STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ABRAHAM AND ZIPORA HIRSCHFELD	:	DECISION DTA NO. 819653
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1985 and 1988 through 1995.	:	

Petitioners Abraham and Zipora Hirschfeld,[1] c/o Elie Hirschfeld, Hirschfeld Properties, LLC, 5 East 59th Street, New York, New York 10022, filed an exception to the determination of the Administrative Law Judge issued on June 30, 2005. Petitioner appeared by Herzfeld & Rubin, PC (James S. Kaplan, Esq. and Alan Weintraub, Esq., of counsel).[2] The Division of Taxation appeared by Mark F. Volk, Esq. (Herbert M. Friedman, Jr., Esq., of counsel).

[1] Elie Hirschfeld is the son of Abraham and Zipora Hirschfeld. A Notice of Withdrawal of Petition and Discontinuance of Proceeding dated May 4, 2004 was executed and filed by Elie Hirschfeld, acting as his mother's guardian, on behalf of petitioner, Zipora Hirschfeld. Therefore, Zipora Hirschfeld is no longer a party to this proceeding. In a closing agreement dated October 17, 2003 by Elie Hirschfeld and October 23, 2003 by the Division of Taxation's Director of Tax Audits, Zipora Hirschfeld conceded the deficiency and agreed to pay $7,500,000.00 in "additional payment" to the Division of Taxation and also agreed that the Division of Taxation may retain the amount of $5,853,197.58 previously levied by the Division of Taxation as noted in footnote "3," below. With the withdrawal of Zipora Hirschfeld, all references to "petitioner" in this decision are to Abraham Hirschfeld.

[2] Temporary Limited Letters of Administration were issued by the Surrogate's Court of New York County to Elie Hirschfeld on November 17, 2005 to act on behalf of the Estate of Abraham Hirschfeld in this proceeding. Elie Hirschfeld then filed the necessary power of attorney with the Tax Appeals Tribunal designating Herzfeld and Rubin, PC as his legal representatives.

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on November 6, 2006 in New York, New York.

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

ISSUES

I. Whether petitioner filed false or fraudulent income tax returns for the years at issue.

II. Whether fraud penalty was properly imposed.

III. Whether petitioner maintained this proceeding primarily for delay so that a penalty for the filing of a frivolous petition may be imposed.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued a Notice of Deficiency dated September 19, 2000 against petitioner asserting New York State and City personal income tax due of $3,781,417.00, plus interest of $5,204,962.38 and penalty of $4,871,332.67, for a total amount due of $13,857,712.05.[3] This notice, as well as a Schedule of Personal Income Tax Audit

[3] In the belief that the assessment or collection of this amount "will be jeopardized by delay," a jeopardy assessment was imposed by the Division against petitioners by a notice and demand also dated September 19, 2000, and a warrant of the same date, which was filed with the New York County Clerk's office. The Division had "information which causes it to believe that [petitioners] are designing quickly to conceal, transfer, or dissipate real and personal property by transferring it to other persons or corporations, or by moving it to an undisclosed location, or by removing it from New York State, or by otherwise encumbering it, thereby placing such property beyond the reach of the Department." The Division had information that petitioners "have recently transferred real property to other persons or corporations" and "have closed out certain New York State bank accounts and moved them to Florida." As of late October 2003, the Division had collected $5,853,197.58 by the imposition of tax compliance levies against petitioners.

Changes also dated September 19, 2000, allocated the personal income tax asserted due of $3,781,417.00 over the years at issue as follows:

Year	New York State Tax	New York City Tax
1985	$1,630,624.00	$ 552,928.00
1992	214,638.00	121,102.00
1993	109,629.00	61,630.00
1994	570,054.00	322,392.00
1995	125,256.00	73,164.00
Totals	$2,650,201.00	$1,131,216.00

The schedule also detailed the imposition of penalties on the above amounts of tax asserted due as follows:

Year	Fraud penalty on New York State tax due	Fraud penalty on New York City tax due	Substantial understatement of liability penalty on New York State tax due	Substantial understatement of liability penalty on New York City tax due	Total penalty asserted for year
1985	$2,420,043.00	$ 820,612.00	$163,062.00	$ 55,293.00	$ 3,459,010.00
1992	184,352.00	103,982.00	21,464.00	12,110.00	321,908.00
1993	88,677.00	49,852.00	10,963.00	6,163.00	155,655.00
1994	428,338.00	242,245.00	57,005.00	32,239.00	759,827.00
1995	86,737.00	50,665.00	12,526.00	7,316.00	157,244.00
Totals	$3,208,147.00	$1,267,356.00	$265,020.00	$113,121.00	$4,853,644.00[4]

According to the Division, petitioner *substantially understated* his income during the years at issue based upon his failure to report his proper income. Instead, on his personal income tax

[4] The record does not disclose a reason for the variance of $17,688.67 between this amount of $4,853,644.00 and the penalty of $4,871,332.67 asserted in the Notice of Deficiency.

returns, he had reported losses for eight of the nine years at issue, which after audit became substantial amounts of taxable income in five of the years at issue as follows:

Tax Year (a)	Taxable income reported (b)	Audit adjustments (c)	Corrected taxable income (d)	Corrected tax due (e)	Tax previously paid (f)	Additional tax liability (g)
1985	$1,983,578	$9,080,565	$11,064,143	$2,497,967	($314,415)	$2,183,552
1988	(1,466,473)	(45,670)	(1,512,143)	-0-	-0-	-0-
1989	(2,101,394)	(818,255)	(2,919,649)	-0-	-0	-0-
1990	(4,281,008)	(328,845)	(4,609,853)	-0-	-0-	-0-
1991	(9,859,973)	(2,527,067)	(12,387,040)	-0-	-0-	-0-
1992	(10,546,430)	13,271,994	2,725,564	335,741	-0-	335,741
1993	(1,700,578)	3,092,688	1,392,110	171,259	-0-	171,259
1994	(1,977,314)	9,216,096	7,238,782	892,446	-0-	892,446
1995	(5,229,731)	6,879,195	1,649,464	198,421	-0-	198,421
		Total	(e)-(f)=(g)	$4,095,834	(314,415)	$3,781,419

In 1994, in response to a referral by the Division's Revenue Crimes Bureau, the Manhattan District Attorney's Office, in conjunction with the New York City Department of Finance and the Division, began an investigation of petitioner's State and City personal and corporate income tax filings. The focus of the investigation centered on petitioner's intentional mistreatment, commingling and false reporting of personal and corporate income on his returns for the years at issue. After an extensive three-year investigation, an indictment consisting of 123 counts was filed on April 29, 1997 against petitioner and his business entities[5] in the case of ***People of the***

[5] Petitioner conducted business through the following business entities which were also named in the criminal indictment: PY Associates, LTD; Prince of Central Park Co. II, Ltd; Hirschfeld Realty Club Corp.; Farlands Enterprises, Inc.; 10 East 30th Street Corp.; Duane Park Development Corp; and 328 East 61st Street Corp.

State of New York v. Abraham Hirschfeld, et al. The numerous counts against petitioner individually included Scheme to Defraud in the First Degree (1 count), Grand Larceny in the Second Degree (2 counts), Offering a False Instrument for Filing in the First Degree (68 counts), and violation of Tax Law § 1804[6] (4 counts), all for the years at issue. The trial against petitioner, which ran the summer of 1999, resulted in a hung jury, which had voted 11-1 in favor of conviction. A retrial was scheduled, but on August 28, 2000, petitioner chose to enter an ***Alford***[7] plea to all of the charges in the indictment over the vigorous objection of Gilda Mariani, Esq., the Assistant District Attorney, who was prepared to proceed with the second trial. Attorney Mariani noted:

> We are opposed to the sentence because Mr. Hirschfeld has continuously over a decade filed [close to a hundred] false tax returns for his personal income tax and his corporate income tax and he owes over $5.5 million. And the exhibits at the prior trial, in fact, support that. . . .
>
> He has shown not the slightest bit of remorse . . . it is not an isolated act. It's something that occurred repeatedly over and over again. It occurred through deception and concealment from his accountants. He failed to answer simple questions, such as "What do you own? How much did you make?"
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> . . . . [T]he People's recommendation to this Court would have been a full restitution of the moneys that we proved at the previous trial and that there be a sentence [of] incarceration, in addition to [the incarceration] which was imposed from the criminal solicitation case.

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[6] This statutory provision provides that a person shall be (i) guilty of a misdemeanor as a result of the filing of a false or fraudulent return with the intent to evade any personal income and earnings taxes and (ii) guilty of a class E felony as a result of the filing of a false or fraudulent return which "substantially understates" his personal income tax liability defined as an amount more than $1,500.00 in excess of his tax liability which was required to be shown on the tax return.

[7] Petitioner entered his guilty plea pursuant to ***North Carolina v. Alford*** (400 US 25, 91 S Ct 160, 27 L Ed 2d 162) whereby petitioner maintained his innocence while nonetheless pleading guilty to the counts included in the indictment.

Nonetheless, the court accepted petitioner's guilty plea to the 123 criminal counts of the indictment, and on August 28, 2000, petitioner was sentenced to a three year conditional discharge and a fine of $1,000,000.00 as a result of his ***Alford*** plea.

The criminal tax fraud investigation, which was the basis for the trial and subsequent ***Alford*** plea as noted above, included an extensive audit performed by New York State and City auditors of petitioner's tax returns for the years at issue. It was determined after such audit that 13 adjustments were warranted to petitioner's income tax returns for the years at issue.

First, petitioner reported net rental income or loss, depending on the particular year, on certain rental property, consisting of a parking lot and garage located at West 33rd Street in Manhattan, which he did not own as an individual. Rather, the property was owned by a corporate entity known as Farlands Enterprises, Inc. Consequently, petitioner incorrectly reported net rental income or loss on schedule E of his personal income tax returns. During 1988 and 1989, petitioner reported losses so that the adjustments resulted in additional income when such losses were eliminated, but in the years 1990 to 1995, Mr. Hirschfeld reported income from such property so that the adjustments resulted in a decrease in his income, as detailed as follows:

Year	Audit adjustment because rental property owned by Farlands Enterprises, Inc. and not by petitioner
1988	$181,239.00
1989	399,469.00
1990	(66,263.00)
1991	(305,751.00)
1992	(282,412.00)
1993	(405,912.00)

1994	(467,605.00)
1995	(456,564.00)

The second audit adjustment related to the sale at a gain of the property located on West 33rd Street in Manhattan, which was owned by the corporate entity, Farlands Enterprises, Inc. As a result, the gain should *not* have been reported by petitioner on his individual personal income tax returns but rather on the corporate entity's tax returns. Petitioner's income was reduced as follows:

Year	Audit adjustment for gain on sale of property owned by Farlands Enterprises, Inc. and not by petitioner
1988	($1,839,600.00)
1992[8]	(1,782,172.00)

The third audit adjustment related to interest income received on the installment sale of the property located on West 33rd Street in Manhattan, which was owned by the corporate entity, Farlands Enterprises, Inc. Such interest income should have been reported on the corporate entity's tax returns and not on petitioner's individual personal income tax returns. His income was reduced as follows:

Year	Audit adjustment because interest income on installment sale of property owned by Farlands Enterprises, Inc. and not by petitioner
1988	($67,542.00)
1989	(300,000.00)

[8] The initial capital gain transaction was realized in 1988 when the property was sold through an installment sale. The balance of the note was paid in 1992.

1990	(300,000.00)
1991	(300,000.00)

With regard to the above three adjustments, petitioner benefitted by misreporting additional income on his personal income tax returns because such returns contained large net operating losses not present on the corporate income tax returns. As noted above, petitioner reported substantial losses on his tax returns for the years 1988 to 1995, ranging from a loss of $9,869,973.00 in 1991 to a loss of $1,466,473.00 in 1988. Consequently, petitioner used such losses to offset and shelter income and capital gain of a corporate entity which he controlled thereby avoiding additional taxes. Reporting the rental income on corporate returns without such offsets, would result in additional corporation taxes due. After the above adjustments related to Farlands Enterprises, Inc. were made, this corporate entity controlled by petitioner had an additional tax liability for the same years of $696,576.00.

The fourth audit adjustment related to losses incurred by a partnership organized by petitioner which produced an unsuccessful play on Broadway called *The Prince of Central Park*. Petitioner instructed his accountants that his losses from this partnership were not his personal losses but the losses of the Hirschfeld Realty Club Corp. which he claimed was the partner. However, a review by the auditors of the documentation filed with the Attorney General's office with regard to this theatrical production showed that petitioner was one of the partners, not the corporation. Consequently, the losses were removed from the corporation tax returns of the Hirschfeld Realty Club Corp. and included on petitioner's personal income tax returns as follows:

Year	Audit adjustment because losses from The Prince of Central Park were petitioner's and not of Hirschfeld Realty Club Corp.
1989	($1,218,418.00)
1990	(21,238.00)
1992	(1,326.00)
1993	(1,580.00)

This misreporting had resulted in the serious understatement of the income of Hirschfeld Realty Club Corp.

The fifth audit adjustment related to rental income, and for some years, losses, for rental property located at 328 East 61st Street which was leased to a tenant by 328 E. 61 Corp., a corporate entity controlled by petitioner, and not by Mr. Hirschfeld individually so that such income or losses should be reported on the corporation's tax returns. Petitioner's income was adjusted as follows:

Year	Audit adjustment because property leased by Hirschfeld Realty Club Corp. not by petitioner
1988	($112,898.00)
1989	1,111.00
1990	(13,705.00)
1991	(18,315.00)
1992	(8,691.00)
1993	(12,790.00)
1994	54,469.00
1995	80,370.00

The sixth audit adjustment related to losses for rental property located in Jackson Heights, Queens which was owned by Duane Park Development Corp. and not by Mr. Hirschfeld individually so that such losses should have been reported on the corporation's tax returns. Petitioner's income was adjusted as follows:

Year	Audit adjustment because property generating losses owned by Duane Park Development Corp. not by petitioner
1988	$97,544.00
1989	35,626.00
1990	54,960.00
1991	40,564.00
1992	21,795.00
1993	15,843.00
1994	918.00
1995	241.00

The seventh audit adjustment related to capital gains on the sale of cooperative apartments owned by Duane Park Development Corp. and not by petitioner, individually. Petitioner's income was adjusted as follows:

Year	Audit adjustment because apartments sold were owned by Duane Park Development Corp. not by petitioner
1988	($121,674.00)
1989	(260,716.00)
1990	(93,487.00)
1991	(106,349.00)

The eighth audit adjustment related to the Division's determination that petitioner had constructive dividends from the three corporations: Farlands Enterprises, Inc., Hirschfeld Realty Club Corp. and Duane Park Development Corp. These three corporations were each owned by the same parent corporation, 10 East 30th Street, of which petitioner was the sole shareholder. The Division, after making the seven audit adjustments described above, calculated that each of the three corporations had positive retained earnings and positive incomes for eight of the years at issue. After auditing certain bank statements and loan documents that showed that petitioner had taken money from these corporations to use for other projects and operational costs and had not returned the money to the corporations, the Division treated funds of these three corporations up to their respective positive retained earnings as constructive dividends to petitioner as follows:

Year	Positive retained earnings of Farlands Enterprise, Inc. treated as constructive dividends	Positive retained earnings of Hirschfeld Realty Club treated as constructive dividends	Positive retained earnings of Duane Park Development treated as constructive dividends	Total positive retained earnings treated as constructive dividends
1988	$1,543,100.00	$ 251,417.00	$22,744.00	$1,817,261.00
1989	119,322.00	213,965.00	191,386.00	524,673.00
1990	721,894.00	176,921.00	-0-	898,815.00
1991	578,104.00	176,748.00	-0-	754,852.00
1992	2,039,363.00	182,330.00	-0-	2,221,693.00
1993	405,743.00	224,406.00	-0-	630,149.00
1994	464,432.00	185,086.00	-0-	649,518.00
1995	454,454.00	169,370.00	-0-	623,824.00
Total	$6,326,412.00	$1,580,243.00	$214,130.00	$8,120,785.00

According to the Division's auditor, whenever money comes out of a corporation that goes to the owner of the corporation for a use that is not directly related to the particular corporate entity, it is properly considered a constructive dividend to the owner. For 1988, Farlands Enterprises, Inc. had total available retained earnings of $2,067,697.00. However, the Division treated only the lesser amount of $1,543,100.00 as constructive dividends to petitioner, as shown in the table above in light of its methodology which limited its determination of constructive dividends to the amount traced by the Division to petitioner's personal bank accounts. Similarly, Hirschfeld Realty Club had total available retained earnings of $2,928,266.00, $3,666,755.00, $3,971,489.00, $3,822,897.00, $3,693,746.00, $3,680,337.00, $3,613,752.00 and $3,492,261.00 for 1988, 1989, 1990, 1991, 1992, 1993, 1994, and 1995, respectively, but only the lesser amounts in the table above were treated as constructive dividends since they were traced by the Division to petitioner's personal bank accounts.

The ninth audit adjustment related to petitioner's omission of income arising from three different transactions in 1985. First, as a partner in Lincoln West Associates, a partnership which owned the Penn Yards railroad yards ("Penn Yards") that stretched from 59th Street to 72nd Street on Manhattan's west side, petitioner received payments over a period of six years totaling $5,500,000.00. These payments were made to petitioner conditioned upon the obtaining of permits from the City of New York required to develop this property, and petitioner never reported such payments as income on the basis that they were not income until he had completed the work of obtaining permits to develop the property. Petitioner wrote in a letter dated August 2, 1984 to his prior accountants, Harrison & Reffsin:

> This total of $5,500,00.00 is to be considered a deposit since the conditions of the contract are such that the assignees, Lincoln West, may request the refund of the

> monies in the event that the project is not approved by all the authorities having jurisdiction thereto, such as New York City Planning Commission, EPA-Albany, Port Authority, etc.

However, in 1985, Lincoln West Associates sold the property to a partnership controlled by Donald Trump. Mr. Hirschfeld's accountant at the time, Sy Harrison, advised him that he either had to return the payments amounting to $5,500,000.00 to the partnership because the work was not done by him to obtain the city permits, or he had to recognize such funds as personal income. Petitioner refused to refund the $5,500,000.00 to Lincoln West Associates, and the Division treated this amount as income in 1985 to petitioner.

Second, petitioner had a capital gain on the sale of a building located at 211 East 43rd Street in Manhattan which he failed to report despite the advice of his accountant at the time, Sy Harrison, that he could not treat the transaction as a "like-kind" exchange as he desired in order to avoid reporting income subject to tax on the transaction. In 1985, the New York State Tax Law did not tax capital gains at 100 percent, so that only 40% of the gain, or $3,352,708.00, was included in petitioner's 1985 income subject to tax.

Third, petitioner failed to report all of his gain on the sale of a multi-story garage building located at 110 East 16th Street in Manhattan to an entity owned by Stanley Muss and Donald Mallar. Here, petitioner, as the primary partner in the partnership that owned the garage, also attempted to cheat other minor partners in the partnership by entering into an undisclosed side agreement with the purchasing entity controlled by Messrs. Muss and Mallar. A check from the purchaser in the amount of $4,300,000.00 was sent to the National Bank of Canada in Montreal under petitioner's personal name. The Canadian bank kept the amount on deposit for 60 days and then the money was transferred to petitioner's personal stock investment account.

The $4,300,000.00 was not reflected on the tax return for 1985 of the partnership controlled by petitioner or disclosed to petitioner's fellow partners. A search of petitioner's offices pursuant to a search warrant uncovered a letter from the Canadian bank which unraveled this scheme. The Division treated $1,740,000.00 or 40% of petitioner's gain in the amount of $4,350,000.00 as additional income to petitioner in 1985.

The tenth audit adjustment related to petitioner's omission of a capital gain in the amount of $17,416,556.00. In 1992, petitioner and several family members surrendered their partnership interest in Penn Yards to Donald Trump, the remaining partner. Mr. Trump forgave the Hirschfeld family's negative capital contribution to the partnership of $20,831,633.00, and petitioner was also required to recognize the rollover or postponement of a capital gain of $8,570,633.00 from his 1985 sale of Lincoln West Associates to the partnership controlled by Mr. Trump. Petitioner had treated the transaction in 1985 as a "like-kind" exchange since he had obtained in 1985 an interest in the partnership controlled by Mr. Trump. When petitioner's former accountants, Weinick & Sanders, advised petitioner that the forgiveness of the negative capital contribution would have to be recognized as income, petitioner provided a fraudulent document which he had prepared stating that the Hirschfeld family partnership known as PY Associates had contributed the $20,000,000.00. Consequently, in 1992, petitioner who owned 59.994% of the Hirschfeld family partnership which held the family's 20% interest in the partnership controlled by Mr. Trump, was treated by the Division as having failed to report a capital gain in the amount of $17,416,556.00.

The eleventh audit adjustment related to petitioner's failure to report a cancellation of debt in 1994 when one of petitioner's partnerships named Able Group had its mortgage note

assigned from its original bank/mortgagee, which was facing financial difficulty, to the Resolution Trust Corporation. Petitioner was aware that Federal law prohibited him from buying back his partnership's own note at a discount from the Resolution Trust Corporation. So instead, he arranged for a dormant, shell entity known as 143 West 72nd Street Corp., which petitioner controlled, to actually purchase the note. Petitioner had his chauffeur attend the closing and sign on behalf of the shell corporation as its president, despite the fact that the chauffeur was neither an officer nor a shareholder of the corporation and knew nothing of the transaction. As a result of this scheme, Able Group was able to gain a cancellation of debt of $7,399,526.00. Since petitioner was entitled to 92.5 percent[9] of all cancellation of debt of the Able Group, he had a cancellation of debt income for this transaction of $6,844,561.00.

The twelfth audit adjustment related to the Division's revising petitioner's net operating loss deductions for the years at issue. On his tax returns as filed, petitioner was running net losses so that there was no taxable income but rather net operating losses which he carried forward. After the Division made all of the audit adjustments noted above, it had to reallocate the net operating loss deductions on petitioner's tax returns. By the end of 1992, the Division calculated that petitioner had enough income to have used up all of his prior net operating losses.

Finally, the thirteenth audit adjustment related to the Division's recognizing that since petitioner no longer had net operating losses after its other audit adjustments, he was now allowed to claim itemized deductions for charitable contributions which he had accumulated given his reported net operating losses. For example in 1992, the Division reduced petitioner's

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[9] A note in petitioner's papers indicated that Elie Hirschfeld was the 55 percent partner and petitioner was the 45 percent shareholder in all matters except where there would be a forgiveness of debt. In that instance, petitioner became the 92.5 percent partner and Elie Hirschfeld became the 7.5 percent partner.

income by $261,000.00 because he now had itemized deductions for charitable contributions he could use that he could not use before.

Procedural Permutations

The Division provided Mr. Hirschfeld with a set of the documents it introduced into the record on June 1, 2004, another copy of its documents on June 30th, and a third copy in the course of the hearing as its documents were marked into the record. Nonetheless, on the first day of hearing, Mr. Hirschfeld's then representative, Gil Chachkes, stated that he had not seen "any of the documents prior to today" (tr., p. 25). On the second day of hearing, petitioner continued to object to the introduction of documents for the same spurious reason. Petitioner contended: "They didn't give it to me beforehand. . . . I cannot examine 30 pages here and let you sit and wait for me" (tr., p. 173). This objection was in the face of the Division's provision of copies of documents on three separate occasion.

In the petition filed by Abraham Hirschfeld, where he was to describe the errors allegedly made by the Division, Mr. Hirschfeld referenced a crude and scurrilous letter, dated September 5, 2003, he sent to Thomas Curry, the conciliation conferee who issued a conciliation order dated August 29, 2003 denying his request and sustaining the statutory notice at issue in this matter. This document was augmented by a similarly crude and scurrilous letter by Mr. Hirschfeld dated September 3, 2003 to Rochelle Katz, an attorney apparently employed as a judicial clerk by the New York County Supreme Court, which on its face shows no relevancy to the matter at hand. Also included in the petition were the following documents: (i) a warrant of the NYC Department of Finance against Duane Park Development Corp.; (ii) a column from the New York Law Journal which included a reference to Penal Law § 215.22 known as "Hirschfeld's

Law" which prohibits parties in criminal or civil actions from conferring any benefit upon any juror as a reward for service. This law was legislated in response to reports that Mr. Hirschfeld "gave or offered to give $2,500.00 to each of the jurors" on the hung jury in his first criminal trial according to the columnist; (iii) an article from the New York Daily News concerning Mr. Hirschfeld's desire to run as the Republican candidate in 2004 for Sen. Schumer's seat; and (iv) articles on the conflict between the Israelis and Palestinians.

Mr. Hirschfeld's behavior in the course of the proceeding also displayed numerous instances of disregard for orderly procedure. Although requested on several occasions to file a hearing memorandum outlining the issues from his perspective and listing his witnesses and the documents he intended to introduce into the record, petitioner never complied with this most basic request of the administrative law judge.[10] Rather, petitioner's *modus operandi* was to attempt to disrupt the orderly conduct of the hearing process and to create confusion and delay. Petitioner made numerous complaints: (i) he claimed that he never received a copy of the Division's answer to his petition or the notice of deficiency or schedule of proposed audit changes; (ii) he prohibited his representative from noting the issues in dispute; and (iii) when he was provided with the opportunity to cross-examine the Division's auditor who had spent four plus years reconstructing petitioner's financial transactions, he merely continued to assert that:

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[10] Under 20 NYCRR 3000.14, each party must prepare a hearing memorandum and submit copies to the supervising administrative law judge and the opposing party not less than 10 days before the hearing date specified in the hearing notice or in this matter by June 28, 2004. A hearing memorandum is required to contain the following information: (1) a list of all witnesses to be called to testify and a very brief summary of the anticipated testimony of such witnesses; (2) a list of all exhibits to be introduced; (3) a brief statement of the issues being contested; (4) a statement of the legal authorities relied on; and (5) if the parties have reached stipulation on any facts, a copy of the stipulation. If a party fails to make a good faith effort to comply with these requirements, the administrative law judge may preclude the testimony of witnesses or introduction of evidence not included in the hearing memorandum. In this matter, petitioner failed to present any witnesses or introduce any relevant evidence so that it was unnecessary for the administrative law judge to consider precluding petitioner from going forward in a substantive fashion.

(1) he was not provided copies of the Division's documents, (2) the hearing should not be going forward while a petition concerning his mental capacity was pending, and (3) a newspaper article was written concerning his threatening a county judge. Further, petitioner used his infirmities as a basis to mislead the administrative law judge by stating that he was in the process of having a guardian appointed to act on his behalf in this matter when, in fact, petitioner intentionally restricted his son, attorney Elie Hirschfeld, from acting as his guardian in this proceeding. In a letter dated November 19, 2004, the administrative law judge summarized petitioner's egregious behavior in this regard:

> Rather than submit a hearing memorandum as required by October 15, 2004, you sent me a letter dated October 12, 2004, advising me that Justice Gangel-Jacob in an order and judgment dated September 14, 2004 had stayed this matter. However, you did not send me a complete copy of the judge's order and judgment nor a copy of her related decision. I have now received a complete copy of the judge's order and judgment and a copy of her related decision which were transmitted to me by a letter dated November 15, 2004 of attorney Lindsey Mayerfeld, Esq. . . . . Attorney Mayerfeld advised that "at the hearing before Judge Gangel-Jacob on September 30, 2004,[11] Abraham Hirschfeld specifically requested that his tax matters not be included in the guardianship, and that he be allowed to handle those matters himself. Judge Gangel-Jacob consented to Abraham Hirschfeld's request.

In a similar vein, earlier on the second full day of the hearing in this matter on July 9, 2004, petitioner asserted that he could not continue to attend the hearing due to physical ailments so that the Division's presentation of its case was cut short. Nonetheless, when petitioner was then given the opportunity by the administrative law judge to make a comment on the record before it was closed for the day, he managed to speak for some time demonstrating once again his *modus operandi* to impede the orderly conduct of this proceeding.

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[11] On October 15, 2004, two weeks after his hearing before Judge Gangel-Jacob where he obtained approval to handle this tax matter himself, petitioner intentionally deceived the administrative law judge in this regard.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge noted that when the Division issues a Notice of Deficiency to a taxpayer, a presumption of correctness attaches to the notice. The burden is on petitioner to rebut that presumption with clear and convincing evidence which demonstrates that the deficiency assessment is erroneous (***Matter of O'Reilly***, Tax Appeals Tribunal, May 17, 2004). With respect to the fraud penalty, however, the Division has the burden of proof (Tax Law § 685[e]). Furthermore, the Administrative Law Judge observed that Tax Law § 683(a) requires that any tax under Article 22 must be assessed within three years after the return was filed with the exception where the return is false or fraudulent, in which case an assessment can be made at any time (Tax Law § 683[c][1][B]). The Administrative Law Judge pointed out that the Notice of Deficiency was dated September 19, 2000, so that the period of limitations of three years for assessment would have run unless petitioner's returns for the years at issue were false or fraudulent. Therefore, the Administrative Law Judge found that the Division of Taxation had a burden to first establish fraud on the part of petitioner.

We have held that:

> Imposition of the fraud penalty requires "clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (***Matter of Sona Appliances***, Tax Appeals Tribunal, March 16, 2000).

Nonetheless, the Administrative Law Judge observed that where a taxpayer has been convicted of criminal tax fraud for the same years at issue in the civil tax fraud proceeding, he is estopped from contesting the imposition of civil fraud penalties.

In this case, the Administrative Law Judge noted, petitioner entered a guilty plea to the 123 counts of the criminal tax fraud indictment filed against him while maintaining his innocence, i.e., an ***Alford*** plea. Yet, the Administrative Law Judge found the pivotal fact to be petitioner's guilty plea to the indictment as detailed above, and petitioner's conviction of 68 counts of offering a false instrument (i.e., a false tax return) for filing in the first degree, as well as other criminal counts related to tax evasion for each of the years at issue. Consequently, the Administrative Law Judge found that petitioner's conviction for fraudulently filing false tax returns collaterally estops the taxpayer from challenging the civil fraud penalty (***see***, ***Matter of Drebin***, Tax Appeals Tribunal, March 27, 1997, ***confirmed Matter of Drebin v. Tax Appeals Tribunal***, 249 AD2d 716, 671 NYS2d 565). Therefore, the Administrative Law Judge held that the Division's proof of petitioner's guilty plea to fraud with respect to the subject period was sufficient to establish that petitioner received additional income for the relevant years, failed to report such additional income on his New York personal income tax returns and such failure was with intent to evade tax (***citing, Matter of Cumberland Pharmacy v. Blum***, 69 AD2d 903, 415 NYS2d 898 [wherein the court noted that a petitioner's ***Alford*** plea of guilt binds "as strongly as any admission of the facts constituting the crime charged"]).

The Administrative Law Judge pointed out that Gilda Mariani, the Assistant District Attorney responsible for the criminal tax prosecution against petitioner, objected to petitioner's plea bargain preferring to proceed with a second trial. In her objection, she noted that petitioner had failed to show "the slightest bit of remorse" for his tax evasion which occurred repeatedly over a period of years. The Administrative Law Judge found the objection of the assistant district attorney significant when combined with the Division's presentation of the credible and

detailed testimony of its two witnesses and its more than 100 related exhibits. The Administrative Law Judge found this conclusive proof of petitioner's dishonesty and tax evasion. The Administrative Law Judge found that the Division's proof supports the 13 audit adjustments detailed in the findings of fact above and further provided an *alternative* basis to uphold the imposition of the civil fraud penalties against petitioner, since fraud by a taxpayer may be established "by surveying the taxpayer's entire course of conduct in the context of events in question and drawing reasonable inferences therefrom" (***Plunkett v. Commissioner***, 465 F2d 299, 72-2 USTC ¶ 9541; ***Matter of Cinelli***, Tax Appeals Tribunal, September 14, 1989, citing ***Korecky v. Commissioner***, 781 F2d 1566, 86-1 USTC ¶ 9232). The Administrative Law Judge found that the Division's proof demonstrated how petitioner used his various schemes and deceptions to consistently and substantially understate his income, which constitutes strong, direct evidence of fraud (***see, Matter of Bennett***, Tax Appeals Tribunal, December 16, 2004). The Administrative Law Judge noted in particular, petitioner's flagrant scheme whereby he cheated his partners out of a share of a capital gain in the amount of $4,300,000.00 by undertaking an undisclosed side agreement with the purchasing entity, which transmitted a check in such amount to the National Bank of Canada in Montreal under petitioner's personal name. The Administrative Law Judge noted that this was direct proof of petitioner's intent to defraud.

Next, turning from the civil fraud issue to the amount of the additional tax assessed as due, petitioner had the burden of proving any error in the amount assessed. The Administrative Law Judge noted that petitioner offered no testimonial evidence by any witness including himself and no relevant documentary evidence to establish any error in the amount of tax assessed as due. Petitioner argued that he was the subject of a guardianship proceeding and the hearing in this

matter should not have gone forward but, in fact, petitioner intentionally restricted his guardian from acting on his behalf in this tax matter. The Administrative Law Judge noted that petitioner's son, Elie Hirschfeld, is an attorney and acts as his legal guardian in other legal matters. The Administrative Law Judge observed that petitioner's *modus operandi* was to disrupt this proceeding with relentlessly aggressive behavior, ranging from the disregard of basic decorum and the use of obscenity to abusing the subpoena process by seeking untimely[12] requests to subpoena individuals to the hearing in this matter, as well as attempting to subpoena individuals including, *inter alia*, former President William Jefferson Clinton, New York State Supreme Court Judges Charles E. Ramos and Martin Schoenfeld and District Attorney Robert M. Morgenthau, who would appear to have no relevant evidence to support petitioner's case against this fraud assessment. The Administrative Law Judge noted that petitioner's defense to the assessment merely consisted of conclusory, self-serving comments.

Finally, the Administrative Law Judge found that petitioner's disruptive and dilatory conduct in the course of this proceeding, as well as the baseless nature of the petition filed, supports the conclusion that petitioner's case was created and maintained primarily for delay. Therefore, the Administrative Law Judge denied the petition and imposed a frivolous petition penalty against petitioner under 20 NYCRR 3000.21.

ARGUMENTS ON EXCEPTION

Petitioner on exception argues that the Administrative Law Judge erred in concluding that he had received additional income which he failed to report for the subject years, and also urges

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[12]A request for the administrative law judge assigned to a case to issue subpoenas must be made in writing at least 20 days in advance of the hearing so that the deadline for such request from petitioner was 20 days in advance of August 2, 2004 (20 NYCRR 3000.7[b]). Petitioner's request was untimely and properly denied (***Matter of McNamara***, Tax Appeals Tribunal, March 9, 2000).

that an ***Alford*** plea does not constitute a plea of guilty. Petitioner also denies that the Division produced documentary evidence that would support the facts underlying the fraud charges.

Petitioner argues that he was not able to carry his burden of proof due to health problems, and denies that the Division's evidence showed that he diverted funds from his controlled corporations to his personal use. Petitioner also denies that the Division's audit adjustments were proper.

The Division maintains that petitioner's entering an ***Alford*** plea to all 123 criminal counts of the indictment conclusively established fraudulent intent on his part. The Division argues that petitioner received additional income for the relevant years, failed to report such additional income on his New York personal income tax returns and that such failure was with intent to evade tax. According to the Division, petitioner's fraud renders the Notice of Deficiency, dated September 19, 2000, a timely assessment since when a false or fraudulent tax return is filed, an assessment may be made at any time (Tax Law § 683[c][1][B]). The Division maintains that the underlying facts in the record establish numerous incidents of fraudulent acts by petitioner for the subject period. The Division contends that it established the basis for the assessment against petitioner by the introduction of documents and the testimony of its witnesses. The Division emphasizes that petitioner, although given a full opportunity to be heard, did nothing to refute the numerous adjustments detailed in the findings of fact. The Division notes in particular that petitioner presented no evidence or material argument in response to the Division's case. The Division also maintains that petitioner's case was brought and maintained primarily for delay thereby justifying the imposition of a penalty for filing a frivolous petition under 20 NYCRR 3000.21.

OPINION

Petitioner claims that the Administrative Law Judge erred in concluding that petitioner had received additional income which he failed to report for the subject years. Petitioner offered no evidence to dispute this portion of the Division's case, however.

Petitioner next claims that his plea pursuant to ***North Carolina v. Alford*** (***supra***), where petitioner continued to maintain his innocence while nonetheless pleading guilty to all counts set forth in the indictment, is not an admission. Accordingly, he urges, he should not be estopped from denying that he engaged in fraud during the subject years. We disagree. As the Court stated in ***Matter of Cumberland Pharmacy v. Blum*** (***supra***), petitioner's ***Alford*** plea binds him "as strongly as any admission of the facts constituting the crime charged." In addition, we note that at the District Attorney's insistence the record of petitioner's trial was made part of the record upon which his ***Alford*** plea was based. We find that petitioner's plea to all 123 counts of the indictment which included Scheme to Defraud in the First Degree (1 count), Grand Larceny in the Second Degree (2 counts), Offering a False Instrument for Filing in the First Degree (68 counts) and violation of Tax Law § 1804 (4 counts) all for the years at issue is effective to estop him from now challenging the civil fraud penalty here which is based on the same underlying facts (***see***, ***Matter of Drebin***, ***supra***).

Even in the absence of petitioner's plea, the Division's witnesses and documentation are more than sufficient to uphold the imposition of the civil fraud penalties against petitioner since fraud by a taxpayer may be established by surveying the taxpayer's entire course of conduct in the context of events in question and drawing reasonable inferences therefrom (***see***, ***Matter of Cinelli***, ***supra***). A review of the record reflects that petitioner's schemes and deceptions are

legion. The evidence establishes not only petitioner's *consistent and substantial understatement of income* which in itself is strong evidence of fraud (***see***, ***Matter of Bennett***, ***supra***), but also *direct* evidence of deception from which his fraudulent intent can reasonably be inferred. In particular, petitioner's scheme to cheat his partners out of a share of a capital gain in the amount of $4,300,000.00 by arranging via an undisclosed side agreement for the purchasing entity to transmit a check in such amount to a bank in Montreal, Canada under petitioner's personal name is direct proof of petitioner's intent to commit fraud. We find that the witnesses and documentation offered in evidence by the Division are sufficient to conclude that petitioner received additional income during the subject years, that he filed false tax returns by intentionally failing to report all of his income and that he did these things with the intent to evade tax owing to the State of New York.

Further, contrary to petitioner's argument on exception, we find the Division properly characterized the diversion of funds into petitioner's accounts as constructive dividends as detailed above in the findings of fact since the evidence established that petitioner diverted funds of his controlled corporations to his personal use (***see***, ***Pittman v. Commissioner***, T.C. Memo 1995-243, 69 TCM 2799, ***affd*** 100 F3d 1308, 96-2 USTC ¶ 50,658 as cited in ***Matter of Bennett***, ***supra***). This evidence stands unrebutted by petitioner.

Petitioner argues that he was not able to carry his burden of proof due to his health problems. We see no merit to this claim. Petitioner elected not to offer evidence into the record or even to cross examine the Division's witnesses. We note that if petitioner felt he required assistance, help was readily available. A guardianship proceeding had already been held appointing petitioner's son as his guardian in other pending legal matters. However, petitioner

expressly requested that his son not be made his legal guardian with respect to the instant matter, and the Supreme Court Judge, for whatever reason, agreed. As a result, petitioner proceeded as he saw fit to handle this matter. That was his privilege.

At oral argument, petitioner's counsel also claimed that the hearing below should not have proceeded because Mr. Hirschfeld did not have an attorney present. We hasten to point out that there is no right to counsel in a civil proceeding. However, this argument is without merit for yet another reason. Petitioner had an attorney, brought him to the hearing and then against the advice of the Administrative Law Judge fired him. Petitioner, a man of considerable resources, could have retained another attorney at any time. He did not.

We reject petitioner's claim that he was denied an opportunity to present his case. It is difficult to read the record of this proceeding, and petitioner's tactics of manipulation, commingling of corporate and personal funds, filing false tax returns, and cheating of partners without feeling sullied by the experience. It would difficult to find an Administrative Law Judge who was more patient, under very trying circumstances, than the one who heard this case. Despite every opportunity, petitioner did not put any relevant evidence into the record to rebut the Division's case. He could have. While at the time of the hearing petitioner's health was failing him, his mind was still active.[13] Even at the conclusion of the hearing, the Administrative Law Judge advised petitioner that the record would be left open for six months to give him time to review the transcripts and submit whatever evidence he had available to counter the Division's

[13]We note the comment by the Judge when taking petitioner's ***Alford*** plea. The Judge commented on how well he knew Mr. Hirschfeld and observed that although Mr. Hirschfeld's health was failing him his mind was always working. The Judge observed that for a man like Mr. Hirschfeld that might not be a happy circumstance.

case. Petitioner could have hired another attorney. He could have gone to his son (who is a lawyer and also was a business associate) for his assistance. He elected to do nothing.

Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioner has provided no legal basis upon which we could justify modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Abraham and Zipora Hirschfeld is denied;

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

3. The petition of Abraham and Zipora Hirschfeld is denied; and

4. The Notice of Deficiency dated September 19, 2000 is sustained, and a penalty of $500.00 for maintaining a frivolous petition is imposed.

DATED: Troy, New York
April 5, 2007

/s/Charles H. Nesbitt
Charles H. Nesbitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner