STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HASMUKH G. & JAYSHRI H. PATEL	:	DETERMINATION DTA NO. 826585
for Redetermination of a Deficiency or for Refund of New York State and City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 2008.	:	

Petitioners, Hasmukh G. and Jayshri H. Patel,[1] filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 2008.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, in Albany, New York, on October 5, 2015, at 11:00 A.M., and continued to its conclusion in New York, New York, on January 13, 2016, at 10:30 A.M., with all briefs to be submitted by August 26, 2016, which date began the six-month period for the issuance of this determination. In accordance with Tax Law § 2010(3), for good cause shown, the due date was extended an additional three months upon notice to the parties. Petitioner appeared by Ramesh Sarva, CPA, PC (Ramesh Sarva, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Marvis A. Warren, Esq. and Jennifer L. Hink-Brennan, Esq., of counsel).

---

[1] The partnership income in question was attributed only to petitioner, Hasmukh G. Patel. Thus, reference will only be made to him as petitioner.

ISSUE

I. Whether the Division of Taxation properly assessed personal income tax against petioner on unreported partnership income for tax year 2008.

II. Whether penalties should be abated.

FINDINGS OF FACT

1. The Division of Taxation (Division) performed a limited scope audit of 29 Sai Hotel, LLC (29 Sai), a New York partnership, specifically focusing on the gain from the sale of business property located at 37-39 West 24th Street, New York, New York, on October 11, 2008, in which the partnership owned a 50% interest. The other 50% interest in the real property was owned by Sam Chang or an entity of which Mr. Chang was the owner.[2]

2. Mr. Chang was a business colleague of Dr. Ashok Dhabuwala, the general partner of 29 Sai. The two men often invested in ventures together and Dr. Dhabuwala would also solicit investors to collaborate with him. Petitioner was one of those investors, and Dr. Dhabuwala had approached petitioner over a 10 to 15 year period to invest in approximately 16 properties, which petitioner invested in, none of which are supported or memorialized by written partnership agreements. Often the investments involved like-kind exchanges of real property under Internal Revenue Code (IRC) § 1031, which allows the deferral of a taxable gain.

3. Petitioner received a check in the amount of $300,000.00, dated November 22, 2008, with the following memo notation: "For 24 St Property." The characterization of this check and its taxable status is at the center of this matter.

---

[2] The record contains redactions of other taxpayer names and identification numbers for the purpose of privacy.

4. 29 Sai filed Form IT-204, a partnership tax return, for the 2008 tax year in October 2009. It originally listed two partners that did not include petitioner, and did not report any gain from the sale of the 37-39 West 24th Street property. The CPA who prepared the return, Larry Reisman, took direction from the general partner, Dr. Dhabuwala, as to the reportable information as well as the partnership interests, since no written agreement existed.[3]

5. During the audit, the Division was told that 29 Sai had four additional partners, one of whom was petitioner. Mr. Reisman was requested to amend the partnership return. In order to do so, Mr. Reisman was provided with the property transaction details and the names of all of the partners for the amended return by Dr. Dhabuwala. He completed the amendment on or about January 8, 2013, after which time the new K-1s were provided to all of the partners, including petitioner. Mr. Reisman had been informed that the reason the sale was not originally brought to his attention, in order to be reported, was due to the fact that the property was originally targeted to be a part of an IRC § 1031 tax-deferred exchange among certain investors. Ultimately, the transaction was not structured in this manner.

6. After petitioner was identified as being a partner of 29 Sai, the Division performed a related audit of his personal income tax records for tax year 2008. The Division determined that no partnership income was reported by petitioner from this entity for tax year 2008 on his original personal income tax return. The form K-1 issued to petitioner as a result of the amended 2008 partnership return of 29 Sai bore the following information: petitioner was listed as a domestic partner with a 10% partnership interest; the partner's share of ordinary business loss

[3] Mr. Reisman was not the accountant of record for the partnership for the years 2005 through 2007. Another accountant prepared returns for those years and had passed away, and it appears that Mr. Reisman was unable to obtain complete prior partnership records.

was $975.00; the partner's share of net long-term capital gain was $546,960.00. Also on the K-1, petitioner's capital account analysis appeared as follows:

Beginning capital account	$0.00
Capital contributed during the year	
Current year increase (decrease)	$545,985.00
Withdrawals and distributions	($545,985.00)
Ending capital account	$0.00

7. During the audit, petitioner contacted the Division's auditor, Frank Cunha, on more than one occasion to discuss his partnership interest in 29 Sai. According to the auditor's records, petitioner spoke to Mr. Cunha on October 22, 2012 and November 29, 2012, indicating to the auditor that he was not a 10% partner in 29 Sai, but rather owned a 5% interest. Petitioner met with Mr. Cunha and provided a copy of the $300,000.00 check referencing the 24th Street property and copies of correspondence petitioner exchanged with Mr. Reisman, who was also petitioner's accountant at that time, requesting petitioner's interest be reported at 5% rather than 10%. On the basis of the information provided, the auditor agreed to assess petitioner on the partnership gain on the property sale only on the basis of a 5% interest.

8. At some point, petitioner became associated with a new representative, Ramesh Sarva, CPA, and Mr. Sarva communicated by email with Mr. Reisman in early 2013, as follows:

a) In an email dated January 12, 2013, from Mr. Reisman to Mr. Sarva, the message was:

> "i [sic] have worked this out with NYS auditors. Harry[4] needs to come with me to NYS dept of taxation, [sic] I have discussed this in detail with the auditors for NYS, [sic] Harry will only be making payment on his 5% interest, [sic] Respectfully yours,"

b) In an email response by Mr. Sarva to Mr. Reisman, he says:

[4] "Harry" is petitioner, Hasmukh G. Patel.

> "Larry
> NYS is very prompt in exchanging info with IRS [sic]. Whatever we get it should be uniform. Please obtain a written acknowledgement [sic] from Managing Partner in writing, so that Mr. Patel can sleep well. He has to know what the $300,000 truly represents. If his 5% share is $546 K then why he got [sic] $300K [sic]. *How can he not report any gain on this tax return* [sic]. Once he reports this late for 2008, who bears the cost of:
> (1) Late reporting penalties,
> (2) Late payment of tax penalties,
> (3) Negligence penalties since this amount far exceeds his total tax liability for the year,
> (4) and I am sure a ton of interest on all tax and penalties.
> I think an affirmation from the 'managing partner' will be appropriate. Regards" (emphasis supplied).

9. In July 2013, the auditor was informed that petitioner would be discussing his audit with his new CPA, Mr. Sarva. On October 16, 2013, petitioner and Mr. Sarva called the auditor expressing disagreement with the audit findings. Petitioner claimed he had no interest in 29 Sai and that the K-1 issued to him from the partnership was fraudulent. Petitioner maintained he made a mistake characterizing his ownership interest as 5%, and that the $300,000.00 he received must be a return of money loaned to Dr. Dhabuwala for other investments, and not taxable. Mr. Sarva explained that only Dr. Dhabuwala could identify what the check was for, and in the absence of his explanation, since Dr. Dhabuwala owes petitioner "a ton of money," he must be returning the loans.

10. Petitioner requested a certified copy of the 2008 partnership return for 29 Sai from the Internal Revenue Service (IRS) by filing Form 4506, dated March 20, 2015, in order to review the return and the K-1s associated with its original filing. In order to request the return, petitioner represented himself as a partner of 29 Sai. At the Division's request, petitioner submitted the completed Form 4506 into evidence. The signature of a taxpayer on Form 4506 represents that of a person authorized to obtain the tax return requested, i.e., a corporate officer,

partner, guardian, or tax matters partner, to name a few, of 29 Sai in this case. Petitioner's name appears on the signature line with his title "patner" [sic] below his signature.

11. During the hearing, it was disclosed by Mr. Reisman that when Dr. Dhabuwala learned of petitioner's position that he did not have an interest in the partnership, Dr. Dhabuwala asked for the return of the $300,000.00 check and indicated that he would assume the responsibility for the tax reporting of that amount on the property sale. Petitioner did not return the check, but instead continued to maintain that it was a return of capital loaned to Dr. Dhabuwala on other investments.

12. Petitioner subpoenaed Dr. Dhabuwala to the hearing in this matter. Mr. Sarva first indicated that Dr. Dhabuwala had vanished from the country, relocated to Singapore, and could not be found in order to be served. It was thereafter disclosed that a process server hired by Mr. Sarva was able to locate Dr. Dhabuwala, and he had been served, but failed to comply with the subpoena.

13. Petitioner claimed at the hearing that he is owed $1,600,000.00 from Dr. Dhabuwala. Petitioner along with a second person filed a lawsuit against Dr. Dhabuwala, Sam Chang and 11 or more corporate entities in the Supreme Court of the State of New York, New York County, on or about June 1, 2011. The lawsuit seeks compensatory damages, punitive damages, the establishment of property interests, and an accounting of all financial transactions for the alleged wrongs committed by the individual defendants, Dr. Dhabuwala and Sam Chang.

14. Petitioner introduced a check in the amount of $150,000.00 that he received from Dr. Dhabuwala, dated April 24, 2010, from an account for McSam West 28 LLC, with a memo notation "share sale 38 St." McSam West 28 LLC and the 38th Street property were not connected. Petitioner attempted to use this check to illustrate that Dr. Dhabuwala often paid him

the share he was due from an account that was not associated with the property for which it was paid. In the case of the 38th Street check, the notation referencing the investment made by petitioner was correct, but the amount was drawn on an account from an entity that had no relation to the property.

15. The Division did not further reduce petitioner's partnership interest from 5% to zero, since petitioner failed to substantiate the accuracy of his interest. The Division also concluded that it did not receive an adequate explanation for the $300,000.00 check received by petitioner. On the basis of the existence of the check, its date and notation reference to the 24th Street property, conflicting conversations with petitioner about his partnership interest and the 2008 partnership K-1 issued to petitioner, the Division assessed additional income tax to petitioner for that year.

16. The Division issued to petitioner a notice of deficiency (assessment L-040290128-4) dated October 30, 2013, asserting additional income tax due for the year 2008 in the amount of $28,659.00, plus negligence penalties under Tax Law § 685(b)(1) and (2), and interest, for a total of $47,524.95.

17. Petitioner requested a conciliation conference at the Bureau of Conciliation and Mediation Services (BCMS) on December 3, 2013. A conference was held, and by a conciliation order dated August 22, 2014, BCMS sustained the statutory notice.

18. A timely petition was filed with the Division of Tax Appeals protesting the conciliation order on October 24, 2014.

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioner maintains that the K-1 issued to him for tax year 2008 from 29 Sai was fraudulent and that he was not a partner in the partnership. He further asserts that the

$300,000.00 check represented the return of money loaned to Dr. Dhabuwala, and is not taxable.

20. The Division contends petitioner has failed to prove by clear and convincing evidence that it improperly asserted additional income tax on petitioner's receipt of the $300,000.00 in tax year 2008. The Division also argues that petitioner has failed to establish any basis for which to abate the penalties asserted.

CONCLUSIONS OF LAW

A. IRC § 702 requires that, in determining his income tax, each partner shall take into account separately his distributive share of the partnership's gains and losses from sales and exchanges of capital assets. The New York adjusted gross income of a resident individual includes his federal adjusted gross income, with modifications set forth in Tax Law § 612(b), none of which are applicable herein (Tax Law § 612[a]).

B. Tax Law § 689(e) states, in pertinent part: "[i]n any case before the tax commission under this article, the burden of proof shall be upon the petitioner," with the exception of four situations not applicable herein. Thus, in this matter it is incumbent upon petitioner to shoulder the burden of proving that the Division's assessment is erroneous.

C. The question in this case centers on whether petitioner is a partner of 29 Sai and is required to report the taxable income which flows from the partnership Form K-1, to him personally. It was never definitively established whether petitioner invested with Dr. Dhabuwala as a partner in 29 Sai; however, the evidence weighs in favor of a finding that petitioner was an investor. Even by his own admission, when Dr. Dhabuwala approached petitioner for investments in other properties, petitioner almost always invested as a 5% owner. In 2008, when the sale of the property located at 37-39 West 24th Street took place, petitioner received a $300,000.00 check bearing the 24th Street property reference. He did not question the check at

that time, but rather cashed it. When the Division determined that the sale of the property located at 37-39 West 24th Street was not reported on the 2008 partnership return of 29 Sai, the return was amended, and the respective partners were provided with a Form K-1. This included petitioner, whose interest was reported at 10%. Petitioner approached the auditor on numerous on occasions to argue a reduction of the percentage interest in the partnership from the reported 10% to 5%. On the basis of information provided to the auditor, petitioner's interest was reduced to 5%. Thereafter, when petitioner acquired a new representative, petitioner's posture changed and he attempted to refuse any acknowledgment of an investment in 29 Sai. His explanation was that he was simply mistaken, had loaned significant money to Dr. Dhabuwala, and that the $300,000.00 was a return of a portion of such money. Despite the assertion that he was not a partner in 29 Sai, petitioner represented himself as a partner to the IRS when requesting a copy of the original partnership return in 2015.

Over a long period of time of investing with Dr. Dhabuwala, it appeared as though petitioner had not seen the return on his money that was promised by Dr. Dhabuwala, and petitioner grew suspicious and mistrusting. When petitioner finally received the $300,000.00, it appears that petitioner wanted to disavow any potential investment in yet another property, despite its 24th Street notation, and convert the check he received into a loan repayment on other funds given to Dr. Dhabuwala. Mr. Reisman testified that when Dr. Dhabuwala learned that petitioner did not believe he was an investor in 29 Sai, Dr. Dhabuwala requested that petitioner return the $300,000.00 check to him and he would report the additional taxable partnership income instead of petitioner. Petitioner refused to return the check to Dr. Dhabuwala, and maintained that the money he received was the return of money loaned on other investments.

Petitioner made sophisticated investments with Dr. Dhabuwala in enormous sums of money at great risk for many years. With no evidence of partnership agreements or records to support the investments, petitioner placed himself in a very difficult position. Petitioner could have attempted to support his assertion that the money he received was loaned to Dr. Dhabuwala by its return to him, and request that the check be reissued with an accurate notation. However, petitioner did not choose this course of action. This fact, in conjunction with petitioner's repeated assertions that he was a 5% partner in 29 Sai, petitioner's representation to the IRS that he was a partner, email communications supporting the same, and a failure to produce any evidence that he was not a partner in 29 Sai leads to the only conclusion available, i.e., that petitioner was a partner in 29 Sai and the Division properly held him responsible for the income generated from the sale of the property at 37-39 West 24th Street of which 29 Sai was a 50% owner. The failure of petitioner to sustain his burden of proof by clear and convincing evidence by the production of evidence demonstrating that the assessment was erroneous, left standing the presumption of correctness which attached to the notice of deficiency (Tax Law § 689[e]; ***Matter of Gilmartin v. Tax Appeals Tribunal,*** 31 AD3d 1008 [3d Dept 2006]; ***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]; ***Matter of Kourakos v. Tully***, 92 AD2d 1051 [3d Dept 1983], ***appeal dismissed*** 59 NY2d 967 [1983], ***lvs denied*** 60 NY2d 556 [1983], ***cert denied*** 464 US 1070 [1984]).

D. The final issue is whether penalties imposed pursuant to Tax Law § 685(b)(1) and (2) for negligence in the underpayment of tax should be abated. It was petitioner's burden to establish a reasonable cause to explain why the required payments were not made (***see Matter of Suburban Restoration Co. v. Tax Appeals Tribunal***, 299 AD2d 751 [3d Dept 2002]; ***Matter of Bachman v. State Tax Commn.***, 89 AD2d 679 [1982]). Although petitioner did not directly

address abatement of the penalties, petitioner inferred his complete reliance upon his CPA, Mr. Sarva, from the time he assumed responsibility for petitioner's representation. In considering whether such reliance provided grounds to abate the negligence penalties imposed, I refer to the Tax Appeals decision in ***Matter of McGaughey*** (Tax Appeals Tribunal, March 19, 1998, ***confirmed*** 268 AD2d 802 [3d Dept 2000]), where it was stated:

> "It is a well-settled principle that each taxpayer has a nondelegable duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause (***see, Logan Lumber Co. v. Commissioner***, 365 F2d 846 [1966]; ***see also, Sanderling, Inc. v. Commissioner***, 571 F2d 174 [1978]).
>
> In making a determination as to whether reasonable cause exists when a taxpayer has relied on the advice of a professional, it must be shown that the taxpayer relied in good faith on the advice he received and it must have been "reasonable" for the taxpayer to rely upon the particular advice he was given (***see***, ***LT & B Realty Corp. v. New York State Tax Commn.***, 141 AD2d 185 [1988]). When determining whether the taxpayer has shown that his reliance was reasonable, the burden is on the taxpayer to demonstrate that he acted with ordinary business care and prudence in attempting to ascertain his liability, if any, for taxes (***see***, ***United States v. Boyle***, 469 US 241 [1985]; ***Matter of Koether***, Tax Appeals Tribunal, December 15, 1994)."

Before and after the issuance of the K-1 to petitioner from 29 Sai in early 2013, petitioner took the position that he was a 5% partner and communicated that fact to the auditor on numerous occasions in order to obtain a reduction from the reported 10% partnership interest. After petitioner received the K-1, he did not file an amended personal income tax return immediately as required. Instead, he sought the advice of another CPA, Ramesh Sarva, who raised the question with petitioner's former CPA as to how petitioner could avoid reporting any gain on his tax return. Thereafter, petitioner changed his position about the distribution designated from the sale of the 24th Street property, characterized the K-1 he received as fraudulent, and disavowed any interest in 29 Sai. Petitioner also then maintained

that the $300,000.00 he received was the return of money loaned to Dr. Dhabuwala, and not from the sale of the 24th Street property, which would have indicated a partnership interest in 29 Sai. However, petitioner did not act in a manner consistent with his new position by returning the money to Dr. Dhabuwala so that a corrected check could be issued to him. Instead, he argued that he had no interest in 29 Sai and retained the check. Throughout the hearing, it was clear that Mr. Sarva was guiding petitioner's position. However, given his sophisticated level of investing, the vast undocumented partnership arrangements and the number of years he chose to invest with Dr. Dhabuwala, petitioner had knowledge of details which should have made him question whether the advice he received was such that he could have placed reasonable reliance on it (***Matter of Felix Industries v. State of New York Tax Appeals Tribunal***, 183 AD2d 203 [3d Dept 1992]). Simply, petitioner did not act with ordinary business care and prudence in attempting to ascertain his liability for tax, and unreasonably relied upon the advice of his representative. Accordingly, petitioner has failed to establish reasonable cause to abate the penalties inasmuch as he has not met the "onerous task" of doing so (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993).

E. The petition of Hasmukh G. and Jayshri H. Patel is denied, and the Notice of Deficiency dated October 30, 2013, is hereby sustained.

DATED: Albany, New York
May 11, 2017

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE