

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**PATRICIA DEVESTA-OWRUTZKY** : DECISION  
 : DTA NO. 826371  
for Redetermination of a Deficiency or for Refund of :  
Personal Income Tax under Article 22 of the Tax Law :  
for the Years 2008 through 2010. :

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Petitioner, Patricia DeVesta-Owrutzky, filed an exception to the determination of the Administrative Law Judge issued on April 7, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Brian J. McCann, Esq., and Kent Gebert, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Petitioner did not request oral argument. The six-month period for the issuance of this decision began on June 29, 2016, the date that petitioner's reply letter brief was received.

***ISSUE***

Whether the Division of Taxation properly attributed additional flow-through income to petitioner, as a shareholder of a subchapter S corporation, for the years at issue.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except that we have modified findings of fact 1, 2 and 11 to more clearly reflect the record. These facts are set forth below.

1. During 2008 through 2010 (years in issue), petitioner, Patricia DeVesta-Owruzky, filed New York State resident income tax returns.

2. During the years in issue, petitioner was a 20% shareholder in LQ511 Corporation (LQ), a subchapter S corporation pursuant to the Internal Revenue Code and Tax Law § 660. She inherited her 20% interest in LQ from her husband after his passing in 2005.

3. Petitioner claimed 20% of LQ's ordinary business losses on her personal income tax returns for the years in issue.

4. In 2011, the Division of Taxation completed a sales tax audit of LQ for the period September 1, 2007 through February 28, 2010, found additional sales by the company in excess of \$3 million and, consequently, sales tax due. LQ consented to the results of the sales tax audit.

5. As a result of the sales tax audit, the Division performed a franchise tax audit of LQ and income tax audits of its shareholders, including petitioner, for the years in issue.

6. For 2008, the Division's audit determined that LQ had \$1,950,690.00 in additional sales receipts, which were added back to LQ's income. Hence, additional net ordinary business income of \$390,138.00 was passed through to petitioner for that year as a 20% shareholder of LQ.

7. For 2009, the Division's audit determined \$939,466.00 in additional sales receipts, which were added back to LQ's income. Hence, additional net ordinary business income of \$187,893.00 was passed through to petitioner as a 20% shareholder, which was reduced to \$25,553.00, after application of ordinary business losses of \$162,340.00 from LQ for that year. Additionally, \$21,154.00 in nonpassive losses from LQ, originally reported by petitioner on her 2009 return, were disallowed.

8. For 2010, the Division's audit determined \$405,717.00 in additional sales receipts, which were added back to LQ's income. Hence, additional net ordinary business income of \$81,143.00 was passed through to petitioner as a 20% shareholder, which was reduced to \$49,851.00, after application of ordinary business losses of \$31,292.00 from LQ for that year.

9. Additionally, for 2008, the Division disallowed \$3,979.00 of itemized deductions on petitioner's New York state return due to the increase in her federal adjusted gross income from the audit. Her New York State itemized deductions remained as reported for 2009 and 2010.

10. Based on the additional income attributed to petitioner from the audit, the Division also disallowed petitioner's 2009 claimed net operating loss of \$57,510.00, which she had carried forward from 2008. Instead, as petitioner claimed a \$134,034.00 net operating loss on her 2011 New York state personal income tax return, \$21,943.00 was carried back and allowed as a net operating loss on her 2009 return.

11. Based on the additional income attributed to petitioner from the audit, the Division likewise disallowed petitioner's 2010 claimed net operating loss of \$63,099.00, which was carried forward from 2009. Instead, the Division applied \$59,758.00 of petitioner's claimed \$134,034.00 net operating loss from her 2011 New York state personal income tax return as a net operating loss on her 2010 return.

12. Moreover, the Division added back \$6,966.00 in non-New York tax-exempt interest on petitioner's 2008 return.

13. The Division added back \$6,494.00 in non-New York tax-exempt interest on petitioner's 2009 return.

14. The Division added back \$6,975.00 in non-New York tax-exempt interest on

petitioner's 2010 return.

15. Based on the Division's audit adjustments, on April 23, 2013, petitioner was issued a Consent to Field Audit Adjustment, asserting the following:

Period	Additional Tax	Penalties	Interest	Total
2008	\$23,894.00	0	\$8,605.00	\$32,499.00
2009	\$404.00	0	\$106.00	\$510.00
2010	0	0	0	0
Total	\$24,298.00	0	\$8,711.00	\$33,009.00

16. Petitioner did not sign the proposed consent. On June 6, 2013, however, petitioner paid \$33,009.00 to the Division for the years in issue.

17. On July 11, 2013, the Division issued a notice of deficiency, assessment ID L-039632892-4, to petitioner for tax in the amount of \$24,298.00 and interest in the amount of \$8,711.00, for a total liability of \$33,009.00. The statutory notice also reflected that petitioner was credited with payment of \$33,009.00 and a zero balance due.

18. Petitioner subsequently filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services with regard to the statutory notice. The statutory notice was sustained by conciliation order of March 14, 2014.

19. On June 24, 2014, petitioner filed a petition with the Division of Tax Appeals seeking a refund of her payment of \$33,009.00, "minus \$200.00," which she considered her proper tax due under the circumstances.<sup>1</sup>

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<sup>1</sup> Because petitioner paid the deficiency in full before her hearing before the Division of Tax Appeals, the Administrative Law Judge deemed petitioner's protest of the statutory notice to be a claim for refund of the amount petitioner paid. We adhere to this characterization of the nature of petitioner's protest.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge noted in his determination that a presumption of correctness attaches to a properly issued statutory notice of deficiency. He stated that when such a presumption attaches, the burden of proof is upon the taxpayer to show by clear and convincing evidence that the assessment is erroneous. He explained that the same clear and convincing standard of proof applies where the taxpayer is protesting a denial of a refund claim.

The Administrative Law Judge determined that petitioner did not sustain her burden of proof by showing clear and convincing evidence that the Division's proposed assessment was erroneous. He reasoned that the basis for the statutory notice was derived from the Division's sales tax audit of LQ. The additional income to LQ stemming from the additional sales receipts determined in the course of LQ's uncontested sales tax audit passed through to the shareholders, including petitioner, according to their ownership interests in LQ. In turn, the personal income tax deficiency the Division asserted against petitioner was the result of the passing through of items of income and loss from LQ during tax years 2008, 2009 and 2010 according to petitioner's 20% ownership interest in the pass-through entity maintained during the years at issue.

The Administrative Law Judge found it notable that petitioner did not disagree with the accuracy of the audit, but merely asserted that she should not be held liable for her pro rata share of the sales tax audit adjustments of LQ because of misdeeds against her by fellow shareholders in LQ and her former representatives. The Administrative Law Judge concluded that petitioner did not meet her burden of proof in demonstrating that the notice of deficiency was erroneous by clear and convincing evidence and thus denied her petition.

***SUMMARY OF ARGUMENTS ON EXCEPTION***

Petitioner's primary argument on exception is that she is not responsible for additional personal income tax resulting from LQ's sales tax audit due to her alleged mistreatment by other shareholders in LQ and her own representatives, which she attempts to illustrate through supplemental submissions filed with her notice of exception. She also questions the propriety of allocating tax attributes from LQ to her for the years in issue because she was not a corporate officer or otherwise involved in managing LQ's business.

The Division argues that petitioner has not raised any issues on exception that were not already addressed by the Administrative Law Judge. The Division asserts that the franchise and personal income tax audits were a proper result of LQ's sales tax audit and maintains that the audit adjustments to petitioner's personal income tax resulting from the company's additional income were correct. The Division also asks that petitioner's supplemental submissions on exception not be accepted or considered in rendering a decision in this matter.

***OPINION***

Corporations electing treatment under subchapter S of the Internal Revenue Code are generally not subject to income tax at the entity level, but rather act as "flow-through" entities, whereby the corporate entity is disregarded for tax purposes and items of income, deduction, credits, and loss are allocated to the S corporation's shareholders in proportion to their respective ownership interests (*see* IRC [26 USCA] § 1361 et seq.). New York provides for analogous flow-through treatment of such tax attributes from S corporations to individual taxpayers under Article 22 of the Tax Law (*see* Tax Law § 660).

Where additional income resulting from a sales tax audit is imputed to a business owner, we have held that results of sales tax audits may properly form the basis of a determination of a business owner's income tax liabilities (*see Matter of Bok Hui Nam*, Tax Appeals Tribunal, September 24, 2009). Thus, the adjustments to petitioner's income resulting from the franchise tax audit, itself the result of an uncontested sales tax audit, properly formed the basis for the Division's determination of additional tax due. As noted by the Administrative Law Judge, a presumption of correctness attaches to a properly issued notice of deficiency reflecting such a determination (*Matter of Hickey*, Tax Appeals Tribunal, August 12, 2004; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). In order for a taxpayer to overcome such a presumption of correctness of the Division's determination, the taxpayer must demonstrate by clear and convincing evidence that the proposed assessment contained therein is erroneous (Tax Law § 689 [e]).

We agree with the determination of the Administrative Law Judge that petitioner has not met her burden of showing by clear and convincing evidence that the Division's proposed assessment was incorrect or erroneous. As noted in his determination, there is a paucity of evidence in the record of proof refuting either petitioner's ownership percentage in LQ during the years in issue or the results of the Division's audit of petitioner. We agree with the Administrative Law Judge's assessment of the evidence entered in the record at the time the record was closed. Therefore, petitioner must yield to the presumption of correctness of the Division's determination (*see Matter of Tavolacci v State Tax Commn.*, 77 AD2d 759 [1980]).

As to the supplemental submissions petitioner would have us consider in rendering our decision, we have held that acceptance and consideration of evidence proffered after the closing

of the record interferes with the finality and efficiency of administrative adjudication (*Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). Further, our acceptance of evidence after closing of the record denies the opposing party the opportunity to question or otherwise counter the evidence offered. In the interests of fairness and efficiency, we must decline to consider petitioner's supplemental submissions offered after the closing of the record as established at the hearing below in rendering our decision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Patricia DeVesta-Owruzky is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Patricia DeVesta-Owruzky is denied; and
4. The notice of deficiency dated July 11, 2013, is sustained.

DATED: Albany, New York  
December 29, 2016

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner  
JAM with permission