

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition                        | : |                |
| of   | : |                |
| <b>WILLIAM M. MULDERIG</b>                           | : | DECISION       |
| for Redetermination of a Deficiency or for Refund of | : | DTA NO. 819783 |
| Personal Income Tax under Article 22 of the Tax Law  | : |                |
| for the Year 1982.                                   | : |                |

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Petitioner William M. Mulderig, 13 Mile Road, Montebello, New York 10901, filed an exception to the determination of the Administrative Law Judge issued on March 17, 2005. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether petitioner has established that the notice of additional tax due issued to him based upon asserted unreported Federal audit changes for the year 1982 was incorrect or improper.

***FINDINGS OF FACT***

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

On December 19, 1991 the Internal Revenue Service (“IRS”) issued a Notice of Deficiency to petitioner and his spouse, asserting a personal income tax deficiency for the year 1982 in the sum of \$1,055,581.00 plus a five percent penalty based on intentional disregard of rules and regulations. The bases of the deficiency included IRS adjustments to petitioner’s reported taxable income for disallowed schedule “C” depreciation of a breeding or racing horse and related expenses, plus the treatment as taxable income by the IRS of a claimed loan made to petitioner by a closely held corporation for the purchase of a 75 percent interest in the horse.

On March 19, 1992 petitioner and his spouse filed a petition with the U.S. Tax Court for redetermination of the deficiency.

On March 28, 1994 the Tax Court issued a memorandum opinion deciding the issues raised by petitioner and his spouse in their petition. Thereafter and by its decision dated May 31, 1994, the Tax Court, in accordance with its memorandum opinion, revised the deficiency and determined additional income tax due in the sum of \$769,096.00 plus penalty of \$38,455.00 imposed pursuant to Internal Revenue Code (“IRC”) § 6653(a)(1). An appeal was taken to the U.S. Court of Appeals for the Second Circuit.

On or about February 21, 1995 petitioner and his spouse filed an amended U.S. individual income tax return, form 1040X, whereby they attempted to carry back net operating losses from tax years 1983 and 1985 to offset the 1982 deficiency.

By decision dated November 9, 1995, the U.S. Court of Appeals affirmed the decision of the Tax Court.

On March 25, 1996 petitioner attempted to file a “motion to clarify” with the U.S. Tax Court, seeking a declaration from the Tax Court that in reaching its May 31, 1994 decision, it had not considered petitioner’s carry-back losses for the years 1983 through 1987. By order dated March 27, 1996 the Tax Court directed the court clerk to return the motion to petitioner without filing.

Petitioner appealed the March 27, 1996 Tax Court order to the U.S. Court of Appeals.

At a time not specified in the record the Division of Taxation (“Division”) was notified by the IRS of the existence of a Federal audit change relating to petitioner’s 1982 personal income tax liability. The Division reviewed its files to determine if petitioner reported the Federal audit change as mandated by the Tax Law. It concluded that petitioner had not reported the Federal audit change.

By letter dated September 11, 1996 the Division informed petitioner that information it received from the IRS indicated the existence of a Federal audit change for 1982, and that petitioner was obliged to inform the Division within 90 days of a final Federal audit change in accordance with Tax Law § 659.

On October 22, 1996 petitioner informed the Division by letter that the matter was then on appeal to the Second Circuit Court of Appeals and invited the Division to contact him in early December for an update.

On January 3, 1997 the Division sent a letter to petitioner requesting a status report on his appeal and requesting that he include copies of the Federal audit changes and the final Federal audit report.

On March 26, 1997 the U.S. Court of Appeals for the Second Circuit issued a decision affirming the March 27, 1996 U.S. Tax Court order rejecting petitioner's "motion to clarify."

On June 13, 1997 petitioner filed another amended U.S. individual income tax return, form 1040X, with the IRS wherein he attempted to carry back losses from 1983 and 1985 to offset the 1982 Federal income tax deficiency. A corresponding New York State amended resident personal income tax return, form IT-201-X, was filed with the Division at a time not clearly specified in the record. Petitioner's Federal claim was denied by the IRS on August 10, 1998 by the issuance of a proposed disallowance, and on June 9, 2000 by notice of disallowance on the grounds of untimeliness in accordance with IRC §§ 6501 and 6511.

On August 15, 1997 petitioner wrote to the Division advising that his 1982 Federal taxes had not yet been finally determined.

On September 4, 1997 the Division issued a notice of additional tax due to petitioner and his spouse asserting New York State income tax due for 1982 in the sum of \$217,274.00, with negligence penalty of \$10,863.70 and interest in the sum of \$475,960.16, for a total due of \$704,097.86.

On or about December 3, 1999, petitioner's wife was granted innocent spouse relief by the Division, which issued a new notice of additional tax due only to petitioner, William M. Mulderig. This new statutory notice superceded the original and is substantially identical to that notice. The record does not include a copy of the new notice of additional tax due.

On February 9, 1998 petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”). On June 25, 2002, at a time when the conciliation conference was scheduled for July 9, 2002, a tax technician with the Division wrote a letter to petitioner in an effort to resolve the matter in advance of the conference. In the letter the tax technician asserted that petitioner had not reported the Federal audit changes to New York State, and acknowledged receipt of copies of petitioner’s 1982 Federal and New York State amended income tax returns.

On September 11, 2001, the audit file was destroyed in the loss of the World Trade Center towers.

A conciliation conference was held on April 24, 2003 and a conciliation order denying request was issued on September 5, 2003. Petitioner filed a petition with the Division of Tax Appeals on December 4, 2003, requesting a formal hearing.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that the statute requires a taxpayer whose Federal taxable income is changed or corrected by the IRS to report such change or correction to New York State within 90 days after the final determination of such change or correction (*see*, Tax Law § 659). The Administrative Law Judge stated that the Second Circuit Court of Appeals affirmed the decision of the United States Tax Court on November 9, 1995 whereby the Tax Court finally determined that petitioner herein owed a deficiency of income tax for the tax year 1982. Thus, the Administrative Law Judge determined that petitioner was required to report the federal changes to the Division by February 7, 1996. The Administrative Law Judge held that petitioner failed to sustain his burden of proof in this case.

The Administrative Law Judge also rejected petitioner's argument that the Notice of Additional Tax Due in this case was time-barred. The Administrative Law Judge noted that when a taxpayer fails to report final federal changes, the tax may be assessed at any time pursuant to Tax Law § 683(c)(1)(C).

Further, the Administrative Law Judge addressed petitioner's claim that he suffered irreparable harm when his audit file was destroyed in the World Trade Center on September 11, 2001. The Administrative Law Judge treated petitioner's argument under the doctrine of equitable estoppel and determined that petitioner had not identified any representation made by the Division that petitioner had the right to rely on and did rely upon to his detriment. The Administrative Law Judge disagreed with petitioner's assertion that the Division attempted to conceal the fact that the file was destroyed.

The Administrative Law Judge also rejected petitioner's argument based upon a theory of equitable recoupment. In this case, the Administrative Law Judge found that the alleged losses claimed from 1983 and 1985 cannot be applied to offset petitioner's 1982 deficiency because the losses did not arise from the same transaction as the deficiency.

In the absence of any argument concerning the abatement of penalties, the Administrative Law Judge sustained the Notice of Additional Tax Due as well as the negligence penalty asserted herein.

#### ***ARGUMENTS ON EXCEPTION***

In his exception, petitioner argues several facts that do not bear upon the 1982 tax year before us herein. Petitioner claims that the Administrative Law Judge erred in failing to address his argument concerning an alleged misappropriation of a life insurance policy by the Division at

some point and that this particular misappropriation and petitioner's insistence on bringing this mistake to light, resulted in the Division engaging in retaliatory behavior which petitioner claims was a factor in the issuance of the Notice of Additional Tax Due in this proceeding.

Petitioner continues to assert that he was prejudiced by the fact that his full audit file regarding his 1982 taxes was destroyed in the unfortunate events that occurred on September 11, 2001 since his audit file was maintained in the Division's offices at the former World Trade Center. Moreover, petitioner claims that the IRS never collected any tax due from him for the year 1982 and petitioner states that the statute of limitation for such collection has well expired.

In opposition, the Division argues that the Administrative Law Judge properly determined that petitioner failed to sustain his burden of proof to establish that the Notice of Additional Tax Due was incorrect. The Division states that the record clearly establishes that petitioner's Federal taxable income was changed by the IRS and that such changes were final. The Division emphasizes that petitioner had 90 days from the date the federal changes were final to report such information to the Division and petitioner has not proven that he did so. Lastly, the Division points out that petitioner has not presented an argument demonstrating that the penalties should be abated and, thus, it asserts that the Administrative Law Judge properly sustained the negligence penalty imposed in this case.

#### ***OPINION***

Pursuant to Tax Law § 659, if the amount of a taxpayer's Federal taxable income is changed or corrected by the IRS, the taxpayer is required to report such change or correction within 90 days after the final determination of such change or correction to New York State and, in doing so, shall either concede the accuracy of such determination or state wherein it is

erroneous. Tax Law § 681(e)(1) states that if a taxpayer fails to comply with section 659, a deficiency may be assessed, based upon the Federal change or correction, by mailing a notice of additional tax due to the taxpayer.

It is clear from the record that petitioner did file an amended return, form IT-201-X, for 1982. However, such return related to petitioner's attempt to carry back net operating losses from tax years 1983 and 1985. Such return was not filed in response to the federal changes. It was incumbent upon petitioner to prove that he reported the federal changes on or before February 7, 1996 in order to have been timely. Petitioner has not proven this fact.

Petitioner also continues to argue that the statute of limitations has run and that the Division's notice is time-barred. We note that since petitioner was not in compliance with section 659, the Division may assess tax at any time (Tax Law § 683[c][1][C]; *see, Matter of Corin*, Tax Appeals Tribunal, November 26, 2003).

After reviewing the record and the determination in this matter, we find that the Administrative Law Judge completely and adequately dealt with the issues presented to him and we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William M. Mulderig is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of William M. Mulderig is denied; and

4. The Notice of Additional Tax Due is sustained.

DATED: Troy, New York  
February 9, 2006

/s/Charles H. Nesbitt

Charles H. Nesbitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Robert J. McDermott

Robert J. McDermott  
Commissioner