STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **SHELDON P. BARR** | : | DECISION<br>DTA No. 809452 |
| for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the years 1981 through 1984. | : | |

Petitioner Sheldon P. Barr, P.O. Box 3254, New York, New York 10163, filed an exception to the determination of the Administrative Law Judge issued on March 24, 1994. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a letter stating it would not be filing a brief. This letter was received on June 27, 1994, which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioner, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

## *ISSUES*

I. Whether petitioner filed a timely claim for refund of taxes paid for the year 1983.

II. Whether petitioner has proven that certain audit adjustments made by the Division of Taxation were incorrect.

## *FINDINGS OF FACT*

We find the facts as delivered by the Administrative Law Judge. These facts are set forth below.

The Division of Taxation ("Division") conducted an audit of the personal income tax returns of petitioner, Sheldon P. Barr, for the years 1981 through 1984. The Division requested documentary evidence to substantiate income, losses, credits and deductions as reported on those returns, and it reviewed the results of audit changes made to petitioner's Federal income tax returns by the Internal Revenue Service.

As a result of its audit, the Division issued to petitioner a Notice of Deficiency dated February 27, 1989 for the years 1981 and 1982, asserting a tax deficiency of $47,550.00 plus penalty and interest. The Division issued a second Notice of Deficiency to petitioner, also dated February 27, 1989, asserting a tax deficiency for 1983 and 1984 of $46,344.00 plus penalty and interest.

Following a conference, the Division issued to petitioner a Conciliation Order dated January 18, 1991 which reduced the total tax deficiency asserted for the years 1981 through 1984 to $65,249.00. The Division issued to petitioner statements of personal income tax audit changes which detail the adjustments made by the Division to petitioner's tax returns as a result of the audit and the conciliation conference and the amount of the tax deficiency now asserted by the Division for each year in issue.

The Division asserts a tax deficiency of $3,058.55 for 1981. At hearing, petitioner offered no evidence to challenge the tax deficiencies asserted for that year.

The Division asserts a tax deficiency of $15,836.23 for 1982. Petitioner offered in evidence a Federal Schedule K-1 for 1982 showing his share of income, losses, credits and deductions as a partner of Nutmeg Associates Limited Partnership ("Nutmeg"). The schedule shows a distribution of ordinary income in the form of a loss of $19,800.00 and a tax credit of $33,660.00. He offered no other information concerning the partnership. An affidavit offered by the Division states that the partnership loss from Nutmeg was "disallowed per Revenue Agents Report".

The Division issued to petitioner a Statement of Personal Income Tax Audit Changes for 1983, asserting a tax deficiency of $7,550.25 plus penalty and interest. Petitioner claims he is entitled to a refund of an overpayment of tax for 1983. On his 1983 personal income tax return, petitioner reported New York State adjusted gross income of $909,101.00. His calculation of gross income included a New York State depreciation deduction of $916,685.00. Apparently, petitioner claimed the deduction for computer equipment allegedly purchased by an S corporation of which he was the sole stockholder. On audit, the Division eliminated the deduction because petitioner did not provide information to substantiate either the fact or amount of the purchase.

At hearing, petitioner claimed that the income reported on his 1983 return erroneously included income of $670,450.00 from Astron Venture Corporation ("Astron"). Petitioner was the sole shareholder and president of Astron. He testified that when he filed the 1983 return he mistakenly believed that Astron was a New York State S corporation and reported Astron's income on his own return. In the course of the audit, petitioner discovered that Astron's sub-chapter S election was not received by the Division in time to be processed for the 1983 tax year. Consequently, Astron was not properly treated as an S corporation until the 1984 tax year. On this basis, petitioner claims that his 1983 income should be reduced by an amount which he says is Astron's corporate income $670,450.51. Petitioner also claimed that Astron's income was reported on a Federal Schedule E; however, Astron's name does not appear on that schedule. Petitioner entered "PRIVILEGED" in the space provided for the name of the S corporation from which the income was derived. According to petitioner, the depreciation expense disallowed by the Division was a pass-through from Astron. Petitioner argues that if the depreciation attributable to Astron is disallowed the income should likewise be eliminated.

Petitioner's 1983 tax return was received by the Division on July 10, 1986. Petitioner claims that he filed an amended 1983 tax return on May 9, 1989, but he provided no evidence of filing such a return. Attached to his petition is a Claim for Credit or Refund of Personal Income Tax for 1983. There is no evidence that this claim was filed with the Division. Apparently,

petitioner believes that the Division should have eliminated Astron's income from its calculation of petitioner's income at the time of the audit, but he never fully articulated this position.

Petitioner offered in evidence a form he received from the Division acknowledging receipt of the sub-chapter S election form for Astron and confirming that the election would be effective as of the period ending December 31, 1984.

The Division adjusted petitioner's income for 1984 by disallowing a loss of $1,117,105.00 from Astron. On audit, petitioner failed to produce either Federal or State corporation tax reports for Astron, and a review of the Division's records revealed no record of Astron having filed such returns for 1984. Since it had no information concerning Astron's business activities or the nature of the loss claimed, the Division disallowed the deduction as unsubstantiated.

At hearing, petitioner claimed that the deduction related to computer and co-generation equipment purchased for installation in a factory called Bally Ribbon Mills. According to petitioner, the total purchase price of the equipment was $5,800,000.00 of which $350,000.00 was paid in cash and the remainder was paid with a series of promissory notes. Petitioner testified that he had a one-half interest in the project. He offered in evidence a document which purports to be an agreement between Middle States Energy, Inc. ("Middle States") and Bally Ribbon Mills. The general purpose of the agreement is described as follows:

***FUNDING PLAN FOR ENERGY CONSERVATION SYSTEMS***

> "Funding provides a means whereby a large industrial user of energy can have an energy conservation system designed, installed and maintained at absolutely no cost to the user, other than to share the monthly utility savings with the funding institution. The funder assumes all of the risks. The user assumes no risk whatsoever. If the capital requirements should be understated, or if the anticipated savings fail to fully materialize, the funder has the responsibility to make the necessary corrections.
>
> "Middle States Energy, Inc. acts as a technical agent for the funding company. We identify and initially qualify the prospect. We perform the energy audit. We collaborate on the design of the system and calculate the potential savings. We apply for verification by a Professional Engineer. We install the system. We monitor and maintain the system under contract and remuneration from the funder.

> Final qualification and acceptance of the prospect, however, resides with the funding institution. The term of agreement is for seven years."

The "Funder" is not identified in this document. An exhibit to the agreement indicates that a sub-contractor, ReEnergy Systems, Inc., would supply equipment and installation and maintenance services in compliance with certain contract specifications. The contract referred to was not placed in evidence. The copy of the agreement entered in evidence was signed by the vice-president of Bally Ribbon Mills, but no one executed the agreement on behalf of Middle States.

Petitioner also entered in evidence an executed Assignment whereby Saxon Energy Corp., identified as the assignee of the contract between Middle States and Bally Ribbon Mills, assigned its rights under that contract to Astron and Leonard Friedman. Petitioner also offered a Security Agreement (or conditional sales contract), in the amount of $5,800,000.00 between Saxon Energy Corporation as the secured party, and Astron and Leonard Friedman as the debtors. The property securing the debt is described as a "Cogeneration Unit" in Bally, Pennsylvania. Finally, petitioner offered a cancelled check evidencing a payment of $175,000.00 from Astron to Saxon Energy Corporation. Petitioner explained the relevance of this transaction to his 1984 tax liability as follows:

> "With reference to that transaction, that transaction--the cost of the equipment was $5,800,000.00 as set forth in the conditional sales contract of which I had one-half interest. So the value of the equipment that was my proportionate share was $2,900,000.00, and depreciating that on a six years straight line basis would be $483,333.00 and that adjustment should be made adding back to the adjustments in 1984 showing a loss of--instead of the $1,177,105.00 as appears on line 15 of the adjustment sheet, that figure should be now $483,333.00. And since that was completed on New York allowable depreciation method, that eliminates the adjustment between ACRS which is the federal computation, and the state computed differential between the two of them is eliminated because this $483,333.00 is computed on the state basis, and therefore that adjustment is eliminated."

## ***OPINION***

In the determination below, the Administrative Law Judge held that "[p]etitioner offered little in the way of explanation or documentation to prove his case" (Determination, conclusion of law "A").

The Administrative Law Judge, with reference to petitioner's claimed loss as a limited partner in Nutmeg, held there was no probative value whatsoever to the schedule K-1 showing partnership distributions for Nutmeg and, further, "[p]etitioner did not offer a description of the business activities of the partnership or place in evidence the partnership return filed by Nutmeg or offer any other evidence to explain or substantiate the nature of the loss" (Determination, conclusion of law "A").

For the tax year 1983, the Administrative Law Judge held "[t]here is no evidence that petitioner filed a claim for refund or credit of 1983 taxes," and further, "[h]is testimony consisted of nothing but the barest allegations of facts which were not proven. Consequently, there are no grounds for reducing his reported 1983 income by the amount he claims was actually Astron's income" (Determination, conclusion of law "A").

The Administrative Law Judge, with reference to the transaction between Astron and Saxon Energy Corporation and an agreement between Middle States Energy, Inc. and Bally Ribbon Mills relating to the purchase and installation of equipment, held that "[e]ven if such equipment was purchased and installed, petitioner has not established that he was entitled to a depreciation deduction for that equipment. Without other evidence, petitioner's testimony amounted to little more than an unsubstantiated allegation that he is entitled to a depreciation deduction (Determination, conclusion of law "A").

The Administrative Law Judge, in sustaining the notices of deficiency as modified by the Conciliation Order issued on January 18, 1991, held that "[i]n sum, petitioner failed to provide clear and convincing evidence demonstrating that the assessments were erroneous" (Determination, conclusion of law "A").

On exception, petitioner argues that he offered sufficient probative evidence "to make out a prima facie case showing the correctness of his treatment of the disallowed items and to sustain his burden of proof. (See entire record and exhibits in evidence). The Division offered no competent non-hearsay evidence to rebut Petitioner's unchallenged testimony and evidence" (Petitioner's exception, Schedule A, p. 4). Petitioner urges that his petition should be granted to

the extent of modifying the notices of deficiency issued on February 27, 1989, as modified by the Conciliation Order issued on January 18, 1991 as he is entitled to: 1) a refund for 1983; 2) a deduction of $19,800.00 on his 1982 return; and 3) a deduction of $483,333.00 on his 1984 return.

The Division, while not submitting a brief, by letter advised that it would rely on the Administrative Law Judge's determination which it argues correctly analyzed and decided this matter.

Petitioner has not raised any issues on exception that were not raised before the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sheldon P. Barr is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Sheldon P. Barr is denied; and

4. The notices of deficiency issued on February 27, 1989, as modified by the Conciliation Order issued on January 18, 1991, are sustained.

DATED: Troy, New York
December 15, 1994

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

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