STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **ROBERT CASSANDRO** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2007, 2008 and 2009.	DECISION DTA NO. 829490

Petitioner, Robert Cassandro, filed an exception to the determination of the Administrative Law Judge issued on July 22, 2021. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Trajbar, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether the Division of Taxation properly determined petitioner's tax liability for the years 2007, 2008 and 2009.

II. Whether petitioner is subject to penalties for fraud.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except we have modified findings of fact 9, 10, 23 and 38 for clarity and 28, 30 and 44 to more clearly reflect the record. The findings of fact, so modified, are set forth below.

1. In 2011, the New York County District Attorney's Office (NYDA's Office) commenced an investigation of petitioner, Robert Cassandro, related to his solicitation of multiple individuals, including family and others, with whom he had built relationships of trust over many years,[1] to lend money for particular real estate projects, representing to the lenders that their loans would be secured, among other promises. The real estate projects consisted of purchases of residential real estate, improvements to those properties (either through the renovation of existing homes or the construction of new homes), and the ultimate sales of the same.

2. Petitioner and Ross Abelow, Esq., were partners in Abelow and Cassandro, LLP,[2] a law firm that maintained two office locations: an office in New York, New York, and a suite of offices located in Jericho, New York. For the most part, Mr. Abelow used the New York City office to conduct primarily a matrimonial and family law practice, as well as some general commercial litigation work, while petitioner predominately used the Jericho, New York, office suite to conduct both his law practice and his real estate projects.

3. During the period June 1, 2002 through March 7, 2012, one of petitioner's entities, A-One Property Management, Inc. (A-One Property Management), leased the Jericho, New York, office suite from Greater Jericho Corp., an unrelated third party. Although the record does not include a copy of the lease for the Jericho, New York, office suite, other evidence in the record indicates that petitioner signed the lease on behalf of A-One Property Management. The Jericho, New York, office suite had, among other things, a reception area, individual offices, and a

[1] When the NYDA's Office began its investigation, petitioner was an attorney licensed to practice in New York State, who focused his practice on real estate and corporate transactional work. Petitioner was disbarred effective May 13, 2014 (***see Matter of Cassandro***, 125 AD3d 79 [2nd Dept 2014]).

[2] Documents in the record also refer to the law firm as Abelow & Cassandro, LLP. Sometime after petitioner filed for Chapter 7 bankruptcy in December 2010, the Abelow and Cassandro partnership ended.

conference room. In addition to the Abelow and Cassandro law firm, the occupants of the office suite included, among others, Michael Norman, CPA (and staff), and Trio, a corporation owned by petitioner's father and two uncles.

4. In conjunction with its investigation of petitioner, the NYDA's Office executed a search warrant at the offices of Abelow and Cassandro, Jericho, New York, on February 16, 2012. The NYDA's Office team that conducted the search consisted of a supervising investigator, computer forensic personnel, accounting personnel, and detectives. Hundreds of documents including ledger business records, transactional data of reports, bank records, financial documents for real estate ventures, and promissory notes were seized.[3] In addition, seven computers, one computer server, two smart phones and a regular cellphone were seized.

5. In 2012, the Grand Jury of New York County returned a two-count indictment against petitioner, to wit: (i) grand larceny in the first degree (Penal Law § 155.42), a class B felony; and (ii) scheme to defraud in the first degree (Penal Law § 190.65 [1] [b]), a class E felony.

With respect to the grand larceny charge, petitioner was accused of stealing property valued in excess of one million dollars from Jerry Perelmutter and Jamie Sadock, his in-laws, in New York County during the period June 2002 through May 2007. With respect to the scheme to defraud charge, petitioner was accused of engaging in a scheme consisting of a systematic ongoing course of conduct with the intent to defraud more than one person and to obtain property from more than one person by false and fraudulent pretenses, representations and promises, and obtained property with a value in excess of one thousand dollars from one or more such persons, in New York County and elsewhere during the period from June 11, 2002 to March 7, 2012.

[3] After the search warrant was executed, petitioner's defense attorneys reviewed all seized documents to determine which documents were attorney-client privileged documents, those privileged documents were segregated and not reviewed by the NYDA's Office as part of its criminal investigation of petitioner.

6. On August 9, 2013, Sarah M. Sacks, an Assistant District Attorney (ADA) in the Major Economic Crimes Bureau of the NYDA's Office sent a letter to Division of Taxation (Division) Assistant Deputy Commissioner Bruce K. Kato concerning the NYDA's Office investigation of petitioner.[4] ADA Sacks, in her letter, indicated that the NYDA's Office investigation showed that from June 2002 through March 2012, petitioner engaged in a fraudulent Ponzi scheme by making false promises to lenders and soliciting multiple individuals to lend money for particular real estate projects. She indicated that documents the NYDA's Office reviewed in its investigation suggested that petitioner had not properly accounted for the money he took from victims through his alter-ego entities and that he under represented his profits, and likely his income, during the period June 2002 through March 2012. ADA Sacks further indicated that the NYDA's Office had reason to believe that petitioner committed the crimes of grand larceny in the first degree and scheme to defraud in the first degree, with which he was already charged, as well as tax-related crimes under New York State Tax Law. She requested the Division to review its files, and if it reached a similar conclusion, to refer the matter back to the NYDA's Office for further investigation and prosecution of tax-related offenses.

7. In response to ADA Sacks's letter, the Division's Criminal Investigations Division (CID), Metro NYC Regional Office, assigned Mukaila Rabiu, Forensic Tax Auditor II, to review petitioner's case[5] for potential Tax Law violations. In his audit report's introductory summary, Mr. Rabiu noted, among other things, that the NYDA's Office investigation to date showed that

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[4] Petitioner's name and 20 named entities, consisting of eight named corporations, 10 named limited liability companies and 2 named limited liability partnerships (petitioner's law firm) were referenced at the top of ADA Sacks's letter.

[5] CID assigned case #20130452 to petitioner's case.

petitioner "allegedly diverted over $4.8 million from clients' accounts through cash withdrawals, wire transfers or cashier's checks improperly drawn against these clients' funds deposited into his IOLA accounts." Mr. Rabiu, in his audit report introductory summary, also noted that the NYDA's Office determined that petitioner "allegedly diverted $1,390,694.43 in 2007, $1,984,036.82 in 2008 and $448,171.00 in 2009." According to the audit report, Mr. Rabiu's review of the Division's records indicated that petitioner and his spouse, Tracy Cassandro, filed an extension of time to file for the year 2007 but did not file a return for such year, and filed joint personal income tax returns (forms IT-201) for the years 2008 and 2009.[6] The audit report indicates that Mr. Rabiu analyzed the bank records provided by the NYDA's Office and petitioner and Ms. Cassandro's income tax returns for the years 2007, 2008 and 2009. Based upon his examination of the tax returns, Mr. Rabiu found that petitioner's source of income was "mostly from his pensions and flow-thru income from his ownership of S-Corporations, LLCs and LLPs." Mr. Rabiu also found that petitioner "also reported capital gain and NYS maximum allowable capital loss from these entities" but did not report on his income tax returns "any of the funds he allegedly diverted from these entities." Assuming the diverted funds were considered unreported income for petitioner, Mr. Rabiu calculated additional tax due for each of the years 2007 through 2009.[7] Based upon his findings that petitioner might have filed false income tax returns for the years 2008 and 2009 and failed to file an income tax return for the year 2007, Mr. Rabiu recommended that petitioner's case be referred to the NYDA's Office for further investigation.

[6] Ms. Cassandro was part of Mr. Rabiu's investigation because she and petitioner filed income tax returns as married filing jointly for the years 2008 and 2009.

[7] Mr. Rabiu estimated a total tax liability in the amount of $263,614.00 for the years 2007 through 2009.

8. By letter dated November 4, 2013, CID Deputy Commissioner Risa S. Sugarman responded to ADA Sacks's August 9, 2013 letter, referring petitioner's case to the NYDA's Office and requesting that the NYDA's Office continue its investigation and, if appropriate, prosecute petitioner for offenses related to violations of the New York State Tax Law and for any other tax offenses that the NYDA's Office investigation revealed. Mr. Rabiu's audit report dated November 4, 2013 was attached to CID Deputy Commissioner Sugarman's referral letter. Both CID Deputy Commissioner Sugarman's letter and Mr. Rabiu's audit report referenced 19 of the 20 named entities referenced in ADA Sacks's letter.[8]

9. Subsequently, the Division's CID continued its criminal investigation of petitioner. Between November 21, 2013 and January 13, 2014, Mr. Rabiu spent a total of 29.5 hours analyzing additional information and bank records received from the NYDA's Office.

10. Petitioner's criminal trial was held in the Supreme Court of the State of New York, County of New York, before the Honorable Gregory Carro. Petitioner was tried on the charges of grand larceny in the first degree and scheme to defraud in the first degree. On May 13, 2014, petitioner was convicted of the charge of scheme to defraud in the first degree, a class E felony. Petitioner was acquitted of the charge of grand larceny in the first degree.

11. On July 29, 2014, Judge Carro sentenced petitioner to an indeterminate term of 1⅓ to 4 years of imprisonment and directed him to pay restitution in the amount of $5,870,169.00, plus a 5% fee to Safe Horizon.

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[8] An employer identification number (EIN) was listed next to 18 of the named entities, an EIN of "unknown" was listed next to 1 corporate entity. One of the 18 named entities referenced in the Sugarman letter and the Rabiu audit report was Abelow and Cassandro, LLP. The other limited liability partnership, Abelow & Cassandro, LLP, originally referenced in ADA Sacks's letter, was not referenced in either the Sugarman letter or the Rabiu audit report.

12. Based upon his conviction of a felony, petitioner was disbarred effective May 13, 2014 (***see*** footnote 1).

13. Subsequently, petitioner appealed his conviction. On March 30, 2017, the Appellate Division unanimously affirmed petitioner's conviction of scheme to defraud in the first degree, and restitution in the amount of $5,870,168.00[9] (***see People v Cassandro***, 148 AD3d 652 [1st Dept 2017]).

14. Between October 28, 2014 and February 20, 2015, Mr. Rabiu continued his criminal investigation of petitioner. According to his auditor work time track log, Mr. Rabiu spent a total of 76.5 hours reviewing and examining the criminal trial documents and constructing and reconstructing petitioner's income based upon the trial documents.

15. At the hearing, the Division presented the testimony of Mr. Rabiu,[10] who was the auditor assigned to both the criminal and civil aspects of petitioner's case.

16. In his investigation of petitioner's real estate scheme, the auditor looked at an unspecified number of petitioner's flow-through entities. However, he focused his review and independent analysis on the State Bank of Long Island bank accounts for the following four entities that petitioner owned and/or controlled:

> (a) A-One Capital LLC (A-One Capital) – bank statements covering the period January 1, 2007 through July 31, 2008;
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> (b) Abelow and Cassandro LLP (Abelow & Cassandro) – operating account bank statements covering the period January 1, 2007 through December 31, 2009;
>
> (c) 612 Union Ave LLC (612 Union Ave.) – bank statements covering the period January 1, 2007 through July 2, 2009; and

[9] It is unclear why the restitution amount affirmed is $1.00 less than the restitution amount directed by Judge Carro.

[10] At the time of the hearing, Mr. Rabiu was a Forensic Tax Auditor III.

(d) A-One Property Management – bank statements covering the period January 1, 2007 through December 31, 2009.

The auditor also reviewed the analysis that the NYDA's Office did of those four entities' bank records. He concluded that the total dollar figures presented by the NYDA's Office matched the total dollar figures he found in his independent analysis of those entities' bank statements. Mr. Rabiu testified that as part of his analysis of the four entities' bank records, he accounted for monetary transfers between accounts. The auditor also looked in the Division's internal systems to verify whether each of the four entities filed tax returns for the years 2007 through 2009. His review of the Division's systems indicated that A-One Capital filed a tax return for the year 2008; Abelow & Cassandro filed tax returns for the years 2008 and 2009; 612 Union Ave filed tax returns for the years 2008 and 2009; and A-One Property Management filed tax returns for the years 2008 and 2009. As part of his computational analysis of the bank records, the auditor testified that he allowed all expenses claimed by those entities on their tax returns.

17. Based upon his review of the criminal trial transcript, the auditor learned that petitioner was convicted of scheme to defraud in the first degree and ordered to pay restitution in the amount of $5,870,169.00. According to the auditor, he checked the Division's internal system to see if petitioner had filed amended income tax returns for the years 2008 and 2009 after his conviction. The auditor found that petitioner had not filed amended returns for either of those years. The auditor testified that his check of the Division's internal system indicated that petitioner had not filed an income tax return for the year 2007. For the years 2007 through 2009, the auditor "came to the conclusion that the income that was supposed to be reported, that was not reported, needed to be reported."

18. The auditor used the numbers given to him by the NYDA's Office in his calculations of additional tax due for the years 2007 through 2009. Specifically, the auditor used unreported

income in the amounts of $1,390,694.00, $1,984,037.00, and $448,171.00, respectively, for the years 2007, 2008, and 2009. The auditor testified that he used the numbers given him by the NYDA's Office:

> "[b]ecause the district attorney's office were the ones who made the case. They were the ones who were able to prove their case as to what Mr. Cassandro did so that's why I relied on their number [sic], in addition to everything I did after I got information from them."

19. Using the filing status of married filing jointly and allowing three dependent exemptions of $1,000.00 for each dependent, the auditor computed additional tax due for the years 2007 through 2009 as follows:

	2007	2008	2009
NYS AGI per return	$ 0.00	$39,124.00	$25,999.00
Adjustments:			
"Unreported Income per DA"	$1,390,694.00	$1,984,037.00	$448,171.00
Adjusted NYS AGI	1,390,694.00	2,023,161.00	474,170.00
Standard/Itemized deduction	(15,000.00)	(57,230.00)	(52,852.00)
Exemptions allowed:	(3,000.00)	(3,000.00)	(3,000.00)
NYS taxable income	$1,372,694.00	$1,962,931.00	$418,318.00
NYS Liability before credits	$94,030.00	$134,461.00	$32,838.00
NYS Credits:			
NYS Liability less credits	$94,030.00	$134,461.00	$32,838.00
NYS tax prev. paid			
Additional NYS tax due	**$94,030.00**	**$134,461.00**	**$32,838.00**
Additional NYS tax due	**$94,030.00**	**$134,461.00**	**$32,838.00**
Refund Received		**756.00**	**1,060.00**
Total Due	**$94,030.00**	**$135,217.00**	**$33,898.00**
Grand Total Due			**$263,145.00**

20. In June 2018, the file of Robert Cassandro and Tracy Cassandro was forwarded to the Metro-NYC Regional Office Income/Franchise Field Audit Bureau for a general verification

limited scope field audit for the period January 1, 2007 through December 31, 2009. The auditor found that

> "Robert J. Cassandro was tried and found guilty of 1 count of Scheme to Defraud; PL 190.65; E Felony. He was sentenced to spend 16 months to 4 years in prison. Although Robert J. Cassandro was not found guilty of any tax crimes, he was ordered by the court to pay restitution to his victims. Since Robert J. Cassandro did not report the fraudulently obtained and diverted funds on filed NYS personal income tax returns, the funds were considered to be unreported income. He was therefore assessed appropriate NYS tax liability together with applicable Fraud penalties."

21. On June 8, 2018, Mr. Rabiu issued a seven-page consent to field audit adjustment to petitioner that sets forth the following amounts of additional tax, penalties and interest due for the years 2007 through 2009:

Summary of Taxes

Period Ended	Jurisdiction	Additional Tax (Tax Reduction)	Penalties	Interest	Total
12/31/2007	NYS	$94,030.00	$100,039.00	$106,050.00	$300,119.00
12/31/2008	NYS	$135,217.00	$134,056.00	$134,403.00	$403,676.00
12/31/2009	NYS	$33,898.00	$65,796.00	$28,811.00	$128,505.00
	Total	$263,145.00	$299,891.00	$269,264.00	$832,300.00

Total	$832,300.00
Payments	$0.00
Amount Due	**$832,300.00**

For the year 2007, penalties in the total amount of $100,039.00 were imposed as follows: penalty pursuant to Tax Law § 685 (e) (1) (fraud at the rate of 50% of the deficiency of tax) in the amount of $47,015.00, and penalty pursuant to Tax Law § 685 (e) (2) (rate of 50% of the interest) in the amount of $53,024.00. For the year 2008, penalties in the total amount of $134,056.00 were imposed as follows: penalty pursuant to Tax Law § 685 (e) (1) (fraud at the rate of 50% of the deficiency of tax) in the amount of $67,230.00, and penalty pursuant to Tax Law § 685 (e) (2) (rate of 50% of the interest) in the amount of $66,826.00. For the year 2009, penalties in the amount of $65,796.00 were imposed pursuant to Tax Law § 685 (e) (1) (if any

part of a deficiency is due to fraud, there shall be added to the tax an amount equal to two times the deficiency).

22. The consent to field audit adjustment included a summary of taxes page and separate detail pages for each of the years 2007 through 2009. Those detail pages included the auditor's computation of additional tax due as outlined above in finding of fact 19, and his computation of penalties and interest for the years 2007 through 2009. The "Remarks" section of each year's detail pages contained the following explanation: "You were tried and found guilty of Scheme to Defraud your clients. Restitution of the funds to your clients was ordered by the Court. This restitution is considered and treated as unreported income."

23. On September 28, 2018, the Division issued a notice of deficiency, notice number L-048814301, to petitioner and Tracy Cassandro, asserting tax due in the amount of $263,145.00, interest in the amount of $279,311.94 and penalties in the amount of $304,323.22 for the years 2007 through 2009.

24. Petitioner protested the notice of deficiency by filing a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). After a conciliation conference held on January 17, 2019, the BCMS conciliation conferee issued a conciliation order, CMS. No. 000304714, dated June 21, 2019, denying the request and sustaining the statutory notice.

25. Subsequently, petitioner filed a petition with the Division of Tax Appeals. In his petition, petitioner asserted that (i) the Division's assertion that the amount due in an unrelated restitution order is unreported income is incorrect and without basis; (ii) the Division's "determination of certain deposits and payments is not accurate when determining Petitioner's taxable income" for the years 2007 through 2009; (iii) penalties and interest should not be added

to any amount of tax determined to be due; and (iv) the audit and assessment is barred by the statute of limitations.

26. At the hearing, the auditor testified regarding his computations of additional tax due for the years 2007 through 2009. He explained that in making his computations of additional tax due for the years at issue, he allowed all expenses and deductions that petitioner claimed for those years. According to the auditor, he used the standard deduction of $15,000.00 for the year 2007 because he found no record of a filing for that year. With respect to the years 2008 and 2009, the auditor noted that petitioner's claimed itemized deductions totaled $114,460.00 and $70,470.00, respectively, in each of those years. However, he explained that the itemized deductions used in his computations for the years 2008 and 2009 were reduced because of the phase out of itemized deductions based upon the inclusion of the unreported income in petitioner's adjusted gross income for those years.

27. After the petition was filed, the auditor again looked in the Division's internal systems and found that petitioner and Ms. Cassandro had in fact filed an income tax return for the year 2007 on October 14, 2008. On their 2007 tax return, petitioner and Ms. Cassandro claimed itemized deductions in the amount of $142,902.00. At the hearing, the auditor stated that an adjustment would be made to the computation of additional tax due for the year 2007 to reflect the filing of an income tax return for such year.

28. Post-hearing, the Division prepared and sent a revised seven-page consent to field audit adjustment to petitioner. A copy of this consent to field audit adjustment was appended to the Division's brief. The Division's revised adjustment of additional tax, penalties and interest due for the years 2007 through 2009 is summarized as follows:

Summary of Taxes

Period Ended	Jurisdiction	Additional Tax (Tax Reduction)	Penalties	Interest	Total
12/31/2007	NYS	$89,230.00	$94,932.00	$100,636.00	$284,798.00
12/31/2008	NYS	$135,217.00	$134,056.00	$134,403.00	$403,676.00
12/31/2009	NYS	$33,898.00	$65,796.00	$28,811.00	$128,505.00
	Total	$263,145.00	$299,891.00	$269,264.00	$816,979.00

Total	$816,979.00
Payments	$0.00
Amount Due	**$816,979.00**

This consent to field audit adjustment includes, among other things, the detail pages for the year 2007 that sets forth the Division's revised computation of additional tax, interest and penalties due for such year. In the detail pages for the year 2007, the Division computed the additional tax due in the following manner:

NYS adjusted gross income per audit	$1,390,694.00
Itemized deductions per audit	($71,451.00)
Dependent exemptions	($3,000.00)
NYS taxable income	$1,316,243.00
Total NYS income tax due per audit	$90,163.00
Total Payments Net	($933.00)
Additional NYS tax due	$89,230.00

The Tax Law § 685 (e) (1) penalty was computed in the amount of $44,615.00, and the Tax Law § 685 (e) (2) penalty was computed in the amount of $50,317.00.

29. At the hearing, petitioner's sole witness was himself. According to petitioner, during the years 2007 through 2009, he was involved in winding down a business of purchasing residential real estate and then either renovating existing homes or building new ones. He testified that this business was greatly affected by the downturn in the real estate market and the economy during the years 2007 through 2009. Petitioner further testified that the recession had a major impact on the real estate industry causing the value of the properties with which he was involved to plummet and as a result, his income was greatly reduced. Petitioner filed a voluntary

petition for Chapter 7 bankruptcy on December 6, 2010. He testified that the Division was named as a creditor and was aware of the bankruptcy filing.

30. At the hearing, petitioner submitted copies of the bankruptcy petition, the claims register (printed on February 22, 2012) and the discharge dated June 18, 2015. A review of the bankruptcy petition's schedule B – personal property, indicates that petitioner owned varying percentage ownership interests in 16 named entities, the majority of which were "defunct" entities through which petitioner conducted his real estate business. The bankruptcy petition's schedule F – creditors holding unsecured nonpriority claims (schedule F) included a total of 31 named creditors whose claims totaled $10,494,866.85. Of those named creditors, 16 were identified in schedule F as either having a possible claim for a loan or petitioner's personal guarantee related to one or more of his entities. Claim amounts for those 16 creditors totaled $9,990,972.60. Although the Division was not listed in either schedule D – creditors holding secure claims or schedule F of the bankruptcy petition, the Division's Bankruptcy Section filed a claim in the amount of $203.27 on February 11, 2011, which was entered in petitioner's bankruptcy claims register on the same date.[11]

31. Petitioner testified that the criminal trial was very complex. He further testified that it involved family members and it was damaging to everyone involved. He stated that many people testified in the criminal matter. Petitioner claimed the majority of the transactions discussed in the criminal trial occurred prior to the 2007 through 2009 audit period. He requested that the Administrative Law Judge review the entire criminal trial transcript and "give

[11] The claims register describes the Division's claim as "Pre Petition Proof of Claim." No further information is provided in the claims register regarding the Division's claim.

full weight to defendant's cross-examination of the DA's witnesses as well as the trial testimony of the defendant and defendant's witnesses."

32. Based upon his review of the Division's audit file, petitioner, at the hearing, claimed that the auditor used the annual deposits made into the four entities' bank accounts to calculate the assessment at issue. In support of his position that the auditor failed to account for transfers between entities, and loans to entities in his calculations regarding the annual deposits for the four entities, petitioner submitted into evidence 27 pages of spreadsheets that allegedly accounted for all transfers between each entity and all loans coming into the four entities. In addition, petitioner submitted the following documents into the record:

(a) copies of petitioner's Abelow & Cassandro attorney escrow account (IOLA) bank statements for the period 2007 through 2009;[12]

(b) copies of A-One Capital bank statements for the period 2007 through 2008;

(c) copies of Abelow & Cassandro operating account bank statements for the period 2007 through 2009;

(d) copies of A-One Property Management bank statements for the period 2007 through 2009; and

(e) copies of 612 Union Ave. bank statements for the period 2007 through 2009.

33. According to petitioner, the spreadsheets "were originally made during the criminal trial and transactions were kind of looped together." However, "both bank statements will have corresponding transactions." Because A-One Property Management received checkline loans from State Bank of Long Island during the years 2007 through 2009, a separate spreadsheet was created to distinguish those loans from loans that A-One Property Management received from other sources during those years.

[12] Petitioner did not submit any "additional documentation for that period because of the potential of violating somebody's attorney-client rights."

34. The first spreadsheet page summarizes the amounts of incoming transfers and loan proceeds that petitioner alleges the auditor incorrectly included in the year-end deposits for each of the four entities. These amounts that should be excluded from the auditor's calculation are summarized from the spreadsheet, in part, as follows:

A-One Capital

2007 - incoming transfers of $29,266.50 and loan proceeds received of $1,162,000.00;

2008 - incoming transfers of $54,500.00 and loan proceeds received of $591,000.00.

Abelow & Cassandro operating account

2007 - incoming transfers of $392,250.00;

2008 - incoming transfers of $163,150.00 and loan proceeds received of $365,000.00; and

2009 - incoming transfers of $49,375.00 and loan proceeds received of $247,500.00.

612 Union Ave.

2007 - incoming transfers of $16,350.00 and loan proceeds received of $30,500.00;

2008 - incoming transfers of $129,950.00 and loan proceeds received of $575,000.00; and

2009 - incoming transfers of $81,050.00.

A-One Property Management

2007 - incoming transfers of $407,500.00 and loan proceeds received of $278,010.00;

2008 - incoming transfers of $334,618.00 and loan proceeds received of $97,917.00; and

2009 – incoming transfers of $111,865.00 and loan proceeds received of $91,039.00.

This spreadsheet summary indicates that for the year 2007, the "Tax Return Gross Receipts" of 612 Union Ave. should be increased by $99,113.04.

35. Petitioner testified that he was a 50% partner in Abelow & Cassandro. With respect to 612 Union Ave., petitioner submitted into the record his schedule K-1 (form 1065) that states

that he was the LLC member manager and his share of profit, loss and capital was 54%. Petitioner also submitted into the record the schedule K-1 for the other LLC member, Charles D'Aleo (Sr.), whose share of profit, loss and capital was reported as 46%. Petitioner testified that he did not know if 612 Union Ave. filed these schedules K-1 in 2009. He further testified that those schedules K-1 accurately reflected the ownership interest of 612 Union Ave. for the years 2007 through 2009.

36. With respect to the loans listed in the spreadsheets, petitioner testified that "[d]uring the audit period, as verified on the trial transcript and the bankruptcy documents," he and his related entities

> "received a significant amount of proceeds in the form of loans, not income. The loans were for various reasons, including to progress and complete open real estate projects, business overhead, and personal expenses. . . . The loans are from various sources. Some of the loan proceeds are being paid back and some were discharged in the bankruptcy. The majority of the funds were deposited into the Abelow & Cassandro attorney escrow account and then transferred into the related entities."

37. At the hearing, the Division submitted into evidence 5,599 pages of the criminal trial transcript for trial dates of March 6, 2014 through May 13, 2014. This voluminous transcript, contained in 10 binders, includes the testimony of all prosecution and defense witnesses, as well as defense and prosecution closing arguments. These 10 binders do not include any opening statements, witness indexes or lists of exhibits. The Division also submitted into the record, as a separate exhibit, the transcript of petitioner's sentence hearing held on July 29, 2014, where Judge Carro sentenced petitioner and ordered him to pay restitution.

38. During the two-month criminal trial, the prosecution presented 41 witnesses and the defense presented four witnesses, including petitioner and his father. All witnesses were subject to cross-examination. In lieu of some witnesses testifying, stipulated affidavits were placed into

the record at the criminal trial. Many exhibits were submitted into the record by both sides. Those exhibits included bank statements, e-mails, copies of deeds, and analyses of other exhibits consisting of, among others, many entities' bank statements and the spending schedules given to Mr. Perelmutter dated as of December 31, 2009.

39. A review of the criminal trial transcript indicates that the witnesses called by the prosecution included, among others, the lenders who had provided money for petitioner's real estate business, i.e. family members, friends, clients and private "hard money lenders," petitioner's former law partner, petitioner's accountant, and the NYDA's Office's forensic personnel who reviewed and analyzed bank statements for a number of entities and individuals and emails and other documents from computers seized during the February 16, 2012 search of Abelow and Cassandro's Jericho, New York, office suite (***see*** finding of fact 4). According to the testimony of the NYDA's Office forensic personnel, the analysis of the bank statements began with the year 2005 and the succeeding years because the retention period for earlier bank statements had already expired when the NYDA's Office investigation began.

40. At the criminal trial, petitioner's former law partner, Mr. Abelow, testified that he maintained his own attorney client escrow (IOLA) account into which all client receipts from his matrimonial and family law practice were deposited. Mr. Abelow stated that he kept all the profits earned from his practice and did not share them with petitioner. However, Mr. Abelow did pay his share of the expenses of Abelow & Cassandro, in the amounts that petitioner told him were due.

41. At the criminal trial, petitioner's accountant, Mr. Norman, testified that he did not do any bookkeeping for any of petitioner's various entities. Rather, he prepared tax returns for petitioner and his various entities, using information supplied by petitioner.

42. At the criminal trial, the prosecution presented the testimony of both Mr. Perelmutter and Ms. Sadock who made multiple loans to numerous real estate projects from 2002 through May 2007 (***see*** finding of fact 5). Sporadically, over the years, petitioner would provide Mr. Perelmutter with a list of the closed and open projects for which he and Ms. Sadock had provided loans.[13] Sometime in early 2010, petitioner provided Mr. Perelmutter with spending schedules, dated as of December 31, 2009, which listed real estate projects in East Moriches, Yaphank, East Patchogue, and Jamesport, as well as the bank accounts, dates, alleged payees and payment amounts related to expenditures for each of those projects. Mr. Perelmutter provided those schedules to the NYDA's Office as part of its investigation of petitioner. At the criminal trial, those spending schedules were received into evidence as People's Exhibit 148D.

43. At the criminal trial, the prosecution presented the testimony of a member of the NYDA's Office forensic staff who had reviewed the spending schedules given to Mr. Perelmutter, dated as of December 31, 2009, tried to match the items listed on those spending schedules with the listed entities' bank statements, and had prepared detailed schedules of his findings. Those findings, titled "Analysis of Peoples Exhibit 148D (Spending Schedules Given to Jerry Perelmutter Dated as of 12/31/09)" were received into evidence at the criminal trial as People's Exhibit 221.

44. A copy of People's Exhibit 221 is part of the Division's audit file. According to petitioner's criminal trial transcript, this schedule was prepared by a Principal Financial Investigator in the NYDA's Office's Forensic Accounting and Financial Investigations Bureau and reflects his analysis of deposits made into 11 accounts controlled by petitioner during the

[13] Petitioner represented to Mr. Perelmutter and Ms. Sadock that when houses were sold, their loan proceeds were rolled over into new real estate projects. Based upon petitioner's representations that they had earned interest on the previously provided loans, Mr. Perelmutter and Ms. Sadock continued to provide additional loans.

years at issue. The investigator testified that his analysis attempted to match deposits into the accounts with expenses paid from those accounts. To the extent that disbursements from the accounts could not be matched to a deposit for a specific expense outlined in the spending schedules petitioner gave Mr. Perelmutter, the investigator denoted such disbursements as having no match found. A review of this analysis indicates total matches were not found for the properties in: East Moriches in the amount of $1,531,353.00; Yaphank in the amount of $338,527.71; East Patchogue in the amount of $2,107,108.00; and Jamesport in the amount of $364,155.91. The portion of the schedule listing the expenditures for the East Moriches property identifies payments beginning on June 1, 2006 and ending on December 1, 2007, along with some undated payments. The Yaphank expenditures list identifies payments beginning December 4, 2006 and ending on November 1, 2009, along with some undated payments. The East Patchogue expenditures list identifies payments beginning on September 1, 2007 and ending on December 1, 2008, along with some undated payments. The Jamesport expenditures list identifies payments beginning on March 4, 2005 and ending on June 15, 2009, along with some undated payments. According to the exhibit, petitioner had specifically dated, but expenditure-unmatched deposits in each year at issue as follows:

	East Moriches	Yaphank	East Patchogue	Jamesport	**Total**
2007	$550,000.00	$230,000.00	$75,000.00	$0.00	$855,000.00
2008	$0.00	$78,000.00	$2,019,411.00	$50,000.00	$2,147,411.00
2009	$0.00	$1,750.00	$0.00	$74,690.00	$76,440.00

45. At the criminal trial, petitioner testified that over the period June 2000 through May 2011, he was involved in at least 25 real estate transactions. He testified that beginning in 2002, his goal was

> "to put together one group and then, using leverage, take that group's money and put it into as many projects as we could because I also felt that if we had multiple projects the diversity would help. If one project went bad there were two or three others where we could make up the difference."

Petitioner would send emails to clients, friends and family members telling them about a specific real estate project for which a builder needed a loan and was willing to pay 20% interest on the loaned money. Individuals, such as Mr. Perelmutter and Ms. Sadock, who decided to provide loans were directed by petitioner to either make their checks payable to Abelow & Cassandro or wire the money to his Abelow & Cassandro attorney escrow account. Sometimes, petitioner asked a client to invest money from the sale of a home or business into his real estate projects. Because petitioner had represented the client in that real estate or business transaction, the sale proceeds were already in his attorney escrow account.

46. Petitioner was asked on cross-examination by the prosecution whether he had a ledger for every transaction in his attorney escrow account. His response was "I would have had a piece of paper - - depending on the project or depending on the use – that's what my recollection was." He further testified that ledger or pieces of spreadsheet to document transactions in his escrow account "might have been by property . . . . at that period of time, I was trying to integrate some Quick Book stuff . . . . I had a whole mixture of things."

47. Testimony of witnesses at the criminal trial reveals that they were assured that the loans they provided would be secure in a first position, and some thought that they were being provided with a mortgage on the property. In most instances, one of petitioner's entities owned the land. For some real estate projects, petitioner secured additional loans from hard money lenders who required a mortgage that was recorded. According to prosecution witnesses who testified at the criminal trial, individual lenders were unaware that additional funds had been

secured from those hard money lenders who demanded the recordation of mortgages against some properties.

48. According to testimony at the criminal trial, petitioner received loans for his real estate projects from his Cassandro relations and at least one of his father's personal friends, which amounts petitioner's father repaid sometime after 2009.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by setting forth the burdens of proof allocated to each of the parties in this matter. While petitioner bears the burden of showing that the proposed assessment in the notice of deficiency is erroneous, the Division bears the burden of demonstrating fraud by a taxpayer in order to sustain the imposition of fraud penalties. The Administrative Law Judge noted that while the statute of limitations for assessment is generally three years from the filing of a return, such a limitations period does not apply to a false or fraudulent return. The Administrative Law Judge explained that establishment of fraud is shown by willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due.

The Administrative Law Judge then described how adjusted gross income is determined for federal purposes, which is the starting point for New York taxable income. The Administrative Law Judge noted that monies received through illegal means are includable in gross income. The Administrative Law Judge reviewed the facts related to petitioner's conviction and subsequent restitution order, and the cooperation between the Division and NYDA's office that led to the sharing of information that formed the basis for the notice of deficiency at issue. The Administrative Law Judge dismissed petitioner's argument that the notice of deficiency should be cancelled because the audit failed to account for petitioner's

timely filed 2007 income tax return, noting that the Division issued an adjusted proposed assessment for that year after discovering the return in its system.

The Administrative Law Judge next addressed the Division's argument that petitioner is collaterally estopped from challenging the Division's determination of additional income based on petitioner's conviction on a charge of a scheme to defraud. The Administrative Law Judge concluded that petitioner was correct that collateral estoppel does not apply in this matter because the issues determined in the criminal case were not identical to the issues in petitioner's protest of the notice of deficiency. However, the Administrative Law Judge found petitioner's argument that the Division incorrectly determined the amount of additional income to be without merit, as the Division relied on the NYDA's office analysis of spending schedules provided by petitioner to one of his victims, which the Division's auditor compared to bank deposits for the same period. Similarly, the Administrative Law Judge dismissed petitioner's argument that certain loans were included in the bank deposits analyzed by the Division, finding that petitioner had not provided evidence of inclusion of such loans.

The Administrative Law Judge then addressed the Division's imposition of fraud penalties. The Administrative Law Judge cited case law describing the elements of fraud for purposes of the Tax Law, noting that the Division must show unmistakable evidence of the elements of fraud in order to maintain its imposition of a fraud penalty. After considering several factors, including petitioner's understatement of taxes, his conviction on a scheme to defraud and the sentencing court's order of restitution, the Administrative Law Judge concluded that the Division correctly determined that the resulting deficiency was due to fraud on the part of petitioner.

The Administrative Law Judge next dismissed petitioner's arguments that the Division's assessment was barred by the statute of limitations, pointing out that there is no statute of limitations for assessment of a deficiency due to a false or fraudulent return filed with the intent to evade tax. The Administrative Law Judge then addressed petitioner's argument that his liability for 2007 was discharged in bankruptcy. Because the US Bankruptcy Code requires more than three years to have elapsed since the tax return generating the liability was due, including extensions, for any such liability to be discharged, and petitioner filed his New York personal income tax return in October 2008 and filed his bankruptcy petition in December 2010, petitioner's argument was found to be without merit.

Accordingly, the Administrative Law Judge denied the petition and sustained the notice of deficiency.

ARGUMENTS ON EXCEPTION

Petitioner argues on exception that the Administrative Law Judge did not accurately consider evidence he presented at the hearing regarding his income as reported in tax years 2007 through 2009. Furthermore, petitioner alleges that the Division failed to carry its burden of demonstrating that each element of fraud was present in this case, and thus improperly imposed fraud penalties for these tax years. Petitioner states that the Division's audit methodology was unreasonable and its determination lacked a rational basis. As a result of the Division's audit methodology employed in this case, petitioner claims that the amounts of tax, interest and penalties proposed by the Division in the notice of deficiency are incorrect. Petitioner maintains that his tax returns for 2007 through 2009 were accurately reported when filed. Petitioner asks that the determination of the Administrative Law Judge be reversed and that his petition be granted.

The Division contends that the Administrative Law Judge correctly determined that the Division's proposed assessment of additional tax and additions for the years at issue was properly based on the referral from the NYDA's Office, petitioner's conviction of a scheme to defraud pursuant to Penal Law § 190.65 (1) (b) and the auditor's independent review of bank records, tax returns and the trial transcript. The Division states that the Administrative Law Judge correctly determined that the Division had carried its burden of demonstrating that petitioner was liable for fraud penalties imposed pursuant to Tax Law § 685 (e), in that petitioner had willfully omitted on his personal income tax returns the ill-gotten gains he had received as a result of his misappropriation of funds for the years at issue. The Division argues that the Administrative Law Judge correctly determined that the elements of fraud for purposes of the fraud penalty statute could be proven by circumstantial evidence demonstrating petitioner's course of conduct and reasonable inferences therefrom. The Division asks that the determination of the Administrative Law Judge be affirmed and the notice of deficiency be sustained.

OPINION

It is well-settled that a determination of the Division contained in a notice of deficiency is entitled to a presumption of correctness and a petitioner bears the burden of demonstrating by clear and convincing evidence that the proposed assessment, or the method used to arrive at the assessment, is improper or erroneous (***Leogrande v Tax Appeals Trib.***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of Scarpulla v State Tax Commn.***, 120 AD2d 842, 843 [3d Dept 1986]; ***see also*** Tax Law § 689 [e]). The burden is not upon the Division to demonstrate the propriety of the deficiency (***Scarpulla***, at 843; ***see also Matter of Nicholls v State Tax Commn.***, 101 AD2d 950 [3d Dept 1984]). If there are any facts or reasonable

inferences from the facts to support the Division's determination, the assessment should be confirmed (***id.***; ***see also Matter of Levin v Gallman***, 42 NY2d 32, 34 [1977]).

Petitioner argues that the Administrative Law Judge did not accurately consider the evidence provided at the hearing that demonstrates that the assessment proposed in the notice of deficiency was erroneous. In support thereof, petitioner references the spreadsheet he prepared based on the bank statements for the four entities that the auditor examined (A-One Capital LLC, Abelow & Cassandro LLP, 612 Union Ave LLC and A-One Property Management Inc.), which petitioner claims shows that he accurately reported his income. He claims that amounts totaling $1,470,510.00 in 2007, $1,628,917.00 in 2008 and $338,539.00 in 2009 represented loan proceeds from persons not deemed by the court to be victims of his scheme to defraud and were ultimately discharged in bankruptcy, and thus do not constitute income to him for purposes of the Tax Law.

Pursuant to the Tax Law, a New York resident's adjusted gross income is determined by reference to such individual's federal adjusted gross income, subject to certain modifications (Tax Law § 612 [a]; 20 NYCRR 112.1). Any term used under article 22 of the Tax Law is given the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required (Tax Law § 607 [a]). Accordingly, we turn to the federal definition of income for purposes of determining whether the bank deposits represented unreported income or nontaxable loans for purposes of the Tax Law.

The Internal Revenue Code (IRC) provides that gross income means all income from "whatever source derived" (IRC [26 USC] § 61 [a]). This includes "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" (***Commissioner v Glenshaw Glass Co.***, 348 US 426, 431 [1955], ***rehearing denied*** 349 US 925 [1955]). Because loans are

accompanied by an obligation to repay, loan proceeds do not constitute income to the taxpayer (***Commissioner v Tufts***, 461 US 300, 307 [1983], ***rehearing denied*** 463 US 1215 [1983]; ***United States v Rochelle***, 384 F2d 748, 751 [5th Cir 1967], ***cert denied*** 390 US 946 [1968]). Whether an advance of funds constitutes a loan for federal tax purposes is a question of fact (***Welch v Commissioner***, 204 F3d 1228 [9th Cir 2000], ***affg*** TC Memo 1998-121; ***see also Minchem Intl., Inc. v Commissioner***, TC Memo 2015-56). In contrast to the nontaxability of loan proceeds, monies received through illegal means, such as fraud, may be included in the gross income of the recipient, even if accompanied by an obligation to repay such amounts to the rightful owner (***James v United States***, 366 US 213 [1961]; ***see also United States v Rochelle***, at 751–752 [holding that fraudulent loans are includable in gross income]; ***Pappas v Commissioner of Internal Revenue***, TC Memo 2002-127 [taxpayer received unreported embezzlement income by taking money, as purported investments or loans, from friends and associates, where funds were not invested and not repaid]).

As noted by the US Tax Court, an advance to a lawyer by a client or business associate may be a loan or taxable income (***Novolesky v Commissioner of Internal Revnue***, TC Memo 2020-68, at 7). Courts have used a variety of tests to guide the determination of whether particular types of advances should be treated as loans for federal tax purposes (***id.***). Several factors have been found to be relevant in assessing whether a transaction is a true loan, including 1) whether the promise to repay is evidenced by a note or other instrument; 2) whether interest was charged; 3) whether a fixed schedule for repayments was established; 4) whether collateral was given to secure payment; 5) whether repayments were made; 6) whether the borrower had a reasonable prospect of repaying the loan and whether the lender had sufficient funds to advance the loan; and 7) whether the parties conducted themselves as if the transaction were a loan

(***Welch***, at 1230). Although these factors are non-exclusive and no single factor is dispositive, these indicia of a bona fide loan form a basis for analysis of purported loans (***id.***).

Mindful that petitioner bears the burden of proof in showing that the Division's assertion of a deficiency was erroneous (***see*** Tax Law § 689 [e]), we find that petitioner has not met his burden of showing by clear and convincing evidence that the advances of funds at issue were not includable in gross income. In reaching this conclusion, we are informed by petitioner's conviction on a charge of a scheme to defraud, petitioner's own testimony at trial, facts developed during the course of the trial and the court's order of restitution totaling $5,870,169.00 for nine victims. It was neither arbitrary nor capricious for the Division to rely on these facts in determining that petitioner understated income during the years at issue, as it may issue a notice of deficiency for income realized as the fruits of criminal conduct and is not limited by an amount ordered as restitution (***see e.g. Matter of Miras***, Tax Appeals Tribunal, October 22, 1992; ***Matter of Defeo***, Tax Appeals Tribunal, April 22, 1999).

Petitioner claims that the Division's method of determining the amount of underreported income, i.e., the bank deposits method described by the Division's auditor at the hearing, was improper because the auditor did not take all the relevant facts into consideration, alleging that the auditor did not properly determine certain deposits in the accounts to be bona fide loan proceeds, and thus excludable from taxable income. However, bank deposits are prima facie evidence of income (***Tokarski v Commissioner***, 87 TC 74, 77 [1986]; ***Estate of Mason v Commissioner***, 64 TC 651, 656 [1975], ***affd*** 566 F2d 2 [6th Cir 1977]). The bank deposits audit method presumes that all money deposited in a bank account during a given period constitutes taxable income. In determining the amount of taxable income, the government must take into account any nontaxable source of which it has knowledge (***DiLeo v Commissioner***, 96 TC 858,

868 [1991], ***affd*** 959 F2d 16 [1992], ***cert denied*** 506 US 868 [1992]), but it is not required to show a likely source of the deposits (***Estate of Mason***, at 657). Gross income includes deposits to bank accounts where the taxpayer has dominion and control of the funds (***Glenshaw Glass Co.***, at 431; ***Manzoli v Commissioner***, TC Memo 1988-299, ***affd*** 904 F2d 101 [1st Cir 1990]). The use of money for personal purposes is an indication of dominion and control (***Woods v Commissioner***, TC Memo 1989-611, ***affd*** 929 F2d 702 [6th Cir 1991]). However, the taxpayer can rebut the presumption that funds are taxable by showing that he derived no benefit or gain or that he had mere dominion without control over such funds (***Brittingham v Commissioner***, 57 TC 91, 101 [1971], ***Kramer v Commissioner***, TC Memo 1996-513).

Petitioner has not shown that the amount of tax asserted in the notice of deficiency was erroneous or that the audit method employed at arriving at such amount was improper. As discussed above, a bank deposits audit is an established method for determining income (***see Estate of Mason***, at 656). In the spreadsheet petitioner offered at the hearing (Petitioner's exhibit 5), petitioner attempts to trace deposits that he claims were nontaxable loan proceeds, but that analysis is flawed in that it starts with the presumption that $3,437,966.00 of the deposits were proceeds from bona fide loans. Whether a transfer of funds is a bona fide loan is a question of fact (***Welch***; ***see also Minchem Intl., Inc.***). Keeping in mind the factors discussed above in determining whether a loan exists, we note the lack of any promissory notes containing details of the loan terms or any fixed schedule of payments for these loans in the record. Petitioner claims that some amounts of the loans were repaid, but the record contains no schedule of payments made. Although the trial transcript indicates that petitioner promised first priority liens to those advancing him funds, it also indicates that no such security interests were recorded. Petitioner relies mainly on the discharge of the loans in bankruptcy in arguing that such amounts are

nontaxable, but fails to clearly delineate the sources of the deposits as specific, verifiable bona fide loans in order for us to conclude that such deposits are excludable from gross income. Petitioner's own testimony that he utilized funds from later investors to repay others indicates that he exercised full control and dominion over the amounts he received. Ultimately, petitioner failed to meet his burden in showing by clear and convincing evidence that the Division improperly included loan proceeds in its determination of additional income for the years at issue.

Although petitioner bears the burden of demonstrating that a determination of a deficiency is erroneous, the Division bears the burden of establishing by clear and convincing evidence whether a taxpayer is guilty of fraud with intent to evade tax (Tax Law § 689 [e] [1]; ***see also Matter of Sener***, Tax Appeals Tribunal, May 5, 1988). For years starting in 2009, if any part of a deficiency is due to fraud, the penalty is equal to two times the amount of the deficiency (Tax Law § 685 [e]). For the prior years, the fraud penalty was equal to the sum of 50% of the deficiency and 50% of the interest imposed (***see*** Tax Law former § 685 [e] [1] and [2]).

Fraud, for purposes of the Tax Law, is shown by clear evidence of willful, knowledgeable, and intentional wrongful acts or omissions constituting false representation, resulting in deliberate underpayment of tax due (***Matter of Ellett***, Tax Appeals Tribunal, December 18, 2003; ***Matter of Sener***). This can be shown by circumstantial evidence demonstrating a taxpayer's course of conduct and reasonable inferences therefrom (***Matter of Revere***, Tax Appeals Tribunal, December 11, 2008; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989). While understatements of tax, standing alone, are not enough to prove fraudulent intent, the size and frequency of omissions leading to an understatement of tax are

factors to be considered (***Matter of Revere***, citing ***Foster v Commissioner of Internal Revenue***, 391 F2d 727 [4th Cir 1968]).

Proof of "willfulness" within the meaning of Tax Law § 685 (e) does not require proof of an evil or bad purpose, but rather an act is done willfully if done voluntarily and with the specific intent to do something the law forbids (***Matter of Fahy***, Tax Appeals Tribunal, April 5, 1990, citing ***United States v Malinowski***, 472 F2d 850, 853 [3d Cir 1973], ***cert denied*** 411 US 970 [1973]). Petitioner is correct that an understatement of tax alone does not rise to the level of fraud. However, considering the facts developed in the criminal trial, the fact of petitioner's conviction pursuant to Penal Law § 190.65 (1) (b) (engaging in a scheme constituting a systematic ongoing course of conduct with intent to defraud and obtaining property worth more than $1,000.00 thereby), the subsequent restitution order and the Division's own analysis showing unaccounted-for bank deposits in 2007, 2008 and 2009, we agree with the Administrative Law Judge that the record, taken as a whole, demonstrates clear evidence of petitioner's fraud with respect to the funds advanced to him as part of his real estate dealings. While it is necessary for the Division to demonstrate that some part of the deficiency is due to fraud for each of the years at issue, we find that its bank deposits analysis shows significant and on-going underreporting of income in each year (***see*** finding of fact 44). Petitioner, despite his assertions that the deposits at issue here represented bona fide loans and were not includable in gross income, has not clearly and convincingly rebutted evidence presented by the Division that he failed to report the unaccounted-for funds deposited into bank accounts under his control and dominion as income. As petitioner filed a New York personal income tax return for each year at issue, we conclude that his omission of this income from his returns was voluntary and knowledgeable, and therefore constituted false representations resulting in deliberate

underpayments of tax. We conclude that the Division properly imposed the fraud penalty pursuant to Tax Law § 689 (e) for 2007, 2008 and 2009.

Finally, although not raised by either party, we acknowledge that the determination and decision in this matter have not been issued in accordance with the time limits for an expedited hearing pursuant to Tax Law § 2008 (2) (b). The three-month period for issuance of this decision began on July 22, 2019, the date the petition in this matter was received. As this delay was not caused by either party, the relief provided by Tax Law § 2008 (2) (b), a default determination or decision, would be inappropriate (***see Matter of Yerry***, Tax Appeals Tribunal, August 10, 2017).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Cassandro is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Robert Cassandro is denied; and

4. The notice of deficiency, assessment number L-048814301, dated September 28, 2018, is modified pursuant to finding of fact 28 for tax year 2007, but is in all other respects sustained.

DATED: Albany, New York
December 16, 2021

/s/ Anthony Giardina
Anthony Giardina
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Cynthia M. Monaco
Cynthia M. Monaco
Commissioner