STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GEORGE E. AND CAROL L. BELLO	:	DECISION DTA No. 806543
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1982 and 1983.	:	

Both the Division of Taxation and petitioners George E. and Carol L. Bello, 164 Mountainwood Road, Stamford, Connecticut 06903, filed exceptions to the determination of the Administrative Law Judge issued on January 30, 1992. Petitioners appeared by Richard DeMarco, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in support of their exception and in opposition to the exception of the Division of Taxation. The Division of Taxation then filed a letter brief in response to petitioners' exception. Oral argument was heard on January 14, 1993 and began the Tax Appeals Tribunal's six-month time period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Notice of Deficiency with regard to the year 1982 was issued in a timely manner.

II. If the Notice of Deficiency with regard to the year 1982 was in fact timely, whether the Division of Taxation properly disallowed Schedule C expenses, partnership gains and losses, and various itemized deductions taken by petitioners on their New York State Nonresident Income Tax Return for 1982.

III. Whether the Division of Taxation properly disallowed partnership gains and losses and various itemized deductions and properly included income from a Schedule C business and properly modified depreciation taken with regard to another partnership property for 1983.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "6," "7" and "8" which have been modified. TheAdministrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On September 25, 1987, the Division of Taxation (hereinafter the "Division") issued to petitioners, George E. and Carol L. Bello, a Notice of Deficiency setting forth additional tax due of $30,130.80, penalty of $1,506.54, and interest of $11,334.61, for a total amount due of $42,971.95 for the years 1982 and 1983.

Pursuant to a properly executed application for extension of time to file for the year 1982, petitioners filed Form IT-203, Nonresident Income Tax Return, for 1982 on or about October 20, 1983.

Subsequently, on September 19, 1985, petitioners filed an amended Form IT-203 for the year 1982.

On October 19, 1984, pursuant to a properly executed application for extension of time to file, petitioners filed Form IT-203, Nonresident Income Tax Return for the year 1983. Subsequently, petitioners filed an amended Form IT-203 on July 30, 1985, which included Schedule C income of $13,389.00. However, on September 19, 1985, petitioners filed a second amended New York State Nonresident Income Tax Return, Form IT-203, which eliminated said Schedule C income.

On October 1 and 2, 1986, petitioners and the Division, respectively, executed a consent fixing the period of limitation upon assessment of personal income and unincorporated business taxes allowing the Division until April 30, 1987 to assess personal income taxes against George E. and Carol L. Bello for the year ended December 31, 1982.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> After examining petitioners' returns for the years 1982 and 1983 and documentation produced by petitioners on audit, the auditor made the following modifications:
>
> 1982
>
> (a) disallowed expenses claimed on petitioners' Schedule C for a hanger business in the sum of $44,349.00 while including the income from said Schedule C business in the sum of $13,185.00;
>
> (b) disallowed gains and losses from four separate partnerships, i.e., B.W. 1980 Energy Ltd. Partners, B.W. 1981 Energy Ltd. Partners, B.W. 1982 Energy Ltd. Partners and Okmulgee Ltd., in the sum of $265,296.00;
>
> (c) disallowed interest expense petitioners claimed with regard to an account with Salomon Brothers in the sum of $211,068.00 and interest expense on alleged loans with Banker's Trust in the sum of $90,820.00; and
>
> (d) disallowed unreimbursed business expenses in the sum of $18,340.00 and short dividends in the sum of $17,000.00.
>
> 1983
>
> For the tax year 1983, the Division made the following adjustments to petitioners' return:
>
> (a) with regard to business income claimed on Schedule C for the hanger business, the Division included gross receipts from said business in the sum of $112,640.00 and disallowed all expenses with regard to said business for lack of substantiation;
>
> (b) disallowed partnership gains and losses from the following non-New York partnerships:

Partnership	Gain (Loss)
B.W. 1980 Energy Ltd. Partners	$ 16,655.00
B.W. 1981 Energy Ltd. Partners	(6,074.00)
B.W. 1982 Energy Ltd. Partners	(3,654.00)
Okmulgee Ltd. Partners	(218.00)
Reliance Figueroa Associates	(374,125.00)
	($367,416.00)

> (c) recalculated petitioners' accelerated cost recovery system depreciation modification with regard to Reliance Figueroa Associates, and increased same by $48,314.00;

(d) disallowed interest expense claimed by petitioners with regard to the accounts at Salomon Brothers ($349,053.00) and Bankers Trust ($63,071.00); and

(e) disallowed business entertainment expenses in the sum of $18,612.87, business gifts in the sum of $6,651.82 and home office expense and Christmas cards in the sum of $1,468.00.

The auditor did not find petitioners' substantiation adequate.[1]

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> The adjusted gross income listed on petitioners' original 1982 return was $59,139.00. With regard to the year 1983, the Division found New York taxable income after audit to be $250,278.00, compared to the zero New York taxable income stated on the amended IT-203, for an upward adjustment of $250,278.00.[2]

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> In response to these adjustments, petitioners produced various documents both at formal hearing and subsequent thereto. The parties agreed at the first hearing, held on January 8, 1990, to be bound by the results of a case called Matter of Blake, DTA No. 802739, with regard to

---

[1] We modified the Administrative Law Judge's finding of fact "6(b)" under the "1983" heading to more fully reflect the record; the Administrative Law Judge's finding of fact "6(b)" read as follows:

> "(b) disallowed partnership gains and losses from non-New York partnerships, i.e., B.W. 1980 Energy Ltd. Partners, B.W. 1981 Energy Ltd. Partners, B.W. 1982 Energy Ltd. Partners, Okmulgee Ltd. Partners, and Reliance Figueroa Associates, in the sum of $367,416.00;"

[2] The Administrative Law Judge's finding of fact "7" read as follows:

> "With regard to the year 1982, the Division found New York State taxable income after audit to be $63,830.00 as compared with the zero taxable income reported on the amended IT-203. Therefore, the adjustment to taxable income was an additional $63,830.00. With regard to the year 1983, the Division found New York taxable income after audit to be $250,278.00 compared to the zero New York taxable income stated on the amended IT-203 for an upward adjustment of $250,278.00."

This fact was modified to state the adjusted gross income listed on petitioners' 1982 original return, an amount which is used in determining whether the six-year statute of limitations applies to the 1982 assessment.

the issues of the partnership gains and losses and the Schedule C hanger business.[3]

At the hearing in the present case, which preceded the Administrative Law Judge's determination in Blake, the Division's auditor stated:

"[W]e are ready to stipulate to be bound by the decision in [Blake]. . . . That case will address the issues of Schedule C, Hanger business expenses that were claimed by the Bellos and disallowed by the Audit Division . . . . So, I believe we have agreed that those issues, the partnership losses and the Schedule C Hanger business expenses, will not need to be addressed today" (Hearing Tr., pp. 10, 11).

Petitioner's representative then responded, "Okay" (Hearing Tr., p. 11).

The relevant facts of the Blake case are as follows: On audit, the petitioners were unable to provide books and records to substantiate the deductions claimed pertaining to their hanger business for 1981 and 1982. This lack of substantiation prompted the Division to disallow these deductions. The petitioners brought an action challenging this assessment. The Administrative Law Judge determined that the Division of Taxation did not establish that the Notice of Deficiency for the years 1981 and 1982 had been mailed to the petitioners, and dismissed the case on jurisdictional grounds (Matter of Blake, Administrative Law Judge determination, October 4, 1990 [p. 14]).

In the case now before us, with regard to the Schedule C business, petitioners' representatives, in unsworn statements, argued that since the Internal Revenue Service had determined that the Schedule C business was not "a transaction . . . entered into for profit but was a transaction structured for tax avoidance," it properly omitted all reference to said business on the amended returns. In support of this allegation, petitioners' representative submitted the February 8, 1985 letter from the Internal Revenue Service indicating an adjustment for the year 1978.

---

[3] However, the Blake case was found by the Administrative Law Judge not to be dispositive of those issues, and the parties were recalled to a hearing on March 1, 1991 for the exclusive purpose of addressing those issues. On that latter date, no testimony was offered by either party and, even though afforded yet another opportunity to submit evidence at the hearing, petitioners only submitted a letter, dated April 30, 1991 (subsequent to the hearing), which enclosed a letter from Stewart Gerson, vice-president and controller of Reliance Development Group, Inc., concerning Reliance Figueroa Associates and a Schedule K-1 issued by Reliance Figueroa Associates to George Bello for the year 1983. The Division submitted United States partnership returns for B.W. 1982 Ltd. Energy Partners, Okmulgee Limited Partners and Chatham Energy Partners for the years 1982 and 1983.

> It is noted that the Division disallowed the expenses and added back the gross income from the Schedule C business without an allowance for cost of goods sold, due to lack of substantiation. Even though given additional time to supply further evidence, petitioners did not submit substantiation of expenses or income with regard to the Schedule C business for either 1982 or 1983. Petitioners submitted a letter dated April 30, 1991 with an attached letter from the controller, Mr. Stewart J. Gerson, concerning the business of Reliance Figueroa Assoc. and a copy of Mr. Bello's 1983 Schedule K-1 from Reliance Figueroa Assoc., reportedly establishing the partnership's New York locus. No other submissions were made subsequent to the March 1, 1991 hearing.[4]

In its March 29, 1990 brief, petitioners conceded that the short dividend deduction they took in 1982 was properly disallowed and that a $10,160.00 short dividend deduction should have been allowed for the year 1983. In its May 18, 1990 brief, the Division of Taxation agreed to allow said $10,160.00 short dividend deduction for the year 1983.

Petitioners submitted statements for an account with Salomon Brothers, Inc., member of the New York Stock Exchange, Inc., customer account number 017634808010, for the period July 31, 1982 through December 30, 1983. Petitioners also included summary sheets, presumably prepared by them, with regard to Salomon Brothers transactions for both years. Petitioners also submitted an "Analysis of Salomon A/C-Income Method" which expressed income from treasury notes over total income as a percentage (12.3%) and multiplied said percentage by interest expense to arrive at the figure they included on their amended return, line 64, "other adjustments to New York itemized deductions". However, it is noted that the total interest expense charged to the account in 1982 was listed as $255,094.22 on "page 1" of the December 1982 account statement but the interest expense utilized for the year 1982 by

---

[4] We modified the first paragraph of the Administrative Law Judge's finding of fact "8" to more fully reflect the record; the first paragraph of finding of fact "8" read as follows:

> "In response to these adjustments, petitioners produced various documents both at formal hearings and subsequent thereto (see footnote "3"). With regard to the Schedule C business, petitioners' representatives, in unsworn statements, argued that since the Internal Revenue Service had determined that the Schedule C business was not 'a transaction . . . entered into for profit but was a transaction structured for tax avoidance,' it properly omitted all reference to said business on the amended returns. In support of this allegation, petitioners' representative submitted the February 8, 1985 letter from the Internal Revenue Service indicating an adjustment for the year 1978."

petitioner and accepted by the Division was listed as $211,068.00. Since there was no testimony in support of these documents, the inconsistencies were never explained.

Likewise, for the year 1983, the percentage of treasury note income to total income was expressed as a percentage, 63.66%, which was multiplied by interest expense of $349,053.00. The Salomon Brothers statement for the period beginning December 1, 1983 noted interest charged to the account in 1983 of $418,868.94. Again, no explanation of this apparent inconsistency was given. Furthermore, many aspects of the source documentation provided, i.e., the Salomon Brothers account statements, were not intelligible, particularly since no one testified with regard to their contents.

With regard to the interest expense allegedly incurred by petitioners on their Bankers Trust loans for the years 1982 and 1983, petitioners submitted copies of twelve checks drawn on the account of George E. and Carol Lee Bello from the Fidelity Trust Company of Stamford, Connecticut, indicating payments of various sums to Bankers Trust Company and a handprinted, purported summary of transactions in the Bankers Trust Company loan account from September 16, 1977 through June 2, 1982. Additionally, on February 13, 1990, petitioners submitted what were alleged to be copies of receipts from Bankers Trust Company detailing and confirming interest paid by the taxpayers during 1982 and 1983. The statements, which do not bear the name Bankers Trust Company anywhere thereon, indicate loan numbers, dates, amounts outstanding, annual percentage rates, days and amounts accrued. There are also handwritten notations of amounts paid with regard to these receipts.

Petitioners submitted various documentation supporting approximately $5,562.61 of business entertainment expenses and $4,668.94 of business gifts. Petitioners claimed that these expenses for the year 1982 only were all ordinary and necessary business expenses pursuant to Internal Revenue Code § 162(a) and the regulations promulgated thereunder. Said documents were submitted by petitioners' representative to the Division's auditor. No documentation was provided for the year 1983 with regard to business entertainment, business gifts, home office expense and Christmas cards.

Petitioners submitted into evidence a letter from Saul P. Steinberg, Chairman and Chief Executive Officer of Reliance Group Holdings, dated January 10, 1984, addressed to Mr. George E. Bello, which set forth the following policy statement with regard to the entertainment expenses of company employees:

> "[t]he salaries of key executives have been set at levels intended to cover the costs of their entertaining subordinates and other company employees as part of their responsibility to maintain effective personal relationships. For this reason, it is the policy of the company not to reimburse its employees via expense accounts/reports for the cost of entertaining other Reliance Group employees or executives."

Petitioners alleged that the principal place of business of the Reliance Figueroa Associates partnership was in New York, thereby subjecting a nonresident partner's income and expenses to New York State tax despite the fact that the property owned by the partnership was located outside of New York State. In support of this position, petitioners submitted the initial United States Partnership Return of Income, Form 1065, of Reliance Figueroa Assoc., c/o Reliance Development Figueroa, Inc., Park Avenue Plaza, New York, New York 10055, and the New York partnership return filed for the initial calendar year beginning August 23, 1983 and ending December 31, 1983, for Reliance Figueroa Associates indicating the same address as that stated on the Federal partnership return. Petitioners also submitted the Schedule K-1 to Form 1065 indicating George E. Bello's share of income and expenses of Reliance Figueroa Associates for the year 1983.

Petitioners also submitted a letter, dated April 26, 1991, from Stewart J. Gerson of Reliance Development Group to the Tax Appeals Tribunal which set forth the following:

> "I am Vice-President and Controller of Reliance Development Group, Inc., an indirectly owned subsidiary of Reliance Group Holdings, Inc., where I have been employed since 1980.
>
> "Reliance Development Group, Inc. is the parent company of Reliance Figueroa, Inc., which is the corporate general partner of Reliance Figueroa Associates. The other partners of Reliance Figueroa Associates consisted of Senior executives of Reliance Group Holdings, Inc.
>
> "Reliance Figueroa Associates partnership was formed in 1983 to own and operate the Los Angeles Hilton Hotel. Since inception, Reliance Figueroa Associates was managed in our office in New York and the books and

> records of Reliance Figueroa Associates were prepared and maintained by my staff in New York.
>
> "The management decisions, as well as the finance, accounting, legal, clerical and secretarial functions of Reliance Figueroa Associates were all performed in New York. Hilton Hotels Corporations managed the daily operations of the hotel under contract with Reliance Figueroa Associates."

Finally, petitioners submitted a fact sheet with regard to Reliance Figueroa Associates, but the origin and author of said facts were never disclosed.

As conceded by petitioners, if it is found that Reliance Figueroa Associates is a partnership whose losses are allowed against other New York State income, then the issue of an accelerated cost recovery system ("ACRS") depreciation modification will arise. Petitioners submitted a separate computation for said ACRS depreciation modification on certain buildings and improvements, furniture and fixtures. Said modification was calculated to be $273,295.00. Mr. Bello's share of said modification was stated to be 11%, or $30,501.00.

For each of the oil and gas partnerships, i.e., B.W. 1980 Energy Ltd. Partners, B.W. 1981 Energy Ltd. Partners, B.W. 1982 Energy Ltd. Partners, and Okmulgee Ltd. Partners, petitioners submitted New York State partnership returns for the years 1982 and 1983, indicating the same address for each partnership for both years, namely, "in care of Reliance Group Holdings, Inc., Park Avenue Plaza, New York, New York 10055." The returns indicate that the principal business activity of each of the partnerships was "oil and gas" but do not indicate the location of the business assets, where management and administrative functions were performed or where the business of the partnerships was carried on.

Petitioners also submitted a two-page statement entitled "In the Matter of the Petition of George E. and Carol L. Bello, DTA #806543, Oil and Gas Partnership Issue" the origin and authors of which were not disclosed. Initially, the statement takes issue with Judge Corigliano's determination in the Matter of Michael J. Blake and Kathleen T. Blake (Administrative Law Judge determination, October 4, 1990), which found that petitioners in that case had not carried their burden of showing that there was a transactional nexus between New York and the oil and gas partnerships. Petitioners submitted with said statement a letter from Mr. Bello listing some

Reliance Group Holdings employees who performed functions for the partnerships in the New York offices and the functions performed by those people; a letter from Philip Sherman, Senior Vice President of Reliance Group Holdings, Inc., describing his activities performed for the partnerships in Reliance Group Holdings' New York offices. Both of the above-referenced letters were dated January 25, 1991 and addressed to the Tax Appeals Tribunal with regard to the Blake matter which is now pending before that body. The names of the oil and gas partnerships in the Blake case were never disclosed in either letter and it is not clear whether or not they were the same partnerships involved in the instant matter. It is noted that the letter from Mr. Bello mentions Reliance Figueroa Associates specifically. Mr. Sherman's letter does not indicate any names of either the oil and gas or real estate partnerships. Mr. Sherman did make the point in his letter that sometimes it was more efficient to have mail of some of the entities sent to a home address and included statements from a "Daily Income Fund, Inc." indicating mail to B.W. 1981 Energy Ltd. Partners sent to Philip S. Sherman at 70-25 Yellowstone Boulevard, New York, New York 11375.

Neither George E. nor Carol L. Bello testified at either hearing. Further, even though both parties were afforded ample opportunities to submit additional documentation after the second hearing on March 1, 1991, petitioners submitted only a letter, dated April 30, 1991, from Mr. Stewart Gerson, vice-president and controller of Reliance Development Group, Inc., with regard to Reliance Figueroa Associates and the Schedule K-1 of Mr. Bello with regard to that partnership.

The Division submitted the United States partnership returns for B.W. 1982 Energy Limited Partners, Okmulgee Limited Partners and Chatham Energy Partners. The address listed for the partnerships was 1300 South Main, Tulsa, Oklahoma.

Even though it was understood by the parties that the raison d'etre of the second hearing was the failure of the Blake case to reach a conclusion with regard to the oil and gas partnership issues, the Reliance Figueroa Associates issue and the Schedule C hanger business issue, neither

party chose to exploit the opportunity to strengthen their cases except by the evidence referred to above.

OPINION

In the determination below, the Administrative Law Judge made the following determinations: 1) he held that the 1982 amended nonresident tax return filed by petitioners did not renew the statutory period for issuing an assessment and, thus held that the assessment issued by the Division on September 25, 1987 was untimely; 2) he held that petitioners failed to meet their burden of proving that the assessment of additional tax, based on the Division's upward adjustment of petitioners' 1983 income, was incorrect; 3) he upheld the disallowance of partnership losses, finding that petitioners failed to substantiate that the partnerships at issue carried on a business in New York State; and 4) he denied petitioners' claimed deductions for interest, entertainment, and home office expenses, as well as business gifts, due to inadequate substantiation. In addition, the Administrative Law Judge directed the Division to adjust petitioners' 1983 tax liability to reflect the $10,160.00 short dividend deduction agreed upon by the parties.

On exception, the Division argues that because petitioners omitted an amount in excess of 25 percent of the New York adjusted gross income stated on their return, the Notice of Deficiency was timely issued within six years of the filing of the original return. In the alternative, the Division argues that the assessment was timely issued within three years of petitioners' filing of their amended 1982 return.

In response, petitioners argue that because at the time of the filing of their 1982 tax return on October 20, 1983, the information causing them to amend their return was not yet known, this income cannot be considered to have been "omitted" from their 1982 return. Thus, petitioners argue, the six-year statute of limitations does not apply. In addition, petitioners contend that the applicable three-year statute of limitations began to run upon the filing of the original return, stating that the proper action by the Division would have been to request a further extension of time to issue an assessment.

Petitioners, in their exception, make the following arguments: 1) because the Internal Revenue Service disallowed deductions concerning petitioners' hanger business due to the absence of a profit motive, the income from this activity need not be included on their 1983 return; 2) the Administrative Law Judge, in determining whether the partnerships at issue were operated in New York, erred in failing to consider the sworn testimony of Michael J. Blake given in the case Matter of Blake (Tax Appeals Tribunal, April 23, 1992); and 3) as to the disallowance of interest expense, petitioners contend that because 63.7% of the securities held in the Salomon Brothers brokerage account represents non-United States Treasury notes, the interest expense related thereto should be allowed as a deduction.

In response to petitioners' exception, the Division contends that: 1) the Administrative Law Judge correctly determined that Schedule C hanger business expenses were properly disallowed; 2) the Administrative Law Judge was correct in upholding the disallowance of partnership losses, arguing that "the partnership losses could also be disallowed since the partnerships invested in real property outside New York" (Division's reply brief, p. 2). The Division also argues that the testimony of Michael J. Blake was properly excluded from consideration. In support of its position, the Division asserts that the deductibility of the partnership losses was not decided in Blake, and that the hearing was reconvened on March 1, 1991 to allow petitioners to present evidence and testimony on this matter; 3) petitioners have not proven that the disallowance of interest expense was incorrect; and 4) petitioners failed to establish that the entertainment, business gifts, and home office expenses claimed by petitioners were legitimate business expenses.

We affirm the determination of the Administrative Law Judge.

We will first address the timeliness of petitioners' 1982 return.

6-Year Statute of Limitations

Tax Law § 683(d)(1) states:

> "[o]mission of income, item of tax preference, total taxable amount or ordinary income portion of a lump sum distribution or includible gain of a

> trust on return.--The tax may be assessed at any time within six years after the return was filed if --
>
> "(1) an individual omits from his New York adjusted gross income . . . an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income . . . stated in the return . . . ." (emphasis added).

Section 683(d) further provides:

> "[f]or purposes of this subsection there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the [Division of Taxation] of the nature and amount of the item of income, tax preference, total taxable amount or ordinary income portion of a lump sum distribution . . . " (emphasis added).

Because the amount assessed to petitioners for the year 1982 arises in part from items claimed for the first time on their amended return, we must first determine whether the use of the term "return" in section 683(d)(1) refers only to the original return, or whether it encompasses subsequently filed returns.

Section 683 was enacted in 1962 as part of comprehensive tax legislation establishing the procedural rules for Articles 22 and 23 of the Tax Law (income and unincorporated business tax, respectively). A primary purpose of this legislation was to "conform the procedural and administrative provisions of Articles 22 and 23 of the Tax Law . . . to the corresponding provisions of the Internal Revenue Code" (1962 McKinney's Session Laws of New York, Memorandum of State Department of Taxation and Finance, at 863). Further evidence of a legislative intention to conform the procedural rules of Article 22 to Federal procedural law is contained in Tax Law § 607(a), which states, in relevant part:

> "[a]ny term used in [Article 22] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required . . . ."

The Federal counterpart of section 683(d)(1) is Internal Revenue Code ("Code") § 6501(e)(1).[5] Like section 683(d)(1), Code § 6501(e)(1) simply uses the word "return." Thus, in light of the legislative directive of Tax Law § 607(a), we will look to Federal case law to ascertain the meaning of "return" under Code § 6501(e)(1).

In Goldring v. Commissioner (20 TC 79), two taxpayers filed returns which omitted more than 25 percent of their gross income. Fifteen months later they filed amended returns which purported to correct, in part, the original omission, so as to reduce it to below 25 percent. In holding that these amended returns had no bearing on the application of the five-year period under former Code § 275(c) (now Code § 6501[e][1]), Judge Bruce alluded to the numerous Federal cases construing the word "return" contained in tax statutes to include only the original return (Goldring v. Commissioner, supra, at 81). Thus, it was held that the five-year statute of limitations under former section 275(c) began to run at the time the original return was filed, "and its running cannot in any way be affected or suspended by the later filing of amended returns" (Goldring v. Commissioner, supra, at 82).

Therefore, giving a similar construction to "return" under Tax Law § 683(d)(1), as we are required to do, we conclude the following: (i) that the adjusted gross income of $59,139.00 listed on petitioners' original 1982 return is the amount used to determine whether a 25 percent omission was made; and (ii) that subsequent adjustments to adjusted gross income made by filing amended returns does not alter this base amount, nor the amount of the omission, when determining if the six-year limitations period is applicable (Tax Law § 607[a]; Goldring v. Commissioner, supra). Based on this conclusion, the partnership losses totalling $265,296.00,

---

[5]This provision states, in part, that:

> "[i]f the taxpayer omits from gross income an amount properly includable therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed . . ." (Code § 6501[e][1][A], emphasis added).

which were reported for the first time on petitioners' amended return and disallowed by the Division, are irrelevant to our application of Tax Law § 683(d)(1).

On petitioners' original 1982 New York nonresident return, they reported net income from a hanger business of $13,185.00, comprised of gross profits of $57,534.00, reduced by various deductions totalling $44,349.00 (see, Exhibit "F" [Schedule C]).[6]

Assuming for purposes of this discussion that these deductions were properly disallowed, petitioners' New York adjusted gross income listed on the original return was understated by $44,349.00, or 77 percent.[7] Because this figure is in excess of 25 percent, we are faced with the threshold issue of whether erroneously claimed deductions are "omissions" from adjusted gross income under section 683(d)(1).

Unlike Code § 6501(e)(1), which refers to omissions of gross income, Tax Law § 683(a)(1) refers to omissions from adjusted gross income.[8] The disallowed deductions which are the source of contention in this case were claimed to be "attributable to a trade or business" under Code § 62(a)(1). Under Federal law, such deductions are subtracted from gross income in arriving at adjusted gross income (26 USC §§ 61, 62[a][1]). It follows that under Code § 6501(e)(1), which addresses only those items which make up gross income, a taxpayer's erroneous inclusion or overstatement of a deduction on his return is irrelevant for purposes of determining whether the six-year statute of limitations

---

[6]Petitioners amended their New York return to remove these deductions, as well as the gross profit. However, as stated earlier, entries made on an amended return have no bearing on the application of section 683(d)(1) (Tax Law § 607[a]; Goldring v. Commissioner, supra).

[7]The interest and short dividend expenses included in the assessment for the year 1982 are not considered in determining the 25 percent figure, as these are itemized deductions subtracted from adjusted gross income to arrive at taxable income (see, 26 USC §§ 63[a], 163).

[8]Although there is no provision under the Tax Law which defines New York adjusted gross income of a nonresident individual, Tax Law § 631(a) states, in relevant part:

> "[t]he New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . ." (emphasis added).

applies. In other words, the Federal six-year statute of limitations is triggered only by a taxpayer's failure to include items of income within gross income (not by the overstatement of deductions). The question before us is whether the same result applies under the State statute, or whether the substitution of "adjusted gross income" for "gross income" indicates a legislative intent to trigger the six-year period of limitations by the overstatement of "section 62" deductions in calculating adjusted gross income.

For the reasons that follow, we hold that the Legislature did not intend such a deviation from the Federal rule.

The primary consideration in construing the meaning of words in a statute is to ascertain and give effect to the intention of the Legislature (Matter of Allstate Ins. Co. v. Libow, 106 AD2d 110, 482 NYS2d 860, 863, affd 65 NY2d 807, 493 NYS2d 128; McKinney's Consol Laws of NY, Statutes § 92[a]). "[S]tatutory interpretation must begin with an analysis of the literal language of the statute [citations omitted]. When the language used by the Legislature is clear, judicial inquiry is limited [citations omitted]. If any ambiguity exists, the spirit and purpose underlying the statute must be considered together with the language employed [citations omitted]" (Matter of Atlantic Cement Co. v. Williams, 129 AD2d 84, 516 NYS2d 523, 526). Thus, we will first examine the literal language of section 683(d)(1).

The word "omit" is defined as "to leave out or leave unmentioned: fail to insert, include, or name" (Webster's Third New International Dictionary 1574 [1986]). The word "omit" in section 683(d)(1) modifies the word "amount." As the facts of this case illustrate, an erroneously claimed section 62 deduction causes an amount to be omitted from New York adjusted gross income, yet any section 62 deduction claimed is, by definition, included in the calculation of this figure. However, the introductory language of section 683(d) and the last sentence of this subsection shed light on this apparent ambiguity. In these provisions, the word "omission" or "omitted" relates to items of "income," "tax preference," "taxable amount or ordinary income portion of lump sum distribution," and "includible gain of a trust." Because these items all constitute additions to, rather than reductions from, adjusted gross income, we

conclude that the Legislature intended to exclude deductions from the scope of section 683(d)(1). Thus, the language of section 683(d)(1), on its face, indicates that the six-year statute of limitations does not apply to the 1982 assessment.

The purpose behind the six-year statue of limitations also supports this conclusion. The purpose behind Code § 6501(e) was set forth by the United States Supreme Court in Colony, Inc. v. Commissioner (357 US 28, 58-2 USTC ¶ 9593). The Court stated that the purpose for the additional period of time to issue an assessment was to offset the disadvantage to the Commissioner in detecting errors where "the return on its face provides no clue to the existence of the omitted item" (Colony, Inc. v. Commissioner, supra, 58-2 USTC ¶ 9593 at 68,637, emphasis added). This disclosure must be sufficiently detailed to alert the taxing agency of this item "so that the decision as to whether to select the return for audit may be a reasonably informed one [citation omitted]" (Estate of Fry v. Commissioner, 88 TC 1020, 1023). Because the claiming of a deduction is necessary to receive the corresponding tax benefit, a deduction is, by definition, disclosed in a manner which gives the Division a "clue" that income has been understated (Colony, Inc. v. Commissioner, supra). Therefore, to conclude that the overstatement of deductions could trigger the six-year statute of limitations would be inconsistent with the purpose of section 683(d)(1).

Finally, our conclusion is also consistent with the disclosure provision of section 683(d). This "disclosure" provision states:

> "[f]or purposes of this subsection there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the [Division] of the nature and amount of the item of income, tax preference, total taxable amount or ordinary income portion of a lump sum distribution . . ." (Tax Law § 683[d], emphasis added).

Deductions, by their nature, must be disclosed on a return. Therefore, deductions treated as omissions within § 683(d)(1) would then invariably be excluded from the application of this statute by virtue of the disclosure provision. This would render section 683(d)(1) ineffective vis-a-vis deductions. Because a statute should not be construed so as to render it ineffective, nor in a way to undermine the purpose for which it was enacted (American Lodge Assn. v. East

New York Sav. Bank, 100 AD2d 281, 285, 474 NYS2d 332; Matter of Atlantic Cement Co. v. Williams, supra), we conclude that a deduction does not constitute an omission from adjusted gross income within the meaning of Tax Law § 683(d)(1).

3-Year Statute of Limitations

We will now address the Division's alternative argument that where an amended return is filed, the three year statute of limitations under Tax Law § 683(a) should run from the date that the amended return is filed. Section 683(a) states that:

> "[e]xcept as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed)."

This provision is identical to the pertinent language of Code § 6501(a). Therefore, we must again look to Federal law to determine the meaning of "return" as it is used in Code § 6501(a) (Tax Law § 607[a]).

Under Federal law, "[i]t is well settled that when a taxpayer files an original return and thereafter an amended return, the statute of limitations begins to run from the date of the original return, and not the date of the filing of the amended return" (Dowell v. Commissioner, 68 TC 646, 649, revd on other grounds 614 F2d 1263, 80-1 USTC ¶ 9216, citing Kaltreider Constr. v. United States, 303 F2d 366, 62-1 USTC ¶ 9491, cert denied 371 US 877 and Northern Anthracite Coal Co. v. Commissioner, 21 BTA 1116; see also, 15 J. Mertens, Federal Income Taxation § 57.17). We adopt this interpretation of "return" under Code § 6501(a) and its predecessor in holding that the three year statute of limitations under Tax Law § 683(a) began to run upon petitioners' filing of their original return (Tax Law § 607[a]; 26 USC 6501[a]). Therefore, the assessment issued to petitioners for the year 1982 is time-barred (Tax Law § 683[a]).

We will now address the issues pertaining to the tax year 1983.

Hanger Income

Petitioners argue that because the Internal Revenue Service ruled that the Schedule C hanger business was not entered into for profit, the income generated from this activity should

also be excluded from their 1983 New York State nonresident tax return (Oral Arg. Tr., pp. 20-22).[9]

Tax Law § 631(a) states, in part, that:

> "[t]he New York source income of a nonresident individual shall be the sum of the net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources . . . ."

Because petitioners do not deny that this activity was "derived from or connected with New York sources," the determination of whether the income at issue was properly included in petitioners' New York adjusted gross income is controlled by Federal law.

Gross income is defined in Code § 61(a) as "all income from whatever source derived . . . ." Exclusions from this broad definition are specifically stated in Subtitle A, Chapter 1B, part III (26 USC §§ 61[b], 101 et seq.). By contrast, the statutory basis used by the Internal Revenue Service for denying petitioners' deductions is section 183, within Subtitle A, Chapter 1B, Part VI of the Code, which is entitled "Itemized Deductions For Individuals and Corporations." This section states, in part, that:

> "[i]n the case of an activity engaged in by an individual . . . if such activity is not engaged in for
>
> profit, no deduction attributable to such activity shall be allowed under this chapter except as provided in this section" (26 USC 183[a], emphasis added).

Section 183 is "simply a statute that allows certain deductions attributable to 'activities not engaged in for profit' in computing taxable income under section 63(a)," but allows these deductions only to the extent they do not exceed the gross income from the activity (Jasionowski v. Commissioner, 66 TC 312, 320). Because petitioners have failed to provide

---

[9]At oral argument, petitioners' representative stated that:

> "[i]f [the activity is] not [for] profit for Federal purposes, the IRS doesn't say well, we're not going to tax the income and knock out the deduction. We're saying the entire transaction was not . . . for profit, and disallow the entire transaction . . ." (Oral Arg. Tr., p. 22).

any authority for their assertion that the disallowance of deductions under section 183 exempts the income generated from this activity from taxation, we find petitioners' argument to be without merit

Partnership Losses

Petitioners contend that the following partnership gain and losses reported on their 1983 return were improperly disallowed or exempted by the Division in determining petitioners' New York tax liability:

BW 1980 Energy Partners	$ 16,655
BW 1981 Energy Partners	(6,074)
BW 1982 Energy Partners	(3,654)
Okmulgee Limited Partners	(218)
Reliance Figueroa Associates	(374,125)

As to these losses, the parties at hearing agreed to be bound by the disposition of this issue in Matter of Blake (supra). However, only one of these partnerships, BW 1982 Energy Partners, was addressed in Blake, with the Administrative Law Judge finding that the petitioners had failed to prove that the 1983 partnership losses were not attributable to a business carried on in New York (Matter of Blake, Administrative Law Judge determination, October 4, 1990). We affirmed based upon the determination of the Administrative Law Judge (Matter of Blake, Tax Appeals Tribunal, April 23, 1992). Therefore, petitioners' distributive share of the partnership loss from BW 1982 Energy Partners claimed on their 1983 amended return was properly disallowed by the Division in accordance with the determination in Blake.[10] Because the four remaining partnerships were not addressed in the Blake case, they will be addressed here.

In the determination below, the Administrative Law Judge found that petitioners failed to meet their burden of proving that the partnerships carried on business in New York State. The Administrative Law Judge found it to be significant that there was no sworn testimony submitted by anyone connected with the partnerships, and the only evidence furnished were fact sheets submitted by petitioners describing the partnerships, the author and origin of which were

[10]In the present case, the Administrative Law Judge erroneously stated in his findings of fact that the Blake case did not determine whether any of the partnership losses could be deducted on their New York return, and the parties were recalled to a hearing for the purpose of addressing these issues (see, Determination, pp. 4-5 [footnote 1]). Thus, to this extent, the determination of the Administrative Law Judge is modified.

not revealed and which were unsworn, and an unsworn letter from Stewart J. Gerson, vice-president and controller of Reliance Development Group, Inc., an indirectly owned subsidiary of Reliance Group Holdings, Inc., describing the activities of Reliance Group Holdings.

Based on our own examination of the record, we agree with the Administrative Law Judge's determination that petitioners failed to meet their burden of proving that the partnerships were conducting business in New York (Tax Law §§ 632, 689[e]).

Finally, petitioners contend that the testimony of Michael J. Blake should have been considered in this case. At hearing, the parties verbally stipulated to be bound by the decision in Matter of Blake (supra) as to the partnership losses and the Schedule C hanger business expenses for 1983 (Hearing Tr., pp. 10-14). "Stipulations, like contracts, bind parties only to the terms actually agreed upon . . ." (Matter of J & L Home Improvement Corp., Tax Appeals Tribunal, August 1, 1991, citing Stamos v. Commissioner, 87 TC 1451). We fail to see how this agreement between the parties can be seen to incorporate Michael J. Blake's testimony into the record before us. Because the parties made no such arrangement, we find petitioners' argument to be without merit.

We now turn to the remaining items of petitioners' exception regarding the denial of the following deductions on their 1983 return: 1) expenses pertaining to petitioners' hanger business; 2) interest expenses; 3) business expenses; and 4) home office expenses. Because the Administrative Law Judge has completely and correctly addressed these issues, we affirm the denial of these deductions based on the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The exception of petitioners George E. and Carol L. Bello is denied;

3. The determination of the Administrative Law Judge is modified to the extent discussed in footnote 10, but is otherwise affirmed;

4. The petition of George E. and Carol L. Bello is granted to the extent indicated in conclusions of law "A" and "D" of the Administrative Law Judge's determination, but is otherwise denied; and

5. The Division of Taxation is directed to modify the notice of deficiency dated September 25, 1987 in accordance with paragraph "4" above, but such notice is otherwise sustained.

DATED: Troy, New York
July 8, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner