STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SURINDER AND ARUNA PAL	:	DETERMINATION DTA NO. 825976
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 2009, 2010 and 2011.	:	

Petitioners, Surinder and Aruna Pal, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 2009, 2010 and 2011.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in New York, New York, on December 16, 2014 at 10:30 A.M., with all briefs to be submitted by April 15, 2015, which date began the six-month period for the issuance of this determination. Petitioners appeared by Jacqueline S. Antonious, Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

ISSUE

Whether petitioners have established a basis for the abatement of penalties asserted by the Division of Taxation pursuant to Tax Law § 685(b) and (p).

FINDINGS OF FACT

1. On December 3, 2012, the Division of Taxation (Division) sent a letter to Upward Trading Westchester LP (Upward), a business owned by petitioners, informing the business that its partnership returns for the years 2009, 2010 and 2011 (audit period or years in issue) had been

selected for review. The Division requested copies of all documents that were used to calculate the income reported on the returns, including a description of the source and nature of the income.

2. On December 3, 2012, the Division sent a similar letter to Peace Medical Care, P.C. (Peace), seeking documentation used to calculate the income reported on Peace's New York S corporation franchise tax returns for the years in issue.

3. By letters dated January 29, 2013, the Division informed Upward and Peace that the documentation submitted in response to the earlier letters was not sufficient and that the income or loss claimed on either the partnership returns or S corporation franchise tax returns had been disallowed and that such adjustments might result in an adjustment to the personal income tax returns of the partners and shareholders. The Division advised Upward and Peace that they could submit additional documentation for review, but received none.

4. On April 24, 2013, the Division issued to petitioners three notices of deficiency for the years in issue, which set forth the following amounts due:

YEAR	TAX	INTEREST	PENALTY
2009	$23,709.68	$6,036.75	$6,574.82
2010	$17,481.65	$2,853.87	$4,049.18
2011	$13,308.62	$1,057.06	$2,524.82

5. Although neither party submitted the statement of proposed audit changes, referred to but never produced at hearing, the Division's witness explained that penalties were imposed pursuant to Tax Law § 685(b) and (p) for negligence and substantial understatement, respectively.

6. After a conference in the Bureau of Conciliation and Mediation Services (BCMS), the deficiencies were modified, such that the tax asserted for the years in issue was determined to be as follows:

YEAR	TAX
2009	$21,212.00
2010	$14,655.60
2011	$8,478.30

Interest and penalties were sustained by BCMS.

7. Petitioners, Surinder and Aruna Pal, were both physicians who worked in numerous medical facilities and hospitals during the period in issue. In addition to their wage income, Dr. Aruna Pal maintained a separate entity, Peace, in which she acted as a consultant in the treatment of psychiatric patients. Dr. Surinder Pal also maintained a separate entity, Upward, wherein he operated an investment or trading business. Each petitioner had an interest in both business entities.

8. For years prior to the audit period, petitioners had not been satisfied with their tax preparer because every year they owed additional tax totalling between $9,000.00 and $14,000.00. After consulting with friends, they were directed to an accountant whom they considered to be well qualified, Mr. John Cisneros. Petitioners were impressed with the professional clientele they saw in his waiting room, the amount of time they had to wait to see him and his luxurious office space located in the Wall Street area of New York City.

9. Petitioners were represented by Mr. Cisneros during the years in issue. On the returns filed for the years in issue, petitioners carried over capital losses from Upward and Peace to their federal personal income tax returns on schedule E. Then, petitioners took a percentage amortization of capital losses reported on the schedule E, in essence treating the capital investments reported on schedule D as assets on schedule E, and, after applying the amortization percentage to the asset values, reported the loss on line 17 of the federal personal income tax

return that, in turn, affected the New York State personal income tax liability. Coupled with their overwithholding of tax, this erroneous loss calculation resulted in petitioners receiving large refunds for each of the years in issue. This lone loss calculation, albeit egregious, was the basis for the additional tax determined to be due after the modifications made at conference, with which petitioners are in agreement.

10. Petitioners were curious about the tax strategy employed by Mr. Cisneros and raised their concerns with him, but no change in the strategy ensued. They were still concerned after meeting with him and researched the strategy at their local public library. However, petitioners' lack of tax knowledge prevented them from ascertaining a clear understanding of the tax strategy being employed in the preparation of their New York State personal income tax returns. Even with their continuing apprehensions and inability to understand the tax strategy, petitioners did not seek an opinion from either another tax professional or the Department of Taxation and Finance.

11. After receiving the notices of deficiency, petitioners filed for a BCMS conference and, with the assistance of legal counsel, produced in excess of 1,000 pages of documentation, providing the basis for an agreement on the correct amount of tax due for the years in issue.

STATEMENT OF THE PARTIES' POSITIONS

12. Petitioners argue that, while liable for the additional tax determined to be due after the BCMS conference, they should not be subject to penalties for negligence or substantial understatement of tax. They contend that they had little knowledge of the Tax Law and relied on the advice of their accountant, whose actions they questioned but in whose advice they chose to abide.

13. Petitioners note that when they learned that the Division had requested documentation, they produced voluminous records at the BCMS conference that justified modifications of the notices of deficiency for each of the years in issue.

14. Petitioners point to the fact that they deliberately overwithheld tax from their salaries, indicating what they say is evidence of a self-imposed tax payment plan. In addition, they contend that they could have taken more charitable deductions, but chose not to.

15. The Division contends that petitioners cannot escape liability by claiming ignorance of the law or reliance on their tax professional because the facts indicate that petitioners made no real attempt to resolve the reservations they said they had with regard to the returns that had been filed on their behalf for the years in issue, or to educate themselves with regard to the Tax Law applicable to their claimed losses. The Division believes that the educational level of petitioners, both physicians, militates against a finding that they did not have the intellectual ability to grasp the nature of what was contained in their returns to the degree claimed.

CONCLUSIONS OF LAW

A. A properly issued notice of deficiency is presumed to be correct and the taxpayer has the burden of demonstrating the incorrectness of such an assessment (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768 [1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of Kourakos v. Tully***, 92 AD2d 1051 [1983], ***appeal dismissed*** 59 NY2d 967, ***lv denied*** 60 NY2d 556 [1983], ***cert denied*** 464 US 1070 [1984]; ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759 [1980]). Tax Law § 689(e) provides that in any matter brought before the Division of Tax Appeals under Article 22 of the Tax Law, the burden of proof is upon the petitioner. Accordingly, it is necessary to ascertain whether petitioners have sustained their burden of proof in showing that they are entitled to abatement of the penalties asserted by the Division in the notices of deficiency.

B. The sole issue to be decided is whether petitioners are entitled to abatement of the penalties asserted by the Division under Tax Law § 685(b) and (p). Those sections provide, in pertinent part, as follows:

> "(b) Deficiency due to negligence. --
>
> (1) If any part of a deficiency is due to negligence or intentional disregard of this article, or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the deficiency.
>
> (2) There shall be added to the tax (in addition to the amount determined under paragraph one of this subsection) an amount equal to fifty percent of the interest payable . . . .
>
> * * *
>
> (p) Substantial understatement of liability. --
>
> (1) If there is a substantial understatement of income tax for any taxable year, there shall be added to the tax an amount equal to ten percent of the amount of any underpayment attributable to such understatement. For purposes of this subsection, there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the greater of ten percent of the tax required to be shown on the return for the taxable year, or two thousand dollars."

C. Petitioners do not dispute that they did not pay their proper tax liability for the years in issue or that the amounts they owe for each of the years in issue qualify as substantial understatements of their liability. The gravamen of their defense is that they were not aware of the reporting requirements and, although suspect of the professional advice they received, relied on their chosen tax professional, whom they believed to be competent.

The record does not support a finding that petitioners established reasonable cause for the abatement of penalty. They are both highly educated professionals who sought out new tax representation for the chief reason that they believed they were paying too much in income taxes

upon filing their returns, usually between $9,000.00 and $15,000.00, which was causing them stress.

Their new tax professional, John Cisneros, recommended that they overwithhold tax on their salaries to avoid having to pay taxes at the end of the year. In addition, he recommended that petitioners use a scheme to carry over losses from their business returns, both S corporation and partnership, to their personal returns. This was generally accomplished by carrying over capital losses from Upward and Peace to their federal personal income tax returns on schedule E. Then, petitioners took a percentage amortization of capital losses reported on the schedule E, in essence treating the capital investments reported on schedule D as assets on schedule E, and, after applying the amortization percentage to the asset values, reported the loss on line 17 of the federal personal income tax return. Ultimately, the resulting loss diminished the taxes due on their New York personal income tax returns. Petitioners now understand that this scheme was contrary to the provisions of the Tax Law and have agreed to pay the taxes that were avoided by their use of this scheme.

At the time Mr. Cisneros explained this tax saving "technique" to them, petitioners claimed they were not sure of its legality, but relied on his apparent expertise, which they measured by the wait time to see him, the types of people he had as clients and the size, elegance and location of his office space. However, during cross-examination, Dr. Aruna Pal stated that they were so suspect of Mr. Cisneros's scheme and the size of their refunds that they conducted research at the public library to try to determine if Mr. Cisneros was acting in their best interest. She stated, "I borrowed books and kept on asking what could be other ways to find out if someone is doing right thing or not right thing or something like that." Due to their lack of tax knowledge, their research proved fruitless. However, despite their continuing concerns, they did not seek out the advice of another

tax professional or the Department of Taxation and Finance, instead choosing to rely on Mr. Cisneros. Neither the case law nor regulations support finding reasonable cause under these circumstances.

D. In ***Matter of Rubin v. Tax Appeals Tribunal*** (29 AD3d 1089 [2006]), the Court addressed the standards for abating penalties imposed pursuant to Tax Law § 685(b) as follows:

> "[I]t was petitioner's burden to establish a reasonable cause to explain why the required payments were not made [citation omitted]. Other than an argument grounded in equity, she proffered no viable evidence to sustain this burden; 'claimed ignorance of the law and reliance on erroneous professional advice' is not sufficient [citation omitted]."

Like the petitioner in ***Rubin***, petitioners herein have not offered any evidence beyond pleading ignorance of the tax laws and a reliance on the erroneous advice of their tax professional, who they claim to have questioned repeatedly during the years in issue, but never seriously investigated, despite the immediate and large refunds they began receiving after retaining his services.

Reliance on the advice of counsel is insufficient to warrant setting aside the penalties. "Additionally, willfulness does not require an intent to deprive the government of its money but only something more than accidental nonpayment." (***Matter of Auerbach v. State Tax Commission***, 142 AD2d 390 [1988], citing ***Matter of F & W Oldsmobile v. Tax Commn. of the State of New York***, 106 AD2d 792 [1984].) Further, reliance on professional advice, in the absence of inquiry to ascertain the position of the Department of Taxation and Finance, does not constitute reasonable cause or provide a basis for disturbing the Division's imposition of penalties. (***Matter of CBS Corporation v. Tax Appeals Tribunal***, 56 AD3d 908 [2008], ***lv denied*** 12 NY3d 703 [2009].)

E. The regulation at 20 NYCRR 2392.1(g)(1), as applicable to the penalty asserted pursuant to Tax Law § 685(p), specifically addresses the reliance on professional advice as a basis for reasonable cause. It clearly states that reliance by a taxpayer on professional advice can be the basis for reasonable cause to abate penalty, but emphasizes that the *reliance must be reasonable and that the taxpayer have no knowledge of circumstances which should have put the taxpayer upon inquiry as to whether the facts were erroneous*. It further states that reliance on professional advice as a basis for reasonable cause will not be supported where the advice is unreasonable, such as when the advice is contrary to written guidance or published information applicable to the facts of the case. (20 NYCRR 2392.1[g][2][iv].)

Petitioners admit they were skeptical of and concerned about the advice they received from Mr. Cisneros, apparently due to the abrupt increase in their refunds, and took steps, albeit inadequate, to investigate. They tried to research the tax strategy at their local public library but found they were unable to comprehend the complexities of the Tax Law. Instead of seeking the assistance of an independent tax professional or the Department of Taxation and Finance, they chose to accept the advice and ignore their concerns. This cannot be said to be reasonable or that they had no knowledge of circumstances which should have put them upon inquiry as to whether the facts were erroneous. (20 NYCRR 2392.1[g][2][iv].)

F. Also, petitioners argued that Mr. Cisneros was allegedly under investigation by a district attorney for undisclosed acts that had a causal link with the advice he gave them. They insinuate that such an investigation somehow supports a finding that their reliance on his advice was therefore reasonable and created a basis for a finding of reasonable cause. However, without any evidence to bear out their allegations, no credence can be given to this argument.

G. The petition of Surinder and Aruna Pal is denied and the three notices of deficiency, dated April 24, 2013, as modified by the Conciliation Order, dated November 22, 2013, are sustained.

DATED: Albany, New York
October 1, 2015

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