

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MOHAMMAD AND ROOSHA JAVED	:	DECISION
	:	DTA NO. 825127
for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 2005 through 2007.	:	

Petitioners, Mohammad and Roosha Javed, filed an exception to the determination of the Administrative Law Judge issued on September 11, 2014. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief. Oral argument was heard on March 19, 2015, in New York, New York, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioners are bound by amounts set forth in a stipulation of discontinuance in a related, but separate, matter involving petitioner Mohammad Javed's liabilities as a responsible officer of 492 Fast Food, Inc.

II. Whether petitioners are liable for additional personal income tax for the years 2005 through 2007 due to constructive dividends attributed by the Division of Taxation to petitioners, such dividends being based upon prior corporation franchise and sales and use tax audits of 492 Fast Food, Inc.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 2, 3, 4, 9 and 11, which have been modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. On August 7, 2008, following an audit of 492 Fast Food, Inc. for the period September 1, 2004 through February 28, 2007, the Division of Taxation (Division) issued a notice of determination, L-030504128, to petitioner Mohammad Javed as a responsible officer of that corporation. This notice asserted \$43,308.61 in additional sales and use taxes due, plus penalty and interest for the period June 1, 2005 through February 28, 2007.¹

2. By letter dated September 22, 2008, the Division informed petitioners that their personal income tax returns for the tax years 2004 through 2007 had been selected for audit. Petitioners were referred for a personal income tax audit following the sales tax audit of 492 Fast Food, Inc. _____The audit adjustment that increased sales in the sales tax audit of the corporation resulted in an increase of \$368,823.00 to 492 Fast Food, Inc.'s entire net income for corporation franchise tax purposes for the period October 1, 2005 through September 30, 2007.

¹ The period for which Mr. Javed was assessed as a responsible officer began on June 1, 2005, rather than September 1, 2004, due to a statute of limitations issue.

3. The increased entire net income of the corporation was then deemed to be a constructive dividend to the shareholders of the corporation. As petitioner Mohammad Javed was initially determined to be a 50% shareholder of the corporation for the entire audit period, based upon the information available to the Division at the time of the audit, \$184,411.50 of the constructive dividend was attributed to him. This resulted in the Division issuing a notice of deficiency, assessment L-033404382, dated March 8, 2010, asserting that petitioners owed an additional \$20,011.00 in personal income tax, plus interest and penalty, for the tax years 2005 through 2007.²

4. Sometime between July 17, 2009 and October 28, 2009, Mr. Javed filed a petition with the Division of Tax Appeals contesting the notice of determination, L-030504128, issued to him as a responsible officer of 492 Fast Food, Inc. in the amount of \$43,308.61 in sales and use tax plus penalty and interest. On August 16, 2010, Mr. Javed and the Division, by their representatives, executed a stipulation for discontinuance of proceeding by which the parties agreed on a disposition of such matter. Pursuant to the stipulation, tax was recomputed to \$27,000.00 plus statutory interest and the penalty was canceled.

5. On August 26, 2010, the Administrative Law Judge assigned to the matter issued an order of discontinuance, finally determining Mr. Javed's responsible officer sales tax matter, with prejudice, in the Division of Tax Appeals in accordance with the terms of the stipulation for discontinuance of proceeding.

² Petitioner Roosha Javed is a party solely because she filed joint returns with her spouse during the years at issue and was accordingly named in the joint notice of deficiency under protest in this matter.

6. On September 22, 2010, Mr. Javed filed papers requesting a review of the order of discontinuance. By order dated January 27, 2011, the Administrative Law Judge denied his motion.

7. Mr. Javed then filed an exception to the order of the Administrative Law Judge issued on January 27, 2011. By decision dated October 6, 2011, the Tax Appeals Tribunal denied the exception and affirmed the order of the Administrative Law Judge denying his motion.

8. With respect to the notice of deficiency, L-033404382, for the personal income taxes, petitioners requested a conciliation conference with the Bureau of Conciliation and Mediation Services (BCMS), which was conducted on December 8, 2010.

9. Two adjustments were made to the notice of deficiency at BCMS. The first adjustment was made based upon certain issues in Mr. Javed's responsible officer sales tax case as follows. The tax period covered by the corporation's notice of determination, in the amount of \$61,441.36 in sales tax, was for the period September 1, 2004 through February 28, 2007. However, the period for which Mr. Javed was assessed as a responsible officer of the corporation began on June 1, 2005 due to a statute of limitations issue. Therefore, although the notice of determination issued to the corporation was in the amount of \$61,441.36, the notice of determination issued to Mr. Javed as a responsible officer was in the amount of \$43,308.61. As noted above, Mr. Javed's responsible officer sales tax matter was settled pursuant to a stipulation of discontinuance in the amount of \$27,000.00 in sales tax due plus interest, and penalties were canceled. The Division allowed an adjustment that reduced the amount of the deemed constructive dividend to Mr. Javed by 26.54%, arrived at by taking the \$16,308.61 difference

between the assessed amount of tax and the final stipulated amount of tax and dividing it by the original \$61,441.36 in tax determined to be due from the corporation.

The second adjustment was based upon Mr. Javed establishing that he was not a 50% shareholder of the corporation, but rather, a 25% shareholder. Thus, the amount of the deemed dividends was decreased in order to properly reflect his ownership interest.

10. By conciliation order dated May 11, 2012, the notice of deficiency, L-033404382, issued in the present matter was recomputed to the amount of \$7,155.00 in tax plus interest and penalty for the tax years 2005, 2006 and 2007.

11. Petitioners filed their petition with the Division of Tax Appeals on July 12, 2012 to contest the recomputed notice of deficiency. Subsequently, the notice was further reduced. This adjustment was calculated using the \$27,000.00 in tax due, as agreed upon in the stipulation of discontinuance in Mr. Javed's responsible officer sales tax matter, to recompute the deemed dividend attributable to Mr. Javed. This was done by: 1) dividing by the sales tax rate to arrive at sales; 2) allowing 50% of the expenses related to the increased sales; and 3) taking 25% of that figure, representing Mr. Javed's shareholdings. This resulted in \$37,843.00 in additional income to petitioners. The Division then adjusted credits based upon this additional income and adjusted for refunds already obtained by petitioners for the tax years 2005 through 2007.

These calculations resulted in the current tax due of \$3,122.00 plus interest. The penalties were canceled and are no longer at issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the notice of deficiency herein is the direct result of the sales tax audit for 492 East Food, Inc., of which petitioner was a 25% shareholder.

Furthermore, the Administrative Law Judge found that the sales tax determination relied upon by the Division as a basis for finding additional corporate income was agreed to by Mr. Javed in a prior proceeding and could no longer be contested by him. The Administrative Law Judge concluded that the income tax deficiency was properly based upon the additional corporate income and that the Division properly deemed this income constructive dividends distributed to Mr. Javed, citing *Matter of Petito* (Tax Appeals Tribunal, October 17, 1991).

Having explained that it was petitioner's burden to prove by clear and convincing evidence that the deficiency was erroneous, the Administrative Law Judge determined that petitioner, having submitted no evidence, had not met that burden.

ARGUMENTS ON EXCEPTION

Petitioners argue that the Division has submitted no evidence in support of its notice of deficiency. Petitioners argue that they have submitted evidence proving that the Division's assertions of additional personal income tax are erroneous, such evidence including a letter from one of 492 East Food, Inc.'s suppliers indicating the corporation's purchases for the period and evidence that petitioners' financial situation during the period at issue precludes a finding of additional income. Furthermore, petitioners argue that they should not be bound by the stipulation of discontinuance executed in Mr. Javed's responsible officer sales tax matter.

The Division argues that petitioners are bound by the amount of tax agreed to in the stipulation of discontinuance entered into in Mr. Javed's responsible officer sales tax matter and points to the decision of this Tribunal holding that there was "no reason to vacate or modify the Stipulation of Discontinuance of Proceeding executed by petitioner through his duly authorized representative in this proceeding" (*Matter of Javed*, Tax Appeals Tribunal, October 6, 2011).

Furthermore, the Division asserts that it properly relied upon indirect methods to determine petitioners' personal income tax and that indeed, it has taken into account all additional information provided by petitioners and recalculated the amount due accordingly. Finally, the Division asserts that the Administrative Law Judge is correct in concluding that petitioners have not met their burden of proving that the Division's assessment is erroneous.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons set forth herein.

Petitioners assert that they are not bound by the tax amount agreed to in Mr. Javed's related responsible officer sales tax matter. We agree. Petitioners herein should not be automatically bound by an agreement as to the amount of tax due in a related sales tax matter any more than an officer of a corporation would be bound in a responsible officer proceeding when the corporation has agreed to a sales tax amount (*see Matter of Jenny Oil Corp.*, Tax Appeals Tribunal, June 20, 1996). Unfortunately for petitioners, however, that is not the end of the inquiry.

It appears to this Tribunal that petitioners are bound by the principle of collateral estoppel. For the doctrine of collateral estoppel to apply, petitioners must have had a fair opportunity to litigate the same issues during the prior proceeding (*see Kuriansky v Professional Care*, 158 AD2d 897 [1990]; *see also Matter of Sterling Bancorp*, Tax Appeals Tribunal, November 18, 1993). This means that:

“the party seeking the benefit of collateral estoppel (here, the State) has the burden of demonstrating the identity of the issues and the necessity of their having been decided, and the party opposing its use (here, petitioner [Sokol]) has the responsive burden of establishing the absence of a full and fair opportunity to litigate the

issue in the prior action (*State of New York v. Sokol*, 113 F3d 303, 306 [1997] [citations omitted]).”

While we prefer to have the benefit of the analysis of the Administrative Law Judge on most issues, in this matter, as neither party raised the issue before the Administrative Law Judge, it was not addressed in the determination. And while we could obtain such benefit through a remand, this does not appear the appropriate course of action in this matter, as collateral estoppel clearly applies.

First, the amount of tax determined to be due through the stipulation of discontinuance in Mr. Javed’s responsible officer sales tax matter is exactly the issue that petitioners are attempting to argue in the present matter. Second, petitioners had a “full and fair opportunity to litigate the issue” in the prior matter (*Sokol*). Mr. Javed, one of the petitioners herein, was the petitioner in his own corporate officer sales tax matter, so the parties in both actions are the same, with the exception of Ms. Javed who is a party solely as a result of filing joint returns with her husband (*cf. Matter of Ashley Jarwood, Officer of Wizard Petroleum*, Tax Appeals Tribunal, January 25, 1996 [petitioner in responsible officer sales tax matter was not the same party as the corporation in its sales tax matter]). The fact that the prior matter was closed pursuant to a stipulation of discontinuance where the parties agreed upon the amount due, rather than after a hearing pursuant to a determination, is not relevant. That is especially true where, as here, the validity of the stipulation of discontinuance was challenged by one of the petitioners herein and upheld by this Tribunal (*Matter of Javed*).

The next question to be addressed is whether the methodology utilized by the Division, and thus the notice of deficiency at issue, was valid and proper. The Division’s methodology began with the amount of sales determined in the sales tax audit of 492 Fast Food, Inc. and applying

such sales to the income of the corporation to determine 492 Fast Food, Inc.'s entire net income for corporation franchise tax purposes. The Division then determined that all of the corporation's entire net income should be deemed a constructive dividend to its shareholders. Based on the information available to the Division at that time, it issued a notice of deficiency based upon petitioners having additional personal income in the amount of \$184,411.50, or 50% of 492 Fast Food Inc.'s entire net income. Such a method of calculating tax due is both valid and proper (*see Holland v United States*, 348 US 121, *rehearing denied* 348 US 932 [1955]; *Matter of Petito*, Tax Appeals Tribunal, October 17, 1991).

As noted by the Administrative Law Judge, having determined that the notice of deficiency was valid and proper, petitioners needed to establish by clear and convincing evidence that the deficiency was erroneous (Tax Law § 689 [c]; *Matter of Leogrande v Tax Appeals Tribunal*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]). The only documentary evidence submitted into the record by petitioners was a letter from Jetro Cash & Carry, a supplier of 492 Fast Food, Inc. Initially, it is noted that there is nothing in the record supporting the fact that this was the corporation's only supplier. Furthermore, the letter itself contains various disavowals of the accuracy of the information therein for purposes of being a complete record of purchases from Jetro Cash & Carry. The only other evidence that petitioners offer to support their position that the deficiency is erroneous concerns their personal financial position during the audit period. However, there is no evidence in the record on this point, only assertions from petitioners.

In contrast, the Division has introduced into evidence documents explaining the analysis utilized in the original audit, the adjustments made during the proceedings at BCMS and the final adjustments made after the petition was filed in this matter. The final adjustments, resulting in a

liability of \$3,122.00, plus interest and with no penalty, were based specifically upon the \$27,000.00 in tax, plus interest, agreed to in the stipulation of discontinuance executed in Mr. Javed's responsible officer sales tax matter. Petitioners have introduced no evidence to prove that the notice of deficiency, as thus modified, is erroneous.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

- 1). The exception of Mohammad and Roosha Javed is denied;
- 2). The determination of the Administrative Law Judge is affirmed;
- 3). The petition of Mohammad and Roosha Javed is denied; and
- 4). The notice of deficiency, dated March 8, 2010, as modified in accordance with findings of fact 9, 10 and 11, is sustained.

DATED: Albany, New York
September 10, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner