

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANK PANUCCIO : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 820138
New York State Personal Income Tax under Article 22 :
of the Tax Law for the Year 1996. :

Petitioner, Frank Panuccio, 23 Storyland Lane, East Setauket, New York 11733, 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 year 1996.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 16, 2005 at 10:30 A.M., with all briefs to be submitted by March 31, 2006, which date began the six-month period for the issuance of this determination. Petitioner appeared by Silberling & Silberling (Stephen P. Silberling, Esq., of counsel). The Division of Taxation appeared by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel).

ISSUE

Whether petitioner has established that the Notice of Additional Tax Due issued to him by the Division of Taxation based upon unreported Federal audit changes was incorrect or improper.

FINDINGS OF FACT

1. On March 24, 2003, the Division of Taxation (“Division”) issued a Notice of Additional Tax Due to Frank Panuccio and Debbie Panuccio¹ which asserted additional New York State personal income tax due in the amount of \$32,287.57, plus interest, for a total amount due of \$48,922.18 for the year 1996. The Notice of Additional Tax Due indicated that petitioner’s Federal adjusted gross income had been increased from \$115,901.00 to \$564,061.00, which resulted in the additional tax due. An explanation provided as follows:

Our records indicate that the Internal Revenue Service has made changes to your federal return. Section 659 of the New York State Tax Law requires that federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.

A search of our files indicates that you did not report these changes to New York State.

* * *

When you do not report federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by section 683(c) of the New York Tax Law.

Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under section 684(a) of the New York State Tax Law.

The federal audit changes show an adjustment was made to your distributive share of partnership income/loss from the following partnership(s): ALCAZAR HOMES & ALLSTATE TECOM.

2. On their 1996 New York State personal income tax return, petitioner and his wife, Debbie Panuccio, reported total Federal gross income in the amount of \$115,901.00. Pursuant to an audit conducted by the Internal Revenue Service (“IRS”), Federal adjusted gross income

¹ In a letter attached to its amended answer filed on April 11, 2005, the Division stated that by correspondence from the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) dated June 15, 2004, Debbie Panuccio was granted innocent spouse status and, accordingly, her name was removed from the Notice of Additional Tax Due.

for 1996 was increased to \$564,061.00 and Federal taxable income was determined to be \$543,941.00 based upon petitioner's distributive share of partnership income from Alcazar Homes and Allstate Telecom.

3. At the hearing held in this matter, petitioner introduced into evidence an account transcript from the IRS which indicated that as of November 28, 2005, there was no account balance for the 1996 tax year. However, the account transcript indicated that petitioner's adjusted gross income for the year 1996 was \$564,061.00 and taxable income was \$543,941.00. There was no explanation provided on the IRS document as to the reason for the zero balance as of November 28, 2005.

4. Petitioner also introduced into evidence correspondence between petitioner and the IRS during the months of May and June of 2005 in which petitioner noted that the sum of \$3,345.00 of overpaid tax from the 2004 return had been applied to the 1996 tax year (which petitioner stated was currently being disputed) rather than to the 2000 and 2001 years as was desired by petitioner. In its response, the IRS informed petitioner that until the dispute over the 1996 taxes is settled, the overpayment was going to be applied to "the oldest year you owe."

SUMMARY OF PETITIONER'S POSITION

5. Petitioner asserts that the account transcript of the IRS shows that the IRS has reversed its original position with respect to the audit changes and has abated all additional tax previously asserted to be due from petitioner for the year 1996. In order to abate all tax and show a zero balance, petitioner's Federal adjusted gross income had to have been revised by the IRS, and petitioner contends that the fact that the account transcript still shows that amount to be \$564,061.00 is simply an error by the IRS employee who entered the information on the IRS's computer.

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 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 tax due are erroneous (Tax Law § 681[e][1]).

B. 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 Tivolacci 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.

C. Pursuant to Tax Law § 612(a), the adjusted gross income of a New York resident taxpayer is his Federal adjusted gross income with certain modifications not relevant to this

proceeding. The account transcript from the IRS indicates that petitioner's Federal adjusted gross income for the 1996 tax year was increased from \$115,901.00 to \$564,061.00. While the account transcript also shows that as of November 28, 2005 there was no balance due for 1996, there has been no explanation provided, by either the IRS document or by petitioner, as to the reason therefor. As noted by the Division in its letter brief, petitioner's own documentary evidence (the correspondence between petitioner and the IRS in May and June of 2005) which relates to overpayments in subsequent years which were applied to the balance due for 1996 appears to provide a possible explanation for the zero balance for 1996. In any event, as previously noted, it is petitioner's burden to prove (*see*, Tax Law § 689[e]) that the Division's Notice of Additional Tax Due was erroneously issued or that the amount asserted therein was incorrect. A mere allegation that an IRS employee failed to make the proper revisions on the account transcript is insufficient to sustain this burden of proof. At the conclusion of the hearing, petitioner was given additional time (60 days) to provide documentation from the IRS to support his contention that the IRS had reduced petitioner's Federal adjusted gross income from the \$564,061.00 amount which was utilized by the Division in its Notice of Additional Tax Due. Petitioner failed to provide this documentation and accordingly, it must be found that pursuant to Tax Law § 659, the Division's issuance of the Notice of Additional Tax Due and the amount of additional tax due asserted therein were proper.

D. The petition of Frank Panuccio is denied and the Notice of Additional Tax Due dated March 24, 2003 is hereby sustained.

DATED: Troy, New York
September 21, 2006

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE