

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
VILMA BAUTISTA : DECISION
 : DTA NO. 827182
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal Income :
Tax under Article 22 of the Tax Law and the New York :
City Administrative Code for the Year 2010. :

Petitioner, Vilma Bautista, filed an exception to the determination of the Administrative Law Judge issued on May 5, 2016. Petitioner appeared by DLA Piper LLP (Ellis L. Reemer, Esq., and Michael J. Scarduzio, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Alejandro Taylor, Esq. and Jennifer Hink-Brennan, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on January 12, 2017, in New York, New York. As determined in accordance with Tax Law § 2008 (2), the due date for this decision is March 13, 2017.

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

ISSUE

Whether the subject notice of deficiency is invalid as it proposes an assessment of fraud penalties, equal to two times a deficiency of tax, but does not propose an assessment of tax and does not rely on a previously determined assessment of tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for findings of fact 1 and 14, which we have modified to more fully reflect the record. As so modified, such facts are set forth below.

1. Petitioner, Vilma Bautista, was at one time an assistant to Imelda Marcos, the former First Lady of the Philippines. Petitioner worked for Mrs. Marcos in New York City.

2. In November 2013, petitioner was convicted in Supreme Court, New York County, after a jury trial, of three felonies under New York State law: 1) conspiracy in the fourth degree; 2) filing a false instrument in the first degree; and 3) criminal tax fraud in the first degree (*People v Bautista*, Sup Ct, NY County, November 18, 2013, White, J.).

3. The convictions emanated from the 1995 acquisition by petitioner of several high-value paintings that had mysteriously disappeared earlier that year from the walls of a townhouse that was owned by the Philippine government and located on the Upper East Side of Manhattan. Mrs. Marcos used the townhouse when she was in New York City. In 2010, petitioner sold one of the paintings, by Claude Monet, for \$32,160,000.00 to a private purchaser and received the proceeds from the sale in that year.

4. Prior to the sale, petitioner had secretly stored the paintings, including the Monet, at her apartment at 188 East 64th Street in New York City (New York City Apartment) for several years.

5. Petitioner maintained the New York City Apartment throughout 2010.

6. Petitioner had several bank accounts with Citibank in 2010 (Citibank Accounts). Each of the Citibank Accounts listed her address as the New York City Apartment. Citibank issued a form 1099-INT for 2010 to petitioner that listed her address as the New York City Apartment. In

addition, there was evidence of activity by petitioner at Citibank branches in Manhattan on at least 118 days in 2010.

7. Petitioner timely filed a 2010 New York State resident personal income tax return (IT-201) (2010 New York return). On her 2010 New York return, she reported a capital loss of \$3,000.00, federal adjusted gross income of \$3,787.00, interest income on state and local bonds of \$7,566.00, and New York adjusted gross income of \$11,315.00. She did not report any income from the sale of the Monet painting. As a result, petitioner reported New York taxable income of only \$3,815.00 and total New York State tax due of \$78.00. She reported that she did not owe any New York City tax.

8. On the 2010 New York return, petitioner listed her home address as 199 Hummingbird Road, Manhasset, New York. She also reported that she did not maintain living quarters in New York City during 2010. Furthermore, she left blank the section asking her to report the number of days that she spent in New York City in 2010.

9. Petitioner's November 2013 convictions for tax fraud and filing a false instrument (*see* finding of fact 2) were premised on the New York County Supreme Court's finding that, with deceitful intent, she filed a fraudulent New York State tax return for 2010. Specifically, the court found that petitioner intentionally did not report the sale of the Monet painting, her receipt of the proceeds and resultant income, and did not pay the taxes rightfully due to the State and City of New York in an amount in excess of \$1,000,000.00. As a result of her conviction, petitioner was sentenced to several concurrent jail terms. In addition, on January 13, 2014, the court issued an order compelling restitution for the unpaid New York State and City taxes in the amount of \$3,557,620.00.¹

¹ Petitioner appealed her conviction and sentence, including the restitution order, to the Appellate Division, First Department. On October 20, 2015, the Appellate Division vacated the conspiracy conviction and remanded it to the Supreme Court for a new trial (*see People v Bautista*, 132 AD3d 523 [2015] *lv granted* 27 NY3d 992 [2016]).

10. The amount of petitioner's restitution was based on the testimony of William Welch, a tax auditor with the New York State Department of Taxation and Finance's (Department's) Criminal Investigations Division, and other evidence produced at the criminal trial. Included in that evidence were work papers prepared by Mr. Welch in an attempt to ascertain petitioner's tax liability. During his testimony, Mr. Welch explained that he performed an analysis of petitioner's 2010 New York return. Initially, Mr. Welch explained that he reviewed several bank statements from the Citibank Accounts, as well as the 1099-INT issued to petitioner from that bank for 2010, and discovered that petitioner had unreported interest income of \$40,357.05. Additionally, he found that in September 2010, the Citibank Accounts received funds in the amount of \$32,000,000.00, the source of which was the sale of the Monet painting.

11. According to Mr. Welch, petitioner had three potential tax liabilities arising from the sale of the Monet painting, depending on various factual scenarios, each of which found her to be a New York State and City resident during the year at issue. Scenario 1 contemplated petitioner possessing and selling the painting either illegally or on behalf of its true owner and retaining the \$32,000,000.00 in proceeds. Scenario 2 assumed the painting was a gift to petitioner and subsequently sold, her retaining the proceeds, and giving her credit for the painting's basis. Scenario 3 contemplated petitioner possessing and selling the painting on behalf of its true owner and only retaining \$11,840,000.00 of the proceeds. Each scenario included petitioner's receipt

The court, however, otherwise affirmed petitioner's remaining convictions, including the tax fraud conviction and, of equal significance, the restitution order. On October 27, 2015, petitioner sought leave to appeal the Appellate Division's decision to the New York State Court of Appeals. That request was pending as of the date of the Administrative Law Judge's determination.

and control of the proceeds. Petitioner's potential tax liabilities from each scenario were described by Mr. Welch as follows:²

Scenario 1 - Assuming Painting Was Not A Gift to Petitioner

Gross Proceeds	Commissions/ Expenses	Net Income	NYS Additional Tax Due	NYC Additional Tax Due
\$32,000,000.00	\$4,340,000.00	\$27,660,000.00	\$2,485,064.00	\$1,072,556.00

Scenario 2 - Assuming Painting Was A Gift

Gross Proceeds	Commissions/ Expenses/Basis	Net Income	NYS Additional Tax Due	NYC Additional Tax Due
\$32,000,000.00	\$5,140,000.00	\$26,860,000.00	\$2,413,304.00	\$1,041,548.00

Scenario 3 - Assuming Sale on Behalf of Another and Petitioner Retained \$11.8 Million

Net Income	NYS Additional Tax Due	NYC Additional Tax Due
\$11,840,000.00	\$1,066,010.00	\$459,373.00

12. Petitioner was afforded the opportunity to cross-examine Mr. Welch on his conclusions and to present witnesses, exhibits and argument on the issue of her tax liability during the trial. Petitioner also presented argument on the issue at the sentencing hearing.

13. Despite argument in opposition by petitioner, on January 13, 2014, the New York County Supreme Court ordered petitioner to pay restitution in the amount of \$3,557,620.00 to the Department. The court concluded the amount of restitution reflected the additional New York State and City personal income tax owed by petitioner for 2010 as described in Scenario 1, above, which it found to be the correct amount based on the evidence adduced at trial. Pursuant to Penal Law § 60.27 (2), the court added at the sentencing hearing that based on the evidence

² Petitioner's unreported interest income of \$40,357.05, gained from deposit of the proceeds in the Citibank Accounts, was added to the additional unreported net income in each of the scenarios to arrive at the New York State and City additional tax due.

and verdict, no further restitution hearing was required. The restitution order designated Safe Horizon as the restitution agent and called for petitioner to make all restitution payments to Safe Horizon pursuant to Criminal Procedure Law § 420.10 (1) for eventual payment to the Department. In addition, by its terms, the restitution order was to be filed and enforceable as a civil judgment.

14. On January 23, 2014, the Division issued to petitioner notice of deficiency number L-040694401-2 (statutory notice). The statutory notice informed petitioner that a “[f]ield audit of your records disclosed additional tax due” of \$2,485,064.00 for New York State and \$1,072,556.00 for New York City for the year 2010. Furthermore, the statutory notice represented that “late payments” in the aforementioned amounts had been received, reflecting that petitioner had a balance of zero tax due. The notice thus did not propose an assessment of tax.

15. The statutory notice did assert the following fraud penalties pursuant to Tax Law § 685 (e) and interest:

Jurisdiction	Penalties	Interest	Balance Due
New York State	\$5,254,161.00	\$569,235.34	\$5,823,396.34
New York City	\$2,267,701.00	\$245,682.26	\$2,513,383.26

The above penalties and interest remained due pursuant to the statutory notice.

16. On March 19, 2014, the Division issued and filed warrant number E-402108570-W001-7 (warrant) against petitioner pursuant to the restitution order (*see* finding of fact 13).³ The warrant reflected the following:

³ Petitioner incorrectly identifies this document in the record as a “notice and demand.”

Assessment ID	Period	Tax	Penalty	Interest	Total
L-040694572-2	2010	\$3,557,620.00	\$17,786.10 ⁴	\$33,837.66	\$3,609,245.76

17. Petitioner did not offer her testimony, either in person or in affidavit form, in support of her petition in this matter.

18. Petitioner submitted 12 “Requested Findings of Fact,” most of which consist of compound factual proposals in paragraph form, interspersed with legal argument. As a result, they cannot be ruled on directly. Instead, in accordance with State Administrative Procedure Act § 307 (1), petitioner’s proposed findings of fact have been generally incorporated in this decision, with the following exceptions:

(a) proposed findings of fact 1, 4, 5, and the last two sentences of 3 as they are contrary to the evidence in the record; and

(b) proposed findings of fact 6 through 10, as they are conclusions of law.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner’s criminal conviction and the restitution order provided a rational basis for the notice of deficiency. He also found that the notice informed petitioner of the additional tax determined by the Division upon which the fraud penalties were based. The Administrative Law Judge specifically found that the Division did, in fact, determine a tax deficiency for the year at issue based on the testimony of its auditor, petitioner’s criminal conviction and the restitution order. The Administrative Law Judge thus concluded that the notice of deficiency in the present matter was valid.

⁴ The rationale for this penalty was never explained by the Division.

The Administrative Law also found that petitioner had the burden of proof to prove error in the tax deficiency herein and that petitioner failed to meet that burden. The Administrative Law Judge rejected petitioner's contention that the restitution order was not a specific determination of her civil tax liability, but was one of three hypothetical results chosen for purposes of exceeding the \$1,000,000.00 threshold required to support a first degree criminal tax fraud conviction. He also rejected petitioner's argument that the criminal court lacked jurisdiction to make a determination of civil tax liability. Rather, the Administrative Law Judge found that the Division reasonably relied upon the court's determination of petitioner's tax liability in issuing the statutory notice. He reviewed the evidence produced at the criminal trial that supported the determination of petitioner's tax liability as indicated in the computation section of the statutory notice. The Administrative Law Judge noted that petitioner had an opportunity to refute such evidence and he further noted that the criminal court was required under the Penal Law to make a precise finding of the loss suffered by the victim, i.e., the Division.

The Administrative Law Judge determined that petitioner was collaterally estopped from disputing the amount of tax referenced in the notice of deficiency. He found that the amount by which petitioner underreported her 2010 New York State and City income taxes was an essential issue in both the present administrative proceeding and the criminal trial. He also found that petitioner had a full and fair opportunity to litigate that issue in the criminal proceeding.

The Administrative Law Judge also determined that, alternatively, even if petitioner was not collaterally estopped from contesting the underlying income tax deficiency in the present matter, she produced insufficient evidence to meet her burden of proving error in the Division's determination of such tax.

As to the question of fraud, the Administrative Law Judge determined that, by her conviction for criminal tax fraud, petitioner was estopped from contesting the civil fraud penalties herein.

Finally, the Administrative Law Judge rejected petitioner's contention that fraud penalties asserted herein were improper because the Division failed to issue a valid notice of deficiency of tax. The Administrative Law Judge found that both the criminal court and the Division determined a 2010 tax deficiency for petitioner and that such deficiency was reflected in the statutory notice. He thus concluded that the subject fraud penalties were correctly assessed in the statutory notice.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner contends that the notice of deficiency is invalid because it does not determine a deficiency of tax. Rather, petitioner contends that the notice relies on an invalid assessment of tax, i.e., the assessment referenced in the tax warrant (*see* finding of fact 16), in order to assert fraud penalties. Petitioner argues that a deficiency of tax is a predicate for the assertion of fraud penalties and that such a deficiency must be determined and assessed through the issuance of a notice of deficiency pursuant to Tax Law § 681 (a). As the Division did not assert any tax deficiency in the present matter by a notice of deficiency, petitioner contends that there is no deficiency supporting the assertion of fraud penalties in the present matter. Hence, according to petitioner, the subject statutory notice is invalid as a matter of law.

Petitioner asserts that the amount of tax owed by petitioner for 2010 is not at issue in the present matter because the notice of deficiency does not determine a deficiency of tax, and because the Division has never determined a deficiency of tax for 2010 as required under Tax

Law § 681 (a) and (c), that is, through the issuance of a notice of deficiency. Petitioner argues that the assessment of tax referenced in the tax warrant was improperly assessed. Petitioner further argues that the criminal court was without jurisdiction to make a determination of personal income tax under Article 22. Petitioner contends that the restitution order and the criminal conviction do not obviate the need for the Division to comply with the Tax Law which, as petitioner notes, requires that the Division propose a deficiency of tax in a notice of deficiency.

Petitioner also contends that she was not collaterally estopped from contesting the validity of the statutory notice. Petitioner asserts that the Administrative Law Judge failed to recognize that a civil proceeding to determine the validity of an assessment, such as the instant matter, is separate and distinct from a criminal proceeding. Petitioner contends that collateral estoppel does not prevent a taxpayer from exercising her right to have the correct amount of tax determined by the Division; to have such deficiency proposed as an assessment in a notice of deficiency; and to challenge that notice before the Division of Tax Appeals. Petitioner notes that her challenge to the validity of the statutory notice, outlined above, was not at issue in the criminal trial and therefore cannot be subject to collateral estoppel. Petitioner also contends that collateral estoppel is available as an affirmative defense for the Division only where the correct amount of tax is actually at issue in the prior proceeding and where the notice of deficiency is issued in compliance with the Tax Law, neither of which, according to petitioner, occurred here. Petitioner also asserts that collateral estoppel is inappropriate here because her correct tax liability was not an element of the crimes charged and thus was not at issue in the criminal matter.

The Division agrees with the Administrative Law Judge's conclusion that the subject notice of deficiency is valid. The Division contends that the notice clearly indicates the amount of tax upon which the asserted fraud penalties were based. The Division further contends that such tax was properly based on Mr. Welch's testimony and documents received in evidence at the criminal trial and the court's adoption of that evidence in the restitution order. The Division thus contends that the notice of deficiency had a rational basis and that petitioner failed to meet her burden to prove error. The Division also asserts that petitioner's conviction satisfies the Division's burden of proof on the fraud issue and that petitioner is estopped from contesting fraud.

The Division also argues that the Administrative Law Judge correctly found that petitioner is estopped from contesting the amount of tax referenced in the statutory notice as the proper amount of tax due from petitioner. The Division asserts that petitioner's 2010 underreported income was the central issue of the criminal trial. The Division notes that, in relation to petitioner's sentencing, the court was required under the Penal Law to make a precise finding of her tax liability for that year. The Division notes further that petitioner had an opportunity to litigate this issue at the trial.

OPINION

Tax Law § 681 (a) provides that "[i]f upon examination of a taxpayer's return . . . [the Division] determines that there is a deficiency of income tax," it may issue a notice of deficiency to such taxpayer. A notice of deficiency becomes an assessment of tax after 90 days, unless the taxpayer timely files a protest of such deficiency (Tax Law § 681 [b]). Under the latter circumstance, the notice may become an assessment only after the taxpayer's administrative

remedies have been exhausted (Tax Law § 681 [c]). With certain exceptions not relevant here, an assessment of a deficiency in income tax must begin with the issuance of a notice of deficiency (*id.*).

A fraud penalty must be assessed in the same manner as income tax and any reference to income tax in Tax Law § 681 is deemed to also refer to such penalty (Tax Law § 685 [l]). A fraud penalty is authorized “[i]f any part of a deficiency is due to fraud” (Tax Law § 685 [e] [1]). The amount of the fraud penalty is set at “two times the deficiency” (*id.*).

As relevant here, a deficiency is generally defined as the amount of income tax imposed by the personal income tax law less the amount of tax reported on the taxpayer’s return and less any tax previously assessed as a deficiency (Tax Law § 681 [g]). For purposes of fraud and negligence penalties, the amount of tax reported on the taxpayer’s return may reduce the amount of the deficiency only if such return was timely filed (Tax Law § 685 [m]).

In the present matter, the assertion of fraud penalties against petitioner was made by the issuance of a notice of deficiency as required by Tax Law § 685 (l) and we find, pursuant to the following discussion, that such notice is premised on a deficiency as that term is defined under Tax Law §§ 681 (g) and 685 (m).

The additional tax liability upon which the fraud penalties are based rests on the additional tax due calculation made by Mr. Welch in his Scenario 1 (*see* finding of fact 11). The facts upon which Mr. Welch relied in making his calculation are in the record (*see* findings of fact 3 through 10). The amount of the restitution order is taken from Mr. Welch’s Scenario 1 (*see* finding of fact 13). This same amount is also indicated as additional tax due in the subject notice of deficiency (*see* finding of fact 14). We thus disagree with petitioner’s assertion that the

additional tax liability upon which the subject fraud penalties are based is a “theoretical deficiency,” for there is no question that the Division asserts this amount to be petitioner’s correct income tax for 2010. As such, this amount is a deficiency as defined under Tax Law §§ 681 (g) and 685 (m).⁵

We find no statutory support for petitioner’s argument that a notice of deficiency proposing an assessment of fraud penalties must itself propose an income tax assessment or be based on a prior income tax assessment in order to be valid. We find petitioner’s position to be inconsistent with the statutory language. As stated in Tax Law § 681 (a), “[i]f . . . [the Division] determines that there is a *deficiency* of income tax, it may mail a *notice of deficiency* to the taxpayer (emphasis added).” Such language thus distinguishes between a deficiency and a notice of deficiency. While a notice of deficiency is necessary to assess a deficiency (*see* Tax Law § 681 [b]), the deficiency itself, i.e., the difference between tax imposed and tax reported (see Tax Law §§ 681 [g] and 685 [m]), may nonetheless provide a basis for the imposition of penalties, whether or not it is assessed. We observe that the statutory language distinguishing between deficiency and notice of deficiency provides the Division with some flexibility in its handling of particular cases, such as the present matter where an amount equal to the tax liability has been filed as a civil judgment (*see* finding of fact 13).

Contending that the asserted additional tax due herein is based on the restitution order, petitioner argues that “restitution is not itself a determination of tax . . . and does not provide a basis on which tax may be assessed” (*Muncy v Commr.*, TC Memo 2014-251 [2014]). In our

⁵ The computation section of the notice of deficiency also indicates that the additional tax due was paid via “late payments” (*see* finding of fact 14). The Administrative Law Judge inferred that this adjustment reflected a choice by the Division to collect on the restitution order in lieu of an assessment of tax. In any event, as both petitioner and the Division were aware, no such payments had or have been made. Accordingly, such non-existent “late payments” do not eliminate petitioner’s tax deficiency for 2010.

view, this claim rests on a false premise. The restitution order is based on Mr. Welch's calculation and the facts supporting that calculation. Hence, it is not the restitution order itself that provides the basis for the Division's asserted tax deficiency, but, rather, the underlying testimony and evidence that provides such a basis.

Petitioner also argues that the assessment referenced in the tax warrant (*see* finding of fact 16) was procedurally defective and therefore is not a deficiency upon which a fraud penalty may be asserted. This argument, too, starts with a false premise. As noted, the tax deficiency herein is based on Mr. Welch's testimony and the facts upon which he relied in making his calculation. Accordingly, such deficiency was not premised on the assessment referenced in the warrant.⁶

Similarly, we must dismiss petitioner's contention that the criminal court's jurisdiction does not extend to determinations of income tax liability and that the restitution order and the criminal conviction may not substitute for the purported requirement that the Division propose a deficiency of tax in a notice of deficiency. As discussed, the Division has asserted a deficiency of tax as the basis for its proposed assessment of fraud penalties. While the Administrative Law Judge's determination states, in part, that the Division relied on the criminal conviction and restitution order as a basis for the issuance of the notice of deficiency, the record shows that both the conviction and the restitution order rely on Mr. Welch's calculation of tax liability and the facts in the record relevant to such calculation. Specifically, the record shows that Mr. Welch reviewed petitioner's bank statements for 2010 indicating that petitioner received funds of

⁶ We note that the filing of a warrant is a collection activity and is thus outside our jurisdiction (*see Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *see also Matter of Kokotas*, Tax Appeals Tribunal, December 11, 2015 [a warrant does not provide hearing rights in the Division of Tax Appeals]). Accordingly, we lack authority to consider the validity of the assessment referenced in the warrant.

\$32,000,000.00 during that year and that such funds were attributable to the sale of a Monet painting. The record also contains evidence indicating that petitioner was a New York City resident in 2010. While such evidence, by itself, may not be conclusive, it is clearly sufficient, independent of both the conviction and the restitution order, to establish a rational basis for the asserted tax deficiency (*see e.g. Matter of Mayo*, Tax Appeals Tribunal, March 9, 2017) [a notice of deficiency requires only a rational basis].⁷

We thus conclude that the subject notice of deficiency was not rendered invalid by the fact that the asserted fraud penalties are not based on either a proposed or existing assessment of tax.

Having determined that the notice of deficiency was properly issued, we must also reject petitioner's contention that the amount of tax owed by petitioner for 2010 is not at issue in the present matter. While the deficiency is not proposed as an assessment in the notice, the amount of the tax deficiency determines the amount of the fraud penalties (*see* Tax Law § 685 [e] [1]). Accordingly, the correct amount of tax owed by petitioner for 2010 is an element of the fraud penalties asserted in the notice. Furthermore, substantial understatement of tax is well-established as an indicia of fraud (*see e.g. Matter of Jay's Distributors, Inc.*, Tax Appeals Tribunal, April 15, 2015).

Petitioner's exception does not contest the Administrative Law Judge's conclusion that petitioner had the burden to prove error in the deficiency of tax supporting the proposed fraud penalty assessment and that petitioner, even if she were not collaterally estopped from doing so,

⁷ In support of her argument that her criminal conviction did not determine her tax liability, petitioner notes that Mr. Welch testified at the criminal trial that he "would need additional information" to "make a determination" of petitioner's 2010 tax liability. Mr. Welch was not asked, however, whether the evidence that he considered in making his Scenario 1 calculations would be sufficient to issue a notice of deficiency. Thus, we deem the quoted testimony to be of little significance herein.

produced insufficient evidence to refute the deficiency. Further, petitioner's exception does not contest the Administrative Law Judge's conclusion that her criminal conviction estops her from challenging the civil fraud penalties asserted herein. Accordingly, we do not address these issues.

Finally, we note that, while petitioner raised the issue of whether she was collaterally estopped from challenging the validity of the notice of deficiency, the Administrative Law Judge's determination does not find that petitioner was so estopped. In any event, this decision has considered this challenge by petitioner. Hence, this issue is moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Vilma Bautista is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Vilma Bautista is denied; and
4. The notice of deficiency, dated January 23, 2014, is sustained.

DATED: Albany, New York
March 13, 2017

/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