

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>PETER TOWER AND ELIZABETH C. TOWER</b>	:	ORDER
for Redetermination of Deficiencies or for Refund of	:	DTA NO. 823144
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 2001, 2004, 2005 and 2006.	:	

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Petitioners, Peter Tower and Elizabeth C. Tower, filed a petition for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 2001, 2004, 2005 and 2006.

Petitioners, by their representative, Blair & Roach, LLP (David L. Roach, Esq., of counsel), brought an application, filed July 21, 2009, seeking an order pursuant to 20 NYCRR 3000.6(c) authorizing a deposition to perpetuate the testimony of petitioner Peter Tower. The Division of Taxation appeared in opposition to the motion by its representative, Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel) who submitted the affirmation of Kevin R. Law, dated August 5, 2009, and supporting documentation, which was received by the Division of Tax Appeals on August 6, 2009.

After due consideration of petitioners' application, the affirmation of Kevin R. Law, Esq., and documents attached thereto, and all the pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

## ***ISSUES***

Whether petitioners' application for a deposition to perpetuate testimony should be granted.

## ***FINDINGS OF FACT***

1. Petitioners, Peter Tower and Elizabeth C. Tower, filed a petition on July 8, 2009, seeking redetermination of deficiencies or for refund of personal income taxes for the years 2001, 2004, 2005 and 2006 on the basis that the Division of Taxation incorrectly disallowed a capital loss claimed by them.

2. On July 21, 2009, petitioners filed an application for an order pursuant to 20 NYCRR 3000.6(c) authorizing a deposition to perpetuate the testimony of petitioner Peter Tower. The application was not supported by any affirmations, affidavits or other documentation.

3. In the application, submitted by petitioners' counsel, David L. Roach, Esq., there was a brief discussion of the legal authority cited by the Division of Taxation in its disallowance of petitioners' capital loss, with specific focus on the Federal Anti-Abuse Rule contained in 26 CFR 1.1701-2, and a seven-factor test used to determine whether a partnership was formed or availed of with a principal purpose of reducing a partner's tax liability inconsistent with subchapter K of the Internal Revenue Code.

4. One of the seven factors involved in the Federal Anti-Abuse Rule calls into question the intended tax results of certain transactions and the application reasons that Peter Tower's testimony with respect to the transactions is critical to petitioners' success in demonstrating the Division of Taxation's error in this matter.

5. The application states that petitioner Peter Tower is 88 years of age, has undergone two major surgeries in the past 2 ½ years and receives 24-hour home care from licensed health professionals.

### ***CONCLUSIONS OF LAW***

A. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide for depositions to perpetuate testimony pursuant to an order of an administrative law judge authorizing same. (20 NYCRR 3000.6[c].)

The regulation also provides that such an order will only be issued under certain circumstances:

Such depositions shall be taken only where there is a substantial risk that the person or document or thing involved will not be available at the hearing of the case . . . .  
(20 NYCRR 3000.6[c].)

B. Petitioners' application for a deposition to perpetuate the testimony of Peter Tower was accompanied by no credible evidence that there was a substantial risk he would not be available to testify at the hearing. Further, the unsworn and unsubstantiated assertions concerning Mr. Tower's age, his prior surgeries and home health care do not demonstrate that he would not be available to attend the hearing in this matter.

This forum must be convinced that there is a substantial risk Mr. Tower will not be available to testify at the hearing and the assertions contained in the application do not, without more, support such a conclusion. A similar provision is found in the CPLR 3117(a)(3)(iii), which permits the liberal use of depositions of witnesses unable to attend or testify because of age, sickness or infirmity. However, that section has been interpreted to require that an adequate foundation be laid to establish petitioner's inability to attend due to his infirmity. (*Cutler v.*

*Konover*, 81 AD2d 571, 437 NYS2d 423 [1981] *affd* 55 NY2d 891, 449 NYS2d 20; *Wojtas v. Fifth Ave. Coach Corp.*, 23 AD2d 685, 257 NYS2d 404 [1965].)

C. Petitioners' application for an order pursuant to 20 NYCRR 3000.6(c) authorizing a deposition to perpetuate the testimony of petitioner Peter Tower is denied.

DATED: Troy, New York  
August 20, 2009

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE