

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>STEPHEN AND Nanci FISHER</b>	:	DECISION
	:	DTA NO. 806534
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Years 1977 and	:	
1984.	:	

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Petitioners Stephen and Nanci Fisher, 2040 Polk Street, Apartment 275, San Francisco, California 94109, filed an exception to the determination of the Administrative Law Judge issued on October 22, 1998. Petitioners appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception and a reply brief. The Division of Taxation filed a brief in opposition. Petitioners' request for oral argument was denied.

Subsequently, by letters dated March 31, 2000, April 6, 2000 and April 14, 2000, petitioners made a motion to the Tax Appeals Tribunal (hereinafter the "Tribunal") to reopen the record for reargument and to introduce newly discovered evidence. The Division of Taxation responded by letter in opposition on May 11, 2000. Petitioners requested leave to file a reply to the Division of Taxation's letter in opposition, which request was denied by letter of the Secretary to the Tax Appeals Tribunal dated May 23, 2000.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

### ***ISSUES***

I. Whether petitioners have established that the entire amount of business expenses claimed on a Schedule C filed with their 1977 personal income tax return should be allowed, in turn resulting in allowance of the full amount of overpayment (refund) claimed by petitioners but denied upon audit by the Division of Taxation.

II. Whether petitioners properly calculated their personal income tax liability for the year 1984.

III. Whether petitioners have established grounds sufficient to warrant abatement of a penalty imposed against them for late filing of their 1984 personal income tax returns.

IV. Whether the Division of Taxation has properly allowed and accounted for all available overpayments of tax by petitioners for the years 1977 through 1988 as credits against petitioners' outstanding liabilities.<sup>1</sup>

V. Whether petitioners are entitled to reopen the record of this proceeding to introduce allegedly newly discovered evidence.

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<sup>1</sup>The terms "overpayment" and "refund" have been used somewhat interchangeably throughout the documents in this case. For purposes of clarity, the term "overpayment" refers to the situation where, in any given year, petitioners' payments (by withholding or otherwise) exceeded their tax liability for such year. A "refund", in contrast, can result from an overpayment if an overpayment is not otherwise utilized as a setoff or credit against a tax liability or is not utilized as an estimated payment against a future tax liability.

***FINDINGS OF FACT***<sup>2</sup>

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

*1975 THROUGH 1978*

Petitioners, Stephen and Nanci Fisher, were residents of New York from at least 1975 through part of 1984. The Division of Taxation ("Division") conducted an audit of petitioners' tax liability for the years 1975 through 1978. For each of these years, petitioners' returns were filed late. More specifically, petitioners' 1975 return was not filed until March 21, 1980, petitioners' 1976 return was not filed until January 23, 1979, petitioners' 1977 return was not filed until August 16, 1978, and petitioners' 1978 return was not filed until March 21, 1980. The Division's audit resulted in the following findings for the years under audit:

<i>YEAR</i>	<i>FINDING</i>
1975	Additional tax due in the amount of \$4,485.09, plus penalties for failure to file a timely return and pay tax due.
1976	Tax due in the amount of \$4,394.70, as set forth on petitioners' return for such year, plus penalties for failure to file a timely return and pay tax due.
1977	Disallowance of claimed Schedule C business expenses resulting in disallowance of a portion of petitioners' claimed overpayment and refund of \$1,310.10, thus leaving a reduced overpayment (refund) in the amount of \$205.88.
1978	No tax due and no overpayment by petitioners.

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<sup>2</sup>Although the only years directly in issue are 1977 and 1984, it becomes necessary to discuss other years in order to provide some perspective and to assess any possible impact on the years in question by reason of the application of overpayments from such other years against petitioners' liabilities.

For 1975, the Division advised petitioners of its audit result by issuing a Statement of Audit Changes dated May 2, 1978. This statement was followed by a Notice of Deficiency dated August 10, 1978, asserting additional tax due in the amount of \$4,485.09, plus penalties under Tax Law § 685(a)(1) and (2) for late filing of a return and late payment of tax, respectively, and interest.

For 1976, the \$4,394.70 amount of tax due per the Division's audit was the same amount of tax shown as due and deemed self-assessed by petitioners upon their late-filed return for 1976. Such amount, consisting of New York State tax (\$3,566.15) and New York City tax (\$828.55), plus penalties as above for late filing and late payment, and interest, was reflected on two notices and demands for payment issued to petitioners on July 3, 1980.

For 1977, the audit disallowance of a portion of petitioners' claimed overpayment and refund did not result in an underpayment or deficiency of tax, but rather left a reduced overpayment of \$205.88. Hence, no Notice of Deficiency was issued for 1977.

For 1978, the audit resulted in no underpayment or overpayment of tax and, hence, no Notice of Deficiency was issued.

By a letter dated June 13, 1980, petitioners challenged the Division's audit findings for 1975 through 1978, including most specifically the overpayment (refund) reduction for 1977 and the imposition of penalties for 1975 and 1976. With specific regard to the business expense disallowance for 1977, petitioners' letter stated:

[expenses for] a consulting business were eliminated (1977) in the audit. That company (Fisher Associates) survives today. Although there was no income (1977) the business expenses were real (such as stationery, telephone, travel) etc. This year (1980) there was some income (from Fisher Associates) and the same expenses.

Because my business was a failure in 1977, I do not believe it is fair to further penalize me for eliminating real expenses paid for doing business.

*1975*

The \$4,485.09 deficiency asserted for 1975 was based on information taken from petitioners' Federal income tax return for such year, and followed petitioners' failure to file a New York State income tax return for 1975 and their failure to respond to inquiry letters sent by the Division. However, this asserted deficiency was reduced by the Division to \$659.89 upon petitioners' March 21, 1980 submission of a photocopy of a joint New York State income tax return for 1975 including attached wage and tax statements.

As the result of a prehearing conference held on January 23, 1981, the Division's reduction of the amount of tax asserted as due for 1975, from \$4,485.09, plus penalty and interest, to \$659.89, plus penalty and interest, was confirmed. In turn, petitioners continued their challenge to the (reduced) deficiency for 1975, and were advised that the matter would be scheduled for a small claims hearing.

After the January 23, 1981 prehearing conference, petitioners filed a perfected petition dated August 24, 1981, protesting all of the audit years 1975 through 1978. This petition raised no specific substantive grounds in challenge to the additional tax asserted as due for 1975, or to the tax assessed as due for 1976, but rather specifically challenged the 1977 refund reduction and the imposition of penalties. Petitioners sought the full overpayment (refund) claimed on their 1977 return, and requested that such overpayment "be applied and other years' deficiencies and penalties adjusted." On October 20, 1981, the Division filed its answer to this perfected petition, asserting that the Notice of Deficiency for 1975 (as reduced) was correct, and that because

notices of deficiency had not been issued for any year other than 1975, there was no jurisdiction to address any of the other audit years.

A small claims hearing was held on January 19, 1982 concerning petitioners' challenge for the year 1975. By a decision of the former State Tax Commission dated December 14, 1982, the Notice of Deficiency issued against petitioners for the year 1975, reduced in amount to \$659.89, plus penalties and interest, was sustained. This decision was specifically limited to the year 1975, on the basis that since no notices of deficiency had been issued for any of the other audit years, there was no jurisdiction to address such years. It is undisputed that no timely appeal was taken from this December 14, 1982 decision.

#### *1977*

For 1977, petitioners claimed (on their return) that they had overpaid their taxes and were entitled to a refund in the amount of \$1,301.10. In this regard, petitioners claimed a loss on such return with respect to a business called Fisher Associates. The specific business expenses giving rise to the claimed loss totaled \$5,675.00, and appeared on Federal Schedule C ("Profit or [Loss] From Business or Profession") filed with petitioners' 1977 New York State return. This Schedule C listed petitioner Stephen Fisher as the business proprietor, reflected "business consultant" as the principal business activity, "administration" as the product, and "Fisher Associates" as the business name. The Schedule C listed business addresses in New York, New York, and in Cannes, France, listed "none" as total (business) income, and included the following claimed expenses:

Rent on business property	\$810.00
Travel-airline	\$1,555.00
Lodging	\$724.00
Entertainment and gifts	\$1,215.00
Printing and Stationery	\$292.00
Telephone	\$398.00
Office Supplies	\$194.00
Postage	\$77.00
Auto Rental	\$140.00
Transportation-train and taxi	\$230.00
Professional dues and subscriptions	<u>\$40.00</u>
Total	<u><u>\$5,675.00</u></u>

The Division, on audit, disallowed petitioners' claimed Schedule C business expenses for 1977 and, as a result, recomputed and reduced the amount of petitioners' claimed overpayment for such year. By a notice of disallowance letter dated April 1, 1981, apparently in response to petitioners' June 13, 1980 letter challenging the audit results (*see*, above), the Division notified petitioners that their allowable refund for 1977 was reduced from \$1,301.10, as claimed, to \$205.88. According to the Division's audit report attachment Form AU 251.1, dated July 7, 1980, the claimed expenses were disallowed because the business showed no income and did not claim any service was rendered, had no business cards, had no list of prospective customers and hence no profit motive, had no professional status, and did not disclose the associates in the business.

Petitioners challenged the 1977 refund reduction by filing a petition. This petition, dated May 31, 1981 and apparently filed in response to the Division's April 1, 1981 refund disallowance letter, was received by the Tax Appeals Bureau of the former State Tax Commission on June 2, 1981. Petitioners also filed a claim for credit or refund of personal

income tax with respect to 1977, which claim was received by the Division on or about January 22, 1982.

By a letter dated April 12, 1982, petitioners were advised that a prehearing conference on their 1977 refund reduction challenge was scheduled for May 12, 1982 at 2:45 P.M. However, petitioners did not appear at this scheduled prehearing conference, and a default order (Order No. 82-C-40) was issued against petitioners on January 14, 1983. Following additional ongoing correspondence between the parties, petitioners received an October 23, 1987 letter from the Division's former Director of Litigation advising that the Division would not oppose a request by petitioners to vacate the default order. Thereafter, upon petitioners' January 14, 1988 application, the default order was vacated and a conciliation conference was scheduled for June 1, 1988 with the Division's Bureau of Conciliation and Mediation Services ("BCMS"), the successor to the former Tax Appeals Bureau's prehearing conference unit.

The conciliation conference was held as scheduled on June 1, 1988. As a result of this conference, the Division conceded that petitioners had provided substantiation with respect to \$2,800.00 of their claimed Schedule C business expenses. On this score, the June 1, 1988 conference report states that "TP [Taxpayer] presented additional substantiation for expenses deducted on TP's [Taxpayers'] Schedule C." Accordingly, on the basis of the \$2,800.00 of expenses substantiated, the Division's conciliation conferee recalculated and increased petitioners' overpayment for 1977 by \$540.00, thus increasing the overpayment amount from \$205.88, as originally determined on audit, to \$745.88. A conciliation order (Order No. 34013) dated November 4, 1988 was issued to petitioners notifying them of the recalculation of the amount of overpayment (refund) for 1977.



*1979 THROUGH 1983*

Based on the evidence submitted at hearing, and in accordance with petitioners' tax returns or transcripts of the contents thereof, for the years 1979 through 1983 there appears to be no dispute between the parties that petitioners:

- a) overpaid their tax liability for 1979 by the amount of \$57.00 and were entitled to a refund or credit for such amount.
- b) overpaid their tax liability for 1980 by the amount of \$874.00 and were entitled to a refund or credit for such amount.
- c) overpaid their tax liability for 1981 by the amount of \$1,010.00 and were entitled to a refund or credit for such amount.
- d) overpaid their tax liability for 1982 by the amount of \$151.00 and were entitled to a refund or credit for such amount.
- e) overpaid their tax liability for 1983 by the amount of \$155.00 and were entitled to a refund or credit for such amount.

*1984*

On or about October 15, 1986, petitioners filed a New York State Resident Income Tax Return (Form IT-201) and a New York State Nonresident Income Tax Return (Form IT-203) for 1984. According to these returns, petitioners were residents of New York through July 31, 1984, and were nonresidents of New York for the balance of such year. Wage and tax statements attached to petitioners' 1984 returns reflect petitioners' address as 115 Field Point Road, Greenwich, Connecticut 06830 and, accordingly, it is presumed that petitioners claimed their change of residence in 1984 was to Connecticut.

On their 1984 returns petitioners computed their New York taxable income, and their tax liability, for the separate periods covered by such returns, and then combined the result to arrive

at a claimed overpayment and refund due for 1984 in the amount of \$282.00. The Division, however, recalculated petitioners' tax liability for 1984 by totaling the amount of New York taxable income determined on each of petitioners' two returns (resident and nonresident) and computing the tax liability on such combined amount of New York taxable income. This method of computation resulted in a higher tax liability than under petitioners' computational method, where the tax was computed separately on the two separate amounts of New York taxable income. Specifically, the Division calculated a tax liability for 1984 in the amount of \$168.82 and denied petitioners' claimed overpayment and refund for such year in the amount of \$282.00. In addition, since petitioners' 1984 return was filed some one and one-half years after its due date, the Division imposed a late filing penalty (per Tax Law § 685[a][1]), and interest.

By a Statement of Audit Changes dated March 11, 1987, including calculations, the Division provided petitioners with an explanation of the additional tax, penalty and interest asserted for 1984 as follows:

[a]n error was made when you calculated New York State tax on your return. Since you had taxable income on both of your part-year returns, you should have calculated the tax on the sum of the taxable income from the two (2) returns. (Section 654(d) of the New York State Tax Law).

Section 685(a)(1) penalty for late filing has been imposed on your tax liability.

By a subsequent Notice of Deficiency dated December 7, 1987, the Division notified petitioners of its assertion of tax, penalty and interest due for 1984.

Petitioners challenged the Division's Notice of Deficiency and calculation for 1984, stating that they were in fact owed a refund for such year. A conciliation conference was held by the

Divisions' BCMS on June 1, 1988. Thereafter, on November 4, 1988, conciliation order No. 84862 was issued sustaining the Division's calculation of tax liability and its Notice of Deficiency for 1984, including penalty and interest.

Petitioners challenged both of the November 4, 1988 conciliation orders pertaining, respectively, to 1977 and 1984, by filing a petition dated January 27, 1989. Petitioners sought the full overpayment (refund) claimed on their 1977 return (i.e., \$1,301.10), and alleged that the conciliation conferee did not consider all of the evidence for such year regarding petitioners' claimed business expenses. For 1984, petitioners alleged that the Division did not properly calculate their tax liability, and that petitioners are owed a refund for such year. In addition, petitioners complained, in their petition, as to the passage of time in resolving these matters.

Petitioners followed their January 27, 1989 petition with a February 13, 1989 amended petition which repeated the claims set forth in the January 27, 1989 petition and specifically requested, in newly added paragraph "7", the following:

Interest on all late refunds paid to petitioner -plus- refunds owed to petitioner must be paid/credited so that N.Y. state can provide a true accounting . . . past penalties must be offset > if petitioner is penalized for late payment of taxes; N.Y. State must be penalized for much later payment of refunds.

A hearing before the Division of Tax Appeals on the January 27, 1989 petition and the February 13, 1989 amended petition was scheduled for December 14, 1989. Prior thereto, by a letter dated August 14, 1989, petitioners requested the issuance of subpoenas for certain individuals then currently or formerly employed by the Division, and one individual employed in the Office of the Attorney General. The requested subpoenas were issued by the Division of Tax Appeals.

By a motion received by the Division of Tax Appeals on November 27, 1989, the Division requested that the subpoenas be quashed, withdrawn or modified. By a responding letter from the Division of Tax Appeals dated November 29, 1989, the Division was advised that its application to quash, withdraw or modify the subpoenas would be ruled on at the December 14, 1989 scheduled hearing. Petitioner Stephen Fisher and the Division appeared at the scheduled December 14, 1989 hearing, and argument was heard on the Division's motion to quash, withdraw or modify the subpoenas. The Administrative Law Judge then assigned to the matter declined to rule on the motion on the basis that he lacked the authority to vacate, modify or enforce the subpoenas, and instead referred the parties to Supreme Court for resolution of the status of the subpoenas and adjourned the hearing pending resolution of the subpoena issue. The underlying substantive merits of the case were not addressed. While these events transpired, the Assistant Attorney General who had been subpoenaed brought a motion, returnable January 10, 1990 in Supreme Court, New York County, to quash the subpoena issued to him.

On January 10, 1990, the Division filed an exception to the Administrative Law Judge's determination that he did not have the power to vacate or modify the subpoenas, and requested that the Tribunal order all of the subpoenas withdrawn.<sup>3</sup> On April 19, 1990, the Tribunal issued its decision holding that the Administrative Law Judge had authority to rule on the Division's motion to quash, modify or withdraw the subpoenas, and that the Tribunal had authority to rule on the Division's exception to the Administrative Law Judge's determination not to address the motion to quash, withdraw or modify. The Tribunal went on to rule on the Division's motion,

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<sup>3</sup> The motion to quash in Supreme Court, New York County, was held in abeyance pending the Tribunal's decision of the Division's exception.

ordering withdrawal of all of the subpoenas except for that issued to the individual having information concerning the impact of the Division's application of any previously granted refunds for tax year 1977 (*see, Matter of Fisher*, Tax Appeals Tribunal, April 19, 1990; *rearg denied* June 9, 1990; *petition dismissed* 177 AD2d 801, 576 NYS2d 415, *appeal dismissed* 79 NY2d 914, 581 NYS2d 666, *lv denied* 80 NY2d 751, 587 NYS2d 287).

Following additional correspondence between the parties, petitioner Stephen Fisher filed an amended petition, dated November 15, 1996, arguing that the Division erroneously denied the full overpayment (refund) claimed on petitioners' 1977 New York State Income Tax Resident Return (Form IT-201/208); that the business expenses claimed by petitioners on Schedule C of such return were improperly denied by the Division; that the Division owes petitioners refunds that were not calculated into the Division's Consolidated Statement of Tax Liabilities dated June 14, 1996 concerning petitioners' income tax liability for 1984; and that the Division's claim for interest on petitioners' outstanding liabilities should be canceled because the Division had not paid interest on unpaid refunds owed to petitioners. More specifically, petitioners claimed that the Division owed petitioners an unpaid refund of \$1,155.27 (\$1,010.00 plus interest) based on petitioners' 1981 tax return, as well as a refund of \$874.00 for 1980 which had not been credited against petitioners' liabilities until 1987 and upon which petitioners had received no interest.

The Division filed an amended answer, dated February 5, 1997, denying that the Division owed petitioners refunds that were not calculated into their 1984 tax liability and denying knowledge or information sufficient to form a belief as to the truth of petitioners' allegations that the \$874.00 refund was credited to petitioners' tax liabilities in 1987 with no interest paid, and that an \$1,155.00 refund for 1981 was not paid to petitioners or credited against petitioners' tax

liabilities. The Division affirmatively stated that Tax Law § 685 requires that penalties be assessed for failure to timely file a tax return or to pay the tax shown as due on a return unless it is established that such failures were due to reasonable cause and were not due to willful neglect, and that petitioners have not met their burden of establishing reasonable cause and the absence of willful neglect for failure to timely report and pay taxes for 1984.

At the hearing held in these proceedings on June 19 and 20, 1997, petitioner Stephen Fisher stated that he thought the entire amount of claimed Schedule C business expenses for 1977 had been allowed as the result of the conciliation conference. However, he also stated that it appears, in fact, only approximately half of such expenses were allowed, and that he did not know which specific expenses were accepted and which remained disallowed. The record contains no evidence from petitioners in substantiation of any of the claimed expenses. In fact, both petitioners' post-hearing submission (denominated the "Fisher Report"), and the Division's Exhibit "EE" (denominated the "Eckler Report"), reflect the \$745.88 amount determined at the conciliation conference as the amount of overpayment by petitioners for the year 1977.

Petitioner Stephen Fisher also appeared to concede, at the hearing, that petitioners erred in computing their liability for 1984. Notwithstanding this seeming concession, however, petitioners' post-hearing submission of the Fisher Report indicates a claim for \$282.00, the amount of overpayment (refund) calculated by petitioners on their returns for 1984. The Fisher Report and petitioners' post hearing brief and reply brief offer no explanation concerning this apparent inconsistency, nor any specific basis in support of petitioners' method of tax calculation as opposed to the Division's method of tax calculation for 1984. In any event, however, petitioners clearly did not concede and continue to contest the imposition of penalties for 1984.

Petitioners offered no specific reason for the late filing of their returns for 1984. However, petitioners noted that any calculation error on their part for such year would have been the result of inadvertent mistake, and again maintained that penalties should be abated based on the Division's lateness in crediting overpayments or paying refunds and, alternatively, that if such penalties are not abated the Division should, like petitioners, be penalized for such lateness.

*1985 THROUGH 1988*

For 1985, the Division indicates an overpayment by petitioners, and hence a refund due, in the amount of \$26.28. In contrast, petitioners' Fisher Report claims a greater overpayment and refund due in the amount of \$226.00. For 1986, there appears to be no disagreement that petitioners' liability per their return was paid, leaving no balance due and no overpayment. For 1987, the Division indicates an overpayment in the amount of \$81.77. Petitioners' Fisher Report provides no claim or information with regard to 1987 and, in the absence of any contrary evidence or claim, it is assumed that petitioners are in fact entitled to the overpayment indicated by the Division. Finally, for 1988, the Division indicates an overpayment, and hence a refund due, in the amount of \$297.00. Petitioners' Fisher Report claims, in contrast, a higher overpayment and refund due in the amount of \$2,297.00.

In summary of the foregoing, the Division claims that petitioners:

- a) owed additional tax for the years 1975, 1976 and 1984;
- b) paid the correct amount of tax (or had no tax due) and made no overpayment for the years 1978 and 1986, and;
- c) overpaid their tax liability for the years 1977, 1979, 1980, 1981, 1982, 1983, 1985, 1987 and 1988.

In contrast, petitioners apparently agree (at this stage of the proceedings) with the tax liability amounts for the years 1975 and 1976, with the fact that there was no tax due nor any overpayment or refund due for the years 1978 and 1986, and with the dollar amounts of the overpayments shown by the Division for the years 1977, 1979, 1980, 1981, 1982 and 1983. As noted, petitioners offered no evidence or argument against the Division's information showing an overpayment of \$81.77 for 1987. Finally, neither party has presented any information regarding refunds or other claims beyond 1988, and petitioners specifically stated that there have been no problems after 1988.

Following correspondence between the parties, this matter was scheduled and came on for hearing on June 19, 1997 and was continued and concluded on June 20, 1997. At such hearing, the Division presented two witnesses and submitted some 31 documents as exhibits, including Exhibit "EE" referred to as the Eckler Report. This report was prepared by one of the Division's witnesses (Theodore Eckler), at the request of Administrative Law Judge Faulkner, as a detailed summary and explanation of the Division's accounting and calculations underlying its position in this case vis-a-vis the amounts of petitioners' outstanding liabilities and the amounts and applications of petitioners' overpayments against such liabilities. Petitioners, in turn, submitted some 18 exhibits, all of which except for Exhibits "3", "11", "13" and "14" were encompassed within two volumes together constituting Exhibit "18" and denominated "Evidence Book I" and "Evidence Book II". At hearing, each party was afforded the opportunity to submit evidence and to challenge the evidence offered by each other's respective opponent, including the opportunity to cross examine the witnesses. Finally, petitioners were afforded the opportunity, post-hearing, to submit their own accounting and calculations in contrast to the Division's accounting set forth



in the Eckler Report. Petitioners in fact have submitted such an accounting, known as the Fisher Report.

Where the parties differ, and what is disputed in this proceeding, is the following:

- a) Whether petitioners have established entitlement to any amount of overpayment for 1977 in excess of the \$745.88 amount determined as a result of the June 1, 1988 conciliation conference.
- b) Whether the Division correctly recalculated petitioners' tax liability for 1984, thus eliminating petitioners' claimed \$282.00 overpayment and resulting in a tax liability of \$168.82 for such year.
- c) Whether penalties for late filing and late payment imposed by the Division on the tax liabilities calculated for each of the years 1975, 1976 and 1984 should be eliminated based on the Division's alleged late crediting of overpayments (or late payments of refunds) owed to petitioners and, for 1984, whether penalty should be eliminated based on reasonable cause excusing petitioners' late filing of returns for such year.
- d) Whether petitioners have established their claim of an overpayment in the amount of \$226.00 for the year 1985, as opposed to the amount of \$26.28 allowed by the Division for such year.
- e) Whether petitioners have established their claim of an overpayment in the amount of \$2,297.00 for the year 1988, as opposed to the amount of \$297.00 allowed by the Division for such year.
- f) Whether the Division's method of crediting overpayments by petitioners against petitioners' outstanding liabilities improperly deprives petitioners of interest due on such overpayments.
- g) Whether petitioners have been denied due process of law because the hearing in this matter was not postponed to a date other than June 19, 1997 and, thereafter, because petitioners were not granted a new hearing as requested in their September 29, 1997 motion.
- h) Whether petitioners have been denied equal protection under the law based on the imposition of penalties against them for late filing and late payment, without concomitant imposition of penalties against the Division for alleged late crediting of overpayments against petitioners' outstanding liabilities.

*ACCOUNTING AND APPLICATIONS OF REFUNDS*

The Division's accounting of petitioners' liability as of the June 20, 1997 hearing date, reflects a total amount due of \$19,839.24, and is set forth in Exhibit "EE", denominated the Eckler Report. This calculation commences with petitioners' liability for 1975, and continues through to include the impact of underpayments and overpayments for ensuing years through 1988. In contrast, petitioners' accounting of their liability as of the June 20, 1997 hearing date totals ("at most") \$806.00, is denominated the Fisher Report, and is included as part of petitioners' post-hearing submission. This calculation also starts with petitioners' liability for 1975, and continues through to include the impact of underpayments and overpayments for ensuing years through 1988. Because of the differences in these accountings, it is helpful to reproduce the same hereafter, verbatim, together with interspersed explanatory Findings of Fact in order to facilitate comparison and highlight the differences between the two. For clarity, the explanatory Findings of Fact are single spaced and are presented in italics.

*THE ECKLER REPORT*

1975 Tax Due	\$	659.89
Penalties		230.97
Interest from 4/15/76 to 4/15/78		<u>112.19</u>
Total Due 4/15/78	\$	1,003.05
Less: 1977 Overpayment <sup>4</sup> (corrected) (4/15/78) <sup>5</sup>		<u>&lt;745.88&gt;</u>
Balance due after 1977 overpayment	\$	257.17
1978 No tax due/No overpayment (4/15/79)		<u>0</u>
Balance 4/15/78	\$	257.17
Less 1979 overpayment (4/15/80)		<u>&lt;57.00&gt;</u>

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<sup>4</sup>Refunds due to the taxpayer are referred to as "overpayments" in this analysis.

<sup>5</sup>All overpayments (refunds) are credited as of April 15<sup>th</sup> of the year the return was due, regardless of whether the petitioners requested an extension or late filed the return.

Balance after 1979 overpayment	\$ 200.17
Total 1975 due 4/15/81	200.17
Less 1980 overpayment (4/15/81)	<u>&lt;874.00&gt;</u>
Balance after 1980 overpayment	\$ <u>&lt;673.83&gt;</u>

The foregoing information reflects that the Division has applied overpayments for the years 1977, 1979 and 1980, the amounts of which are not in dispute, against the outstanding liability, including penalties and interest, owed by petitioners for the year 1975. The Division has computed interest on the 1975 tax liability only (*prior to 9/1/83, interest accrued only on outstanding tax liability, and not on penalties or interest*) for the period from the due date for petitioners' 1975 return (4/15/76) through to the due date for petitioners' 1977 return (4/15/78), at which point petitioners' \$745.88 overpayment for 1977 (determined as the result of the June 1, 1988 conciliation conference) is credited. This overpayment credit eliminates the tax liability for 1975, thus eliminating the accrual of further interest charges on such liability and leaves unpaid, for the 1975 tax year, only penalties and interest. The Division's method of accounting continues in the same manner to apply petitioners' overpayments for 1979 and 1980 against their remaining liability for 1975, consisting of penalties and interest, until such liability has been satisfied. The Division then, as detailed hereafter, applies the remaining 1980 overpayment amount (\$673.83) against petitioners' next outstanding liability, i.e., the amount due for 1976. In sum, overpayments for the years 1977, 1979 and 1980 are being applied to petitioners' liabilities, including penalties and interest, outstanding for the earlier years 1975 and 1976, as opposed to such overpayments being paid over as refunds to petitioners.

1976 Tax Due	\$ 4,394.70
Penalties	1,845.78
Interest on \$4,394.70 from 4/15/77 (due date of return) to 4/15/81 (date of 1980 overpayment the first date an overpayment was applied to this liability)	<u>1,493.94</u>
Total 1976 due 4/15/81	\$ 7,060.59
Interest 4/15/81 to 4/15/82 on \$3,720.87 (tax only)	<u>451.83</u>
Total 1976 due 4/15/82	\$ 7,512.42
Less 1981 overpayment (4/15/82)	<u>&lt;1,010.00&gt;</u>
Balance after 1981 overpayment	\$ 6,502.42
Interest from 4/15/82 to 4/15/83 on \$2,710.87 (tax only)	<u>350.95</u>
Total 1976 due 4/15/83	\$ 6,853.37
Less 1982 overpayment	<u>&lt;151.00&gt;</u>
Balance after 1982 overpayment	\$ 6,702.37

Interest 4/15/83 to 8/31/83 on \$2,559.87 (tax only)	<u>88.06</u>
Total 1976 due 8/31/83	\$ 6,790.43
Interest 9/1/83 to 4/15/84 <sup>6</sup>	<u>401.69</u>
Total 1976 due 4/15/84	\$ 7,192.12
Less 1983 overpayment (4/15/84)	<u>&lt;155.00&gt;</u>
Balance after 1983 overpayment	\$ 7,037.12
Interest 4/15/84 to 4/15/86	<u>1,535.07</u>
Total 1976 due 4/15/86	\$ 8,572.19
Less 1985 overpayment (4/15/86)	<u>&lt;26.28&gt;</u>
Balance after 1985 overpayment	\$ 8,545.91

*The Division's accounting reflects continued applications of petitioners' overpayments for the years 1980, 1981, 1982, 1983 and 1985, against petitioners' outstanding unsatisfied liability for 1976, including penalties and interest. Interest is computed from 4/15/84 to 4/15/86 to reflect the existence of a liability asserted by the Division for the year 1984. That is, interest was calculated on the unpaid 1976 liability for this two-year period because there was no 1984 overpayment available to reduce such liability. Hence, the next available overpayment to apply against the outstanding 1976 liability was the overpayment for the year 1985, applied as of the due date for petitioners' 1985 return (i.e., 4/15/86). Similarly, as shown below, interest on the outstanding unpaid liability for 1976 is computed from 4/15/86 to 4/15/88 because there was no overpayment for 1986 available to reduce the unpaid liability. The next available overpayment to reduce such liability is the overpayment for 1987 (\$81.77) applied as of the 4/15/88 due date for petitioners' 1987 return. In this manner, the Division's accounting continues to apply overpayments, as of the due date for the return for the particular overpayment year, against petitioners' outstanding liability for the year 1976.*

1986 Balance due and paid/No overpayment	<u>0</u>
Balance 4/15/86	\$ 8,545.91
Interest 4/15/86 to 4/15/88	<u>1,265.58</u>
Total 1976 due 4/15/88	\$ 9,811.49
Less 1987 overpayment (4/15/88)	<u>&lt;81.77&gt;</u>

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<sup>6</sup>As of 9/1/83, Tax Law § 684 allowed interest to be computed on outstanding amounts of tax, penalty and interest due, rather than only on outstanding tax liability, as had previously been the case. Accordingly, where the interest amount in the Division's accounting is followed by the parenthetical notation "tax only", the interest base reflects the amount of outstanding tax liability, reduced by the amount of available overpayment. Thus, interest was calculated for the period 4/15/81 to 4/15/82 on an outstanding tax liability of \$3,720.87, computed as petitioners' 1976 tax liability of \$4,394.70 less the \$673.83 overpayment balance for 1980. In the same manner, the resulting reduced 1976 tax liability of \$3,720.87 was again reduced by application of petitioners' \$1,010.00 overpayment for 1981 (applied as of the 4/15/82 due date for the 1981 return), to arrive at an outstanding tax liability of \$2,710.87. Finally, the resulting reduced 1976 tax liability was again reduced to \$2,559.89 in the same manner by the \$155.00 overpayment for 1982.

Balance after 1987 overpayment	\$ 9,729.72
Interest 4/15/88 to 4/15/89	<u>743.44</u>
Total 1976 due 4/15/89	\$10,473.16
Less 1988 overpayment (4/15/89)	<u>&lt;297.00&gt;</u>
Balance after 1988 overpayment	\$10,176.16
Interest 4/15/89 to 6/20/97	<u>9,179.29</u>
1976 Balance due 6/20/97	\$19,355.45

*The foregoing presentation shows that the Division has applied petitioners' overpayments as soon as they became available against petitioners' outstanding liabilities, starting with the oldest liability (1975) and working forward. According to the Division's computations and accounting, the overpayments set forth above and applied as of the due date for petitioners' return for each of the overpayment years against petitioners' outstanding liabilities for 1975 and 1976, including penalties and interest, were not sufficient to extinguish such liabilities. Although the Division has asserted a liability for 1984, as noted, there were no outstanding overpayments available to apply against such liability, and as set forth below, the 1984 liability, including penalties and interest, was added to the remaining unsatisfied liability for 1976 to arrive at the Division's computation of petitioners' liability as of the June 20, 1997 date of the hearing.*

1984 Tax Due	\$ 168.82
Penalty	42.21
Interest 4/15/85 to 6/20/97	<u>272.76</u>
Total due 6/20/97	\$ 483.79
Total 1976 and 1984 due as of 6/20/97	\$19,839.24

#### THE FISHER REPORT

	<i>Refunds Owed by Tax Dept.</i>	<i>Taxes Owed by Petitioners</i>	<i>Running Total</i>
1975 tax due	\$	\$ 659.00	\$
Interest		<u>744.00</u>	
Total		\$1,403.00	
1976 tax due		4,394.00	
Interest		<u>4,690.00</u>	
Total		\$9,084.00	
Balance			\$10,487.00

Less 1977 refund	< 745.00>	
Less 1977 refund interest	<u>&lt; 751.00&gt;</u>	
Total refund due	<\$1,496.00>	
Balance		\$ 8,991.00
Less 1979 refund	< 57.00>	
Less 1979 refund interest	<u>&lt; 56.00&gt;</u>	
Total refund due	< \$113.00>	
Balance		\$ 8,878.00
Less 1980 refund	< 874.00>	
Less 1980 refund interest	<u>&lt; 727.00&gt;</u>	
Total refund due	<\$1,601.00>	
Balance		\$ 7,277.00
Less 1981 refund	< 1,010.00>	
Less 1981 refund interest	<u>&lt; 783.00&gt;</u>	
Total refund due	<\$1,793.00>	
Balance		\$ 5,484.00
Less 1982 refund	< 151.00>	
Less 1982 refund interest	<u>&lt; 109.00&gt;</u>	
Total refund due	<\$ 260.00>	
Balance		\$ 5,224.00
Less 1983 refund	< 155.00>	
Less 1983 refund interest	<u>&lt; 102.00&gt;</u>	
Total refund due	<\$ 257.00>	
Balance		\$ 4,973.00
Less 1984 refund	< 282.00>	
Less 1984 refund interest	<u>&lt; 205.00&gt;</u>	
Total refund due	<\$ 487.00>	
Balance		\$ 4,486.00
Less 1985 refund	< 226.00>	
Less 1985 refund interest	<u>&lt; 125.00&gt;</u>	
Total refund due	<\$ 451.00> <sup>7</sup>	
Balance		\$ 4,035.00

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<sup>7</sup>It would appear that petitioners' accounting includes a mathematical error with regard to 1985. Specifically, petitioners' sum the refund (\$226.00) and interest (\$125.00) amounts shown for such year as equaling \$451.00, instead of the \$351.00 correct sum of such amounts. Hence, petitioners' "running total" liability, if accepted as correct on the law, would nonetheless be understated by \$100.00.

Less 1988 refund	< 2,297.00>	
Less 1988 refund interest	< <u>932.00</u> >	
Total refund due	<\$ 3,229.00>	
Balance		\$ 806.00

Maximum Possible Tax Liability as of June 20, 1997: \$806.00.

Petitioners' accounting differs in several aspects from the Division's accounting. For example, petitioners do not include penalties for any of the years in which the Division has asserted penalties are due (i.e., 1975, 1976 and 1984). Petitioners' accounting also reflects 1984 as a refund year, rather than as a liability year, and also includes the higher overpayment amounts claimed by petitioners as due for the years 1985 and 1988. Attached to the Division's accounting are detailed computations of interest amounts, including the rates used and the specific time periods for which such rates were applied. In contrast, petitioners' accounting does not specify the interest rates or the periods used in calculating interest on the 1975 and 1976 tax liabilities or in calculating "refund interest." It appears, however, as though petitioners may have calculated such interest on each of the discrete yearly individual amounts of tax liability or refund, from such year through to the June 20, 1997 hearing date. However, it is not specified that such amounts were calculated starting with the due date for the return for each of the particular years (i.e., as of April 15 of the succeeding year in each case), or from some other date nor, without some indication of the interest rate used, is it possible to determine whether such is the case. The main distinction between petitioners' accounting and the Division's accounting, however, is that the Division's accounting applies overpayments (refunds), as of the date they would have first become available, in reduction of petitioners' outstanding liabilities for years prior to such overpayments, whereas petitioners' accounting calculates interest on such refunds through the

hearing date, and then reduces the accumulated total of tax liability, including interest thereon through the hearing date, by the amount of such refunds, including interest thereon. In (simpler) terms of impact, the Division's method of applying (or using) the overpayments immediately as they became due against the outstanding existing tax liabilities does not provide for any accrual of interest on the overpayments, but rather reduces such tax liabilities and hence the base against which interest on the unpaid liabilities continued to accrue.

We find the following additional findings of fact.

Subsequent to the submission of briefs in this matter, petitioners filed a motion with this Tribunal to reopen the hearing in this matter for the purpose of introducing two pieces of what was allegedly new evidence concerning a pending federal court action in California entitled ***Fisher v. Urbach, Hand & Devinsky*** (Case # 96-2034) and a claim that the Division wrongfully submitted new evidence into the record during the administrative hearing in this matter moments before the conclusion of the hearing. By order of this Tribunal dated February 24, 2000, petitioners' motion was denied on the basis that under the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000 et seq.), such a motion was not timely. Furthermore, the Tribunal concluded that the material sought to be submitted did not constitute newly discovered evidence.

On March 31, 2000, petitioners filed a motion to reopen the record to reargue, alleging as in their prior motion, the discovery of new evidence in a case pending in United States District Court for the Northern District of California ***Fisher v. Urbach, Hand & Devinsky*** (Case # 96-2402). Petitioners' motion was supplemented by their letters of April 6, 2000 and April 14, 2000. By letter dated April 25, 2000, petitioners requested the opportunity to serve a reply to the Division's letter in opposition. The Division, on May 11, 2000, filed a letter in opposition to petitioners' motion. On May 23, 2000, the Tribunal received a reply to the Division's letter in opposition. By letter dated May 23, 2000, the Secretary to the Tribunal denied petitioners' request to serve such a reply pursuant to 20 NYCRR 3000.5(b) and returned the reply and supporting documents to petitioners.



***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge first considered whether petitioners had demonstrated entitlement to a refund of \$1,301.10 for tax year 1977. As the result of the June 1, 1988 conciliation conference, the Division had accepted \$2,800.00 of the \$5,675.00 in claimed Schedule C business expenses for 1977 which had been disallowed upon audit. This resulted in an allowance by the Division of a \$745.88 overpayment for that year (\$245.88 determined upon audit after initial disallowance of the entire amount of claimed expenses, plus \$540.00 allowed thereafter based upon substantiation presented at conference). However, petitioners claimed entitlement to the full overpayment amount shown on their return for 1977. The Administrative Law Judge rejected petitioners' claim as they provided no evidence to show that the disallowed expenses were in fact incurred or were legitimate business expenses. As a result, the Administrative Law Judge allowed only \$745.88 as the amount of petitioners' overpayment for 1977.

The Administrative Law Judge also rejected petitioners' claim that they had overpaid their liability for tax year 1984 by \$282.00 and did not owe a liability of \$168.82, plus penalty and interest, as determined by the Division. The Administrative Law Judge concluded that petitioners properly filed two returns for 1984, pertaining respectively to their periods of residence and nonresidence during such year. Petitioners calculated their tax liability for 1984 on the amount of New York taxable income computed on each of the individual returns, and then combined the results to arrive at the claimed \$282.00 overpayment. Pursuant to Tax Law former § 654(d), as in effect for the year 1984, the total tax due for petitioners' returns could not be less than what would be due if their respective New York taxable incomes were included in one

return. Accordingly, the Administrative Law Judge determined that the Division had correctly denied petitioners' claim of an overpayment of \$282.00 and properly asserted additional tax due in the amount of \$168.82 for 1984. While petitioners claimed that their calculation error was simply the result of an inadvertent mistake, the penalty imposed for 1984 was a late filing penalty, and petitioners provided no excuse for filing their returns one and one-half years after the April 15, 1985 due date.

The Administrative Law Judge concluded that he had no jurisdiction to address petitioners' liabilities for either of tax years 1975 or 1976. The liability for 1975 was the subject of a hearing which resulted in a State Tax Commission decision sustaining such liability, including penalties from which no timely appeal was taken. Further, since the Division made no adjustment to the amount of liability for 1976 which petitioners reported on their return for that year, such amount was an assessment of tax upon the filing of the return and there was no jurisdiction to address that assessed liability. The Administrative Law Judge also rejected petitioners' request to penalize the Division based on its alleged late crediting of overpayments (or late payment of refunds) for any of the years discussed in these proceedings in the event penalties were upheld against petitioners. The Administrative Law Judge found no authority in the Tax Law or elsewhere for imposition of such penalties against the Division.

The Administrative Law Judge next addressed the Division's application of petitioners' overpayments against petitioners' outstanding liabilities. The Administrative Law Judge concluded that the Division's accounting properly set forth the amounts of the overpayments the Division believed were correct for 1985 and 1988 based on its records and the testimony of its witnesses explaining such records. In addition to 1977 and 1984, these were the two years for

which the Division and petitioners disagreed as to the amount of overpayment. While petitioners made the general assertion that they were owed “thousands” in refunds which should offset any unpaid liabilities, petitioners provided no evidence to support a conclusion that the Division’s overpayment calculations for 1985 and 1988 were in error as to amount, or that petitioners’ amounts should be accepted as correct. Thus, the Administrative Law Judge concluded that petitioners did not establish entitlement to overpayments for 1985 or 1988 in amounts greater than the amounts of \$26.28 and \$297.00, respectively, allowed by the Division’s documentary evidence.

As to the propriety of the Division’s application of petitioners’ overpayments, the Administrative Law Judge noted that pursuant to Tax Law § 686, the Division is entitled to utilize an overpayment of tax liability for any year as a credit or offset against any underpayment of tax liability. The Division explained its method of accounting for petitioners’ liabilities based on underpayments for 1975, 1976 and 1984 and the applications of petitioners’ overpayments for the years 1977, 1980, 1981, 1982, 1983, 1985, 1987 and 1988 as credits against such liabilities. The Administrative Law Judge found that the Division had complied with the applicable provisions of the Tax Law regarding underpayments, overpayments, applications of such overpayments as credits against underpayments, and the imposition and allowance of interest with respect thereto. The Administrative Law Judge found that the Division had demonstrated that it had applied petitioners’ overpayments against their liabilities at the earliest possible date. Thus, petitioners were not entitled to interest on overpayments which were applied as soon as they became available against prior outstanding unpaid liabilities.

The Administrative Law Judge concluded that petitioners' method of accounting did not account for the imposition of penalties; treated 1984 as an overpayment year rather than a liability year; and reflected greater overpayment amounts for 1985 and 1988 than those determined herein. The Administrative Law Judge rejected petitioners' method of accounting in light of Tax Law § 686, which supports the Division's authority to utilize any overpayment as a credit against any outstanding liability, and in light of Tax Law § 688(a)(1) which precludes interest on overpayments which have been used as credits against prior period underpayments. The Administrative Law Judge noted that petitioners' accounting method was inconsistent with the Tax Law.

The Administrative Law Judge held that the Eckler Report relied on by the Division at hearing was prepared at the request of the Administrative Law Judge who conducted the hearing at the close of the first day of hearing as a summary of the Division's position vis-a-vis amounts, applications and impact of petitioners' overpayments. The Administrative Law Judge found that it was based on the evidence the Division offered at hearing regarding the dollar amounts of petitioners' overpayments and underpayments for the various years. The Administrative Law Judge concluded that petitioners offered nothing to affirmatively support their claims on the substantive issues in this case, or to support any changes to the amounts of the overpayments reflected in the Eckler Report.

The Administrative Law Judge determined that petitioners were afforded a proper accounting of the application of their overpayments to their outstanding liabilities. Thus, the Administrative Law Judge rejected petitioners' claims that they were denied equal protection of the law. Further, the Administrative Law Judge rejected petitioners' claims that were denied due

process of law because the hearing in this case was not postponed to a date other than June 19, 1997 and they were not granted a new hearing as requested in their September 29, 1997 motion, as more specifically set forth in an order dated January 29, 1998.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners argue that they are entitled to a new hearing that would comply with the fundamental principles of due process of law. Petitioners argue that they had an absolute right to a hearing in order to deal with tax matters involved from 1975 through 1978, as set forth in their original 1981 petition. Petitioners assert that they advised Assistant Chief Administrative Law Judge Daniel Ranalli (hereinafter “Judge Ranalli”) in May 1997 that Mr. Fisher was undergoing severe drug therapy which was scheduled to end in early July and, as a result, requested that a hearing be scheduled after mid-July. Petitioners claim that in their request for a July or later hearing date, they relied exclusively on Mr. Fisher’s severe and oppressive drug therapy as the sole reason to support their request. Petitioners claim that the denial of a July hearing date was a shock to them. Petitioners believe that the failure to provide a hearing on the dates requested was a denial of due process.

Petitioners argue that while at the hearing, Mr. Fisher was enfeebled, weakened, drugged and incoherent. Such facts were obvious to the hearing officer, petitioners argue, and Mr. Fisher should not have been forced to participate in the hearing while in that condition.

Petitioners also argue that when the Administrative Law Judge who conducted the hearing resigned her position with the Division of Tax Appeals in September 1997 prior to issuing her determination, petitioners made a motion for a new hearing. This motion was denied in January

1998 by order of the Administrative Law Judge who ultimately issued the determination under consideration herein. Petitioners now appeal this order as part of their exception.

Petitioners complain that, at the June 1997 hearing, the Division's witnesses presented contradictory evidence of the amount of petitioners' liability. Petitioners disagree with the Administrative Law Judge that such inconsistencies were accounting and administrative errors. Petitioners allege that such inconsistencies evidence a concerted campaign of perjury and lies. As the Administrative Law Judge who issued the determination herein saw and heard no witnesses, petitioners argue that the failure to grant them a new hearing is a denial of due process.

Petitioners assert that the Eckler Report was not a summary of the Division's position, as concluded by the Administrative Law Judge, but new evidence. Petitioners maintain that the introduction of such new evidence into the hearing requires that they be granted a new hearing. This report, conclude petitioners, demonstrates that the other evidence introduced by the Division to account for the application of petitioners' overpayments of tax was fraudulent.

Petitioners believe that they had a constitutionally guaranteed right to be apprized of all the evidence which would be considered at the hearing prior thereto. Petitioners argue that the Division supplied false facts to petitioners before the hearing and concealed official facts regarding refunds and liabilities that were in the Division's official records. Petitioners assert that the Administrative Law Judge incorrectly focused on the correctness of the Division's interpretation of the information contained in their records rather than on the credibility of the Division's witnesses.

In opposition, the Division maintains that the record does not support petitioners' allegation that Mr. Fisher was too ill at the time of the June 1997 hearing to present petitioners' case. Rather, the Division believes that the hearing transcript shows that petitioner, Mr. Fisher, was "spirited at the two day hearing and was an active participant in the hearing process" (Division's brief, p. 2). Since there is no basis for granting petitioners a new hearing, the Division asserts that the determination of the Administrative Law Judge should be affirmed.

In reply, petitioners argue that based on the constantly changing Division claims over the years in which petitioners and the Division have disagreed on petitioners' liability, there is no reason to believe that the Eckler Report is correct. Thus, petitioners are entitled to a new hearing.

### ***OPINION***

Initially, we consider the denial of petitioners' motion for a new hearing because the Administrative Law Judge who presided over the hearing left her employment with the Division of Tax Appeals prior to rendering her determination. Petitioners' motion was denied by an order issued on January 29, 1998. Such order was not considered final until issuance of the Administrative Law Judge's determination and, therefore, petitioners' challenge to that order is considered on this exception as well.

In his order, the Administrative Law Judge concluded that there is no requirement that a new hearing must be granted as a matter of law upon the assignment of a successor Administrative Law Judge. Rather, it depends on whether, in the discretion of the successor Administrative Law Judge, the matter can be decided on the existing record without substantial prejudice to the litigants absent a new hearing. After reviewing the transcript and record of the

hearing in this matter, the successor Administrative Law Judge concluded that no new hearing was warranted. He concluded that both parties had ample, full and fair opportunities to present their evidence and there was no claim made by petitioners that they would offer any new evidence at a rehearing. In their exception, petitioners have presented no reason to disturb the conclusion of the successor Administrative Law Judge on this issue and, therefore, we affirm his order.

As to petitioners' motion to reargue before this Tribunal, we note that a motion to reargue is intended to affect a prior order or decision. Such a motion is not based on new proof but seeks only to convince the court that it was wrong and ought to change its mind (Siegel, NY Prac § 254, at 383 [2d ed]). As this Tribunal has not yet rendered its decision on the merits in this matter, petitioners' motion to reargue is premature. Therefore, petitioners' motion is denied.

Petitioners claim, on exception, that they are entitled to a new hearing because the hearing was not adjourned until July 1997. Further, petitioners claim they do not owe the liability found to be due by the Administrative Law Judge, asserting that the Division submitted new evidence on the final day of hearing and no credibility should have attached to the facts and figures presented by the Division at the hearing. Additionally, petitioners request that subpoenas should be issued to new witnesses and that a new hearing should be held in New York City by an independently appointed judge with no connection to the Department of Taxation and Finance.

We agree with the Administrative Law Judge's observation that: "[i]t is true that a great deal of confusion has surrounded this matter over the years, specifically concerning the issue of the correct accounting for overpayments" (Determination, conclusion of law "R"). However, we reject each of petitioners' arguments in full.



Petitioners allege in their brief that Judge Ranalli, an employee of the Division of Tax Appeals, callously disregarded Mr. Fisher's extraordinary medical condition when he scheduled a hearing in this matter during June 1997. We find that petitioners' allegations are not supported by the record in this proceeding.

The Rules of Practice of the Tribunal provide, in relevant part, that:

At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown (20 NYCRR 3000.15[b][1]).

Essentially, this regulation leaves it to the sound discretion of the Division of Tax Appeals whether or not to grant a request for an adjournment. The record includes copies of letters exchanged between petitioners and the Division of Tax Appeals during the months prior to the hearing date. However, after reviewing that correspondence, we find no evidence that petitioners ever sought an adjournment of the June 19-20, 1997 hearing due to Mr. Fisher's medical condition.

Petitioners refer to a letter to Judge Ranalli in May 1997 in which petitioners allegedly disclosed Mr. Fisher's condition and requested an adjournment. While there is a letter in the record from petitioners to Judge Ranalli dated in early May 1997, that letter merely advises Judge Ranalli that petitioners believe that it will take them three to four days to present their case instead of the allotted two days and, if an adjournment is to be had, petitioners advise of the dates of their availability. The letter contains no mention of Mr. Fisher's alleged medical condition. Further, petitioners concede in footnote 2 of their post-hearing reply brief (April 22, 1998) that

the alleged May 1997 correspondence advising Judge Ranalli of Mr. Fisher's medical condition is not a part of the record.

The record does contain a letter dated one week prior to the June 19-20 hearing from petitioners to the Administrative Law Judge who conducted that hearing. In that letter, petitioners advised the Administrative Law Judge that they would be attending the hearing against the recommendation of Mr. Fisher's doctors and that, due to his medical condition, Mr. Fisher might have to ask for a recess of the hearing in order to make visits to the bathroom or to regain his composure if he were to become dizzy. However, petitioners did not ask for an adjournment and alluded to Mr. Fisher's condition without providing any specific information concerning it.

In his opening statement at the hearing, Mr. Fisher referred to his medical problems but indicated that he had overcome the debilitating effects of his condition. No further mention was made of Mr. Fisher's condition during the hearing nor does the hearing transcript disclose any request by petitioners to the Administrative Law Judge for an adjournment or recess to allow Mr. Fisher to tend to any of the medical problems he claims to have experienced as set forth in petitioners' brief on exception. Additionally, in petitioners' motion for a new hearing made subsequent to the conduct of the hearing but prior to the issuance of a determination by the Administrative Law Judge, petitioners make no mention of Mr. Fisher's medical condition.

In short, whatever Mr. Fisher's medical condition may have been at the time of the hearing, there was no documented restrictions on his ability to travel or other evidence that indicated that attendance at the hearing would be injurious to his health. Additionally, the hearing transcript does not indicate that Mr. Fisher was hampered in any respect with regard to

his participation in the hearing. We agree with the observation of the Division in its brief: “[t]he hearing transcript shows that Mr. Fisher was spirited at the two-day hearing and was an active participant in the hearing process” (Division’s brief, p. 2).

Petitioners argue that they were denied the right to call witnesses at the hearing. This argument also is rejected. Petitioners sought, as early as 1989, to subpoena numerous Division employees and an assistant attorney general. While the requested subpoenas were issued, all but one was subsequently canceled by the Tribunal. Petitioners had the opportunity to contest this cancellation and did so, but to no avail (*Matter of Fisher, supra*). Four additional subpoenas were requested prior to the 1997 hearing and two were issued. Petitioners then wrote to the Administrative Law Judge prior to the hearing and expressed their satisfaction with the assurance they had received from the Division’s attorney that competent Division personnel would be testifying at the hearing and, therefore, petitioners would not be serving the two subpoenas that were issued. Inexplicably, petitioners now claim that additional subpoenas should be issued. Petitioners had the opportunity to subpoena witnesses and their decision not to do so does not constitute a denial of due process of law.

The only liabilities of petitioners under consideration in this proceeding concern tax years 1977 and 1984. The Administrative Law Judge correctly restricted his review to those years and did not expand his review in the manner sought by petitioners. Petitioners fail to appreciate that the burden of proof in these matters falls on them. Petitioners introduced no evidence to refute the disallowance by the Division of a claimed business deduction on their 1977 tax return. Similarly, petitioners did not introduce sufficient evidence to disprove the correctness of the Division’s Notice of Deficiency for additional tax concerning their 1984 tax return.

In this proceeding, petitioners also seek an accounting of the application of tax overpayments made by petitioners toward their tax liability. In *Matter of O'Connor* (Tax Appeals Tribunal, February 24, 1994), this Tribunal upheld the right of a petitioner to seek such an accounting of tax payments allegedly made to the Division. It appears from an examination of the record in the present case that the Division has made every effort to correctly track petitioners' tax liability from 1975 through the time of the hearing. Admittedly, the evidence presented by the Division on the first day of hearing was confusing, not only to petitioners but to the Administrative Law Judge. Thus, the Administrative Law Judge directed the Division to provide a clarification of its application of overpayments and calculations of interest. Petitioners point to no evidence except their own method of accounting which would vary the amount calculated as due by the Division. Petitioners have not provided any substantiated payment or credit which was not allowed by the Division in its calculation of liability. Petitioners' method of calculating their tax liability was not in accord with the methodology required by the Tax Law and was properly disregarded by the Administrative Law Judge. As a result, despite petitioners' claims that they were denied due process of law and a fair hearing, the record demands the opposite conclusion and we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The motion to reargue, dated March 31, 2000, made by Stephen and Nanci Fisher is denied;
2. The denial of petitioners' motion for a new hearing by the Administrative Law Judge is affirmed;
3. The exception of Stephen and Nanci Fisher is denied;

4. The determination of the Administrative Law Judge is affirmed;
5. The petition of Stephen and Nanci Fisher is denied;
6. The April 1, 1981 denial of a portion of petitioners' claimed overpayment and refund for 1977, as subsequently adjusted, and set forth in BCMS Order No. 34013 dated November 4, 1988, is sustained; and
7. The Notice of Deficiency dated December 7, 1986 pertaining to the year 1984, together with penalty and interest thereon, is sustained;

DATED: Troy, New York  
May 25, 2000

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner