS.

On October 18, 1999 the taxpayer's representative contacted the Audit Division and indicated that the matter had been resolved with the IRS.

The information submitted by the taxpayer's representative showed that the IRS abated some of the interest imposed on their 1982 and 1983 IRS assessments.

The taxpayer did not submit any documentation showing that the Internal Revenue Service made changes to the Federal Audit Adjustment for the 1992 [sic] Tax Year to the Adjustments to income for Riviera Investments in the amount of $16,841.

The only documentation submitted showed that the IRS made an adjustment to the interest imposed.

On August 16, 2000 the taxpayer's representative filed a Request for Conciliation Conference. The taxpayer did not submit any documentation to show that an adjustment should be made to his client's 1982 Notice of Additional Tax Due.

6. Upon review of this matter, the Division's advocate found an error was made in the computation of petitioner's New York City tax due shown on the Notice of Additional Tax Due, and corrected the computation to show additional New York City tax due of $599.22, compared to the originally computed $471.00.

7. A conciliation conferee sustained the notice in issue by Conciliation Order CMS No. 182219. The Order noted, however, that a refund credit in the amount of $574.00 had been applied to Notice L015856246.

8. The IRS corresponded with petitioner by a document entitled Notice of Final Partnership Administrative Adjustment, dated March 30, 1987. The tax year listed on the notice

is 1983. However, in a different type font appears "& 1982." In addition, petitioner's representative added in his own handwriting "& 1984 which allows original investment as a cost & offset of the 3 years." The substance of the correspondence was to give petitioner an opportunity to enter into a binding settlement to treat certain partnership items consistent with the treatment of items on the partnership return (depicted in a schedule that was not attached to the correspondence) as modified by the final partnership administrative adjustment. The effect of accepting the offer of settlement is that petitioner would not have been affected by a later judicial determination on the partnership items.

9. With regard to petitioner's contact with the IRS over the matter in issue, on or about September 5, 1997, petitioner's representative filed Form 843, Claim for Refund and Request for Abatement, requesting an abatement of interest in the amount of $15,145.14 for tax year 1982, due to IRS errors and delays. Form 843 was filed pursuant to Revenue Procedure 87-42, which provides the procedure by which a taxpayer may request the abatement of interest, when the taxpayer has been charged interest that is attributable in whole or in part to any error or delay by an IRS officer or employee.

Petitioner's Form 843 explained that petitioner had entered into a tax shelter partnership which resulted in a tax saving of $5,155.00 in 1982 and excess taxes paid in 1983 and 1984 of $1,893.00, which when disallowed, resulted in a net tax due of $3,262.00. A check in the amount of $3,400.00 was paid to the IRS, which petitioner maintained should have settled the net tax due. Petitioner and his representative sent to the IRS a TEFRA settlement agreement and thereafter claimed to have heard nothing from the IRS between 1987 and 1997.

10. Petitioner received an IRS notice dated September 29, 1997, entitled "Reminder of Overdue Tax" indicating that petitioner had an amount unpaid from prior notices of $15,145.14, for tax year 1982, possibly including tax, penalties and interest.

11. Petitioner received correspondence dated August 16, 1999 from the IRS, attached to which was Form 906, with respect to the abatement of interest. Form 906, entitled "Closing Agreement on Final Determination Covering Specific Matters," was executed by both petitioner and the IRS, and stated:

> Whereas, a dispute has arisen between the parties to this agreement as to whether any interest should be abated under the provisions of section 6404(e)(1) of the Internal Revenue Code for the tax years 1982 and 1983.
>
> Whereas, the parties wish to determine with finality, the period of time for which interest should be abated.
>
> Now it is hereby determined and agreed for Federal Income Tax purposes that:
>
> 1. Interest in the amounts of $13,967.00 and $3,078.00 will be abated under the provisions of IRC section 6404(e)(1) for the tax years ending December 31, 1982 and December 31, 1983, respectively.
>
> 2. No interest accrued or accruing for any other period will be abated under the provisions of IRC 6404(e)(1) for the tax years ending December 31, 1982 and December 31, 1983.

12. The Division introduced the affidavit of Peggy Joyce, who was formerly employed in the Division's Audit Bureau where she was responsible for reviewing information provided by the Internal Revenue Service regarding Federal audit changes of personal income tax returns. Her search of the Division's records failed to show that petitioner reported the Federal audit changes in issue to the Division.

13. The Division also introduced a certification by the Division's Assistant to the Commissioner for Regulatory Affairs, who is authorized to authenticate copies of all papers and

documents in the possession and custody of the Commissioner of Taxation and Finance, that a search of all documents in the Division's possession was made of personal income tax files for personal tax returns for tax year 1982 of Harry Corin, and that no Report of Federal Audit Changes, Form IT-115, was located.

14. Petitioner could not produce evidence of a canceled check in the amount of $54.00, the amount claimed by petitioner to be the net amount of tax due to New York State for 1982, 1983 and 1984 stemming from the Federal changes for such years.

***SUMMARY OF THE PARTIES' POSITIONS***

15. Petitioner asserts that the IRS permitted him to settle 1982 with 1983 and 1984, with respect to the tax liability arising from the partnership investment and maintains that the Division should be guided by how the IRS handled this matter. Petitioner suggests that if the Division netted the amendments for 1982, 1983 and 1984 with regard to the partnership investment, the net tax due would be $54.00, plus interest, which petitioner would be willing to pay.

16. The Division maintains that pursuant to the Federal/State information exchange program, the Division was notified by the IRS of Federal audit changes to petitioner's income for tax year 1982. Petitioner was required to report such changes to New York State pursuant to Tax Law § 659, which petitioner failed to do. Petitioner has failed to establish by clear and convincing evidence that the Notice of Additional Tax Due is improper or erroneous, and thus, his petition should be denied.

***CONCLUSIONS OF LAW***

A. Internal Revenue Code § 6103(d) authorizes the disclosure of return information to a state agency charged with the responsibility of auditing state revenues. Similarly, Tax Law § 697(f) authorizes cooperation between the IRS and New York State with respect to information

on returns. In view of the express statutory authority for the use of information gathered from the IRS, it is concluded that reliance on this information was reasonable.

B. Tax Law § 659 provides that if the amount of a taxpayer's Federal taxable income is changed or corrected by the United States Internal Revenue Service, the taxpayer shall report such change or correction within 90 days after the final determination of such change or correction and shall concede the accuracy of such determination or state wherein it is erroneous. Pursuant to Tax Law § 681(e)(1), if a taxpayer fails to comply with section 659, a deficiency may be assessed, based upon the Federal change or correction, by mailing to the taxpayer a Notice of Additional Tax Due. Such deficiencies, interest and additions to tax or penalties stated in a notice of additional tax due are deemed assessed on the date the notice is mailed unless within 30 days after the mailing of such notice, a report of federal change, correction or disallowance or an amended return, where required by Tax Law § 659, is filed, showing where such Federal determination and notice of additional due are erroneous (Tax Law § 681[e][1]).

C. A presumption of correctness arises with respect to a notice of deficiency (including that represented by a notice of additional tax due) properly issued under the Tax Law, and a petitioner who fails to present any proof as to the incorrectness of the deficiency surrenders to this presumption (***Matter of Suburban Carting Corporation v. Tax Appeals Tribunal,*** 263 AD2d 793, 694 NYS2d 211; ***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398; ***Matter of Tavolacci v. State Tax Commn***., 77 AD2d 759, 431 NYS2d 174). Tax Law § 689(e) then makes it incumbent upon petitioner to demonstrate the incorrectness of the deficiency, in order to rebut the presumption, since petitioner has the burden of proof, except under three circumstances not applicable herein (Tax Law § 689[e]).

Petitioner has attempted to meet his burden by claiming that the IRS settled the matter of tax due for 1982, by combining it with tax years 1983 and 1984, and accepting a net amount of tax due, in addition to a waiver of interest for some period of time. Petitioner asserts that the IRS accepted such settlement based upon the same documents presented in this matter, and argues that the Division should be doing the same. For example, petitioner's representative insists that a $3,400.00 check payable to the IRS in December 1987 is proof that the IRS settled the matter as described by petitioner. The $3,400.00 was paid with petitioner's filed Form 1040X for 1982, filed as a protective measure, on the advice of someone in charge of the tax shelter, in order to support the eventual agreement to settle. Although the return showed a balance due of $5,155.00, the amount submitted was not the balance due pursuant to the Form 1040X calculations, but rather, the alleged net amount due for the three tax years (1982 through 1984), an amount that supposedly would reflect the amount for which petitioner was willing to settle the IRS claim. According to petitioner's representative, the filing of Form 1040X did not automatically lead petitioner to file the same for New York State, since it was not required to be filed, but rather suggested to support the settlement.

Petitioner also points to the IRS issued Form 906, a closing agreement concerning the abatement of interest for tax years 1982 and 1983. This was the IRS's response to petitioner's request for such abatement on Form 843, which, as filed (***see***, Finding of Fact "9"), suggests some merit to petitioner's claim that some type of IRS error or delay was involved with 1982 and 1983. This does not prove that the IRS settled the tax due for 1982, 1983 and 1984, inasmuch as it only addresses an interest abatement. Petitioner's response to the Division's suggestion that a clear paper trail to the facts has not been shown, is that the IRS would not openly admit its error that it reopened the case and settled it by the $3,400.00 payment.

D. Perhaps there was a mishandling or delay of petitioner's IRS settlement. The facts as petitioner's representative recounts are not completely incredible. However, the evidence does not support what petitioner has attempted to establish, i.e., a settlement of three tax years that should guide the Division in this case, and lead to a conclusion that the notice of additional tax due is erroneous.

All of that said, perhaps more importantly, the Division of Tax Appeals only has jurisdiction to address tax year 1982. Even if petitioner presented an iron clad case that the IRS settled tax years 1982 through 1984 with regard to the tax shelter adjustments, the Division is not bound to settle the case in the same manner, and clearly, there is no power in this forum to net an adjustment of the tax year before me, with tax years that are not.

E. Petitioner's representative claims to have filed a report of Federal changes (Form IT-115) in 1987 when the IRS settled the matter for the three tax years. This assertion is contradicted by the communication recorded in the Division's records where petitioner's representative indicated on April 17, 1999 that petitioner had not reported the Federal changes and had no intention of doing so until the dispute with IRS was settled. As pointed out by the Division, the forms appear to have been prepared in response to the notice of tax due issued to petitioner by the Division by notice dated November 16, 1998, and included with the petition filed with the Division of Tax Appeals. The Division cannot locate Form IT-115, or any such report of the Federal changes, after a diligent search (***see***, Findings of Fact "12" and "13"). Furthermore, a canceled check for the net amount petitioner claims is due to the Division ($54.00) could not be located by petitioner. This was just one of many items that may have lent credence to petitioner's purported communication with the Division upon the alleged settlement with the IRS but which were not submitted. In fact, numerous times during the hearing when

questions were raised regarding a fact which needed further explanation, responses by petitioner's representative were evasive, only arguing that the IRS netted the three tax years and the Division should be doing the same.

F. By virtue of Tax Law § 659, petitioner had 90 days to notify the Division of these changes and this record contains no such notification to the Division by petitioner at any time before he was contacted by the Division in March 1997, long after the alleged settlement with the IRS in 1987. It was not until the Division issued the Notice of Additional Tax Due on November 16, 1998 that petitioner initiated any communication with the Division regarding his 1982 tax liability.

As the Division has correctly noted in its brief, since petitioner has failed to present sufficient evidence to support his argument that the Federal audit changes upon which the Division based the Notice of Additional Tax Due were erroneous, petitioner has failed to meet his burden of proof.

G. The petition of Harry Corin is denied and the Notice of Additional Tax Due dated November 16, 1998, as modified (***see***, Finding of Fact "6") is hereby sustained.

DATED: Troy, New York
April 17, 2003

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE