STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

KURT A. AND MELISSA R. WAGEMANN : DETERMINATION
DTA NO. 815823

for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1992 and 1993. :

Petitioners, Kurt A. Wagemann and Melissa R. Wagemann, 42 Agostino, Irvine, California 92614, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1992 and 1993.

Petitioners and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Justine Clarke Caplan, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by August 25, 1998, which commenced the six-month period for the issuance of this determination. Petitioner Kurt A. Wagemann appeared *pro se* and on behalf of Melissa R. Wagemann. After review of the evidence and arguments presented, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners established that the taxes asserted by notices of deficiency were discharged in a bankruptcy proceeding.

FINDINGS OF FACT

1. Petitioners, Kurt A. Wagemann and Melissa R. Wagemann, filed a Chapter 13 petition in United States Bankruptcy Court on May 7, 1991 (the "Plan"). The Internal Revenue Service ("IRS"), the Department of Taxation and Finance, and the New York City Department of Finance were scheduled as creditors. The amount of New York State and New York City income taxes owed was shown in petitioners' bankruptcy petition as "unknown," and no tax years were identified. Petitioners completed the Plan and received an Order Discharging Debtor After Completion of Chapter 13 Plan, dated August 1, 1995. As relevant here, the order states that "the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. § 502 . . . ." It also states: "All creditors are prohibited from attempting to collect any debt that has been discharged in this case."

2. The Division of Taxation ("Division") issued a Notice of Deficiency, dated November 7, 1994, to petitioners for unpaid income taxes for the 1991 tax year (L-009553695), and petitioners protested this assessment by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services on November 22, 1994. Before an order was issued, the Division conceded that petitioners' 1991 tax debt was discharged in bankruptcy. Petitioners executed withdrawals of protest on July 31, 1995, and the notice for 1991 was canceled.

3. On October 10, 1995, the Division issued a Notice of Deficiency to petitioners for the 1992 tax year, asserting New York State and City taxes due of $564.00 plus penalty and interest. Petitioners timely filed a request for a conciliation conference protesting that notice. They claimed that any taxes which were owed for 1992 were discharged under the bankruptcy plan,

and they claimed that the Division is barred from seeking to collect those taxes by issuance of a notice of deficiency. The Division reviewed petitioners' contentions and issued a letter, dated December 11, 1995, outlining its own position. As pertinent, the letter states:

> We have determined that your Bankruptcy claim was discharged on August 7, 1995. Our first bill for the 1992 tax year was issued on August 16, 1995. Therefore, since the 1992 bill was issued after your Bankruptcy claim was discharged, you are responsible for the full payment of this bill.

4. By letter dated December 17, 1995, petitioners challenged the Division's interpretation of the bankruptcy law. In that letter, Mr. Wagemann contended that the date of the Division's assessment is irrelevant to determining whether taxes for 1992 were discharged under the Plan. He also claimed that the critical date for determining whether the 1992 taxes were discharged is the date on which the Division received the information which resulted in the assessment. Petitioners claimed that the taxes were discharged if the Division received that information before the date of the order of discharge, August 1, 1995. Based on this understanding of the law, petitioners requested that the Division provide them with the date it received the information that led to the issuance of the assessment.

5. On February 26, 1996, the Division issued a Notice of Deficiency to petitioners for the 1993 tax year, asserting New York State and New York City taxes due of $236.00 plus penalty and interest. Petitioners filed a request for a conciliation conference protesting this notice on the ground that the tax debt was discharged in the Chapter 13 bankruptcy proceeding.

6. Both the 1992 and 1993 tax deficiencies were based upon information received from the IRS, consisting of computer generated facsimiles of petitioners' 1992 and 1993 Federal income tax returns. A comparison of these returns with petitioners' State returns revealed that petitioners had erroneously included New York State and City income taxes in their calculation

of New York itemized deductions. The Division explained the basis for its audit conclusions to petitioners in a letter, dated December 11, 1995, addressing the 1992 tax year, and in a Statement of Proposed Audit Changes, dated January 2, 1996, addressing the 1993 tax year.

7. By letter dated April 11, 1996, Mr. Wagemann again "requested that the Department of Taxation 'provide me with proper documentation as to the date your department received this information.'" (Petitioner's letter of April 11, 1996, quoting his previous letter of December 17, 1995).

8. The Division issued a Conciliation Order to petitioners, dated March 21, 1997, sustaining both the 1992 and 1993 notices of deficiency.

9. Apparently, petitioners filed a Freedom of Information Law ("FOIL") request on or about March 13, 1998. In a letter dated April 7, 1998, Jude Mullins, the Division's Records Access Officer, informed petitioners that the information concerning the 1992 tax year was received from the IRS on December 31, 1993 and that the information concerning the 1993 tax year was received from the IRS on December 12, 1994. Petitioners then filed a second FOIL request on April 14, 1998.

10. On or about April 22, 1998, the Records Access Officer processed petitioners' second FOIL request and forwarded a group of documents to petitioners, all relating to the 1991 tax year. Those documents included copies of a computer printout showing information received from the IRS (essentially, an electronic summary of petitioners' 1991 Federal income tax return); a copy of petitioners' 1991 New York State income tax return; a voucher showing a tax refund to petitioners in 1991; internal memorandums relating to petitioners' protest of the 1991 tax assessment; letters between petitioners and the Division; documents relating to the conciliation

conference proceeding; and petitioners' executed withdrawal of protest on the basis of cancellation of all taxes assessed for 1991. In a cover letter, Mr. Mullins informed petitioners that they were "denied access to three pages of this file as they are considered to be intra-agency materials."

11. In a letter to the Records Access Officer, dated May 1, 1998, Mr. Wagemann states that the three pages denied him contained the reasons that the Division dropped a prior claim for taxes for 1991, and he states that the information is essential to petitioners' claim that no tax is due for 1992 and 1993.

12. The documents which were provided to petitioners clearly establish that the 1991 tax debt was discharged in bankruptcy and that the notice of deficiency issued for 1991 was canceled for that reason.

13. On March 23, 1998, the Administrative Law Judge provided the parties with a schedule for the submission of documents and briefs. A letter containing that schedule was mailed to petitioners at the address provided on their petition, 64 Hendrick Avenue, Staten Island, New York, and there is no evidence that petitioners did not receive this letter.

14. By letter dated June 23, 1998, the Division's attorney, Justine Clarke Caplan, requested a 30-day extension of time in which to file the Division's brief which was due on July 6, 1998. Ms. Caplan stated that she had been unable to confer with petitioners regarding her extension request because their telephone in New York had been disconnected and she did not have a telephone number for them in California. The letter indicated that a copy of the letter was mailed to petitioners, although the address to which it was mailed was not provided.

15. Upon review of Ms. Caplan's request and the file relating to this matter, the

Administrative Law Judge found no evidence that petitioners had filed a brief or documents. Ms. Caplan's request was granted, and, in addition, she was informed that the Division of Tax Appeals had no record of receipt of petitioners' documents. A copy of this letter was sent to petitioners at their address in Staten Island.

16. In a letter dated July 9, 1998, Mr. Wagemann stated that petitioners had received a copy of the Administrative Law Judge's letter to Ms. Caplan, and they formally objected to the Division's receipt of an extension of time in which to file its brief. Mr. Wagemann stated that the Division was aware of petitioners' position for a period of over three years and had failed to resolve the matter. He asserted that another delay would be unacceptable to him. He also provided proof that he had mailed documents and a brief to the Division of Tax Appeals in accordance with the established submission schedule.

17. Petitioners' documents and brief were discovered after further searching, and he was informed of this by letter dated July 9, 1998. However, petitioners' request that the brief date extension already granted the Division be rescinded was denied. That letter states, among other things, "I routinely grant extensions of time for filing briefs and would not deny such a request unless I had evidence of an abuse of process within the Division of Tax Appeals" (letter of Administrative Law Judge Corigliano to Kurt A. Wagemann, July 9, 1998.)

18. By letter dated July 13, 1998, Mr. Wagemann informed the judge that he had just received a copy of Ms. Caplan's original letter of June 23, 1998. He asserted that Ms. Caplan's claim of ignorance of his telephone number in California was false and that Ms. Caplan had communicated with him by telephone in California. He also noted that a temporary California address appeared at the top of the cover letter accompanying his brief and documents which were

mailed to Ms. Caplan on May 13, 1998.

19. The Division's brief was filed on August 5, 1998. The brief addressed all of the substantive issues raised in petitioners' brief, but it did not address the contention that the assertions made by the Division's attorney in her letter requesting a brief date extension were false.

20. Petitioners filed a reply brief on August 21, 1998, reiterating their claim that the Division supplied false information to the Division of Tax Appeals in connection with the request for a brief date extension.

SUMMARY OF THE PARTIES' POSITIONS

21. Petitioners assert that the Division's notices of deficiency must be canceled because the information which forms the basis for those notices was received by the Division while petitioners were under the protection of the Bankruptcy Court. Their argument is summarized in their reply brief as follows:

> Under U.S.C. 502, the State is clearly responsible for filing any tax claim when properly notified by the Court. The State was notified by the Bankruptcy Court that this was a four-year reorganization plan, and any such claim for past taxes must be made to the Court if such information is received while Petitioners are under the jurisdiction of the Court. Such information was received by the State, and the State did not act. Therefore, the State is precluded from collecting these taxes under the provisions of 11 U.S.C. 502

22. Petitioners contend that this case should be dismissed on the basis of the Division's alleged failure to comply with FOIL. In the alternative, petitioners request that this proceeding be adjourned until the Division complies with their request that they be provided with the three pages of internal memoranda denied them by the Records Access Officer.

23. Apparently, a Division employee, Alan A. Tamaroff, stated at a conciliation

conference that the dates on which the Division received information from the IRS about the 1992 and 1993 tax years could not be determined. Inasmuch as Mr. Mullins later provided this information to petitioners, petitioners assume that the information was available to Mr. Tamaroff and that he may have lied to the conciliation conferee. They request that this matter be referred to the proper authorities for investigation and possible prosecution.

24. Citing to ***Matter of Ryan*** (78 Bankr 175), the Division contends that only prepetition tax debts will be discharged without payment when a debtor completes a plan. Since petitioners' 1992 and 1993 income tax returns were not filed, or required to be filed, until after the filing of the bankruptcy petition on May 7, 1991, the Division claims that it had the choice under 11 USC § 1305(a)(1) of accepting payment under the Plan or collecting the tax after the Plan was completed and petitioners received a discharge. The Division claims that it is irrelevant when it received the information regarding the 1992 and 1993 tax years from the IRS, since the Division was not obligated to collect the taxes under the Chapter 13 Plan.

25. Relying in part on ***Matter of Markowitz*** (Tax Appeals Tribunal, February 27, 1998), the Division asserts that the Division of Tax Appeals has no jurisdiction to provide a remedy where FOIL requests are not complied with.

CONCLUSIONS OF LAW

A. If upon examination of a taxpayer's return, the Division determines that there is a deficiency in income tax, it may mail a notice of deficiency to the taxpayer (Tax Law § 681[a]). Although every notice of deficiency must have a rational basis in order to be sustained upon review, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis in the absence of evidence challenging the basis or correctness of the

assessment (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398; ***Matter of Kourakos v. Tully***, 92 AD2d 1051, 461 NYS2d 540, ***appeal dismissed*** 59 NY2d 967, 466 NYS2d 1030, ***lv denied*** 60 NY2d 556, 468 NYS2d 467, ***cert denied*** 464 US 1070, 79 L Ed 2d 215; ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174). The taxpayer bears the burden of proof when challenging a properly issued notice of deficiency (Tax Law § 689[e]).

The rationality of the assessments issued to petitioners is not in dispute. New York residents are required to add back to Federal adjusted gross income any income taxes imposed by this State or any other taxing jurisdiction (Tax Law § 612[a][3]). Upon review of petitioners' 1992 and 1993 Federal and State income tax returns, the Division determined that petitioners had not made this adjustment and erroneously included their State and local income taxes in their calculation of New York itemized deductions. Accordingly, the Division's assessments are rational, and, inasmuch as petitioners have introduced no evidence to establish that the amounts in dispute are incorrect, they have submitted to the presumption of correctness of the Division's assessments.

B. Petitioners' primary contention is that the Division may not seek to collect the income taxes owed for 1992 and 1993 because those taxes were discharged in their Chapter 13 proceeding. The order of discharge states: "the debtor is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. § 502 . . . ." Petitioners claim that New York State and City personal income taxes for 1992 and 1993 were "provided for" by the Plan. The Division contends that they were not. This dispute is factually similar to the one addressed in ***Matter of Rothman*** (76 Bankr 38 [Bankr ED NY 1987). There, the debtor filed a petition for

relief under Chapter 13 of the Bankruptcy Code on August 27, 1980. The Division filed a proof of claim based on taxes owed for 1976 and 1979. The plan was amended to conform with the Division's claim. The plan was confirmed on July 15, 1981 and discharged on April 4, 1986. The Division received full payment on its claim for 1976 and 1979 taxes. On August 2, 1985, the Division informed the debtor that tax plus interest charges for 1976 were due and owing. In a later Field Memorandum, the Division informed the debtor that $572.29 was owed by her for 1980 taxes and $3,082.59 was owed by her for 1976 taxes. The debtor applied to the Bankruptcy Court for an order prohibiting the Division from attempting to collect taxes allegedly due for 1976 and 1980, claiming that those debts had been discharged under the bankruptcy plan. In response to the Bankruptcy Court's Order to Show Cause, the Division stated: "The 1976 assessment is the result of a federal adjustment due to unreported income. The 1980 assessment is for the debtor's 1980 income tax return that was filed late on April 14, 1982."

Based on this set of facts, the Court determined that the 1976 tax obligation was prepetition and was provided for in the plan. Accordingly, the 1976 debt was held to be discharged upon completion of the Chapter 13 plan. However, the Court determined that the 1980 taxes — those from the year of filing of the bankruptcy petition — arose postpetition and thus were not discharged under the 1980 plan. In so holding, the Court stated that section 1305(a)(1) together with section 1322(b)(6) of the Bankruptcy Code permit a claim to be filed for taxes that become payable while a case is pending but give the State taxing authority the choice of accepting payment under the plan or of collecting after the debtor completes the plan and receives a discharge. (***See also***, ***Matter of Ryan***, ***supra***; ***Matter of Busone,*** 71 Bankr 201, 205-206 [Bankr ED NY 1987]; ***Matter of Hester***, 63 Bankr 607 [Bankr ED Tenn 1986].)

Applying the reasoning of ***Rothman*** to petitioners' situation leads to the conclusion that their 1992 and 1993 State and City income taxes were not discharged under the 1991 Plan. The Plan was filed on May 7, 1991. The taxes for 1992 and 1993 did not become due or owing until April 15, 1993 and April 15, 1994, respectively; thus, the 1992 and 1993 taxes constitute postpetition taxes under the Plan. The Division elected not to file claims for those taxes in the Chapter 13 proceeding; therefore, those taxes were not discharged.

I can find no authority that supports petitioners' contention that the 1992 and 1993 taxes were discharged under the plan because the Division became aware of the underreporting of tax due during the pendency of the plan. Moreover, petitioners have presented no evidence that the taxes were paid under the Plan or actually discharged under the Plan.

C. I recognize that the Division of Tax Appeals does not have jurisdiction in matters that arise under the Federal Bankruptcy Code. If petitioners believe that the Division's attempt to collect the 1992 and 1993 taxes violates the order of discharge of the Bankruptcy Court, their remedy is to apply to the Bankruptcy Court to prevent collection of the taxes. I can only find, as I do here, that as a factual matter petitioners have not carried their burden of proof to show that taxes owing for 1992 and 1993 were discharged under the Plan.

D. Petitioners' request for dismissal of the notices on the ground that the Division failed to comply with the Freedom of Information Law is denied. Sections 87 and 89 of the Public Officers Law and 20 NYCRR Part 2370 contain specific procedures to be followed for requesting public records from the Division of Taxation and provide an administrative and judicial remedy when access to such records is denied. The Division of Tax Appeals and the Tax Appeals Tribunal have no jurisdiction to provide a remedy where a petitioner complains of

noncompliance with FOIL ***(see, Matter of Markowitz, supra)***. I also find that petitioners have failed to show "good cause" for adjourning this proceeding until the Division provides them with the additional information referred to in Mr. Mullins' letter to petitioners of April 22, 1998. As the Division points out, its reasons for canceling the 1991 assessment are not relevant to the 1992 and 1993 tax years. Moreover, the record supports petitioners factual assertions — that the 1991 taxes were discharged in bankruptcy and that information pertaining to 1992 and 1993 was obtained by the Division during the pendency of the Plan. Petitioners have not explained what further information they seek or why such information is vital to their case.

E. Section 3000.10 of the Tax Appeals Tribunal Rules of Practice and Procedure provide, as relevant: "No party shall communicate in writing with an administrative law judge or presiding officer assigned to a case in connection with any aspect of that case unless a copy of such communication is promptly delivered to the opposing representative, or if there is none, to the opposing party." Petitioners' correspondence establishes that they received a copy of Ms. Caplan's request for a brief date extension. Thus, the record shows that the Division's attorney complied with the *ex parte* rule. There is no rule requiring notice to the opposing party before an extension request is made or granted; moreover, administrative law judges have the discretion to grant or deny such requests without agreement of the parties (***see***, 20 NYCRR 3000.8[a]; 3000.10[c][3]). Finally, there is no evidence that Mr. Tamaroff lied under oath or otherwise.

F. The petition of Kurt A. Wagemann and Melissa R. Wagemann is denied; the notices of deficiency issued on October 10, 1995 and February 26, 1996, respectively, are sustained; and, in all other respects the petition is denied.

DATED: Troy, New York
December 17, 1998

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE