

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Vilma Bautista, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2010.

On September 11, 2015 and September 15, 2015, respectively, petitioner, appearing by DLA Piper LLP (Ellis L. Reemer, Esq., and Michael J. Scarduzio, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Alejandro Taylor, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by April 4, 2016.¹ After due consideration of the documents and arguments submitted and all of the pleadings and proceedings had herein, Herbert M. Friedman, Jr., Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the notice of deficiency issued to petitioner is invalid as it lacks a determination of a deficiency in tax.

¹Although the parties agreed to submission of this case without a hearing pursuant to 20 NYCRR 3000.12, it continues to proceed in an expedited manner under Tax Law § 2008(2) as it involves the imposition of fraud penalties.

II. Whether fraud penalties imposed under Tax Law § 685(e) and interest should be sustained where they are based on a criminal conviction for tax fraud and an accompanying restitution order.

III. Whether petitioner is collaterally estopped from challenging the tax and penalty asserted in the notice of deficiency.

FINDINGS OF FACT

1. Petitioner, Vilma Bautista, was at all relevant times, an assistant to Imelda Marcos, the former First Lady of the Phillippines. Petitioner worked for Mrs. Marcos in New York City.

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

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

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

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

6. Petitioner had several bank accounts with Citibank in 2010 (Citibank Accounts). Each of the Citibank Accounts listed her address as the New York City Apartment. Citibank issued a form 1099-INT for 2010 to petitioner that listed her address as the New York City Apartment. In addition, there was evidence of activity by petitioner at Citibank branches in Manhattan on at least 118 days in 2010.

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

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

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

an order compelling restitution for the unpaid New York State and City taxes in the amount of \$3,557,620.00.²

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

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

² Petitioner appealed her conviction and sentence, including the restitution order, to the Appellate Division, First Department. On October 20, 2015, the Appellate Division vacated the conspiracy conviction and remanded it to the Supreme Court for a new trial (*see People v Bautista*, 132 AD3d 523 [1st Dept 2015]). The court, however, otherwise affirmed petitioner's remaining convictions, including the tax fraud conviction and, of equal significance, the restitution order. On October 27, 2015, petitioner sought leave to appeal the Appellate Division's decision to the New York State Court of Appeals. That request is pending as of the date of this determination.

and only retaining \$11,840,000.00 of the proceeds. Each scenario included petitioner's receipt and control of the proceeds. Petitioner's potential tax liabilities from each scenario were described by Mr. Welch as follows:³

Scenario 1 - Assuming Painting Was Not A Gift to Petitioner

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

Scenario 2 - Assuming Painting Was A Gift

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

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

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

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

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

³ Petitioner's unreported interest income of \$40,357.05, gained from deposit of the proceeds in the Citibank Accounts, was added to the additional unreported net income in each of the scenarios to arrive at the New York State and City additional tax due.

to Penal Law § 60.27(2), the court added at the sentencing hearing that based on the evidence and verdict, no further restitution hearing was required. The restitution order designated Safe Horizon as the restitution agent and called for petitioner to make all restitution payments to Safe Horizon pursuant to Criminal Procedure Law § 420.10(1) for eventual payment to the Department. In addition, by its terms, the restitution order was to be filed and enforceable as a civil judgment.

14. On January 23, 2014, the Division issued to petitioner Notice of Deficiency number L-040694401-2 (statutory notice). The statutory notice informed petitioner that a “[f]ield audit of your records disclosed additional tax due” of \$2,485,064.00 for New York State and \$1,072,556.00 for New York City for the year 2010. Furthermore, the statutory notice represented that “late payments” in the aforementioned amounts had been received, reflecting that petitioner had a balance of zero tax due.

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

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

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

16. On March 19, 2014, the Division issued and filed warrant number E-402108570-W001-7 (warrant) against petitioner pursuant to the restitution order (*see* Finding of Fact 13).⁴ The warrant reflected the following:

⁴ Petitioner incorrectly identifies this document in the record as a “notice and demand.”

Assessment ID	Period	Tax	Penalty	Interest	Total
L-040694572-2	2010	\$3,557,620.00	\$17,786.10 ⁵	\$33,837.66	\$3,609,245.76

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

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

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

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

SUMMARY OF THE PARTIES’ POSITIONS

19. Petitioner maintains that the statutory notice is invalid as it does not propose an assessment of a tax deficiency determined by the Division with respect to which a fraud penalty may be asserted, nor does it rely on a previously proposed and validly assessed tax deficiency. Petitioner adds that the restitution order cannot serve as a basis for the assertion of a penalty and that the New York County Supreme Court lacks jurisdiction to determine a tax deficiency. Finally, petitioner argues that the doctrine of collateral estoppel is inapplicable to this matter.

20. The Division, meanwhile, asserts that it properly adopted the restitution order and that the order, along with the criminal conviction, constitutes a determination of tax and rational

⁵ The rationale for this penalty was never explained by the Division.

basis for the imposition of fraud penalties and interest. It adds that a civil audit is unnecessary for it to enforce a criminal sentence of restitution. The Division further maintains that petitioner is collaterally estopped from relitigating the facts underlying her conviction as there is an identity of issues with the instant case and she had a full opportunity to litigate them.

CONCLUSIONS OF LAW

A. The first question to be resolved is whether the Division issued a valid notice of deficiency in the instant case. Tax Law § 681(a) provides that “[i]f upon examination of a taxpayer’s return under [Article 22] the tax commission determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer.” “Deficiency” includes the amount of tax imposed by Article 22, less the amounts reported on the taxpayer’s return and the amounts previously assessed or collected (*see* Tax Law § 681[g]). In order to ascertain the existence and amount of a deficiency of personal income tax, there is no requirement that the Division request and examine books and records before issuing a notice of deficiency (*see Matter of Ragozin*, Tax Appeals Tribunal, July 22, 1993). Of course, a notice of deficiency must have a rational basis to be sustained (*see Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992).

In the case at bar, the Division relied upon petitioner’s November 2013 convictions of filing a false instrument and criminal tax fraud and accompanying January 2014 restitution order as a basis for issuance of the January 23, 2014 Notice of Deficiency. In opposition, petitioner maintains that the Division failed to independently determine the tax assessed and, therefore, because of this reliance on the state court decision, did not comply with the requirements of Article 22 by issuing a valid notice of deficiency. She adds that New York State courts presiding over criminal tax proceedings lack jurisdiction to make a specific determination of a deficiency

under Article 22. Finally, she argues that without a valid notice of deficiency, she is deprived of the right to challenge the deficiency.

Contrary to petitioner's arguments, however, the Division has properly issued a valid notice of deficiency in this matter. The Division certainly had a rational basis for determining a tax due and issuing the statutory notice based upon petitioner's criminal convictions and restitution order (*see Matter of Hirschfeld*, Tax Appeals Tribunal, April 5, 2007 [where conviction of criminal tax fraud with respect to the subject period was sufficient to establish that petitioner received additional income for the relevant years, failed to report such additional income on his New York personal income tax returns and such failure was with intent to evade tax]). A review of the "Computation Section" in the statutory notice evidences that the Division informed petitioner of additional New York State tax of \$2,485,064.00 and New York City tax of \$1,072,556.00 after review of her returns. Unquestionably, these figures derived from the criminal proceeding and restitution order, which case law dictates may serve as a basis for assessment of tax (*see Matter of Allen*, Tax Appeals Tribunal, December 10, 1992).⁶ Thus, the statutory notice contains a rationally-based determination of tax, is valid pursuant to Article 22 of the Tax Law, and provided petitioner the opportunity to exercise her due process rights in this proceeding.

Curiously, the *Division* states in its briefs that it "made no determinative finding regarding the amount of tax owed" and that it "did not propose an assessment by issuing a Notice of Deficiency pursuant to Tax Law § 681(a) for the tax due on the gains realized from

⁶The statutory notice also credited the restitution amounts as "late payments," resulting in a zero balance of tax due. Clearly, the Division's adjustments represented the amount of tax assessed and already subject to collection by Safe Horizons pursuant to the existing restitution order. Indeed, if the Division failed to make this adjustment on the statutory notice, as petitioner argues would have been proper, she may have been subject to collection twice for the same tax obligation.

[p]etitioner's sale of the artworks [sic] that was the subject of her criminal trial." In actuality, the evidence shows that the Division determined a tax due based on the efforts of its auditor, Mr. Welch, the criminal conviction and restitution order. The Division asserted its determination in the statutory notice, and gave petitioner credit for the amount of restitution ordered by the court in order to avoid double collection. Although the Division's above-quoted statements are erroneous based on the record, they do not render the notice invalid.

B. Petitioner also challenges the correctness of the amount of tax assessed. Generally, as is the case here, when the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice, and the burden of proof is on the taxpayer to demonstrate that the deficiency assessment is erroneous by clear and convincing evidence (*see* Tax Law § 689(e); *Matter of O'Reilly*, Tax Appeals Tribunal, May 17, 2004). In this matter, that burden holds true with regard to the underlying tax assessed. Despite her arguments to the contrary, a review of the record demonstrates that petitioner fails to meet this burden.

First, petitioner maintains that the Division did not independently determine the precise amount of tax due. Instead, petitioner asserts, the Division incorrectly relied upon the restitution order, which she maintains was not a specific determination of her civil tax liability. According to petitioner, the court simply chose one of three hypothetical results for purposes of exceeding the \$1,000,000.00 liability threshold required by Tax Law § 1806 to support a criminal tax fraud conviction. Moreover, petitioner argues that the court, in any event, would not have the jurisdiction to make such a specific determination.

On the contrary, the evidence shows that the Division's auditor, William Welch, presented expert testimony in the criminal trial regarding the exact amount of tax owed by petitioner. While it is true that Mr. Welch offered three hypothetical scenarios, the court relied

upon his testimony and found that one scenario was most accurate based on the following evidence produced at trial: 1) petitioner sold the Monet painting and retained \$27,660,000.00 of the proceeds; 2) she failed to report the income on her 2010 New York State return; 3) she was a resident of New York State and City; 4) her 2010 New York State tax liability was \$2,485,064.00, and 5) her New York City tax liability was \$1,072,556.00. This conclusion was reached after petitioner had a full opportunity to present her position on each issue. Furthermore, the court was required to make a precise finding of the loss to the victim (in this case, the Department) in its restitution order pursuant to Penal Law § 60.27(2).⁷ Contrary to petitioner's assertion, the court had the jurisdiction to reach its conclusion (*see Matter of Allen* [where the Tax Appeals Tribunal, under similar circumstances, stated "we see no basis for petitioner's assertion that the Supreme Court's judgment does not establish the fact of tax liability because the Supreme Court has no jurisdiction to adjudicate questions of tax liability."]). Consequently, the Division properly relied upon the court's determination of petitioner's tax liability in creating the statutory notice (*see Matter of Roswick*, Tax Appeals Tribunal, June 30, 2005; *Matter of Ragozin*).

C. Additionally, the Division correctly points out that collateral estoppel prevents petitioner from disputing the amount of tax in the statutory notice. For the doctrine of collateral estoppel to apply, petitioner must have had a fair opportunity to litigate the issue of her liability for the income tax at issue at the criminal proceeding (*see Kuriansky v. Professional Care*, 158 AD2d 897, 899 [1990]). This means that:

⁷ Petitioner cites to *Muncy v. Commissioner* (TC Memo 2014-251[2014]) for the proposition that under the federal tax system, "restitution is not itself a determination of tax and does not provide a basis on which tax may be assessed." In *Muncy*, however, the Tax Court made it clear that determination of the tax deficiency was not an essential part of the government's case nor actually litigated, two huge distinctions from the case at bar.

“First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination.” (*Kaufman v. Eli Lilly and Co.*, 65 NY2d 449, [citations omitted].)

Furthermore, the Court of Appeals in *Kaufman v. Eli Lilly and Co.* (at 456) noted:

“The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action [citations omitted].”

An essential issue litigated and decided in the criminal proceeding is the same one raised by petitioner here, i.e., the amount by which petitioner underreported and underpaid her 2010 New York State and City taxes. The criminal proceeding required such central issue to be decided, not only for conviction under Tax Law § 1806, but for determination of a proper amount of restitution (*see* Penal Law § 60.27). The issue was resolved by petitioner’s conviction of criminal tax fraud, which required an intentional underreporting of at least \$1,000,000.00 in tax, and the court’s ensuing restitution order, which required a precise finding of loss to the Department. Of course, such amount of restitution corresponds to the amount of additional taxes asserted by the Division in the statutory notice. Therefore, the Division has demonstrated the identity of issues required for the invocation of collateral estoppel on the issue of the amount of tax deficiency.

D. As a result, it is petitioner’s burden to show that she did not have a “full and fair opportunity to litigate” her income tax liability during the criminal proceeding (*see Kaufman v. Eli Lilly and Co.*, at 456). The review of the record demonstrates exactly the opposite. Mr. Welch thoroughly testified as to petitioner’s 2010 New York State and City filing and liability. Included in that testimony was an analysis of petitioner’s New York City residency status during

2010. Petitioner had a full opportunity to cross-examine him and discredit his testimony.

Petitioner also had the opportunity to present witnesses and documents on the issue.

Additionally, petitioner had the opportunity to make arguments on the point at the restitution hearing. Hence, petitioner has failed to establish that she was precluded from a full and fair opportunity to litigate her 2010 tax liability, and collateral estoppel with regard to that issue is appropriate.

E. Additionally, it must be pointed out that even if petitioner were not collaterally estopped from disputing the tax deficiency, she has produced insufficient evidence in this matter to refute the Division's determination of tax in the statutory notice. As noted, petitioner bears the burden to demonstrate by clear and convincing evidence that the asserted tax deficiency is incorrect, and she certainly had the opportunity to present such evidence in this proceeding. The scant substantive evidence in the record supporting an alternate determination of petitioner's 2010 tax liability, however, does not overcome the overwhelming evidence supporting the statutory notice. Indeed, petitioner did not even offer her own affidavit in support of her case. Under such circumstances, it is reasonable to take the strongest possible negative inference from her failure to testify (*see Matters of Huaquechula Restaurant Corp. and Lira*, Tax Appeals Tribunal, May 12, 2011). Meanwhile, in contrast, the Division presented evidence that 1) petitioner received the proceeds from the sale of the Monet painting and failed to report them on her 2010 return; 2) she maintained the New York City Apartment during 2010; 3) she maintained the Citibank Accounts in New York City; 4) the Citibank Accounts listed petitioner's address as the NYC Apartment; and 5) she spent a significant amount of time in New York City in 2010. Unquestionably, given the balance, the Division had a rational basis for its determination, while petitioner failed to present clear and convincing evidence that she was not a

resident of New York City during the relevant period or that the amount of tax assessed is incorrect. Therefore, she failed to refute the tax deficiency as determined by the Division.

F. Petitioner also contests the application of collateral estoppel with regard to the fraud penalties asserted in the statutory notice pursuant to Tax Law § 685(e). Unlike with the underlying tax, the Division bears the burden of proof with respect to the issue of the fraud penalties (*see* Tax Law § 689[e][1]). The Tax Appeals Tribunal has explained the standard for the determination of fraud on the part of a taxpayer as follows:

“Imposition of the fraud penalty requires ‘clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing’” (*Matter of Sona Appliances*, Tax Appeals Tribunal, March 16, 2000 [citations omitted]).

Nonetheless, where a taxpayer has been convicted of criminal tax fraud for the same year at issue in the civil tax fraud proceeding, as is the case here, she is estopped from contesting the imposition of civil fraud penalties (*see Matter of Drebin*, Tax Appeals Tribunal, February 20, 1997, *confirmed* 249 AD2d 716, 719 [1998]). Based on its proof of petitioner’s conviction, the Division has established that petitioner received additional income for the relevant years, deliberately failed to report such additional income on her New York personal income tax return and such failure was with intent to evade tax (*see Matter of Hirschfeld; see also Matter of Cumberland Pharmacy, Inc. v. Blum*, 69 AD2d 903 [1979]). Thus, petitioner’s conviction for fraudulently filing false tax returns collaterally estops her from challenging the civil fraud penalty (*see Matter of Drebin; Matter of Nanni*, Tax Appeals Tribunal, July 22, 1993).

G. Finally, petitioner argues that the fraud penalties are improper as the Division failed to issue a valid deficiency. Tax Law § 685(e)(1) allows for fraud penalties “[i]f any part of a deficiency is due to fraud, there shall be added to the tax an amount equal to two times the

deficiency.” According to petitioner, since there was no determination of a deficiency by the Division, there can be no fraud penalty. This position, however, ignores the fact that there was a tax deficiency determined for 2010 by both the court and the Division, and reflected in the statutory notice (*see* Conclusion of Law B). Certainly, the entire deficiency emanated directly from petitioner’s fraudulent conduct and conviction and the penalties were correctly assessed in the statutory notice pursuant to Tax Law § 685(l). Hence, the imposition of fraud penalties with respect to the subject deficiency is appropriate.

H. The petition of Vilma Bautista is denied and the Notice of Deficiency dated January 23, 2014 is sustained.

DATED: Albany, New York
May 5, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE