STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CLIFFORD DUFTON AND NOREEN CONLON	:	DETERMINATION DTA NO. 811698
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1986.	:	

Petitioners, Clifford Dufton and Noreen Conlon, 137 Tree Top Circle, Nanuet, New York 10954, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1986.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 27, 1994 at 1:30 P.M., with all briefs to be submitted by March 31, 1994. Petitioner Clifford Dufton, appearing pro se and on behalf of petitioner Noreen Conlon, submitted a brief on February 28, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (David C. Gannon, Esq., of counsel), submitted a responding letter brief on March 3, 1994. Petitioners submitted a letter brief in reply on March 28, 1994.

ISSUE

Whether petitioners have established entitlement to a refund of personal income tax, penalty and interest paid for the year 1986 based upon the claim that their taxable income reported for such year was overstated.

FINDINGS OF FACT

On or about June 16, 1987 petitioners, Clifford Dufton and Noreen Conlon, husband and wife, filed their U.S. Individual Income Tax Return(Form 1040) for the year 1986. Petitioners chose filing status "2" (Married Filing Joint Return) and reported adjusted gross income of $111,243.00, taxable income of $53,230.00, and a tax liability of $12,048.00. On or about the

same June 16, 1987 date, petitioners also filed their New York State, City of New York and City of Yonkers Resident Income Tax Return (Form IT-201) for the year 1986. On this return, petitioners chose filing status "3" (Married Filing Separately on One Return) and reported a combined total New York income (columns A + B after New York modifications) of $107,532.00, combined New York taxable income of $50,199.00, and a combined New York tax liability of $5,908.00.

On or about October 10, 1987, petitioners filed an Amended U.S. Individual Income Tax Return (Form 1040X) for the year 1986. On this amended return, petitioners reported a net change increasing their taxable income by $21,715.00. This increase to income resulted in an increase to petitioners' tax liability from $12,048.00 (as originally reported) to $19,243.00. After subtracting the amount of tax paid with their original return ($12,048.00),[1] petitioners arrived at an additional amount due of $7,195.00. There is no question that petitioners paid such additional amount with the filing of their amended return.

Included in evidence are copies of petitioners' Schedule D ("Capital Gains and Losses and Reconciliation of Forms 1099B") pertaining, respectively, to petitioners' Form 1040 and their subsequent Form 1040X. Comparison of such two schedules reveals an increase in petitioners' net

long-term capital gain in the amount of $50,000.00, described on the Schedule D accompanying petitioners' Form 1040X as "one third share 341-15th Street, Brooklyn, New York - 12/11/85 to 12/16/86." This gain is reflected as derived from a gross sales price of $150,000.00 (at column D), less a cost or other basis of $100,000.00 (at column E) to arrive at a net gain of $50,000.00 (at column G). Petitioner Clifford Dufton stated at hearing that part of the $21,715.00 increase to income per petitioners' Form 1040X resulted from this real property transaction which was inadvertantly not reported on petitioners' original return, but was reported subsequently as

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[1]Consisting of tax withheld plus tax remitted with the filing of petitioners' original Form 1040.

capital gain on the amended return.[2]

On or about October 10, 1987, petitioners also filed a New York State, City of New York and City of Yonkers Amended Resident Income Tax Return (Form IT-201-X) for the year 1986. On this return, petitioners again filed under status "3" (Married Filing Separately on One Return), reported a (combined) increase in net income of $21,715.00 and, ultimately, a (combined) increased tax liability of $6,063.00. Again, it is undisputed that petitioners paid the additional tax liability as calculated.

On or about January 18, 1988, the Internal Revenue Service ("IRS") issued to petitioners a refund check in the amount of $15,040.89. A notation on this check indicates the amount of interest included therein to be $650.89, thus leaving the amount of refunded tax at $14,390.00. At this point it is noteworthy that the $14,390.00 amount of refunded tax is exactly

twice the $7,195.00 amount of tax shown as due on petitioners' amended Federal return.

On or about August 4, 1989, the IRS issued to petitioners a Notice of Deficiency for 1986 asserting additional personal income tax due in the amount of $2,836.00. The amount of this deficiency stems from an IRS-claimed increase to petitioners' income for 1986 based on an unreported taxable pension or annuity payout in the amount of $8,531.00. The IRS calculations are shown on a "Report of Individual Income Tax Examination Changes" attached to the Notice of Deficiency. Also attached to the Notice of Deficiency was a Form 886-A ("Explanation of Items") issued to petitioners in explanation of the tax examination changes for the year 1986.[3] This Form 886-A stated as follows:

"We received your letter of 4-2-89.

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[2]Calculation of the overall $21,715.00 increase to income is set out in Finding of Fact "8".

[3]It is unknown whether these three forms (the Notice of Deficiency, the Report of Individual Income Tax Examination Changes and the Explanation of Items) were issued to petitioners at the same time by the IRS or, rather, whether petitioners simply submitted these three forms attached together as one exhibit (Exhibit "9") at hearing.

"Your 1040X was received and processed. However, the 1040X was processed incorrectly. You paid $7195.00 on 10-21-87. IRS processed your increase as a decrease of $7195.00.

"$ 7195.00	Your payment
7195.00	Decrease in error
$14390.00	
650.89	Interest
$15040.89	Was refunded to you on 2-22-88 in error

"Therefore, the amount of deficiency proposed still remains in effect.

"You will receive a 90-day letter. You have 90 days from the date of that letter to respond."

By way of summary, at this point petitioners have:

(a) paid to the IRS, with their original return and their amended return, a total of $19,243.00 in tax;

(b) received an erroneous refund totalling $14,390.00 in tax, thus leaving a total (net) dollar amount paid of $4,853.00 in tax; and

(c) continued to face the Notice of Deficiency asserting a $2,836.00 liability based on the allegedly unreported pension or annuity payout.

Petitioners offered in evidence a letter issued to them by their then-representative, one James Lewis, Esq., dated October 24, 1990. This letter also had documents attached including a proposed United States Tax Court Stipulation Decision, indicating a deficiency for 1986 in the amount of $14,390.00 (the amount of erroneous IRS refund) and further indicating a stipulation that the IRS claimed an increased deficiency in income tax for 1986 in the amount of $11,554.00. Additional schedules attached to this letter, including a Statement of Account and a Statement of Income Tax Changes, provide some explanation. The IRS Statement of Account indicates:

(a) petitioners' revised tax liability (after their filing of Form 1040X) to be $19,243.00;

(b) credits for payments made by petitioners equalling such amount;

(c) a net refund (the erroneous refund) of $14,390.00; and

(d) a credit to petitioners for the net amount of $4,853.00 in tax paid (calculated as their $19,243.00 of payments less the $14,390.00 amount of the erroneous IRS refund).

In addition, the IRS Statement of Income Tax Changes explains the total adjustments per petitioners' Form 1040X to have consisted of:

(a) a Schedule D increase to income of $20,000.00;[4]

(b) the fully taxable pension and annuity payout of $8,532.00 (noted above as the basis for the August 4, 1989 Notice of Deficiency); and

(c) a Schedule E loss in the amount of $6,817.00.[5]

These three items together total the $21,715.00 net increase to income per Form 1040X and, in turn, resulted in a revised taxable income per Form 1040X in the amount of $74,945.00. The IRS Statement of Income Tax Changes again reflects an increase in tax of $14,390.00 (i.e., recovery of the erroneous refund) and shows petitioners' net tax payment (as previously adjusted) of $4,853.00. Subtracting the $2,836.00 liability shown on the August 4, 1989 Notice of Deficiency (see, Finding of Fact "6") from the erroneous refund amount ($14,390.00) results in the $11,554.00 increased deficiency reflected on the proposed stipulation decision.

By a check dated February 11, 1989, petitioners paid $439.03 (consisting of $68.03 in interest and $371.00 in late-payment penalty) with respect to the amount of tax shown as due on their amended New York State return. Petitioner Clifford Dufton noted that, as of the time of this payment, petitioners had no New York State problems paralleling their IRS problems due to the fact that the Division had not issued any erroneous refund to petitioners.

By a letter dated August 14, 1989, petitioners indicated their disagreement with the IRS calculations, noting specifically that the fully taxable pension or annuity amount of $8,531.00

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[4]$20,000.00 represents the taxable portion of petitioners' $50,000.00 net long-term capital gain after exclusion of 60% thereof per Internal Revenue Code former § 1202(a).

[5]Schedule E to petitioners' returns was not included in evidence herein.

had been reported on their amended return (Form 1040X) such that no adjustment or Notice of Deficiency was proper with respect to such amount. In turn, petitioners challenged the IRS by commencing proceedings in the United States Tax Court.

By a letter dated April 27, 1990, together with an attached proposed stipulation decision, the IRS tentatively advised petitioners of no deficiency in income for the year 1986 (compare, Finding of Fact "8" which reflects IRS calculations indicating that the IRS should not be pursuing the August 4, 1989 Notice of Deficiency based on the pension or annuity payout). Petitioners executed this proposed stipulation decision; however, the IRS letter indicated that the same was subject to IRS approval. No IRS-executed copy or court-approved copy of such proposed stipulation decision was entered in evidence and it appears undisputed that such stipulation was never in fact ultimately approved by the IRS or the Tax Court.

By notice dated August 21, 1990, petitioners and the IRS were advised that a trial involving petitioners' 1986 Federal income tax return was scheduled for the Tax Court's trial session beginning on November 5, 1990, to commence with the 10:00 A.M. calendar call for such session.

By a letter dated November 9, 1990 from petitioners' counsel (James Lewis, Esq.), petitioners were advised of a proposed stipulation decision indicating a deficiency owed by petitioners for the taxable year 1986 in the amount of $10,000.00, together with a further stipulation that the IRS claimed an increased deficiency for the taxable year 1986 in the amount of $7,164.00. Noteworthy at this point is that the dollar difference between the $10,000.00 deficiency and the $7,164.00 increased deficiency is $2,836.00, which is the amount of the Notice of Deficiency relating to the fully taxable pension or annuity. In the same manner, the difference between the earlier proposed stipulated deficiency of $14,390.00 (equal to the IRS erroneous refund) and the claimed increased deficiency of $11,554.00 again equalled the $2,836.00 tax amount related to the fully taxable pension and annuity (see, Finding of Fact "8"). This stipulation decision was executed by petitioners' representative on their behalf, by the IRS, and was filed with the Tax Court, thus effectively ending the Federal dispute. In his

November 9, 1990 letter, petitioners' counsel pointed out that the Federal resolution would impact on petitioners' New York liability as follows:

> "Finally, as I am sure you know, there will be a resulting, but smaller, New York tax deficiency. There are two ways of handling that part of the problem. One way would be for you to telephone or write to the New York tax people (you can get their address and telephone number from the blue pages in the back of your white pages telephone directory or the nearest large city white pages telephone directory). The second way would be to let nature take its course, in which case the IRS will eventually pass the relevant information on to the New York tax people, who will send you a bill for the New York tax and interest. As in the case of the federal tax, interest on the New York tax will continue to accrue until the tax is paid."

By way of summary, petitioners had earlier received an erroneous IRS refund of $14,390.00 in tax (see, Finding of Fact "5"). By the proposed stipulation decision attached to the November 9, 1990 letter, petitioners would agree to a deficiency of $10,000.00 in tax, with such amount being some $4,390.00 less than a repayment to the IRS of the full $14,390.00 erroneous refund. In turn, it is from this $4,390.00 difference that petitioners' dispute with the Division of Taxation ("Division") arises. In sum, and as will be more fully explained hereinafter, petitioners' position is that the reduction in tax from $14,390.00 to $10,000.00 resulted from the IRS accepting petitioners' claim of a reduction in their taxable income for 1986 (to an amount equal to a Federal tax deficiency of $10,000.00). Stated differently, petitioners claim that their 1986 taxable income was overstated by the amount of income necessary to generate a $4,390.00 reduction in tax (see Finding of Fact "17"). In turn, petitioners argue that the Division should be bound to follow and accept such reduction in tax liability as flowing from a reduction in taxable income, and thus should grant petitioners' request for a corresponding refund.

By a letter dated January 25, 1991, petitioners advised the Division of a change in "Federal income tax" for 1986, as agreed to with the IRS on November 5, 1990 and as reflected in the stipulation decision entered with the Tax Court on November 20, 1990. Petitioners' letter provides that:

> "This change resulted in a reduction of our taxable income for 1986 as reflected in the attached amended return. This change also affects the interest and penalty assessment paid under assessment number R8708313563. We hereby request a refund of the overpayment in the amount of $2,095.00, a recalculation of the

assessment, and a refund of the overpayment of the assessment."

Attached to petitioners' letter is a copy of a Form IT-201-X. This (second) amended return reflected a reduction in New York taxable income of $11,767.00, a reduction in State and City tax (combined) of $2,095.00 resulting from such decrease in taxable income, and a claim for refund of such $2,095.00 amount.

By a letter dated August 19, 1992, the Division advised petitioners that their claim for refund had been disallowed. According to this letter, the Division noted the IRS erroneous refund of $14,390.00, the IRS agreement via stipulation to accept a deficiency of $10,000.00, and the statement that the Division was not bound to accept the Federal reduction to $10,000.00 (citing, 20 NYCRR 153.4).

By a responding letter dated August 23, 1992, petitioners continued to dispute New York State's disallowance of their claim for refund. Petitioners specifically noted that their claim for refund totalled $2,095.00 in tax, plus $371.00 in penalty and $68.03 in interest (together totalling $439.03) as previously paid (see, Finding of Fact "9"). Page 2 of petitioners' letter sets forth petitioners' position as follows:

> "In 1988 the IRS did, in fact, erroneously send us a refund of $14,390.00. As a result of their subsequent discovery of the error we discovered that we had overpaid our taxes for 1986. We indicated to the IRS that we would file an amended return and that the amended return would reduce the deficiency to $10,000.00. The IRS accepted that position, agreed that the net result of our overpayment and their erroneous refund was a deficiency of $10,000.00 and not a deficiency of $14,390.00."

Stated in context, petitioners claim that the amount of tax paid per their original Federal return plus their amended Federal return ($19,242.00) was overpaid by the amount of $4,390.00 (the difference between the erroneous refund of $14,390.00 and the deficiency ultimately agreed to in the amount of $10,000.00). Based upon these calculations, petitioners would argue that their correct 1986 Federal tax liability in total should have been $14,853.00, and that their amended Federal return should have indicated a liability of $2,805.00 rather than $7,195.00. Petitioners go on to note that adding such proposed corrected amount of $2,805.00 to the $12,048.00 paid with their return as originally filed totals to a proposed corrected liability of $14,853.00.

By a letter dated September 9, 1992, the Division repeated its denial of petitioners' claim for refund.

Petitioners requested a conciliation conference to challenge the Division's continued denial of their claim for refund. In turn, on February 12, 1993, a Conciliation Order was issued denying petitioners' request and sustaining the disallowance of petitioners' claim for refund.

Petitioners claim the reduction in taxable income which resulted in an agreed deficiency of $10,000.00 stemmed from their earlier incorrect reporting of the $50,000.00 long-term capital gain (see, Finding of Fact "3"). Petitioners specifically described the reason for the reduction (at pages 33 through 36 of the transcript of proceedings) as follows:

> Mr. Dufton: "Discussions with Professor [James] Lewis[6] and our tax preparer revealed the real estate transaction had not been correctly reported and our income tax had been overstated.
>
> "On Monday, October 29, 1990, we advised the IRS of this and that we wished to file an amended return which would show a reduced income tax for 1986 and therefore a reduced deficiency from $14,390 to some other figure. The IRS requested corroborative information from us concerning the basis of our position and this information was provided to the IRS.
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> "On Thursday, November 1, 1990, we met with the IRS and reiterated our position that we would not agree to the deficiency of $14,390. We advised them that we would exercise our right to file an amended return. We advised them that the filing would result in a reduction of deficiency based on the reduction of income tax to $10,000."
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> ALJ Galliher: "Even?"
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> Mr. Dufton: "We said we hadn't done all the exact math. It looks like $10,000, give or take a hundred or two hundred either way, but certainly within a small variation from $10,000."
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> ALJ Galliher: "Alright."
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> Mr. Dufton: "Subsequent to the adjournment of that meeting but on the same date, the IRS advised us they would accept our position based on the submittal of some additional documentation.
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> "On Friday, November 2, 1990, the initial documentation was provided to the IRS and we were advised by Professor Lewis in the afternoon that the IRS had

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[6] Petitioners' representative in the Tax Court proceedings, James Lewis, Esq., is sometimes referred to in testimony as Professor Lewis.

accepted our position and would prepare a stipulation/decision document reflecting that.

"On Friday evening, we were advised by Professor Lewis that he signed a document on our behalf, the IRS would sign it and file it with the Tax Court on Monday, November 5, 1990 at the 10:00 A.M. calendar call.

"The reasons for doing it that way, as I recall, rather than doing it through an amended return, was because of the short time frame we were dealing with. The IRS dilly-dallied around until we are literally on the afternoon to evening of the last business day before the court call and they agreed to the stipulation and decision document rather than having us file an amended return and that's why there was no amended return filed and that's why the deficiency was changed via stipulation/decision document."

ALJ Galliher: "No Federal amended return?"

Mr. Dufton: "No Federal amended return, right. At no time during our discussions with the IRS was there any discussion whatsoever of any kind of a compromise solution or at no time with the IRS was there any discussion of lack of ability to pay the $10,000 deficiency or, for that matter, the $14,390 deficiency or any other deficiency. There were no discussions of that nature whatsoever" (emphasis added).

Petitioner Clifford Dufton further testified with regard to the real estate transaction and long-term capital gain in question (at pages 53 through 56 of the transcript of proceedings) as follows:

Mr. Dufton: "What it came down to was the -- a transaction was done in 1986 and it was a forced transaction because of the changes in the tax laws that were coming into effect at that point in time and it was a transaction where not -- where the transaction was completed in 1986 but not all of the monies were paid.

"The question was, do we report that transaction fully in that tax year or -- I forget the terminology --"

ALJ Galliher: "Installment payment."

Mr. Dufton: "Do you record it as an installment payment contract or transaction. In the one case you report the entire amount in 1986 and what you got in 1986 and then you report what you get in 1987 and whenever it comes in.

"If you note, we filed late in 1987, in June, because we were wrestling with this and we finally decided we will put in what we have now and get that amount out of the way and file an amended return when we can get to that and there is a statutory time for that, of course. We ended up putting in the entire transaction in 1986.

* * *

"As it turned out, the other funds were never forthcoming. Our position was,

look, there was really no installment contract on the basis of this thing; and since the money that was reported never really came in we are entitled to take it back out. I asked my accountant to calculate roughly what that was and to have a number for me. And if you will recall, we were presented with this on one Monday and the next Monday we are looking at the court date. So I didn't ask him to give it to me as $9,852.03 or whatever it might be.

"Here's what actually came in, there was some other expenses and things that haven't been taken out and there is probably some other revenues and so on and so forth that have come in, but here's the number. This is what the real number was, approximately what does this mean in terms of tax.

"And he said, 'Well, that means instead of $14,390 with your approximately $10,000 and given that we're talking about minimal expenses and minimal other associated revenues and adjustments, that's probably good within $100 or $200.'

"We went in and said, 'Here's what happened. We want to file an amended return reflecting what happened.' And we got to that point on Friday afternoon. And the IRS said, 'Well, show us the transaction document.' We showed them the transaction document.

* * *

"Right. I said -- well on Friday, I think it was, they said -- I believe it was the partnership documents they asked for. They said, 'Everything is fine but you have to show us that the partnership really existed and you're not just saying it.'

"We stipulated -- we FAXed them, on Friday morning as I recall, the partnership documents showing the partnership existed and subsequently, later that day, they issued the stipulation and decision document and Professor Lewis signed it on our behalf" (emphasis added).

Petitioners were afforded the opportunity, post-hearing, to submit documentation with regard to the real estate transaction, the manner in which the same was accounted for, and the ensuing alleged reduction of income for 1986 which, in turn, allegedly accounted for the reduction from $14,390.00 to $10,000.00. Petitioners, however, chose not to submit any such additional documentation specifically pertaining to the real estate transaction, arguing that the same would constitute an unreasonable burden, to wit, researching through eight-year-old financial records in order to produce undefined documentation to substantiate the claim that their taxable income was overstated with respect to the real estate transaction. Petitioners argue that full compensation for the real estate transaction was not received and that they, in essence, would be required to prove a negative (i.e., the nonreceipt of such income) in order to carry their burden of establishing entitlement to a refund. Instead, petitioners rely upon the

documentation submitted in evidence and the testimony of Clifford Dufton to establish that: the full amount due on the real estate transaction was not received; that such nonreceipt resulted in a decrease in taxable income previously reported for 1986; that such decrease in income resulted in the reduction of petitioners' Federal tax liability for 1986 by $4,390.00; that such tax reduction was not the product of settlement negotiations centered either on compromise or on a question of ability to pay; and that the record contains evidence sufficient to carry petitioners' burden and should result in a refund as claimed.

CONCLUSIONS OF LAW

A. Stripped of the procedural background, the only issue presented in this case is whether petitioners have demonstrated that their 1986 amended Federal and State returns, filed on or about October 10, 1987, overstated petitioners' taxable income by the amount they were owed but did not receive on a real estate transaction which had been reported as fully completed and paid in 1986 per such amended returns.

Petitioners' position, in essence, is that the IRS stipulated to a decrease in the amount of the $14,390.00 erroneous refund which petitioners were required to repay to the IRS, and that such stipulated decrease is attributable to the IRS accepting petitioners' claim vis-a-vis the real estate transaction. That is, petitioners claim that their Federal tax liability for 1986 was not $19,243.00 (per original return plus amended return), but was $14,853.00, and that the $4,390.00 difference (decrease) is due to the fact that petitioners did not actually receive all of the income reported as received in 1986 on the real estate transaction. Petitioners, in turn, maintain that the Division should be bound to the IRS' alleged acceptance of petitioners' claim of reduced income.

B. It is undoubtedly true that some of petitioners' problem herein may have been complicated by IRS errors. However, it remains that petitioners, though claiming to have overstated their income for 1986 via their October 10, 1987 amended returns, have provided no documentation succinctly explaining the real estate transaction, the amount of income in fact received with respect thereto, or even such documentation concerning the real estate transaction

as was admittedly supplied to the IRS at its request in connection with the negotiations leading to the Tax Court stipulation decision (see, Findings of Fact "20" and "21"). Petitioners claim that to produce such documentation at this time would constitute an unreasonable burden. However, it is noted that petitioners were able to obtain information from their accountant and produce necessary documentation for the IRS as late as November 1990 (see Finding of Fact "21"). In turn, knowing specifically that the resolution of the dispute with the IRS would have an impact on their New York State liability (as pointed out by petitioners' counsel at the time [see, Finding of Fact "13"]) would seem to lead to the conclusion that petitioners could reasonably be expected to have maintained and have available whatever paperwork, documentation and substantiation was submitted to the IRS. Given these circumstances, one would expect the availability of at least some piece of documentation in support of the $10,000.00 agreed-to figure. In turn, the absence of such evidence casts doubt on the full plausibility of petitioners' claim that the IRS-agreed reduction to a deficiency of $10,000.00 was based on a reduction in taxable income as opposed to a settlement agreement of a relatively complicated matter. In this regard, petitioners speak of a real estate transaction apparently involving the sale of premises in Brooklyn (see, Finding of Fact "3") in which petitioner(s) held a one-third ownership interest apparently via partnership with other owners of the premises (compare Findings of Fact "3" and "21"). Petitioners claim that their gain on the sale, allegedly structured as an installment sale, was reported in its entirety on their 1040-X for 1986. Petitioners claim further that the entire amount due on the transaction (presumably installment payments due after 1986) was not received and that, therefore, petitioners' gain and thus their taxable income on the transaction was less than the amount reported (and that this claim was accepted by the IRS as described). However, the record contains no other detail as to the nature of the real estate transaction, the owning partnership, or the amount of payments (or proceeds) due on the sale but not received. Of particular note is the lack of any evidence of a documentary nature or testimony detailing any attempt(s) by petitioners (or the partnership) to pursue foreclosure and/or collection efforts with respect to the monies due but allegedly not

received on the real estate transaction. It is curious that while the record is replete with detail on the procedural history of the case, it is nearly devoid of detail concerning the real estate transaction giving rise to petitioners' claim of reduced income and consequent claimed refund, especially given the specific invitation and opportunity to provide such information. In sum, and notwithstanding petitioner Clifford Dufton's testimony, there is little or no specific evidence as to the real estate transaction or the actual basis for the calculation of the decrease in Federal liability to $10,000.00. Documentation requested with respect thereto, being uniquely within petitioners' possession, was simply not submitted.

The Division, for its part, is not required to accept IRS stipulated liability reductions and grant refunds based thereon without presentation of some proof regarding the basis therefor. Petitioners noted, and the Division did not dispute, that the issue at hand might never have arisen had petitioners filed a second Form 1040-X rather than having concluded the Federal matter via stipulation decision. This point appears only to indicate that the purported income decrease might have been a less likely candidate for State audit review if handled via Federal amended return. However, the same in no way precludes the Division from challenging the basis for a Federal liability change or requires the Division to accept the IRS result without presentation of substantiating evidence as to the basis for such change. Since petitioners have not submitted what would appear to be readily available proof detailing the real estate transaction, it can only be concluded that petitioners have failed to carry their burden of proving that the IRS reduction was in fact premised upon the IRS' acceptance that petitioners' taxable income was overstated for the year 1986 per petitioners' Form 1040X or, in turn, of establishing their entitlement to a refund.[7]

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[7]In passing, petitioners' claim that the tax decrease could only have been occasioned by a decrease in income is not entirely correct. For instance, such decrease could also have been the result of late-discovered or accepted increases to allowable deductions. In any event, there is no greater proof that the reduction in question was based on a reduction in income as opposed to an agreed-to even dollar settlement figure of $10,000.00.

C. The petition of Clifford Dufton and Noreen Conlon is hereby denied and the Division's denial of petitioners' claim for refund is sustained.

DATED: Troy, New York
August 11, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE