

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT G. BAUER AND JOAN C. BAUER	:	DECISION
for Redetermination of a Deficiency or for	:	DTA NO. 811537
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1985.	:	

Petitioners Robert G. Bauer and Joan C. Bauer, 132 Marvin Street, Patchogue, New York 11772, filed an exception to the determination of the Administrative Law Judge issued on March 16, 1995. Petitioner Robert G. Bauer appeared pro se and on behalf of his wife, Joan C. Bauer. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel).

Petitioners filed a brief in support of their exception, the Division of Taxation filed a brief in opposition and petitioners filed a reply brief which was received on February 7, 1996, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Division of Taxation properly determined that petitioners received, in 1985, shares in a cooperative housing corporation and an ownership interest in a co-op apartment as compensation for legal services rendered by petitioner Robert Bauer.

FINDINGS OF FACT

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

On January 22, 1991, the Division of Taxation ("Division") issued to petitioners, Robert G. Bauer and Joan C. Bauer, a Notice of Deficiency which asserted \$13,797.28 in additional personal income tax due, plus penalties and interest, for the year 1985.

A Statement of Personal Income Tax Audit Changes dated October 16, 1990 indicated that the tax liability asserted against petitioners was "based on value of co-op apartment as undeclared income." The statement listed additional income of \$106,800.00 to petitioners as the value of such co-op apartment.

The Statement of Audit Changes also indicated that penalties were being asserted against petitioners for failure to timely file a return (Tax Law § 685[a][1][A]); failure to pay tax shown on return (Tax Law § 685[a][2]); deficiency due to negligence (Tax Law § 685[b]); failure to pay estimated tax (Tax Law § 685[c]); and substantial understatement of liability (Tax Law § 685[p]).

Petitioners late filed their joint 1985 New York State personal income tax return (Form IT-201) on September 17, 1990. With their return petitioners remitted a payment of \$3,830.05.

Attached to petitioners' 1985 New York return was a depreciation schedule listing property depreciated on petitioners' 1985 Federal Schedule E ("Supplemental Income Schedule"). Among the property listed on the depreciation schedule was "Condo-Hermitage" with an acquisition date listed of "1/85" at a cost of \$20,000.00.¹ Also attached to petitioners' 1985 return was a copy of Mr. Bauer's Schedule C for his law practice, which indicated that Mr. Bauer used a cash accounting method.

A copy of a portion of petitioners' 1986 Federal income tax return was also entered into evidence herein. Schedule D of said return ("Capital Gains and Losses") listed a \$6,000.00 long-term capital loss resulting from the sale of a "condo" acquired "1/85" at a cost of \$106,000.00 and sold "12/86" at a price of \$100,000.00.

¹The record contains no explanation for this \$20,000.00 cost figure.

On audit, the Division determined that, in lieu of legal fees, petitioner Robert Bauer had received a cooperative apartment unit located at "The Hermitage at Napeague", Amagansett, New York and that the fair market value of this unit was properly reportable as ordinary income. Upon review of petitioners' 1985 New York return and 1986 Federal return, the Division determined that petitioners had acquired the cooperative unit in January 1985 and that the unit's fair market value at that time was \$106,800.00. The Division also observed that petitioners had not reported this \$106,800.00 on their 1985 New York return. The Division concluded, therefore, that petitioners had improperly failed to report the value of the cooperative unit on their 1985 return and issued the aforementioned Statement of Personal Income Tax Audit Changes and Notice of Deficiency accordingly.²

At all times relevant herein, petitioner Robert G. Bauer was engaged in the practice of law as a sole practitioner. Commencing in or about 1968, petitioner began representing a Mr. Kenneth J. Tedaldi in connection with numerous real estate acquisition and development activities undertaken by Mr. Tedaldi. In September 1981, Mr. Tedaldi, acting through a corporate entity called Kenneth J. Tedaldi, Inc., acquired a parcel of real property in Amagansett, New York ("the Amagansett property"). Mr. Tedaldi intended to develop the Amagansett property by constructing condominium-type units.

Throughout 1982, architectural plans for the development of the Amagansett property were drawn and efforts were made to secure the requisite governmental approvals. On November 3, 1982, a building permit was granted to Mr. Tedaldi for the construction of 56 "motel units" on the Amagansett property.

In September 1982, Napeague Dunes Development Corporation ("Napeague Dunes") was incorporated. Mr. Tedaldi was president and petitioner Robert Bauer was secretary of this corporation. Pursuant to a contract of sale dated December 15, 1982 and a deed dated

²It appears that the Division erred in its determination that the value of the coop was \$106,800.00 (see, finding of fact above), since the 1986 Federal return, upon which the Division's determination was based, lists a cost for the unit of \$106,000.00.

March 30, 1983, title to the Amagansett property was transferred from Kenneth J. Tedaldi, Inc. to Napeague Dunes Development Corporation. Mr. Bauer signed the December 15, 1982 contract on behalf of Napeague Dunes Development Corporation.

In March 1983, The Hermitage at Napeague, Ltd. ("The Hermitage") was incorporated. Mr. Tedaldi was president of this corporation and petitioner Robert Bauer was secretary.

By deed dated February 2, 1984, title to the Amagansett property was transferred from Napeague Dunes Development Corporation to The Hermitage.

Napeague Dunes Development Corporation was the sponsor of a conversion of the Amagansett property, as developed, to cooperative ownership and The Hermitage was the cooperative housing corporation.

Petitioner Robert Bauer provided legal services to Napeague Dunes Development Corporation and The Hermitage in connection with their incorporation and in connection with the real property transfers previously referred to. Petitioner also provided legal services in connection with the application for a building permit and also in connection with The Hermitage's filing of an offering plan to convert the Amagansett property to cooperative ownership with the New York State Attorney General's office.

Petitioners made use of one of the cooperative units, Unit D-12, at The Hermitage during 1984. Such use included furnishing the unit, rental of the unit during the summer months, and personal use. In connection with the rental of Unit D-12, petitioners took out an advertisement in the New York Times offering the unit for summer rental.

During 1984, petitioners received statements from the management of The Hermitage with respect to their rental of Unit D-12. Such statements listed receipts paid to the managing agency for the rental of the unit, less taxes, expenses and a management fee, and listed a payment amount due petitioners. Petitioners also received general correspondence from the management of The Hermitage addressed "Dear Shareholder".

Petitioners purchased a "condominium" insurance policy for Unit D-12 which covered the period May 30, 1984 through May 30, 1985. Said policy insured petitioners' personal property for \$10,000.00.

Pursuant to a stock certificate dated January 10, 1985, petitioners received 160 shares of The Hermitage.

Petitioners submitted into the record a letter dated June 10, 1983 written by Mr. Bauer and addressed to Mr. Tedaldi which stated:

"I wanted to outline our understanding regarding the arrangements for my final fee in connection with the above.

"As of now, I have one share of stock of Napeague Dunes Development Corp. and you have 50 shares. This was given to me in November, 1982 as my fee. The understanding is that in November 1983, after one year, you will be obligated to allow me to transfer that share of stock to you in return for ownership of one unit, of your choosing, in the Hermitage. Thereafter you will agree to carry the full maintenance on the unit for one year. At that point, November of 1984, you will owe me an additional \$40,000. If I keep the unit, you will have the option of either paying me the \$40,000. or pay the monthly maintenance charges for me until you have paid the \$40,000. on my behalf to the Hermitage Co-op.

"If I sell the unit at any time prior to your paying me the full \$40,000., you will be obligated to pay me the balance due on the \$40,000. on terms to be agreed upon.

"All of this is on the understanding that the stock transfer is in consideration of \$150,000. as of November 1983. So that I am getting with a \$160,000. unit, \$110,000. free and clear with the underlying co-op mortgage of \$50,000. of which you owe me \$40,000.

"If this is agreeable, please counter-sign the enclosed copy and return it to me."

Mr. Tedaldi's signature was not contained on the copy of the letter submitted in evidence herein.

OPINION

The Administrative Law Judge rejected petitioners' claim that Mr. Bauer and Mr. Tedaldi were involved in a "co-venture" and he concluded that the record "establishes that Mr. Bauer was to receive shares in the cooperative and an interest in an apartment unit as his fee for legal services rendered" (Determination, conclusion of law "B"). The Administrative Law Judge next

concluded that the documentary evidence and testimony presented was insufficient to meet petitioners' burden of proof to establish that they were shareholders in The Hermitage in 1984 and not 1985 as asserted by the Division.

On exception, petitioners assert that the Administrative Law Judge "has not, fully and fairly, taken into account the proofs offered by the petitioner's testimony and the exhibits" (Petitioners' Exception, p. 2). Petitioners argue that the evidence adduced clearly supports that Mr. Bauer was a partner with Mr. Tedaldi and should not be considered as a lawyer due a fee. Petitioners also maintain that the record contains overwhelming proof that they possessed all the benefits and burdens of ownership of the condominium in 1984 and, hence, constructive receipt of said unit occurred in 1984 and not 1985.

We affirm the determination of the Administrative Law Judge. Although some supporting documentary evidence was presented by petitioners, the critical elements of their case are contained in the testimony given by Mr. Bauer. The Administrative Law Judge found said testimony inadequate. Generally, we defer to the Administrative Law Judge's evaluation of the credibility of a witness since the Administrative Law Judge has the ability to observe the witness first hand (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). We see nothing in the record before us that would cause us to disagree with the Administrative Law Judge's evaluation in this matter. Since petitioners have not raised any arguments that were not presented to the Administrative Law Judge and since the Administrative Law Judge correctly and adequately addressed all of the issues raised before him, we affirm the Administrative Law Judge's determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

The exception of Robert G. Bauer and Joan C. Bauer is denied;

The determination of the Administrative Law Judge is affirmed;

The petition of Robert G. Bauer and Joan C. Bauer is granted to the extent indicated in conclusion of law "D" of the Administrative Law Judge's determination, but in all other respects is denied; and

The Division of Taxation is directed to modify the Notice of Deficiency dated January 22, 1991 in accordance with paragraph "3" above, but in all other respects the notice is sustained.

DATED: Troy, New York
July 18, 1996

/s/Donald C. DeWitt
Donald C. DeWitt
President

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