

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH AND MARILYN CHIRA	:	DECISION
	:	DTA NO. 815602
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1978 through 1986.	:	

Petitioners Joseph and Marilyn Chira, 1045 East 8th Street, Brooklyn, New York 11230, filed an exception to the determination of the Administrative Law Judge issued on May 21, 1998. Petitioners appeared by Kalnick, Klee & Green, P.C. (Allen Green, Esq., of counsel) and Schneider, Ehrlich & Wengrover, LLP (Jerry Schneider, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kevin R. Law, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a brief in opposition to the exception. Petitioners filed a reply letter brief. Oral argument, at petitioners' request, was heard on October 15, 1998 in New York, New York.

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

ISSUE

Whether petitioners, Joseph and Marilyn Chira, are entitled to a refund of interest paid with respect to deficiencies of personal income tax arising from tax years 1978 through 1986, based on the alleged delay of the Division of Taxation in resolving this matter.

FINDINGS OF FACT

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

Joseph Chira (“petitioner”)¹, was a limited partner in various investment partnerships which were under audit by the New York State Department of Taxation and Finance and the Internal Revenue Service (“IRS”). Such investments spanned tax years 1978 through 1986, and, on income tax returns filed by petitioners for such tax years, partnership losses, interest and other deductions arising from such investments were reported.

A Statement of Audit Changes dated March 26, 1986 was issued to petitioner reflecting modifications to petitioner’s 1982 and 1983 New York State income tax returns pursuant to Tax Law § 612. The statement reflected additional tax due for the two tax years in a total amount of \$124,846.46, plus penalties and interest.

The Division of Taxation (“Division”) issued a Notice of Deficiency dated April 11, 1986 for tax years 1982 and 1983, asserting additional tax due in the amount of \$124,846.46, plus penalties and interest. The notice advised petitioner that the deficiency would become subject to collection by the Division with interest to the date of payment, unless he filed a petition within 90 days of April 11, 1986, or by July 10, 1986.

Although petitioner did not file a formal petition with the former Tax Appeals Bureau to protest the Notice of Deficiency, petitioner’s representative, Jerry Schneider, CPA, corresponded with the Division on May 14, 1986, in protest of the notice of April 11, 1986, and requested

¹Marilyn Chira is named in this matter solely by reason of having filed a joint tax return with her husband. All references to “petitioner” shall refer to Joseph Chira.

details of the assessments in order to resolve them. Mr. Schneider testified at the hearing that when petitioner received the Notice of Deficiency from the Division, he was unaware of the source of the assessments. Sometime later, it became clear that the examination of tax issues relating to investment partnerships was the source of the additional taxes due.

The Division issued notices and demands for payment of income tax due dated August 29, 1986, for the collection of \$124,846.46, plus penalties and interest for tax years 1982 and 1983.

On June 17, 1987, the Division issued a tax warrant covering the 1982 and 1983 assessments in addition to a small penalty assessed for the 1981 tax year.

By correspondence dated July 20, 1987, petitioner's representative requested detailed information concerning the warrants and the reasons for the assessments.

In correspondence dated November 10, 1987, petitioner's representative acknowledged that, in fact, some of petitioner's investments were under audit, and since there was a pending appeal before the IRS on the same matter, petitioner was requesting that any collection efforts and proceedings resulting from the issuance of the warrants be suspended until the case was resolved at the IRS level.

On or about December 3, 1987, petitioner filed a Notice of Petition with the Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules requesting that the warrants be annulled on the basis that the IRS was conducting an audit of the partnership associated with the modification adjustments which formed the basis of the Division's Notice of Deficiency in issue. Petitioner assured prompt reporting of the outcome to the Division when the Federal audit was finalized. Mr. Schneider indicated that the Article 78 proceeding was instituted in order to get a reaudit by the Division.

The filing of the Article 78 proceeding prompted contact between Jerry Schneider, petitioner's CPA, and the New York State Office of the Attorney General. Mr. Schneider corresponded with the Attorney General's office on December 14, 1987, providing in great detail information about petitioner's investments in various partnerships, including the specifics of the deductions taken. Mr. Schneider offered, on behalf of petitioner, to post a bond or make a payment in the amount of \$25,000.00 during the period that the matter was being resolved.

Mr. Schneider next corresponded with Arnold Glass, Esq., representing the Division, in a letter dated January 29, 1988. Mr. Schneider provided petitioner's IRS contact person and indicated reasonable certainty that the case was very near settlement at the Federal level. He requested additional review by the Division of the New York State tax assessments.

On May 5, 1989, the Division received amended New York State income tax returns for tax years 1978 through 1986. The amended returns for 1978 through 1983 reflected a balance due, and the returns for 1984 through 1986 resulted in refunds. The accompanying correspondence stated that such returns were prepared in accordance with closing agreements entered into with the IRS and requested that petitioners be billed directly for the net amounts due including appropriate interest. No payment was submitted with these returns.

On August 27, 1990, petitioners again submitted the New York amended tax returns for 1978 through 1986, and made a payment in the amount of \$30,000.00.

Although the Division maintained the position that it would not accept any IRS agreements for investment partnership cases since it had its own agreements which were substantially different from the IRS agreements, at the Division's audit level the case was put on hold awaiting final Federal audit changes.

Petitioner's case was assigned to David Tubbs, a tax auditor of the Division, with the goal of settling the Article 78 proceeding. On December 9, 1991, Mr. Tubbs commenced review of the case and analyzed the amended returns submitted to the Division by petitioner.

Petitioners' representative received correspondence from the Division dated November 5, 1992, prepared by David Tubbs, stating that the time lag experienced by petitioners to resolve this matter was due to several things beyond his control: major changes in auditing personnel, a major overhaul of the Division's computer systems, and a high volume of investment partnership cases under review. Mr. Tubbs reviewed the amended returns submitted by petitioner and he was in substantial agreement with such filings, with the exception of tax years 1982 and 1983, where there existed some disagreement with the Division's calculations. At that time Mr. Tubbs projected interest to December 15, 1992 and presented petitioner with an amount due of \$58,449.94.

In March 1993, petitioner's case was reassigned to Linda Goot who also made contact with Mr. Schneider regarding petitioner's case.

On April 28, 1993 a courtesy conference was held and Ms. Goot, Mr. Tubbs and Mr. Schneider met to discuss settlement of petitioner's case. Mr. Schneider indicated at that time that petitioner was still being audited by the Internal Revenue Service and that he was still in disagreement with the IRS audit. During the conference, it was recommended to Mr. Schneider that petitioner sign the settlement agreement relating to the 1982 and 1983 years and send in payment to reduce the interest and penalty. During the next few months, the parties agreed that petitioner would sign a settlement agreement for 1982 and 1983, and by doing so, be released for

any liability for 1978 through 1986, and not be precluded from protesting interest on the assessment.

On August 5, 1993 the Division received the signed settlement agreement for 1982 and 1983, in addition to statements of personal income tax audit changes for tax years 1978 through 1985, signed by petitioner and his wife. Petitioner also enclosed a \$10,000.00 payment on account. In December 1993 the case was closed and the assessments which were the basis of the Article 78 proceeding were adjusted and amounts due determined. Although both the affidavit of Mr. Tubbs and the tax field audit record of Ms. Goot indicated that the case was closed in December 1993, the closing settlement agreement was signed by the Division's representative on March 7, 1994. Petitioner claims he did not receive the signed copy until October 1994, but did not introduce into evidence the envelope he claimed bore such mailing.

Final payment of the balance due was received by the Division on November 1, 1994. Petitioner received correspondence from the Division dated November 15, 1994 confirming that all liabilities resulting from the investment partnership audit for tax years 1978 through 1986 were paid in full.

Petitioner filed a refund claim with respect to the interest paid on the assessments in issue in January 1995. The Division denied the claim in its May 8, 1995 Notice of Disallowance on the basis that petitioner had not shown that there was undue delay by the Division in resolving the case. On or about July 17, 1995, petitioner filed a request for a conciliation conference, appealing the denial of the refund. A conciliation conference was held before the Bureau of Conciliation and Mediation Services on April 24, 1996, and by a Conciliation Order dated November 29, 1996 (CMS No. 14910), the refund denial was sustained.

A petition was filed with the Division of Tax Appeals on January 22, 1997 contesting the refund denial.

The Federal audit was completed on or about March 1997.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that Tax Law § 3008(a) allows for the abatement of interest attributable to unreasonable errors and delays by an officer or employee of the Division in performing certain acts, so long as no significant aspect of such unreasonable error or delay can be attributed to the taxpayer involved. However, Tax Law § 3008 became effective on December 1, 1992 and only applies to interest accruing with respect to deficiencies, amounts of tax due or payments for taxable years occurring on or after that date with respect to Articles 22 and 30 of the Tax Law. Thus, the Administrative Law Judge concluded that Tax Law § 3008 has no application to this matter as the interest at issue accrued on deficiencies for tax years ending prior to its effective date.

The Administrative Law Judge went on to note that even if Tax Law § 3008 did apply, the record did not support a conclusion that the interest which accrued on the underlying deficiency resulted from the error or delay of a Division employee. The Administrative Law Judge found that although there was delay involved in the resolution of petitioner's case, such delay was due, in large part, to petitioner's request to have the Federal matter resolved first. The Administrative Law Judge concluded that any delay that might have been attributed to the Division was negated by the actions of petitioner and the Division's failure to abate interest could not be considered "grossly unfair," the standard required for review of the Division's action pursuant to Tax Law § 3008.

ARGUMENTS ON EXCEPTION

On exception, petitioner continues to maintain that the Division delayed the resolution of this matter such that petitioner is entitled to an abatement of interest from October 15, 1987 to the time of final payment on November 1, 1994 in the amount of \$54,769.40. Petitioner argues that it would have been unreasonable for petitioner to pay the amount of tax asserted due when it was demanded, since the assessment was ultimately compromised by the Division and settled for a lesser amount. Petitioner argues that the 1986 assessment was arbitrary and the proper audit was not commenced until 1991.

In opposition, the Division argues that the Administrative Law Judge's determination is correct and petitioner is not entitled to the relief requested.

OPINION

On exception, petitioner has not pointed to any authority that would allow this Tribunal to waive a portion of the interest imposed by law on petitioner. We agree with the Administrative Law Judge that Tax Law § 3008 has no application to the interest which accrued on deficiencies for the years in issue, tax years 1978 through 1986. Nor has petitioner taken exception to this finding.

In 1986, a Notice of Deficiency of personal income tax was issued to petitioners. The Administrative Law Judge found that within one month of the issuance of the notice, petitioner's representative corresponded with the Division concerning the basis of the deficiency. However, the notice was not timely protested. As a result, when the time for protest expired, the notice became an assessment of the amount of tax, penalty and interest asserted due therein.

It was at petitioner's request that collection efforts regarding this assessment be suspended until the partnership investment matter was resolved before the IRS. Interest continued to accrue during this period by operation of law. There appears to be no question that petitioner was liable for additional tax, penalty and interest which was not paid until November 1, 1994. As the Administrative Law Judge noted, petitioner could have paid the amount due at any time to avoid accrual of interest. The consequence for not doing so is an interest charge, which represents the cost for the use of funds (*Matter of Rizzo*, Tax Appeals Tribunal, May 13, 1993).

Although the Division subsequently adjusted downward the amount of tax due as the result of amended tax returns filed by petitioner, the Division was under no obligation to settle for any amount less than that which was due as a result of its final 1986 assessment. This was not a reaudit nor a recognition that the 1986 assessment was in any way incorrect. Rather, it was an accommodation by the Division. We agree with the Administrative Law Judge that any delay that might have been attributed to the Division is negated by the actions of petitioner.

We find that the Administrative Law Judge has fully and correctly addressed each of the issues raised by petitioner and we affirm her determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph and Marilyn Chira is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Joseph and Marilyn Chira is denied; and

4. The Notice of Disallowance, dated May 8, 1995, is sustained.

DATED: Troy, New York
March 25, 1999

/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