STATE OF NEW YORK

DIVISION OF TAX APPEALS

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

Petitioner, Robert Cassandro, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under article 22 of the Tax Law for the years 2007, 2008 and 2009.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, on March 12, 2020, in New York, New York, with all briefs to be submitted by January 22, 2021. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Trajbar, Esq., of counsel).

ISSUES

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

II. Whether petitioner is collaterally estopped from challenging the tax and penalties asserted due for the years 2007 through 2009.

III. Whether petitioner is subject to a penalty for fraud.

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

obtained property with a value in excess of one thousand dollars from one or more such persons, in the County of New York and elsewhere during the period from June 11, 2002 to March 7, 2012.

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

7. In response to ADA Sacks's letter, the Division's Criminal Investigations Division (CID), Metro NYC Regional Office, assigned Mukaila Rabiu, Forensic Tax Auditor II, to review

[4] Petitioner's name and 20 named entities, consisting of 8 named corporations, 10 named limited liability companies and 2 named limited liability partnerships (petitioner's law firm) were referenced at the top of ADA Sacks's letter.

petitioner's case[5] for potential Tax Law violations. In his audit report's introductory summary, Mr. Rabiu noted, among other things, that the NYDA's Office investigation to date showed that petitioner "allegedly diverted over $4.8 million from clients' accounts through cash withdrawals, wire transfers or cashier's checks improperly drawn against these clients' funds deposited into his IOLA accounts." Mr. Rabiu, in his audit report introductory summary, also noted that the NYDA's Office determined that petitioner "allegedly diverted $1,390,694.43 in 2007, $1,984,036.82 in 2008 and $448,171.00 in 2009." According to the audit report, Mr. Rabiu's review of the Division's records indicated that petitioner and his spouse, Tracy Cassandro, filed an extension of time to file for the year 2007 but did not file a return for such year, and filed joint personal income tax returns (forms IT-201) for the years 2008 and 2009.[6] The audit report indicates that Mr. Rabiu analyzed the bank records provided by the NYDA's Office, and petitioner and Ms. Cassandro's income tax returns for the years 2007, 2008 and 2009. Based upon his examination of the tax returns, Mr. Rabiu found that petitioner's source of income was "mostly from his pensions and flow-thru income from his ownership of S-Corporations, LLCs and LLPs." Mr. Rabiu also found that petitioner "also reported capital gain and NYS maximum allowable capital loss from these entities" but did not report on his income tax returns "any of the funds he allegedly diverted from these entities." Assuming the diverted funds were considered unreported income for petitioner, Mr. Rabiu calculated additional tax due for each of the years 2007 through 2009.[7] Based upon his findings that petitioner might have filed false income tax returns for the years 2008 and 2009 and failed to file an income tax return for the year 2007, Mr.

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

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

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

Rabiu recommended that petitioner's case be referred to the NYDA's Office for further investigation.

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

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

10. Petitioner's criminal trial was held in the Supreme Court of the State of New York, County of New York, Part 32, before the Honorable Gregory Carro, Justice of the Supreme Court. Jury selection in this trial began on or about March 3, 2014. Petitioner was tried on the charges of grand larceny in the first degree and scheme to defraud in the first degree. On May 13, 2014, after a more than two-month jury trial, petitioner was convicted of the charge of scheme to defraud in the first degree, a class E felony. Petitioner was acquitted of the charge of grand larceny in the first degree.

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

11. On July 29, 2014, Judge Carro sentenced petitioner to an indeterminate term of 1⅓ to 4 years of imprisonment and directed him to pay restitution in the amount of $5,870,169.00,[9] plus a 5 percent fee to Safe Horizon.

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

13. Subsequently, petitioner appealed his conviction. On March 30, 2017, the Appellate Division unanimously affirmed petitioner's conviction of scheme to defraud in the first degree, and restitution in the amount of $5,870,168.00[10] (***see People v Cassandro***, 148 AD3d 652 [1st Dept 2017]).

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

15. At the hearing, the Division presented the testimony of Mr. Rabiu,[11] who was the auditor assigned to both the criminal and civil aspects of petitioner's case.

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

(a) A-One Capital LLC (A-One Capital) – bank statements covering the period January 1, 2007 through July 31, 2008;

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[9] Petitioner was directed to pay 9 named individuals, including, among others, Mr. Perelmutter and Ms. Sadock, restitution in specific amounts, the sum total of which was $5,870,169.00.

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

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

(b) Abelow and Cassandro LLP (Abelow & Cassandro) – operating account bank statements covering the period January 1, 2007 through December 31, 2009;

(c) 612 Union Ave LLC (612 Union Ave.) – bank statements covering the period January 1, 2007 through July 2, 2009; and

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

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

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

the auditor "came to the conclusion that the income that was supposed to be reported, that was not reported, needed to be reported."

18. The auditor used the numbers given to him by the NYDA's Office in his calculations of additional tax due for the years 2007 through 2009. Specifically, the auditor used unreported income in the amounts of $1,390,694.00, $1,984,037.00, and $448,171.00, respectively, for the years 2007, 2008, and 2009. The auditor testified that he used the numbers given him by the NYDA's Office:

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

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

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

"Grand Total Due" $263,145.00

20. In June 2018, the file of Robert Cassandro and Tracy Cassandro was forwarded to the Metro-NYC Regional Office Income/Franchise Field Audit Bureau for a general verification limited scope field audit for the period January 1, 2007 through December 31, 2009. The auditor found that

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

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

Summary of Taxes

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

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

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

$134,056.00 were imposed as follows: penalty pursuant to Tax Law § 685 (e) (1) (fraud at the rate of 50% of the deficiency of tax) in the amount of $67,230.00, and penalty pursuant to Tax Law § 685 (e) (2) (rate of 50% of the interest) in the amount of $66,826.00. For the year 2009, penalties in the amount of $65,796.00 were imposed pursuant to Tax Law § 685 (e) (1) (if any part of a deficiency is due to fraud, there shall be added to the tax an amount equal to two times the deficiency).

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

23. On September 28, 2018, the Division issued a notice of deficiency, notice number L-048814301, to petitioner and Tracy Cassandro, asserting tax due in the amount of $263,145.00, interest in the amount of $279,311.94, and penalties in the amount of $304,323.22 for the years 2007 through 2009. The "taxpayer's complete legal name" is listed as "CASSANDRO-ROBERT" in this notice of deficiency.

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

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

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

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

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

Summary of Taxes

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

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

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

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

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

29. At the hearing, petitioner's sole witness was himself. According to petitioner, during the years 2007 through 2009, he was involved in winding down a business of purchasing

residential real estate and then either renovating existing homes or building new ones. He testified that this business was greatly affected by the downturn in the real estate market and the economy during the years 2007 through 2009. Petitioner further testified that the recession had a major impact on the real estate industry causing the value of the properties with which he was involved to plummet and as a result, his income was greatly reduced. Petitioner filed a voluntary petition for Chapter 7 bankruptcy on December 6, 2010. He testified that the Division was named as a creditor and was aware of the bankruptcy filing.

30. At the hearing, petitioner submitted copies of the bankruptcy petition, the claims register (printed on February 22, 2012) and the discharge dated June 18, 2015. A review of the bankruptcy petition's schedule B – personal property, indicates that petitioner owned varying percentage ownership interests in 16 named entities, the majority of which were "defunct" entities through which petitioner conducted his real estate business. The bankruptcy petition's schedule F – creditors holding unsecured nonpriority claims (schedule F) included a total of 31 named creditors whose claims totaled $10,494,866.85. Of those named creditors, 16 were identified in schedule F as either having a possible claim for a loan or petitioner's personal guarantee related to one or more of his entities. Claim amounts for those 16 creditors totaled $9,990,972.60. Although the Division was not listed in either schedule D – creditors holding secure claims or schedule F of the bankruptcy petition, the Division's Bankruptcy Section filed a claim in the amount of $203.27 on February 21, 2011, which was entered in petitioner's bankruptcy claims register on the same date.[12]

31. Petitioner testified that the criminal trial was very complex. He further testified that it involved family members and it was damaging to everyone involved. He stated that many

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

people testified in the criminal matter. Petitioner claimed the majority of the transactions discussed in the criminal trial occurred prior to the 2007 through 2009 audit period. He requested that the undersigned administrative law judge review the entire criminal trial transcript and "give full weight to defendant's cross-examination of the DA's witnesses as well as the trial testimony of the defendant and defendant's witnesses."

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

(a) copies of petitioner's Abelow & Cassandro attorney escrow account (IOLA) bank statements for the period 2007 through 2009;[13]

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

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

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

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

33. According to petitioner, the spreadsheets "were originally made during the criminal trial and transactions were kind of looped together." However, "both bank statements will have corresponding transactions." Because A-One Property Management received checkline loans

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

from State Bank of Long Island during the years 2007 through 2009, a separate spreadsheet was created to distinguish those loans from loans that A-One Property Management received from other sources during those years.

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

A-One Capital

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

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

Abelow & Cassandro operating account

2007 - incoming transfers of $392,250.00;

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

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

612 Union Ave.

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

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

2009 - incoming transfers of $81,050.00.

A-One Property Management

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

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

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

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

35. Petitioner testified that he was a 50% partner in Abelow & Cassandro. With respect to 612 Union Ave., petitioner submitted into the record his schedule K-1 (form 1065) that states he was the LLC – member manager and his share of profit, loss and capital was 54%. Petitioner also submitted into the record the schedule K-1 for the other LLC member, Charles D'Aleo (Sr.), whose share of profit, loss and capital was reported as 46%. Petitioner testified that he did not know if 612 Union Ave. filed these schedules K-1 in 2009. He further testified that those schedules K-1 accurately reflected the ownership interest of 612 Union Ave. for the years 2007 through 2009.

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

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

37. At the hearing, the Division submitted into evidence 5,599 pages of the criminal trial transcript for trial dates of March 6, 2014 through May 13, 2014. This voluminous transcript, contained in 10 binders, includes the testimony of all prosecution and defense witnesses, as well as defense and prosecution closing arguments. These 10 binders do not include any opening statements, witness indexes or lists of exhibits. The Division also submitted into the record, as a

separate exhibit, the transcript of petitioner's sentence hearing held on July 29, 2014, where Judge Carro sentenced petitioner and ordered him to pay restitution.

38. During the over two-month criminal trial, the prosecution presented 41 witnesses and the defense presented 4 witnesses, including petitioner and his father. All witnesses were subject to cross-examination. In lieu of some witnesses testifying, stipulated affidavits were placed into the record at the criminal trial. Many exhibits were submitted into the record by both sides. Those exhibits included, among other items, bank statements from a number of entities, printouts of numerous e-mails, copies of deeds for a number of pieces of real property, and analysis of other exhibits consisting of, among others, many entities' bank statements, and the spending schedules given to Mr. Perelmutter dated as of December 31, 2009.

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

40. At the criminal trial, petitioner's former law partner, Mr. Abelow, testified that he maintained his own attorney client escrow (IOLA) account into which all client receipts from his matrimonial and family law practice were deposited. Mr. Abelow stated that he kept all the

profits earned from his practice and did not share them with petitioner. However, Mr. Abelow did pay his share of the expenses of Abelow & Cassandro, in the amounts that petitioner told him were due.

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

42. At the criminal trial, the prosecution presented the testimony of both Mr. Perelmutter and Ms. Sadock who made multiple loans to numerous real estate projects from 2002 through May 2007 (***see*** finding of fact 5). Sporadically, over the years, petitioner would provide Mr. Perelmutter with a list of the closed and open projects for which he and Ms. Sadock had provided loans.[14] Sometime in early 2010, petitioner provided Mr. Perelmutter with spending schedules, dated as of December 31, 2009, which listed real estate projects in East Moriches, Yaphank, East Patchogue, and Jamesport, as well as the bank accounts, dates, alleged payees and payment amounts related to expenditures for each of those projects. Mr. Perelmutter provided those schedules to the NYDA's Office as part of its investigation of petitioner. At the criminal trial, those spending schedules were received into evidence as People's Exhibit 148D.

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

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

to Jerry Perelmutter Dated as of 12/31/09)" were received into evidence at the criminal trial as People's Exhibit 221.

44. A copy of People's Exhibit 221 is part of the Division's audit file. A review of this analysis indicates total matches were not found for the properties in: East Moriches in the amount of $1,531,353.00; Yaphank in the amount of $338,527.71; East Patchogue in the amount of $2,107,108.00; and Jamesport in the amount of $364,155.91. The East Moriches expenditures list identifies payments beginning on June 1, 2006 and ending on December 1, 2007, along with some undated payments. The Yaphank expenditures list identifies payments beginning December 4, 2006 and ending on November 1, 2009, along with some undated payments. The East Patchogue expenditures list identifies payments beginning on September 1, 2007 and ending on December 1, 2008, along with some undated payments. The Herricks Lane expenditures list identifies payments beginning on March 4, 2005 and ending on June 15, 2009, along with some undated payments.

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

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

Petitioner would send emails to clients, friends and family members telling them about a specific real estate project for which a builder needed a loan and was willing to pay 20% interest on the loaned money. Individuals, such as Mr. Perelmutter and Ms. Sadock, who decided to provide loans were directed by petitioner to either make their checks payable to Abelow & Cassandro or wire the money to his Abelow & Cassandro attorney escrow

account. Sometimes, petitioner asked a client to invest money from the sale of a home or business into his real estate projects. Because petitioner had represented the client in that real estate or business transaction, the sale proceeds were already in his attorney escrow account.

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

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

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

CONCLUSIONS OF LAW

A. When the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice, and the burden is on the taxpayer to demonstrate that the deficiency assessment is erroneous by clear and convincing evidence (***Matter of O'Reilly***, Tax Appeals Tribunal, May 17, 2004). In contrast, in order to impose the fraud penalty pursuant to Tax Law § 685 (e) with respect to the asserted deficiencies for the three years at issue herein, the Division of Taxation has the burden of establishing fraud by petitioner. Furthermore, Tax Law § 683 (a) provides that any tax under article 22 shall be assessed within three years after the return was filed with the exception of those situations where the return is a false or fraudulent return for which assessment can be made at any time (Tax Law § 683 [c] [1] [B]). This provision is not contingent upon, or triggered by, the assertion of fraud penalties (***see Matter of Drebin***, Tax Appeals Tribunal, February 20, 1997, ***confirmed*** 249 AD2d 716 [3d Dept 1998]). Rather, "it is triggered by a taxpayer's fraudulent conduct" (***see id.***). As noted in finding of fact 23, the notice of deficiency was dated September 28, 2018, so that the period of limitations of three years for assessment would have run unless petitioner's returns for the years at issue were false or fraudulent returns. Consequently, the Division of Taxation had a burden to establish fraud on the part of petitioner in the first instance. The Tax Appeals Tribunal explained the standard for the determination of fraud on the part of a taxpayer as follows:

> "For the Division to establish fraud by a taxpayer, it must produce '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).

B. Internal Revenue Code (IRC) (26 USC) § 61 (a) defines the term "gross income" to include "income from whatever source derived. . . ." This statutory language has been held to encompass "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion" (***Commissioner v Glenshaw Glass***, 348 US 426, 431 [1955]). It is long settled that monies received through illegal means, such as fraud, may be included in the gross income of the recipient (***see e.g. James v United States***, 366 US 213 [1961]). In his criminal matter, petitioner was convicted after a trial of the crime of scheme to defraud in the first degree, a class E felony, sentenced to an indeterminate term of 1⅓ to 4 years and ordered to pay restitution in the amount of $5,870,169.00. Petitioner appealed his conviction and restitution order, which was later unanimously confirmed as there was "overwhelming evidence of defendant's guilt" (***see People v Cassandro***, 148 AD3d 652, 653 [1st Dept 2017]). Petitioner was convicted of the scheme to defraud one or more people from June 11, 2002 to March 7, 2012 and was ordered to pay restitution to nine of his victims. As a result of CID's cooperation with the NYDA's Office in the criminal investigation of petitioner, the Division had access to detailed bank records and criminal trial documents that ultimately formed the basis for the notice of deficiency. The auditor conducted an independent review of four entities' bank statements. He also reviewed the four entities' tax returns, as well as the tax returns filed by petitioner and Ms. Cassandro. In addition, he reviewed the criminal trial documents. After completing his independent review and analysis, the auditor used the numbers (dollar amounts) given to him by the NYDA's Office and concluded that petitioner had unreported income in the amounts of $1,390,694.00, $1,984,037.00, and $448,171.00, respectively, for the years 2007, 2008, and 2009 (***see*** finding of fact 18). On June 8, 2018, the Division issued a consent to field audit adjustment that apprised petitioner that additional tax was determined to be due based upon his conviction for scheme to

defraud, and the inclusion of "unreported income determined per DA" in each of the years 2007 through 2009. The consent to field audit adjustment also contained details of how the additional tax due was computed in each of those years. Subsequently, the notice of deficiency was issued in this matter. With respect to petitioner's contention that the notice of deficiency should be cancelled because the auditor failed to use information from petitioner's timely filed 2007 income tax return, it is meritless. The auditor credibly testified that he looked in the Division's internal system for the return and could not find any evidence of a filing at the time he did his computations of additional tax due. The notice of deficiency was properly issued in this matter. Furthermore, based upon further review of its internal systems the results of which showed that a 2007 income tax return was filed, the Division has made an adjustment to the tax determined to be due for the year (***see*** finding of fact 28).

C. Petitioner contends that the amount of tax, interest and penalties are incorrect and without basis. He also contends that he is not collaterally estopped from denying he committed tax fraud. Petitioner asserts that the issue in this matter is not identical with the issue in the prior proceeding. He maintains that the criminal indictment period covered 2002 through 2012 and tax fraud was neither charged nor mentioned during the trial. Petitioner argues that the criminal proceeding did not cover the same period and did not allege the same conduct as this case. The Division asserts that petitioner's guilty conviction is conclusive evidence of his wrongful actions. It maintains that petitioner's real estate scheme constituted fraud for purposes of imposing the fraud penalty under Tax Law § 685 because he willfully, intentionally, and with knowledge misappropriated funds of his victims and concealed his ill-gotten gains from taxing authorities. The Division maintains that petitioner had a full and fair opportunity to litigate the issues, chose to proceed to a criminal trial, and was convicted of scheme to defraud in the first degree. The

Division further maintains that because its imposition of tax, penalties, and interest on the tax deficiency resulting from his criminal actions is civil in nature, petitioner's conviction of scheme to defraud in the first degree conclusively resolves the issue of whether he realized the income at issue in this matter. Because the Division included only items that petitioner personally received, as evidenced by the review of the bank records, the Division asserts that there is no need to re-examine the individual items of income that petitioner believes should not have been included in the amount of taxable income.

D. For the doctrine of collateral estoppel to apply, petitioner must have had a fair opportunity to litigate the issue of his liability for the income tax at issue at the criminal proceeding (***see Kuriansky v Professional Care***, 158 AD2d 897, 899 [3d Dept 1990]). This means that "the identical issue necessarily must have been decided in the prior action and be decisive of the present action . . . and . . 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 [1985] [citations omitted]).

E. Petitioner correctly argues that collateral estoppel does not apply in this matter. After an over two months long trial, at which many witnesses testified and many transactions were examined and discussed, petitioner was convicted of a scheme to defraud and ordered to pay restitution to nine victims, although my review of the trial transcript indicates that there were many additional victims of petitioner's real estate scheme. The auditor did not use the full amount of the restitution ordered. Rather, and after an independent analysis of bank records, tax returns, and the criminal trial transcript and trial documents, the auditor used the dollar amounts provided by the NYDA's Office for the years 2007 through 2009. Turning to petitioner's argument that the auditor incorrectly determined the tax due in this matter, I find it meritless.

Petitioner contends that the loans identified in his spreadsheets were not income. Rather, he claims that they were for various reasons, including to progress and complete open real estate projects, business overhead and personal expenses. He also maintains that some of the loan proceeds are being paid back and some were discharged in bankruptcy. Petitioner acknowledged and the documentary evidence shows that almost all of the loans were deposited in his attorney escrow account and then transferred to the entities. The NYDA's Office did an analysis of the spending schedules which petitioner provided to Mr. Perelmutter, dated December 31, 2009, regarding open real estate projects and amounts allegedly spent on the same. Many expenses listed in those spending schedules were allegedly paid during the years 2007 through 2009. That analysis consisted of a detailed review of bank records to ascertain whether the amounts were actually paid. The prosecution presented testimony regarding that analysis, which was subject to cross-examination. Petitioner was also cross-examined regarding his attorney escrow recordkeeping, which based on petitioner's testimony was extremely poor, if not nonexistent. Petitioner controlled all the bank accounts and made all of the withdrawals, in whatever form, from the same. As for petitioner's claim that A-One Property Management's checkline loans should be excluded from the computation of his income, it is meritless. There is no evidence that those loans were included in the amounts of unreported income determined by the Division for the years 2007 through 2009. The prosecution's focus in the criminal trial was the amounts loaned by individuals to petitioner for his real estate projects, how those funds were used, and whether they were returned to the lenders. As such, I find that no adjustments to the amounts of unreported income determined by the Division for the years 2007 through 2009 are warranted.

F. In addition to the tax assessed, the Division assessed penalty for fraud. For the years 2007 and 2008, Tax Law § 685 (e) (1) provided for a penalty of fifty percent of the amount of

tax if any part of the deficiency was due to fraud (Tax Law § 685 [e] [1]). For the year 2009, Tax Law § 685 (e) (1) provided for a penalty of twice the amount of tax if any part of the deficiency is due to fraud[15] (Tax Law § 685 [e] [1]). In ***Matter of Ellett*** (Tax Appeals Tribunal, December 18, 2003), the Tax Appeals Tribunal stated:

> "For the Division to establish fraud by a taxpayer, it must produce '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 Sener,*** Tax Appeals Tribunal, May 5, 1988; ***see also, Schaffer v. Commissioner,*** 779 F2d 849, 86-1 USTC ¶ 9132; ***Matter of Cousins Serv. Sta.,*** Tax Appeals Tribunal, August 11, 1988).
>
> The Division need not establish fraud by direct evidence, but can establish it by circumstantial evidence by surveying the taxpayer's entire course of conduct in the context of the events in question and drawing reasonable inferences therefrom (***Plunkett v. Commissioner,*** 465 F2d 299, 72-2 USTC ¶ 9541; ***Biggs v. Commissioner,*** 440 F2d 1, 71-1 USTC ¶ 9306; ***Matter of Cinelli,*** Tax Appeals Tribunal, September 14, 1989, citing ***Korecky v. Commissioner,*** 781 F2d 1566, 86-1 USTC ¶ 9232).
>
> Among the factors that have been considered in finding fraudulent intent are consistent and substantial understatement of taxes (***Foster v. Commissioner,*** 391 F2d 727, 68-1 USTC ¶ 9256; ***Merritt v. Commissioner,*** 301 F2d 484, 62-1 USTC ¶ 9408). Understatement alone is not sufficient to prove fraudulent intent but, where other factors indicate fraudulent intent, the size and frequency of the omissions are to be considered in determining fraud (***see, Foster v. Commissioner, supra***)."

G. Although substantial understatements alone are not enough to meet the Division's burden, the evidence as a whole leads to a finding of fraud. First, petitioner's criminal conviction is a factor to be taken into consideration in determining whether the Division has met its burden of establishing fraud as to petitioner. As the Court in ***McGee v Commissioner of***

[15] L.2009, c.57. pt. V-1, subpt. J, § 7, substituted "two times" for "fifty percent of" in Tax Law § 685 (e) (1).

Internal Revenue (61 TC 249, 260 [1973] ***affd*** 519 F2d 1121 [5th Cir 1975] ***cert denied*** 424 US 967 [1976] stated:

> "While evidence that a taxpayer was attempting to defraud another in a business transaction may not be direct evidence of fraud with intent to evade tax, . . . the Court is entitled to consider such evidence along with other evidence in determining the intent of the taxpayer in doing certain acts, because it is a fair inference that a man who will misappropriate another's funds to his own use through misrepresentation and concealment will not hesitate to misrepresent and conceal his receipt of those same funds from the Government with intent to evade tax. . . . The legal relevancy of such evidence is based upon logical principles which go to negate innocent intent (citations omitted)."

In addition to his conviction of scheme to defraud, petitioner was ordered to pay restitution in the amount of $5,870,169.00 to nine victims, although my review of the criminal trial transcripts indicates there were many additional victims of petitioner's on-going real estate scheme. He abused the trust of his family, friends, and clients to fund a lifestyle, and portray to the world that he was a successful real estate attorney, who also had a successful real estate enterprise. During the criminal trial, he admitted using loan money from his victims for personal expenses and failed to report that income on his tax returns. The Division found that petitioner had unreported income in the amounts of $1,390,694.00, $1,984,037.00, and $448,171.00, for the years 2007, 2008, and 2009, respectively. The gravity of petitioner's fraud, and his failure to report the fruits of that fraud on his tax returns for the years 2007 through 2009, all lead to the conclusion that the resulting deficiency is due to fraud on the part of petitioner.

H. Petitioner claims that the assessment is barred by the three-year statute of limitations (Tax Law § 683 [a]). However, assessments may be made by the Division at any time in the event a false or fraudulent return is filed with the intent to evade the tax (Tax Law § 683 [c] [1] [B]). Thus, in the conclusion of law G, petitioner's returns for the years 2007 through 2009 were determined to be fraudulent, and Tax Law § 683 (a) does not act as a bar to the notice of deficiency issued by the Division on September 28, 2018.

I. With respect to petitioner's claim that the liability for tax year 2007 was discharged by his bankruptcy, it is meritless. 11 USCA § 523 (a) (1) (B) and 11 USCA § 507 (a) (8) requires that more than three years must have elapsed since the tax return generating the liability was due, including extensions. Petitioner's 2007 tax return was filed on October 14, 2008, under an extension of time to file. Petitioner's bankruptcy petition was filed on December 6, 2010. Thus, the tax liability at issue here was not discharged.

J. The petition of Robert Cassandro is denied and the notice of deficiency dated September 28, 2018 as modified (***see*** finding of fact 28) is sustained.

DATED: Albany, New York
July 22, 2021

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE