STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MIGUEL AND MARISOL FLORES	:	DETERMINATION DTA NO. 818740
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law and New York City Personal Income Tax pursuant to the Administrative Code of the City of New York for the Year 1995.	:	

Petitioners, Miguel and Marisol Flores, 2157 Holland Avenue, Apt. 1G, Bronx, New York 10462, 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 and New York City personal income tax pursuant to the Administrative Code of the City of New York for the year 1995.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 1740 Broadway, New York, New York on February 27, 2003 at 9:15 A.M. Petitioners appeared by Lapatin Lewis Kaplan & Weissmeier, PLLC (Joseph Lapatin, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Susan Parker).

The final brief in this matter was due on April 11, 2003, and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether petitioners have sustained their burden of proof to show that additional tip income of $7,466.00, disclosed pursuant to an audit conducted by the Internal Revenue Service, should be reduced to $4,119.00.

FINDINGS OF FACT

1. Petitioners herein, Miguel and Marisol Flores, are husband and wife who filed Federal and New York State and City personal income tax returns for the year 1995. Initially, petitioners filed separate returns, with Miguel Flores claiming a filing status of head of household and Marisol Flores filing as a single individual. In 1998 petitioners amended their Federal and New York State and City personal income tax returns for 1995 changing their filing status to married filing jointly.

2. The Internal Revenue Service ("IRS") conducted an examination of petitioners' Federal income tax return for 1995 and determined that Miguel Flores had received additional tip income from the Hotel Plaza Athenee which was not reported as taxable income on the 1995 Federal return. The record reflects that the IRS initially calculated unreported tip income of $10,378.00 in the following manner:

Gross receipts	$3,184,273.00
Overall tip rate	x 21.00%
Total tips	$668,697.00
Employee's share	x 2.19%
Total audited tips	$14,627.00
Reported tip income	-$4,249.00
Additional tip income	$10,378.00

The IRS subsequently determined that only 80% of total tips, i.e., $534,958.00 ($668,697.00 x 80%), should be allocated to "directly tipped employees," which group included petitioner Miguel Flores and other similarly situated employees. Applying petitioner Miguel Flores's 2.19% share to revised total tip income of $534,958.00 produced audited total tip income of $11,715.00, and after subtracting reported tip income of $4,249.00, unreported tip income totaled $7,466.00.

3. On December 24, 1998, the IRS issued to petitioners a notice entitled "Income Tax Examination Changes" wherein reported taxable income for the 1995 tax year was increased by $7,466.00. The notice asserted that $1,117.00 of Federal income tax was due, together with penalties of $223.40 and interest of $362.82, for a total amount due of $1,703.22. On January 12, 1999, petitioners signed a consent agreeing to the assessment and immediate collection of the amounts asserted due in the notice dated December 24, 1998. A transcript of petitioners' Federal income tax account for the 1995 tax year reveals that petitioners paid the tax, penalties and interest asserted due in the notice dated December 24, 1998 and that the IRS made no further adjustments or revisions to petitioners' audited Federal taxable income or Federal income tax liability for 1995.

4. The Division of Taxation ("Division") received information from the IRS which contained the results of the audit of petitioners' 1995 Federal income tax return. The Division thereafter conducted a search of its records and determined that petitioners had not reported the IRS audit changes as required by Tax Law § 659. Accordingly, on November 15, 1999, the Division issued a Notice of Additional Tax Due to petitioners wherein New York taxable income for 1995 was increased by $7,466.00 based on the results of the IRS audit for this year. The

Notice of Additional Tax Due asserted additional New York State and City personal income tax due of $893.00, plus interest.

5. Petitioners protested the Notice of Additional Tax Due by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On July 27, 2001, BCMS issued a Conciliation Order which reduced the tax due from $893.00 to $827.00, plus interest. The tax due was reduced solely as the result of the correction of an addition error on petitioners' amended joint income tax return for 1995 and in all other respects the Conciliation Order sustained the Division's $7,466.00 increase to New York taxable income based on the IRS audit findings. Petitioners timely protested the Conciliation Order by filing a petition with the Division of Tax Appeals and this proceeding subsequently ensued.

6. On May 1, 2001, petitioners' representative sent a letter to the IRS requesting, *inter alia*, that the 1995 tax year be "re-opened for reconsideration and re-examination." The letter requested that the additional unreported tip income for 1995 should be reduced to $4,119.00 for the following reasons:

> The taxpayer agreed to an adjustment of $7,466.00 in under reported tips for 1995 which sum was arrived at using 17.98%[1] as an overall tip rate and then permitting 20% tip outs to busboys, etc. Taxpayer was employed at the Plaza Athenee in room service and the checks delivered to the customers contained a 17% service charge of which two percent goes to the manager and 15% to the waiters. A re-calculation of the tip calculation sheet based on 15% rather than 17.98% results in total tips of $477,641.00 with corrected direct tips of $382,113.00, after applying 20% tip out. Taxpayer's share (using his percentage of 2.19%) equals $8,368.00 against which he had previously reported $4,249.00 leaving an under reported amount of $4,119.00.

[1] As can be seen from Finding of Fact "2" the overall tip rate used by the IRS to determine petitioners' unreported tip income of $7,466.00 for 1995 was 21% and not 17.98% as stated in the letter dated May 1, 2001.

7. The record herein does not reflect what action, if any, the IRS took with respect to petitioners' request to reopen the 1995 tax year. As note in Finding of Fact "3", the transcript of petitioners' 1995 Federal tax account, dated February 6, 2003, reveals that the IRS made no adjustments or revisions to petitioners' taxable income or income tax liability for 1995 after it had issued the Income Tax Examination Changes dated December 24, 1998.

SUMMARY OF PETITIONERS' POSITION

8. Petitioners assert that, notwithstanding the fact that the IRS has not yet made any revisions to its audit findings for 1995, the Division should nonetheless modify the results of the IRS audit in accordance with the computational method set forth in their representative's letter dated May 1, 2001. As support for their position, petitioners have submitted documents which establish that the IRS used a different method[2] to compute petitioner Miguel Flores's unreported tip income for the 1997 tax year and that the IRS used yet another method[3] to compute the 1995 unreported tip income of a co-worker of Mr. Flores.

CONCLUSIONS OF LAW

A. As relevant to this proceeding, Tax Law § 659 provides that if a taxpayer's Federal taxable income is changed or corrected by the IRS, such taxpayer is required to report the changes to the Division within 90 days of the date of the final Federal determination and concede

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[2] For the 1997 tax year, the IRS computed Mr. Flores's unreported tip income by multiplying gross receipts of $1,181,248.00 by 15% to determine total tips of $177,187.00. The total tip figure was next multiplied by 15% to compute the $26,578.00 amount allocated to "indirectly tipped employees." Mr. Flores's 38% share of $26,578.00 totaled $10,099.00 and, after subtracting reported tip income of $4,839.00, unreported tip income amounted to $5,260.00.

[3] The method used by the IRS to compute the 1995 unreported tip income of the co-worker used a tip rate of 17.98% applied to gross receipts of $3,184,273.00, as opposed to the 21% used with respect to Mr. Flores. The tip sheet submitted in evidence for the co-worker reflects that 100% of total tips were allocated to "directly tipped employees," however, there are notations on the tip sheet, made with a different pen and in a different handwriting, which show that 80% of total tip income was allocated to "directly tipped employees." There is no evidence in the record to show which method the IRS ultimately used to compute the 1995 unreported tip income of the co-worker.

the accuracy of the Federal determination or state wherein it is erroneous. There is no dispute in the instant matter that the final Federal determination for the 1995 tax year occurred on January 12, 1999 when petitioners signed the consent agreeing to the assessment and immediate collection of the amounts asserted due in the IRS's notice dated December 24, 1998. It is also undisputed that petitioners did not report these changes to the Division as required by Tax Law § 659. Accordingly, the Division properly determined that petitioners had underreported their New York State and City taxable income for 1995 by $7,466.00 as determined by the IRS audit for said year.

B. Petitioners' argument that the Division should adjust the results of the IRS audit for 1995, even though the IRS has not altered or revised its audit findings, must be rejected. Although petitioners have shown that the IRS used different methods to calculate Mr. Flores's unreported tip income for 1995 and 1997, it is clear that for 1995 the IRS considered Mr. Flores a "directly tipped employee," while for 1997 he was deemed an "indirectly tipped employee." Since Mr. Flores's status apparently changed[4] from 1995 to 1997, it was reasonable for the IRS to utilize different computational methods to determine unreported tip income.

With respect to the different percentages apparently used was by the IRS to compute the 1995 unreported tip income of a co-worker, there is insufficient evidence in the record to establish which of the different percentages was used by the IRS. Moreover, even if a different percentage was in fact used by the IRS with respect to the co-worker, there has been no showing that the different percentage was applicable to petitioner Miguel Flores.

Finally, it must be noted that the Division's assessment for 1995 was based entirely and solely on the IRS audit findings and the evidence before me shows that as late as February 6,

[4] It appears that Mr. Flores was employed as a waiter in 1995 and as a busboy in 1997.

2003, more than four years after petitioners had agreed to the Federal audit findings, the IRS has made no revisions or modifications to the agreed upon audit changes. Furthermore, the evidence presented by petitioners is insufficient to establish that the IRS audit findings were in any way erroneous and in need of modification. It should be noted, however, that petitioners are not without relief in the event they are successful in getting the IRS to revise its audit findings for 1995, since petitioners would be required, pursuant to Tax Law § 659, to report such changes within 90 days of the date any changes become final.

C. The petition of Miguel and Marisol Flores is denied and the Notice of Additional Tax Due dated November 15, 1999 is, as modified by the Conciliation Order dated July 27, 2001, hereby sustained.

DATED: Troy, New York
May 8, 2003

/s/ James Hoefer
PRESIDING OFFICER