STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YESENIA ALMONTE	:	DETERMINATION DTA NO. 827891
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 2014.	:	

Petitioner, Yesenia Almonte, filed a petition for redetermination of a deficiency or for refund of personal income tax under article 22 of the Tax Law for the year 2014.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on August 23, 2018, in New York, New York, with all briefs to be submitted by June 13, 2019, which date began the six-month period for issuance of this determination. Petitioner appeared by Greenspan & Greenspan (Leon J. Greenspan, Esq., and Michael J. Greenspan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Ellen Krejci, Esq., of counsel).

ISSUE

Whether the Division of Taxation's imposition of tax preparer penalties against petitioner, pursuant to Tax Law former § 685 (aa) (1), was proper and should be sustained.

FINDINGS OF FACT

1. Petitioner, Yesenia Almonte, was a New York State registered tax return preparer who prepared over 2,000 personal income tax returns in the year 2015. Petitioner offered tax preparation services at an office located at 275 East Gunhill Road, Bronx, New York, beginning in January 2015 and lasting through July 2015.

2. The Division of Taxation (Division) has a team within its Income/Franchise Desk Audit Division that analyzes groups of tax returns filed during a tax season for suspicious activity, fraudulent activity, and identity theft.

3. Jason Huneau, a Tax Technician 2 in the Division's Income/Franchise Desk Audit Division, testified at the hearing.[1] Mr. Huneau is part of the Income/Franchise Desk Audit Division analysis team. He was part of the analysis team that analyzed groups of personal income tax returns for tax year 2014 which were filed in the year 2015.

4. Mr. Huneau explained that the analysis team looks at groups of filed returns for patterns of business losses, capital losses, other losses, and itemized deductions claimed on such returns. The team then looks at the geographic location from which the returns were filed based upon the internet protocol address, and the preparer identification number listed on such returns.

5. Mr. Huneau testified that on an unidentified date in February 2015, the analysis team noticed that over 50% of the 2014 returns prepared by petitioner claimed other losses, capital losses, or federal adjustments to income. Shortly thereafter, the analysis team referred petitioner to the Division's Office of Professional Responsibility for outreach to discuss the federal adjustments to income, other losses, and capital losses claimed on the 2014 tax returns prepared by her.

6. On February 23, 2015, Richard S. Ernst, then Deputy Commissioner in the Division's Office of Professional Responsibility, sent a letter to petitioner at her East Gunhill Road business address, which stated the following:

> "It has come to my attention that a large percentage of the 2014 New York State Personal Income Tax Returns that you have prepared claim certain

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[1] At the time of the hearing, Mr. Huneau had been a Tax Technician 2 for about a year and one-half.

deductions. These include capital losses, other gains or losses, business losses and/or federal adjustments to income for student loan interest.

Of the 1408 returns [sic] 2014 New York State PIT returns that you have prepared, 691 of these returns claim a federal adjustment to income of $2,500 or more which reduced your client's taxable income.

A taxpayer can only claim a Business Loss on line 6 if they operated a business or practiced their profession as a sole proprietor. Documentation for both the income and expenses should be available for verification.

A taxpayer can only claim a Capital Loss on Line 7 if they sold a capital asset, such as a stock or bond. Documentation of both the cost or basis value and the sales price should be available for verification of the capital loss claimed.

A taxpayer can only claim a loss on line 8, Other Gains or Losses, if they sold or exchanged assets used in a trade or business. For further information, please see the instructions for IRS Form 4797.

Finally, a taxpayer should only take a deduction for student loan interest as a federal adjustment to income if all the following apply.

- The Taxpayer paid interest in 2014 on a qualified student loan - any loan they took out to pay the qualified high education expenses for themselves, their spouse or their dependent.
- Their filing status is any status except married filing separately.
- Their modified adjusted gross income (AGI) is less than: $80,000 if single, head of household, or qualifying widow(er): $160,000 if married filing jointly
- They or their spouse, if filing jointly, are not claimed as a dependent on someone else's (such as their parent's) 2014 tax return.

In most cases, form 1098-E will be issued by the lending institution.

Many of the 2014 New York State Personal Income Tax returns that you prepared claim two deductions which your clients may not be entitled to. It is critical that you make sure that your clients have the proper documentation prior to your claiming a deduction [on] [sic] their return [sic].

Thank you for your attention to this matter."

7. Subsequently, on March 26, 2015, the Division's Office of Professional Responsibility sent a letter to petitioner at a Hoffman Street, Bronx, New York, address. The record includes both the February 23, 2015 and March 26, 2015 letters from the Office of Professional

Responsibility to petitioner. Review of those letters indicates that the contents of both letters were identical. Mr. Huneau stated that he did not know why the March 26, 2015 letter was sent to petitioner.

8. The Division's Audit Division-Income/Franchise Desk-AG1 issued a notice of deficiency, notice number L-043263489, dated June 30, 2015, against petitioner asserting penalty in the amount of $713,000.00 for tax year 2014. The computation section of the notice states, in relevant part, the following:

> "Based on a review of your filing history as a tax preparer, we have determined that you have repeatedly prepared returns for taxpayers reporting other losses from federal form 4797 on line 8 of the New York State IT-201. Audits conducted on these returns have established no proof of entitlement to these deductions.
>
> A taxpayer can only claim Other Gains or Losses, if they sold or exchanged assets used in a trade or business.
>
> We have audited 713 returns prepared by you that report other losses, but none of the audited returns conform to these established guidelines.
>
> As a preparer, you should have reasonably known the proper tax treatment for reporting Other Gains or Losses as an adjustment to income.
>
> Therefore, a penalty has been imposed under 685(aa) of the New York State Tax Law. The penalty is $1,000 for each return reporting the understatement of liability based on the claim for other losses.
>
> This penalty applies to the returns you prepared for the taxpayers on the enclosed attachment.
>
> This notice applies to the returns filed for the 2014 tax year.
>
> * * *
>
> If you have questions concerning this audit determination, please call (518) 453-4874."

9. In addition to referring petitioner to the Office of Professional Responsibility, Mr. Huneau stated that the analysis team recommended that returns prepared by petitioner that

claimed other losses and federal adjustments to income be reviewed by desk audit. He testified that of the 2,176 returns filed by petitioner, 1,019 returns claimed other losses and the Division conducted desk audit reviews of 713 of those returns. Mr. Huneau stated that he did not know if all the taxpayers were issued inquiry letters as part of the audits of their returns.

10. Mr. Huneau did not review all 713 returns. Rather, eight to ten members of the analysis team reviewed the returns. No one member of the analysis team reviewed all 713 returns.

11. In discussing the possible imposition of tax preparer penalties, the analysis team looks at the tax preparer's behavior in light of the three elements set forth in Tax Law former § 685 (aa) (1), and decides whether the tax preparer's behavior meets "that criteria." Mr. Huneau testified that after the analysis team reviewed the returns that petitioner prepared for tax year 2014, it concluded that there was not a reasonable belief for the tax position petitioner had taken on the returns she filed, and the imposition of the tax preparer penalty was appropriate. In forming its conclusion, Mr. Huneau testified that the analysis team relied upon the following:

(a) The number of returns that claimed the other loss, "which is usually uncommon."

(b) The missed information on forms 4797 attached to some returns, i.e., the lack of information other than the loss amount figure reported on line 7 of form 4797.

(c) "Many" returns had the same sale amount reported for listed property on the form 4797.

(d) The amount by which the claimed other losses reduced the federal adjusted gross income on the returns and the effects such other losses had on the refunds requested on the returns.

(e) None of the taxpayers, who were contacted via correspondence, provided to the audit

division any evidence corroborating the claimed other losses.

12. Mr. Huneau stated that the analysis team discussed the imposition of the penalty at $1,000.00 for each return in a “regular meeting.” He further stated that the analysis team decided to issue the penalty at $1,000.00 for each return based upon the “egregious nature of the full case,” and because her conduct regarding preparing returns claiming other losses did not change even after receiving two letters from the Office of Professional Responsibility advising her of what was required of her as a tax preparer. In addition, Mr. Huneau explained that the analysis team assessed the penalty based upon the improper position taken on all of the returns, on the date each such return was prepared and filed.

13. Someone in the Division’s audit division caused the notice of deficiency to be issued to petitioner on June 30, 2015. Mr. Huneau thought it was Delores Correll, who at that time was a Tax Technician 2 on the analysis team.

14. With respect to the due diligence required by a tax preparer to make a determination regarding whether to file form 4797 for a particular taxpayer, Mr. Huneau stated that the tax preparer should probably ask the taxpayer a few questions and maybe ask “to see some proof of the sale or exchange.”

15. At the hearing, the Division submitted selected documents from the audit file related to petitioner’s case. Included in this 131-page submission were, among other documents, 6 returns prepared by petitioner for tax year 2014,[2] and 17 spreadsheets containing information regarding returns prepared by petitioner for tax year 2014.

16. The 17 spreadsheets contain information concerning a total of 713 returns petitioner

[2] All information concerning the taxpayer has been redacted on each return, except for the first name and last four digits of the social security number.

prepared for tax year 2014, and are the returns for which the $1,000.00 per return penalty was assessed. At the top of each spreadsheet, 9 separately-headed columns contain return information including the document locator number, the taxpayer's first name and possibly middle initial, the taxpayer's social security number,[3] federal adjusted gross income claimed on the return, wages claimed on the return, business income or loss claimed on the return, other gains or losses claimed on the return, the refund requested on the return, and the refund allowed after adjustments by the Division. The record is silent regarding the creator of these undated spreadsheets.

17. Review of the last column on the 17 spreadsheets, labeled refund allowed after adjustments by the Division, indicates that the amount of $0.00 is listed for 231 taxpayers and no dollar amount is listed for 3 taxpayers. Mr. Huneau testified that he did not know whether each taxpayer whose refund allowed after adjustments by the Division was $0.00 received an assessment or a notice of refund denial.

18. Of the 6 returns submitted into the record as examples of the audited returns, only 1 return was included in the 713 returns listed on the spreadsheets. It was a return prepared by petitioner on February 16, 2015 for a taxpayer named "Kxxxxx." Review of that return indicates that the only information on form 4797 is a claimed loss of $9,882.00. It is noted that wages in the amount of $47,908.00 were reported on this return.

19. The record does not include the date on which each of the 713 returns were filed with the Division, the date and type of inquiry, if any, made by the Division regarding each return, the date and type of response, if any, from each taxpayer, and the date and type of notice issued to

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[3] The first five numbers of all listed social security numbers have been redacted for confidentiality.

the taxpayer regarding the refund amount allowed, if any, and the adjustments made to the refund requested on such return. It also does not include a sample inquiry letter that may have been sent as part of the audit of the 713 returns.

20. The record does not include either the total number of returns that lacked information on the form 4797, or the total number of returns that contained the same sale prices on the form 4797.

21. The Division submitted into the record the "2014 Instructions for Form 4794" (form 4797 instructions). In the "General Instructions" section of the form 4797 instructions, the purpose of the form is set forth as follows:

> "Use Form 4797 to report:
> • The sale or exchange of:
> 1. Property used in your trade or business;
> 2. Depreciable and amortizable property;
> 3. Oil, gas, geothermal, or other mineral properties; and
> 4. Section 126 property.
>
> • The involuntary conversion (from other than casualty or theft) of property used in your trade or business and capital assets held in connection with a trade or business or a transaction entered into for profit.
> • The disposition of noncapital assets (other than inventory or property held primarily for sale to customers in the ordinary course of your trade or business).
> • The disposition of capital assets not reported on Schedule D.
> • The gain or loss (including any related recapture) for partners and S corporation shareholders from certain section 179 property dispositions by partnerships (other than electing large partnerships) and S corporations.
> • The computation of recapture amounts under sections 179 and 280F(b)(2) when the business use of section 179 or listed property decreases to 50% or less.
> • Gains or losses treated as ordinary gains or losses, if you are a trader in securities or commodities and made a mark-to-market election under Internal Revenue Code section 475(f)."

22. In or about 2011, petitioner took a tax preparation course at H&R Block. Other than preparing tax returns as part of the course, petitioner never worked for H&R Block as a tax return preparer. At the time of the hearing, petitioner was pursuing an associate's degree in accounting

at Brown Community College.

23. The year 2015 was the first year that petitioner prepared tax returns professionally. Beginning in January 2015, petitioner rented an office at East Gunhill Road for 12 months at $1,100.00 per month. Petitioner bought everything she needed for the business with start-up money from family. She chose Drake software as her tax preparation software because it was a popular tax preparer software that she heard about during conversations at the H&R Block course, and by navigating the internet. Petitioner installed the software herself with telephone help from Drake, and Drake provided her with a CD that had a tutorial on how to use the software. Petitioner developed a standard questionnaire that asked each client for basic information, including, among other items, first and last name, address, date of birth, children, and social security number. This standard questionnaire was used by petitioner at the time she interviewed each client before she prepared the client's tax return.

24. Some of petitioner's clients were people she knew. However, the majority of her clients were walk-ins who heard about petitioner's tax preparation business from employees of Prestige Car, a local cab company for which petitioner had worked.

25. Petitioner employed two people to help maintain order, book appointments, and collect the client's information. Petitioner paid both employees in cash. She did not file any withholding taxes or file forms W-2 on behalf of those employees.

26. With regard to her preparation of tax returns for her clients, petitioner had a standard procedure. First, the questionnaire would be filled out by the client. Next, one of her employees would paper-clip any tax documents and information that the client had brought to the completed questionnaire. Thereafter, petitioner would meet with the client, at which time, petitioner would review the questionnaire and the paper-clipped documents, and conduct an interview of the

client. Then, petitioner prepared the tax return for the client.

27. For clients who owned businesses, petitioner would ask them questions about their businesses and the information provided to her regarding the same.

28. Petitioner explained that one of her clients showed her the form 4797, and stated that his losses from a business loaning money to others could be reported on that form. Petitioner stated that she was unfamiliar with claiming business losses on form 4797 before her client came in stating that such losses could be claimed on that form. To determine whether it was appropriate to report the business losses for her client on form 4797, she reviewed her books from H&R Block, the form 4797, and information on the Internal Revenue Service (IRS) website.

29. Many of petitioner's clients had losses from their investments in a business loaning money to others, which business turned out to be a pyramid type scheme. To learn about that particular loan business, petitioner used the internet, and asked people knowledgeable about the subject. Petitioner learned that it had been very popular business in which to invest because it offered to pay interest on amounts invested in the same.

30. Petitioner stated that many of her clients came to her and stated that they had sustained business losses in 2014, and based upon research that they had conducted, they knew that they could report such losses on their returns. In completing the form 4797 for each client, petitioner used the written information provided to her by the client. For losses connected to the loan business, the clients provided their personal notes of dates and amounts provided to the business to use as loans, and the dates the clients requested the return of same from the business. They did not provide copies of cancelled checks showing the amounts invested. Because the losses were so large, petitioner stated that she could not report them on schedule D, so she reported them on

form 4797. With respect to the due diligence petitioner used in preparing the forms 4797 and the tax returns, petitioner verified the information that she had on hand, which was the information she received from the clients.

31. In her preparation of all tax returns for tax year 2014, petitioner used and relied upon the back-up documentation and information provided by her clients. She kept a copy of all documents and information used in the preparation of each client's tax return. Petitioner testified that she had the documents used in the preparation of each client's return in storage. Petitioner, at the hearing, emphatically denied having the intent to cheat the state through her preparation of the 713 returns.

32. Petitioner, at the hearing, admitted that she prepared the 713 returns that were used as the basis for the $1,000.00 per return penalty imposed by the Division. When she received the notice of deficiency, petitioner reviewed the attached list of taxpayers' names and did not recognize any name. Prior to the issuance of the notice of deficiency, no client contacted her regarding the Division's audit of the return she had prepared for such client. She did not recall any client contacting her after the notice of deficiency was issued.

33. Petitioner stated that she never received either of the February 23, 2015 or March 26, 2015 letters from the Office of Professional Responsibility, and the first time she saw the February 23, 2015 letter was at the hearing. With respect to the March 26, 2015 letter, petitioner explained that the letter bore the former address of her mother, and her mother did not reside at that address in 2015.

34. Petitioner charged from $75.00 to a maximum of $350.00 for preparation of a tax return. She exercised her discretion, and negotiated with the client in determining the amount charged for the preparation of the return. Petitioner prepared returns for people she knew

personally for free. She did not charge 50 people for the preparation of their returns.

35. Petitioner admitted that she did not report the income from her tax preparation business on her 2015 personal income tax return because she "didn't know how to handle" the cash and the amounts received through the Drake software system, and acknowledged that she needed to file an amended return for tax year 2015.

36. Petitioner prepared tax returns professionally for tax year 2014 only. At the time of the hearing, petitioner worked as a driver for Lyft.

37. On or about July 3, 2015, petitioner received the notice of deficiency. She immediately retained Leon Greenspan, Esq., as her representative. On August 13, 2015, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A BCMS conciliation conference was held on May 3, 2016. Subsequently, BCMS issued a conciliation order, CMS No. 267564, dated September 23, 2016, denying the request and sustaining the statutory notice, i.e., notice of deficiency, notice number L-043263489.

38. Petitioner timely filed a petition seeking review of the penalty imposed on the grounds that the law had expired and was no longer in effect. Subsequently, a hearing was held before the undersigned administrative law judge on August 23, 2018.

CONCLUSIONS OF LAW

A. Tax Law former § 685 (aa) (1) provides as follows:

"(aa) Tax preparer penalty.– (1) If:

(A) any part of any understatement of liability with respect to any return or claim for refund is due to a position for which there was not a reasonable belief that the tax treatment in that position was more likely than not the proper treatment,

(B) any person who is an income tax return preparer with respect to such return or

> claim knew (or reasonably should have known) of such position, and
>
> (C) such position was not disclosed as provided in subsection (p) of this section or there was no reasonable basis for the tax treatment of that position, such person shall pay a penalty of up to one thousand dollars with respect to such return or claim unless it is shown that there is reasonable cause for the understatement and such person acted in good faith."

B. On June 30, 2015, the Division issue to petitioner a notice of deficiency assessing penalty in the amount of $713,000.00 for tax year 2014. It is well established that notices of deficiency issued by the Division are presumed to be correct until the contrary is established, and the burden of showing such notices are incorrect rests upon the petitioner (***see*** Tax Law § 689 [e]; ***Matter of Leogrande v Tax Appeals Tribunal***, 187 AD2d 768, 769 [3d Dept 1992], ***lv denied*** 81 NY2d 704 [1993]**;** ***Matter of Tavolacci v State Tax Commn.***, 77 AD2d 759, 760 [3d Dept 1980]).

C. Petitioner argues that the Division's mailing of the notice of deficiency under the authority of Tax Law former § 685 (aa), which expired and was deemed repealed on July 1, 2015, cannot be used as a basis for the assessment it seeks to enforce. She further argues that Tax Law § 681 (b) clearly teaches that a notice of deficiency only becomes an assessment 90 days after its issuance. Petitioner maintains that no enforcement can occur prior to assessment, and no assessment can occur prior to the expiration of 90 days from delivery of the notice of deficiency. Petitioner contends that by the time, the Division could legally act, the statute would have and had expired. She further contends that the notice of deficiency cannot be considered an assessment until she has exhausted her administrative remedies. Petitioner claims that without an assessment, here never made, there could not have been a penalty imposed nor collected by the Division from her. As such, petitioner maintains that the penalties should be annulled.

D. Petitioner's arguments are without merit. It does not matter when the notice of

deficiency "ripened" into an assessment. Rather, what matters is what the law was at the time of the action for which the penalty was imposed.

General Construction Law § 93 provides that:

> "The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, **penalty**, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected (emphasis added)."

The acts of petitioner that are at issue are the preparation and filing of 713 of her clients' tax returns for the tax year 2014, all of which occurred prior to the commencement of these proceedings. The liabilities asserted by the Division herein were incurred at the time such returns were filed (***see Matter of Garcia***, Tax Appeals Tribunal, December 1, 2016). Thus, the repeal of Tax Law § 685 (aa) effective July 1, 2015, does not affect the actions taken by petitioner in filing returns or the liability incurred based on those actions (***see id.***). Accordingly, the Division may assert the penalty at issue and the Division of Tax Appeals is required to provide petitioner with a process to protest such penalties (***id.***; ***see also*** General Construction Law § 94 ["all actions and proceedings . . . commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed"]).

E. Petitioner contends that her rights to due process were violated because she was not given notice and opportunity to be heard prior to the Division's issuance to her of the notice of deficiency.

F. The Division is not required to request and examine a taxpayer's books and records before issuing a notice of deficiency (***see Matter of Mayo***, Tax Appeals Tribunal, March 9, 2017). Nor is the Division required to issue a statement of proposed audit changes before issuing

such notice (***id.***). The Division is required, however, to have a rational basis for the deficiency asserted in such notice (***see e.g. Matter of Estate of Gucci***, Tax Appeals Tribunal, July 10, 1997 citing ***Matter of Atlantic & Hudson Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992).

Here, the Division assessed the maximum penalty because 713 of the returns filed claimed other losses, the incomplete form 4797 was attached to many of those returns, and the taxpayers' inability, in every case under audit, to substantiate the position taken on the returns. Clearly, the Division had a rational basis for issuing the notice of deficiency.

G. Petitioner bears the burden of proof to demonstrate "by clear and convincing evidence" that the penalty was erroneously imposed (***Matter of Greenfeld***, Tax Appeals Tribunal, March 7, 2019). Tax Law former § 685 (aa) (1) is a negligence penalty, which requires only that there be no reasonable basis for the tax treatment chosen by the tax preparer.

The record supports the Division's determination that petitioner lacked a reasonable belief that the tax position claimed was more likely than not the proper treatment. Petitioner stated that she did internet research and consulted with unidentified individuals to research the business in which many of her clients claimed to have invested. At the same time, she did not consult any other authorities before determining that the appropriate treatment for her clients' purported losses was to file a form 4797 and include the amount of such loss on line 8 of the form IT-201. Petitioner failed to submit any information given to her by her clients, for whom she prepared returns, and none of petitioner's 713 clients who were audited submitted any documents to support the losses claimed on their forms 4797. Petitioner should have known that her position was improper. She was a registered tax return preparer who had completed college course work in accounting as well as a tax preparation course at H&R Block. Although petitioner stated that she reviewed the form 4797 and information on the IRS website, she did not

specify what information on the IRS website she reviewed. Therefore, it is impossible to know whether she reviewed the form 4797 instructions. In addition, none of her clients provided her with any documentation, other than their own handwritten notes, in support of their claims that they lost money. Despite her training in tax preparation, petitioner did not report any of the income she earned from her tax preparation business on her 2015 personal income tax return. Petitioner paid two employees in cash and did not pay any withholding tax or file forms W-2 on their behalf. Certainly, petitioner should have been aware of her legal obligations to report her income from tax preparation on her personal income tax return, and to report and withhold taxes from wages she paid her employees. As such, based upon petitioner's willingness to disregard the tax laws with regard to her own personal income tax and wage reporting obligations, it can be inferred that petitioner was not acting in good faith when she filed the 713 returns claiming other losses. Because there is no reasonable basis for the tax treatment on the 713 returns and she did not act in good faith, petitioner's actions merit the imposition of the tax preparer penalty. Petitioner has failed to show any "clear and convincing" evidence to prove that the penalty was erroneously imposed by the Division, and therefore, she has failed to meet her burden of proof.

Petitioner's contention that the manner in which the Division proceeded in this matter violated her rights to due process is rejected. The hallmarks of due process are notice and an opportunity to be heard (***see Matter of Mayo*** citing ***Matter of Balkin***, Tax Appeals Tribunal, February 10, 2016). The notice of deficiency was properly issued to petitioner. She exercised her protest rights following the issuance of the notice of deficiency by requesting a conciliation conference in BCMS and by filing a petition for hearing in the Division of Tax Appeals. Both the conciliation order and the hearing were opportunities for petitioner to explain her conduct and submit evidence in support of her position. It is thus clear that petitioner received the due

process to which she was entitled in the present matter (***see Matter of Balkin*** [“There . . . could . . . be [no] successful argument that the statutory provisions for contesting assessments in New York do not provide the necessary elements of notice and opportunity to be heard required by due process”]).

H. Petitioner claims that the penalty assessed was arbitrary or capricious. She maintains that the Division could have, but chose not to, look at each individual return and come up with a framework for determining which return warranted a penalty and if so, what would be a proper amount. Petitioner further maintains that no opportunity was given to her to be heard about the fact of the imposition of a penalty or the quantum of the penalty. Petitioner posits that the Division’s assessment of the maximum penalty on each and every return without providing her with the opportunity to be heard, demonstrates the lack of any legitimate basis for the same.

In order for penalties to be abated, petitioner is required to establish reasonable cause as well as the absence of willful neglect (***see Matter of Baird v State Tax Commn.***,102 AD2d 958 [3d Dept 1984]). Petitioner did not meet her burden.

Mr. Huneau testified that the maximum penalty was assessed because of the “egregious nature of the full case” and because petitioner did not alter her behavior even after receiving two letters from the Division’s Office of Professional Responsibility advising that the position she took might be inappropriate. The large number of returns filed claiming other losses, the incomplete form 4797 attached to many of those returns, and the taxpayers’ failure to submit any corroborating documentation on audit of the returns, all contributed to the Division’s determination that the $1,000.00 per return penalty was appropriate. Moreover, the record supports the Division’s determination that petitioner lacked a reasonable belief that the tax position was more likely than not the proper tax treatment of the claimed losses. As such, I find

the Division properly imposed the maximum tax preparer penalty for the 713 returns on which other losses were claimed for tax year 2014.

I. To the extent that petitioner claims that Tax Law former § 685 (aa), as revived, violates the prohibition against bills of attainder in the U.S. Constitution (U.S. Const. art 1, § 10, cl. 3) and is unconstitutional on its face, the jurisdiction of the Division of Tax Appeals, as prescribed by its enabling legislation, does not encompass such challenges (***see Matter of Fourth Day Enterprises, Inc.***, Tax Appeals Tribunal, October 27, 1988). The Division of Tax Appeals is a forum of limited jurisdiction and is not authorized to determine the facial constitutionality of statutes (***see Matter of J.C. Penney Co.***, Tax Appeals Tribunal, April 27, 1989; ***also see Matter of Fourth Day Enterprises***).

J. With respect to petitioner's claim that the testimony of Mr. Huneau should be excluded because he lacked the necessary qualifications to provide expert testimony, it is meritless. Mr. Huneau testified on behalf of the Division as a lay witness and shared factual information about the audit in which he participated. It is appropriate for a lay witness to

> "give opinion testimony when the subject matter of that testimony is such that it is impossible to accurately describe certain facts without including some opinion or impression (***see, People v Russell***, 165 AD2d 327, 332, ***affd*** 79 NY2d 1024). Indeed, it has been held, 'such is not opinion evidence at all, but statement from observation of existing physical fact'" (***People v Dax***, 233 AD2d 177, 178 [1st Dept 1996], quoting ***Senecal v Drollette***, 304 NY 446, 449 [1952]).

Additionally, the Rules of Practice and Procedure (Rules) of the Tax Appeals Tribunal state that "[t]echnical rules of evidence will be disregarded to the extent permitted by the decisions of the courts of this State, provided the evidence offered appears to be relevant and material to the issues" (20 NYCRR 3000.15 [d]). Therefore, Mr. Huneau's testimony was appropriately offered as evidence and the undersigned administrative law judge can consider it in rendering this

determination.

K. Petitioner claims that the selected audit file admitted into the record contained "rank hearsay," and the entire audit file should be excluded from the record. Petitioner's claim is rejected. The Tax Appeals Tribunal in ***Matter of Robritt Liquor Store*** (December 27, 1991) confirmed that

> "[i]t is settled law, however, that an administrative determination supported by some substantial evidence retains it validity despite the fact that hearsay evidence was admitted and considered" (***Matter of Robritt Liquor Store***, citing ***Matter of Mira Oil Co. v Chu***, 114 AD2d 619, 494 NYS2d 458, 459, ***lv denied*** 68 NY2d 602, 505 NYS2d 1026, citing ***Matter of Ray v Blum***, 91 AD2d 822, 458 NYS2d 105; ***see also Matter of Vega v Smith***, 66 NY2d 130, 495 NYS2d 332; ***Matter of Meskouris Bros. v Chu***, ***supra***).

Additionally, the Tribunal's Rules provide that "[t]echnical rules of evidence will be disregarded to the extent permitted by the decisions of the courts of this State, provided the evidence offered appears to be relevant and material to the issues" (20 NYCRR 3000.15 [d]).

L. The petition of Yesenia Almonte is denied and the notice of deficiency (L-043263489) dated June 30, 2015 is sustained

DATED: Albany, New York
December 12, 2019

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE