STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM M. MULDERIG	:	DETERMINATION DTA NO. 819783
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1982.	:	

Petitioner, William M. Mulderig, 13 Mile Road, Suffern, New York 10901-3505, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1982.

A hearing was held before Gary R. Palmer, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 28, 2004 at 10:30 A.M., with all briefs to be submitted by January 18, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUE

Whether petitioner has established that the notice of additional tax due issued to him based on asserted unreported Federal audit changes for the year 1982 was incorrect or improper.

FINDINGS OF FACT

1. Pursuant to section 3000.15(d)(6) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, and section 307(1) of the State Administrative Procedure Act, both parties have submitted proposed findings of fact. The proposed findings of fact have been substantially

incorporated into this determination with the exception of so much of petitioner's proposed finding of fact which asserts that he complied with Tax Law § 659.

2. On December 19, 1991 the Internal Revenue Service ("IRS") issued a Notice of Deficiency to petitioner and his spouse, asserting a personal income tax deficiency for the year 1982 in the sum of $1,055,581.00 plus a five percent penalty based on intentional disregard of rules and regulations. The bases of the deficiency included IRS adjustments to petitioner's reported taxable income for disallowed schedule "C" depreciation of a breeding or racing horse and related expenses, plus the treatment as taxable income by the IRS of a claimed loan made to petitioner by a closely held corporation for the purchase of a 75 percent interest in the horse.

3. On March 19, 1992 petitioner and his spouse filed a petition with the U.S. Tax Court for redetermination of the deficiency.

4. On March 28, 1994 the Tax Court issued a memorandum opinion deciding the issues raised by petitioner and his spouse in their petition. Thereafter and by its decision dated May 31, 1994, the Tax Court, in accordance with its memorandum opinion, revised the deficiency and determined additional income tax due in the sum of $769,096.00 plus penalty of $38,455.00 imposed pursuant to Internal Revenue Code ("IRC") § 6653(a)(1). An appeal was taken to the U.S. Court of Appeals for the Second Circuit.

5. On or about February 21, 1995 petitioner and his spouse filed an amended U.S. individual income tax return, form 1040X, whereby they attempted to carry back net operating losses from tax years 1983 and 1985 to offset the 1982 deficiency.

6. By decision dated November 9, 1995, the U.S. Court of Appeals affirmed the decision of the Tax Court.

7. On March 25, 1996 petitioner attempted to file a “motion to clarify” with the U.S. Tax Court, seeking a declaration from the Tax Court that in reaching its May 31, 1994 decision, it had not considered petitioner’s carry-back losses for the years 1983 through 1987. By order dated March 27, 1996 the Tax Court directed the court clerk to return the motion to petitioner without filing.

8. Petitioner appealed the March 27, 1996 Tax Court order to the U.S. Court of Appeals.

9. At a time not specified in the record the Division of Taxation (“Division”) was notified by the IRS of the existence of a Federal audit change relating to petitioner’s 1982 personal income tax liability. The Division reviewed its files to determine if petitioner reported the Federal audit change as mandated by the Tax Law. It concluded that petitioner had not reported the Federal audit change.

10. By letter dated September 11, 1996 the Division informed petitioner that information it received from the IRS indicated the existence of a Federal audit change for 1982, and that petitioner was obliged to inform the Division within 90 days of a final Federal audit change in accordance with Tax Law § 659.

11. On October 22, 1996 petitioner informed the Division by letter that the matter was then on appeal to the Second Circuit Court of Appeals and invited the Division to contact him in early December for an update.

12. On January 3, 1997 the Division sent a letter to petitioner requesting a status report on his appeal and requesting that he include copies of the Federal audit changes and the final Federal audit report.

13. On March 26, 1997 the U.S. Court of Appeals for the Second Circuit issued a decision affirming the March 27, 1996 U.S. Tax Court order rejecting petitioner’s “motion to clarify.”

14. On June 13, 1997 petitioner filed another amended U.S. individual income tax return, form 1040X, with the IRS wherein he attempted to carry back losses from 1983 and 1985 to offset the 1982 Federal income tax deficiency. A corresponding New York State amended resident personal income tax return, form IT-201-X, was filed with the Division at a time not clearly specified in the record. Petitioner's Federal claim was denied by the IRS on August 10, 1998 by the issuance of a proposed disallowance, and on June 9, 2000 by notice of disallowance on the grounds of untimeliness in accordance with IRC §§ 6501 and 6511.

15. On August 15, 1997 petitioner wrote to the Division advising that his 1982 Federal taxes had not yet been finally determined.

16. On September 4, 1997 the Division issued a notice of additional tax due to petitioner and his spouse asserting New York State income tax due for 1982 in the sum of $217,274.00, with negligence penalty of $10,863.70 and interest in the sum of $475,960.16, for a total due of $704,097.86.

17. On or about December 3, 1999, petitioner's wife was granted innocent spouse relief by the Division, which issued a new notice of additional tax due only to petitioner, William M. Mulderig. This new statutory notice superceded the original and is substantially identical to that notice. The record does not include a copy of the new notice of additional tax due.

18. On February 9, 1998 petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). On June 25, 2002, at a time when the conciliation conference was scheduled for July 9, 2002, a tax technician with the Division wrote a letter to petitioner in an effort to resolve the matter in advance of the conference. In the letter the tax technician asserted that petitioner had not reported the Federal audit changes to New York State, and acknowledged receipt of copies of petitioner's 1982 Federal and New York State amended income tax returns.

19. On September 11, 2001, the audit file was destroyed in the loss of the World Trade Center towers.

20. A conciliation conference was held on April 24, 2003 and a conciliation order denying request was issued on September 5, 2003. Petitioner filed a petition with the Division of Tax Appeals on December 4, 2003, requesting a formal hearing.

SUMMARY OF THE PARTIES' POSITIONS

21. Petitioner maintains that he complied with Tax Law § 659 in that he reported the Federal audit change to New York State within 90 days of the final Federal determination, that he owes no Federal or New York State taxes for 1982, and that the notice of additional tax due issued by the Division was barred by the statute of limitations. He further states that the IRS has collected no tax from him arising out of the liability determined by the U.S. Tax Court, and that this fact operates to preclude the Division from collecting any part of its claimed deficiency from him.

22. The Division asserts that after it was notified by the IRS of a Federal audit change that increased petitioner's taxable income for 1982, it examined its records and determined that petitioner had neither reported the Federal audit change to the Division, nor paid the additional tax due. The Division then wrote to petitioner to remind him of his responsibility to report the Federal audit change and later issued a notice of additional tax due to petitioner imposing additional tax, plus penalty and interest for 1982. The Division contends that in accordance with Tax Law § 683(c)(1), the notice of additional tax due may be issued at any time due to petitioner's noncompliance with Tax Law § 659. The Division argues that because the IRS rejected petitioner's claims made in his two filed amended Federal income tax returns seeking to carry back later year net operating losses to offset his 1982 deficiency, the Division properly rejected petitioner's similar claim in his New York State amended income tax return. Lastly, the

Division contends that the burden of proof is on petitioner to demonstrate that the basis for the notice of additional tax due is unreasonable or that the amount of additional tax stated is incorrect, and that a presumption of correctness attaches to its notice of additional tax due.

CONCLUSIONS OF LAW

A. Tax Law § 659 provides that if the amount of a taxpayer's Federal taxable income is changed or corrected by the IRS, 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. In the matter here under review petitioner acknowledges the existence of a deficiency in his 1982 New York State personal income tax, but argues that he had losses from subsequent years which may be carried back to 1982 to offset the deficiency.

B. The New York adjusted gross income ("AGI") of a resident individual is defined in Tax Law § 612(a) as such person's Federal AGI with certain modifications. Federal AGI is, therefore, the starting point in the calculation of New York AGI, and is defined in IRC § 62(a) generally as gross income less certain deductions. Among the deductions subtracted from gross income to arrive at Federal AGI is the net operating loss deduction (***see***, IRC § 172). There is no statutory provision in the New York State Tax Law which authorizes a New York net operating loss deduction. A net operating loss deduction is, however, accounted for in the calculation of Federal AGI. It follows that in order to determine whether, as petitioner contends, there existed net operating losses in 1983 and 1985 that could be carried back to offset or eliminate his 1982 New York State personal income tax deficiency, it is necessary to determine whether the IRS accepted his net operating loss carrybacks for 1983 and 1985. Pursuant to Tax Law § 689(e), it

is petitioner who bears the burden of proving that the IRS did, in fact, accept his net operating losses for 1983 and 1985.

C. Petitioner contends that he complied with Tax Law § 659 by timely filing with the Division an amended New York State personal income tax return, form IT-201-X, for 1982. There is no dispute that such a return was filed at some point in time. Only the timing of such filing is in dispute. Petitioner testified that the New York State amended return was filed in 1996 or 1997. Petitioner's accountant, by affidavit, asserts that the New York State amended return would have been filed "within days" of the 1982 amended Federal return, which, according to the record, was filed on June 13, 1997. An earlier version of the amended Federal return was filed on February 21, 1995. The Division claims that petitioner's New York State amended return was filed at some point after the filing of petitioner's request for a conciliation conference, which was filed on February 9, 1998. Although the destruction of the audit file on September 11, 2001 in the collapse of the World Trade Center towers, while this matter was pending before BCMS, served to frustrate any effort to further determine the actual filing date of petitioner's New York State amended return, such determination is not necessary to a finding of whether or not petitioner complied with Tax Law § 659.

D. Petitioner's obligation under section 659 was to report the Federal audit change to the Division within 90 days after the final determination of such change. By its decision dated November 9, 1995, the Second Circuit Court of Appeals affirmed the decision of the U.S. Tax Court whereby the Tax Court determined that petitioner and his wife owed a deficiency of income tax for 1982 in the sum of $769,096.00 plus penalty in the sum of $38,455.00 and interest. This decision was petitioner's 1982 final Federal determination. Ninety days from November 9, 1995 expired on February 7, 1996. At no time during this 90-day period or since did petitioner report this final determination of the Federal audit change to the Division. Instead,

on February 21, 1995, petitioner filed an amended Federal income tax return with the IRS claiming a credit to offset the 1982 deficiency by carrying back net operating losses from 1983 and 1985 in the total sum of $2,323,932.00, which losses served to reduce the amount of 1982 taxable income he reported to zero. By letter dated June 19, 1995 the IRS disallowed this claim.

E. On June 13, 1997 petitioner filed a second amended Federal income tax return with the IRS for 1982, this time claiming net operating losses for 1983 and 1985 totaling $2,101,935.00 for the purpose of offsetting the 1982 deficiency. This is the same net operating loss amount that was reported on petitioner's 1982 New York State amended income tax return that is in the record. The IRS denied petitioner's June 13, 1997 claim. Under Tax Law § 689(e) the burden is on petitioner to prove that the operating loss carrybacks to eliminate his 1982 Federal income tax liability were accepted by the IRS (***see, Matter of Cohen***, Tax Appeals Tribunal, March 11, 2004). Petitioner has failed to meet this burden.

F. Petitioner asserts that the statute of limitations has run and that the Division's notice of additional tax due is time barred. Relying on ***Fund v. Department of Taxation and Finance*** (132 AD2d 787, 517 NYS2d 591), petitioner argues that the two-year statute of limitations of Tax Law § 683(c)(3) prohibited the issuance by the Division of the notice of additional tax due on September 4, 1997. The two-year statute alluded to applies only in instances where the taxpayer is in compliance with section 659 of the Tax Law by timely notifying the Division of the Federal audit change. As noted in Conclusion of Law "D" above, petitioner was not in compliance with section 659 and it follows that, in accordance with Tax Law § 683(c)(1)(C), the Division may assess the tax at any time (***see, Matter of Corin***, Tax Appeals Tribunal, November 26, 2003).

G. Petitioner, in his reply brief, complained that the Division concealed from him the fact that the audit file had been destroyed at the World Trade Center on September 11, 2001, and as a

consequence, he suffered irreparable harm by his failure to timely appeal the carry-back loss issue. Petitioner asks that the Division be equitably estopped from pursuing the state income tax deficiency that, he postulates, could have been offset by the 1983 and 1985 losses. Because it is unclear from petitioner's reply brief whether his intent was to invoke the doctrine of equitable estoppel or equitable recoupment, I will endeavor to address both theories.

In ***Matter of Attea*** (Tax Appeals Tribunal, November 18, 1999), the Tax Appeals Tribunal discussed the doctrine of equitable estoppel as follows:

> Equitable estoppel, usually referred to simply as estoppel, is not, as a general proposition, available as a defense to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (***see, Matter of Sheppard-Pollack, Inc. v. Tully***, 64 AD2d 296, 409 NYS2d 847). This rule applies particularly to a taxing authority because sound public policy favors full enforcement of the Tax Law (***Matter of Turner Constr. Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78). Exceptions to the doctrine have been rare and limited to unusual fact situations.

The Tax Appeals Tribunal then, citing to its decision in ***Matter of Consolidated Rail Corp.*** (Tax Appeals Tribunal, August 24, 1995, ***confirmed Matter of Consolidated Rail Corp. v. Tax Appeals Tribunal***, 231 AD2d 140, 660 NYS2d 459, ***appeal dismissed*** 91 NY2d 848, 667 NYS2d 683), adopted certain language from the determination of the Administrative Law Judge in ***Matter of Consolidated Rail Corp.*** which noted that the Tax Appeals Tribunal had:

> embraced a three-part test to determine applicability of the doctrine to specific cases. We ask if petitioner had the right to rely on the Division's representation; whether, in fact, there was such a reliance; and whether such reliance was to the detriment of petitioner (***Matter of AGL Welding Supply Co. v. Commissioner of Taxation & Fin.***, 238 AD2d 734, 656 NYS2d 502, ***lv denied*** 90 NY2d 808, 664 NYS2d 270; ***Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988).

In the matter here under review petitioner has not identified any representation made by the Division that he had the right to rely on and did rely on to his detriment. Petitioner's complaint is that the destruction of the audit file on September 11, 2001 was concealed from him

by the Division. At the hearing petitioner testified that, at the time, he had been concerned that the conciliation conferee had been killed on September 11, 2001. While all present were relieved to learn that the conferee was safe following the attack on the World Trade Center, certainly petitioner, at the time, had reason to suspect that the audit file assigned to the conferee may have been destroyed. There is no evidence that the Division attempted to conceal the destruction of the file from petitioner or gained any strategic advantage in this litigation from the loss of that file. The Division issued the notice of additional tax due to petitioner and his wife on September 4, 1997. If petitioner disposed of any pertinent 1982 tax records between September 1997 and September of 2001, he did so at his own peril. It follows that there is no basis to estop the Division from pursuing its remedies in the instant proceeding.

H. If instead it was petitioner's intent in his brief to rely on the doctrine of equitable recoupment, this theory is equally unavailing because, as stated by the Tax Appeals Tribunal in ***Matter of Turbodyne Corp.*** (Tax Appeals Tribunal, July 3, 1996, ***confirmed Matter of Turbodyne Corp. v. Tax Appeals Tribunal***, 245 AD2d 976, 667 NYS2d 105, ***lv denied*** 91 NY2d 812, 671 NYS2d 715):

> [t]he doctrine of equitable recoupment allows a taxpayer against whom a deficiency is asserted to offset against that deficiency overpayments which are time barred for claiming a refund and (1) involve the same type of tax as the deficiency; (2) were paid during the period that comprises the deficiency; and (3) involve the same transaction as is the subject of the deficiency. . . .

In ***Matter of Corin (supra)***, the Tax Appeals Tribunal declined to apply the doctrine of equitable recoupment because in ***Corin*** the taxpayer sought to apply overpayments made in connection with tax years 1983 and 1984 to offset a 1982 deficiency. Here, the losses incurred in 1983 and 1985 cannot, under this doctrine, be applied to offset petitioner's 1982 deficiency because the losses did not arise from the same transaction as the deficiency.

I. The notice of additional tax due issued by the Division imposed negligence penalty pursuant to Tax Law § 685(b)(1). Petitioner has presented no written or oral arguments respecting the penalty issue. Because Tax Law § 689(e) places the burden of proof on petitioner to show why penalty should be abated, it follows that petitioner has not met his burden (***see, Matter of Dickinson***, Tax Appeals Tribunal, February 3, 2000). The negligence penalty is sustained.

J. The petition of William M. Mulderig is denied, and the notice of additional tax due is sustained.

DATED: Troy, New York
March 17, 2005

/s/ Gary R. Palmer
ADMINISTRATIVE LAW JUDGE