STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MEYER AND CYNTHIA COHEN	:	
	:	DETERMINATION DTA NO. 817062
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1977, 1978, 1980 and 1981.	:	

Petitioners, Meyer and Cynthia Cohen, 1060 East 22nd Street, Brooklyn, New York 11210, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1977, 1978, 1980 and 1981.

A hearing was commenced before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on November 3, 1999 at 10:30 A.M. and continued to completion at the same location on May 10, 2000 at 10:30 A.M., with all briefs to be submitted by August 25, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared by Sy Schnur, CPA. The Division of Taxation appeared by Barbara G. Billett, Esq. (Michael J. Glannon , Esq., of counsel).

ISSUE

Whether petitioners have shown that certain Federal audit changes were imposed in error so that the Division of Taxation's assertion of additional New York State and City personal income taxes based upon such Federal audit changes was improper.

FINDINGS OF FACT

1. Neither the Division of Taxation ("Division") nor petitioners presented the testimony of any witnesses at the hearing held in this matter. Rather each side attempted to establish their respective positions by the introduction of documents only.

2. The Division issued two notices of additional tax due, each dated September 17, 1990 with a payment due date of September 27, 1990, against petitioners for 1977 and 1978, respectively, which asserted additional New York State and City personal income tax. The notice for 1977, with an "Assessment ID" of L-002028248-5, asserted additional State personal income tax due of $2,377.50 plus interest and City resident income tax due of $681.55 plus interest, for a total tax due of $3,059.05, plus interest. This additional tax due was based upon an increase of $15,850.00 to petitioners' previously stated New York taxable income of $45,046.00 for 1977. The notice for 1977 included the following explanation:

> Section 659 of the New York State Tax Law requires taxpayers to report federal changes to New York State within 90 days after final federal determination. This provision of the Tax Law is outlined in the instructions for preparation of New York State income tax forms.
>
> Section 683(c) of the New York State Tax Law provides for assessment at any time when a taxpayer fails to comply with Section 659.
>
> The federal audit changes show an adjustment was made to your distributive share of partnership income/loss from the following partnership(s):
> RAINBOW GROUP
>
> Partnership/trust/small business income on your New York return has been corrected to include the federal adjustment.

> Interest is required by Section 684(a) of the New York State Tax Law. Interest is mandatory under the Tax Law and cannot be waived.

The notice for 1978, with an "Assessment ID" of L-002028247-6, asserted additional State personal income tax due of $13,855.60 plus interest and City resident income tax due of $4,904.05 plus interest, for a total tax due of $18,759.65 plus interest. This additional tax due was based upon an increase of $121,735.00 to petitioners' previously stated New York taxable income of $2,360.00 for 1978. The notice for 1978 included the following explanation:

> Section 659 of the New York State Tax Law requires taxpayers to report federal changes to New York State within 90 days after final federal determination. This provision of the Tax Law is outlined in the instructions for preparation of New York state income tax forms.
>
> Section 683(c) of the New York State Tax Law provides for assessment at any time when a taxpayer fails to comply with Section 659.
>
> Partnership/trust/small business income on your New York return has been corrected to include the federal adjustment.
>
> The maximum tax benefit has been allowed in the computation of your New York State tax.
>
> Your minimum income tax has been adjusted to reflect the change to your New York personal income tax.
>
> The household credit is not allowed since your total combined household gross income is $25,000 or more.
>
> Interest is required by Section 684(a) of the New York State Tax Law. Interest is mandatory under the Tax Law and cannot be waived.

3. The Division also issued a Notice of Additional Tax Due dated June 28, 1993, with a payment due date of July 8, 1993, against petitioners[1] for 1981, which asserted additional New York State and City personal income tax. This notice, with an "Assessment ID" of L-

[1] Separate notice of additional tax due, each dated June 28, 1993, were issued to Meyer Cohen and Cynthia Cohen, respectively. Both notices had the same Assessment ID of L-007520864-8 and contained the same information.

007520864-8, asserted additional State personal income tax due of $1,435.00 plus interest and City resident income tax due of $865.00 plus interest, for a total tax due of $2,300.00 plus interest. This additional tax due was based upon an increase of $34,191.00 to petitioners' previously stated New York taxable income of $50,738.00 for 1981. The notice included the following explanation:

> Our records indicate that the Internal Revenue Service has made changes to your federal return. Section 659 of the New York State Tax Law requires that Federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.
>
> A search of our files indicates that you did not report these changes to New York State. If you have reported the Federal audit changes, please send a copy of the report and a copy of both sides of the cancelled check showing our deposit serial number stamped on the face of the check.
>
> When you do not report Federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by Section 683(c) of the New York Tax Law.
>
> Interest is due on the underpayment of tax from the due date of the return to the date the tax is paid in full. Interest is required under Section 684(a) of the New York State Tax Law.

4. The petition dated April 13, 1999 by petitioners, which commenced this proceeding, did not include copies of any of the notices of additional tax due. Instead, petitioners attached to their petition a copy of a Consolidated Statement of Tax Liabilities dated August 9, 1993 which listed the following four liabilities:

Assessment ID	Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Current[2] Balance Due
L-002028248-5	12/31/77	$ 3,059.05	$ 7,703.71	$ 519.52	$ 11,282.28
L-002028247-6	12/31/78	18,759.65	43,619.12	3,188.86	65,567.63
L-000730361-9	12/31/80	7,253.22	14,380.54	2,138.91	23,772.67
L-007520864-8	12/31/81	2,300.00	3,784.21	0.00	6,084.21
TOTALS		$31,371.92	$69,487.58	$ 5,847.29	$106,706.79

No basis, statutory or otherwise, was noted by the Division for the assertion of penalty, and as noted in Findings of Fact "2" and "3", penalty was not asserted in any of the three notices of additional tax due.

5. The Division was unable to find a copy of a Notice of Additional Tax Due for the year 1980 in its records. Instead, the Division's representative indicated that utilizing the Assessment ID for 1980 shown in the Consolidated Statement of Tax Liabilities attached to the petition, he "personally accessed the client's computer system yesterday and entered [the Assessment ID of L-000730361-9] and produced [the assessment summary for 1980]" which he introduced into evidence (tr., p. 14). This summary, which appears to be a printout of a computer screen or screens, showed total New York State and City personal income tax due for 1980 of $7,253.22 plus penalty and interest. It also showed a "NOT DEMAND DATE" of July 21, 1989, which the Division's representative interpreted to mean the date on which a Notice of Additional Tax Due for 1980 was issued by the Division. In addition, this summary also showed an "ASMT REASON ORIG" of "PARTNERSHIP FED ADJU," which suggests the additional tax due

[2] "Current" means as of August 9, 1993, the date of the Consolidated Statement of Tax Liabilities.

resulted from some type of federal adjustment to partnership income or loss, as in the other years at issue.

6. The only tax returns filed by petitioners during the years at issue introduced into the record were their Federal returns (i) for 1977 dated April 14, 1978 by Mr. Cohen and (ii) for 1978 dated June 15, 1979 by Mr. Cohen. Looking closely at the return for 1978, as an example, petitioners were sophisticated taxpayers who filed a complex tax return which sheltered substantial wage income. For example, petitioners reported Federal adjusted gross income for 1978 of $26,646.00 calculated as follows:

Line Description	Amount
Wages, salaries, tips, and other employee compensation[3]	$ 169,000.00
Interest income	12,821.00
Dividends subject to tax after applicable exclusion	88.00
State and local income tax refunds	3,324.00
Business loss from Schedule C	(31,389.00)
Capital gain from Schedule D	30.00
Partnership losses from Schedule E	(120,693.00)
Total Income	33,181.00
Employee business expenses from Form 2106	(6,535.00)
Federal adjusted gross income	$ 26,646.00

The business loss of $31,389.00[4] shown on the Schedule C attached to the 1978 Federal tax return was from Mr. Cohen's lithography business conducted as a sole proprietorship.

[3] Mr. Cohen described his occupation on the tax returns in evidence as a "sales executive."

[4] In addition, in 1977, petitioners claimed a loss from Mr. Cohen's lithography business of $18,222.00.

Lithographic plates purchased in 1977 for a reported $132,000.00 provided a depreciation deduction of $25,284 in 1978. The partnership loss of $120,693.00 shown on the Schedule E attached to the 1978 tax return was reported as generated by the following three entities:

Name	Amount
Del Sol Properties, a partnership	($2,170.00)
Rainbow Group, a partnership	(15,223.00)
Meyer Cohen Trust	(103,300.00)
Total	($120,693.00)

In comparison to 1978, on their 1977 Federal income tax return, petitioners included a Schedule E which reported a partnership loss of $29,266.00 calculated as follows, with one of the following three entities generating a small gain:

Name	Amount
Bayshore Properties, a partnership	$ 3,096.00
Rainbow Group, a partnership	(31,627.00)
Del Sol Properties, a partnership	(735.00)
Total	($29,266.00)

7. Included in the record are photocopies of what appear to be printouts of computer screens apparently obtained by the Division from the Internal Revenue Service which summarize what are labeled “transactions” with regard to each of the years at issue (as well as for 1979, which is not at issue in this proceeding). Each of these summaries include a “transaction” by the Internal Revenue Service assessing additional income tax against petitioners for each of the years at issue as follows:

Year	Transaction Date	Money Amount	Explanation
1977	April 21, 1986	$ 21,205.00	Additional tax assessed by examination
1978	April 21, 1986	52,790.00	Additional tax assessed by examination
1980	October 8, 1987	46,391.00	Additional tax assessed by examination
1981	June 11, 1990	8,536.00	Additional tax assessed by examination

8. The Division also obtained from the Internal Revenue Service a photocopy of a document dated April 1986, with the specific date not decipherable, which shows that petitioners and the Internal Revenue Service "disposed" of the tax years, 1977 and 1978, by "stipulation" which allowed petitioners to claim the following adjustments to income:

Adjustment to income	1977	1978
Partnership loss- Rainbow Group	($21,400.00)	-0-
Lithographs	(12,600.00)	(2,250.00)
Meyer Cohen Trust	-0-	(20,000.00)
Total adjustments	($34,000.00)	($22,250.00)

Based upon the above adjustments, petitioners and the IRS stipulated that additional tax was due from petitioners for 1977 and 1978 of $21,205.00 and $52,790.00, respectively, as noted in the table in Finding of Fact "7". It appears that the IRS initially had disallowed *all* losses from the Rainbow Group, Mr. Cohen's lithograph proprietorship, and the Meyer Cohen Trust. As noted in Finding of Fact "6", petitioners on their tax returns reported losses from the Rainbow Group of $31,627.00 in 1977 and $15,223.00 in 1978; losses from Mr. Cohen's lithography business of $18,222.00 in 1977 and $31,389.00 in 1978; and a loss from the Meyer Cohen Trust of $103,300.00 in 1978. Pursuant to the above stipulation, the IRS had agreed to allow some lesser part of these claimed losses as follows:

	Loss claimed	Loss allowed by stipulation
1977 Rainbow Group partnership loss	$31,627.00	$21,400.00
1977 loss from lithographs	18,222.00	12,600.00
1977 Meyer Cohen Trust loss	-0-	-0-
1978 Rainbow Group partnership loss	15,223.00	-0-
1978 loss from lithographs	21,389.00	2,250.00
1978 Meyer Cohen Trust loss	103,300.00	20,000.00

Petitioners' Failure to Respond to Inquiries

9. By a letter dated October 11, 1989, the Division advised petitioners as follows:

> Information available indicates the Internal Revenue Service has adjusted your Federal income tax return(s) for [1976-1979]. This information also indicates that the net income/loss from the partnership, Rainbow Group, of which you are a member partner, was adjusted.
>
> A search of our files fails to show that you reported these changes to New York State. . . .
>
> * * *
>
> If you did not report the federal change(s), please provide [information as listed].

By a hand-written note dated October 21, 1989, with Meyer Cohen's name preprinted, Mr. Cohen advised the Division that he forwarded the October 11, 1989 letter to his accountant, Morris Nadjar. With no further response from petitioners or their accountant, the Division by a letter dated March 5, 1990 provided petitioners with another opportunity to "provide the information needed to complete the review of [petitioners' returns from 1976-1979]." The record does not disclose any response by petitioners to this renewed request. Approximately, six

months later, as detailed in Finding of Fact "2", the Division issued two notices of additional tax due each dated September 17, 1990 against petitioners for 1977 and 1978.

SUMMARY OF THE PARTIES' POSITIONS

10. In their petition dated April 13, 1999, petitioners asserted that "The assessments for each of the four tax years were made outside of the Statute of Limitations . . . ." In addition, the petition included a letter dated October 6, 1998 from petitioners' former representative, Anthony N. Verni, Esq., which referenced a stipulation of settlement in November of 1994 which settled "certain litigation in the United States District Court entitled, ***Meyer Cohen v. The United States of America***." Based on this settlement, attorney Verni also referenced in his letter "appropriate amended returns representing that there is no state tax due and owing." However, neither the referenced stipulation of settlement nor appropriate amended returns were attached to the petition or introduced into evidence by petitioners.

11. Petitioners offered very little in the nature of evidence in this proceeding and what was submitted was unexplained by anyone with personal knowledge. For example, petitioners introduced as an exhibit a photocopy of a Notice of Federal Tax Lien Under Internal Revenue Laws dated August 11, 1986[5] showing an unpaid balance of assessment of $115,064.53 for the 1978 tax year with an assessment date of July 30, 1979 and a "Last Day for Refiling" of August 29, 1985. Petitioners' representative asserted that the date of August 29, 1985 represented "the last date of the statute [of limitations]" (tr., p. 49). When questioned by the administrative law judge concerning the basis for his assertion, petitioners' representative referenced the date of April 8, 1986 noted by IRS auditor Pappas on an Appeals Transmittal Memorandum and

[5] Photocopied on the same sheet as the Notice of Federal Tax Lien Under Internal Revenue Laws is a photocopy of a Certificate of Release of Federal Tax Lien dated October 13, 1994 in the amount of $115,064.53.

Supporting Statement. However, a close review of this document discloses on its second page that the notice of deficiency for 1977 and 1978 was dated December 24, 1984. The date of April 8, 1986 was the date on which auditor Pappas, an appeals officer, pursuant to a stipulation between the IRS and petitioners, as detailed in Finding of Fact "8", reduced the amount of Federal income tax due for 1977 and 1978. Petitioner's representative also indicated that he needed additional time to obtain documents to show that the statute of limitations had run before the Internal Revenue Service issued its assessments. Although the hearing in this matter was continued for approximately six months in order to permit petitioners to submit further documentation concerning the running of the statute of limitations, no such evidence was ever submitted at the continued hearing. Petitioners' representative did introduce into evidence "a transcript that [he] received from the IRS" consisting of six pages (tr., p. 105). This document shows that with regard to 1977, on February 17, 1982, "assessment statute expiration date extended to 12-31-1983"; with regard to 1978, on April 14, 1983, "assessment statute expiration date extended to 12-31-1984"; with regard to 1980, on September 30, 1987, "assessment statute expiration date extended to 10-30-1987" and on October 8, 1987, "additional tax [for 1980] assessed by examination."

12. At the continuation of the hearing on May 10, 2000, the Division introduced into evidence additional IRS documents for the purpose of showing that "there was no mention anywhere . . . that there was any statute of limitations problem for any of the assessments, 1977, 1978, 1980 or 1981" (tr., p. 89). The most recent document introduced was a letter from the IRS Brooklyn District Director dated March 10, 1992 noting that for the years 1980, which is at issue, and 1983, "our records show that [petitioners] still owe the Federal tax shown below [of $18,244.21 for 1980], plus penalty and interest."

13. At the continuation of the hearing, petitioners reserved time to submit an affidavit of their "tax preparer," Phil Alampi.[6] In lieu of Mr. Alampi's affidavit, with the consent of the Division, petitioners submitted after the hearing the affidavit dated May 26, 2000 of John T. Ambrosio, an attorney who has represented petitioners in other matters. In his affidavit, attorney Ambrosio stated that he had been told by Mr. Alampi that the IRS "admitted violating the applicable statute of limitations" with reference to the years at issue and that petitioners reached a settlement with the IRS "during the course of a meeting at the IRS's offices on Long Island, which was attended by Mr. Alampi, Mr. Verni and Meyer Cohen." Mr. Ambrosio further stated that Mr. Alampi told him that he, i.e., Mr. Alampi, "discussed the statute of limitation defense with Mr. Verni." According to Mr. Ambrosio: "However, notwithstanding Mr. Alampi's advice, the settlement agreement-which was negotiated by Mr. Verni-failed to contain any such language." According to a note signed by an individual named Shirley Smith, which transmitted various documents to the Division, petitioners' "prior accountant had a Power of Attorney and executed waivers extending the Statute of Limitation" and that Mr. Cohen "is attempting to mislead . . . ." As noted in Finding of Fact "9", petitioners' prior accountant was Morris Nadjar not Mr. Alampi.

14. Petitioners' primary argument is that New York did not have the right to proceed against them for additional tax for each of the four years at issue based on Federal changes because the Federal changes were not timely assessed by the IRS. According to petitioner's representative:

---

[6] In his affidavit, attorney John T. Ambrosio referred to petitioners' tax preparer as Philip Alampi while at the hearing, petitioners' representative referred to their tax preparer as an individual named "Amalpi." The surname of Alampi has been used for purposes of this determination.

> "[T]he audit was . . . done more than six years after the filing of the tax returns. All four years are in that same situation. (Tr., p. 56.)

15. In its brief, the Division counters that:

> There is no proof in the record that the statute of limitations was raised before the IRS and that the IRS cancelled its assessments based on that argument (Division's brief, p. 2).

The Division questions petitioners' reliance on the affidavit of attorney Ambrosio since he "never represented the petitioners in any tax matters and never dealt with the IRS" (Division's brief, p. 5). Their reliance on the IRS transcript (as detailed in Paragraph "11") was also misplaced. According to the Division:

> [P]ayments were made by petitioners after the 'assessment statute expiration date' showing that neither the petitioners nor the IRS viewed the statute of limitations as prohibiting the Federal audit adjustments and assessments" (Division's brief, p. 5).

16. In their responding brief, petitioners make certain factual statements that have not been supported by any evidence introduced at the hearing. For example, petitioners' brief states that their original representative "never communicated to [them] that IRS was required to extend the Statute before they could make assessments" (Petitioners' brief, p. 3). For another example, the brief also states that "[t]he Chief of Special Programs [for the IRS], told me [petitioners' representative, accountant Schnur] in no uncertain terms, that the IRS violated the Statute of Limitations" (Petitioners' brief, p. 5). Petitioners also seek to place the burden on the Division to "document Statute of Limitation extensions" (Petitioners' brief, p. 3). Petitioners have not raised any issues concerning the Division's computation of additional New York State and City income tax due based on Federal audit changes for each of the years at issue, other than their allegation that the Federal audit changes were untimely made by the IRS.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 689, in income tax matters, the Division of Tax Appeals ("Tax Appeals") has jurisdiction to hear and determine a petition which contests a notice of deficiency or which challenges a denial of a refund claim or the failure of the Division of Taxation to timely act with regard to the review of a refund claim. In addition, the Appellate Division, in its reversal of the Tax Appeals Tribunal, decided that Tax Appeals also has jurisdiction pursuant to Tax Law § 2006(4) to hear and determine a petition which contests a notice and demand (***Meyers v. Tax Appeals Tribunal***, 201 AD2d 185, 615 NYS2d 90, ***lv denied*** 84 NY2d 810, 621 NYS2d 519). The relief sought by petitioners in their petition is to vacate the Consolidated Statement of Tax Liabilities dated August 9, 1993, as detailed in Finding of Fact "4", which was attached to their petition. In effect, petitioners are contesting the notices of additional tax due, two dated September 17, 1990 for 1977 and 1978, respectively, as described in Finding of Fact "2", one dated June 28, 1993 for 1981, as described in Finding of Fact "3", and taxes asserted due by a notice and demand dated July 21, 1989 for 1980, as referenced on a printout of a computer screen displaying information from the Division's computerized file on petitioners. All four of these notices, which asserted additional tax liabilities against petitioners were consolidated and restated on the Consolidated Statement of Tax Liabilities dated August 9, 1993 included in the petition. Since a notice of additional tax due has been viewed as equivalent to a notice and demand, it is concluded that Tax Appeals has jurisdiction over petitioners' challenge to the Consolidated Statement of Tax Liabilities dated August 9, 1993 (***see, Matter of Yampol***, Tax Appeals Tribunal, August 28, 1997).

B. Tax Law § 659, in relevant part, provides as follows:

> If the amount of a taxpayer's Federal taxable income . . . is changed or corrected by the United States internal revenue service . . . or if a taxpayer's claim

> for credit or refund of Federal income tax is disallowed in whole or in part the taxpayer . . . shall report such change or correction in Federal taxable income . . . or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the [commissioner], and shall concede the accuracy of such determination or state wherein it is erroneous . . . .

Petitioners do not deny that the IRS audited their Federal income tax returns for the years at issue and determined that they owed additional Federal income taxes. As detailed in Finding of Fact "7", there is sufficient evidence to conclude that the IRS assessed additional tax against petitioners for each of the years at issue prior to the Division's issuance of the respective notices of additional tax due with reference to 1977, 1978 and 1981 and the notice and demand with reference to 1980. Consequently, it is reasonable to conclude that the Division issued notices seeking additional New York State and City personal income tax based upon Federal audit changes, and that this action by the Division represented a rational reliance on Federal audit changes (***see, Matter of Karayannides***, Tax Appeals Tribunal, March 13, 1997).

C. Tax Law § 681(e)(1) provides that if a taxpayer fails to comply with section 659 of the Tax Law then instead of issuing a Notice of Deficiency the Division "may assess a deficiency based upon such Federal change, correction or disallowance by mailing to the taxpayer a notice of additional tax due . . . . " The deficiencies, interest and additions to tax or penalties stated in a Notice of Additional Tax Due are deemed assessed on the date the notice is mailed except in the following circumstances:

> [U]nless within thirty days after the mailing of such notice a report of the Federal change, correction or disallowance or an amended return, where such return was required by section six hundred fifty-nine, is filed accompanied by a statement showing wherein such Federal determination and such notice of additional tax due are erroneous (Tax Law § 681[e][1]).

The Division has not sought to bar petitioners from contesting on the merits its notices of additional tax due for 1977, 1978 and 1981 and the notice and demand for 1980 on the basis of

the above provision which required petitioners to respond within 30 days after the mailing of such notices with a statement showing where the Federal audit changes were in error. The skimpy evidentiary record does not establish the Division's date of mailing of such notices nor does it include any statements from petitioners pursuant to Tax Law § 681(e)(1). Consequently, although it may be concluded that the Division properly proceeded against petitioners by notices of additional tax due and a notice and a demand, petitioners in the first instance, are not barred from contesting these notices issued by the Division which are in the nature of assessments.

D. Petitioners have the burden of proving by clear and convincing evidence that the Division's assertion of tax due for the years at issue was in error (***see, Bello v. Tax Appeals Tribunal***, 213 AD2d 754, 623 NYS2d 363). They have attempted to meet this burden by establishing that the Federal audit changes were in error on the basis that they were rendered after the applicable period of limitations had expired. They have failed to shoulder this burden. There is no evidence in the record that petitioners raised the statute of limitations argument in their corresponding Federal tax matter. Rather, in their brief, petitioners hint at a malpractice claim against their prior representative for failing to properly raise such argument. In both Federal and State tax matters, a statute of limitations defense is waived if not raised (***Bradshaw v. United States***, 33 F Supp 2d 1316, 99-1 US Tax Cas ¶ 50,166; ***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109; ***Matter of Pittman***, Tax Appeals Tribunal, February 20, 1992). Moreover, the record fails to establish that petitioners, in fact, had a statute of limitations defense in the Federal matter. As noted in Paragraph "11", the evidence introduced by petitioners at the hearing in this matter was extremely limited and confused. As noted in Paragraph "13", there is even a hint of evidence

that petitioners' prior accountant signed waivers for the IRS which *extended* the time to assess. Furthermore, in their petition, petitioners, as noted in Paragraph "10", referenced a stipulation of settlement in November of 1994 which settled their Federal tax matter. This stipulation was not produced by petitioners. Assuming for the moment that they were unable to introduce this document because of an on-going legal dispute with their former attorney, petitioners declined the opportunity to appear at the hearing and testify under oath concerning such settlement. Furthermore, petitioners' representative was granted a continuation of the hearing for approximately six months to obtain some type of documentation from the IRS concerning the resolution of petitioners' Federal tax matter. No such documentation was ever produced. This failure by petitioners to provide such relevant evidence must be held against them (***see, Meixsell v. Commissioner of Taxation***, 240 AD2d 860, 659 NYS2d 325, ***lv denied*** 91 NY2d 811, 671 NYS2d 714).

E. As noted in Finding of Fact "4", the Consolidated Statement of Tax Liabilities dated August 9, 1993 asserted penalties against petitioners for each of the years at issue except for the year 1981. In contrast, none of the three notices of additional tax due for 1977, 1978 and 1981, respectively, asserted penalties against petitioners. While the printout of the summary of petitioners' account on the Division's computer screen for 1980 did show the assertion of penalty against petitioners for that year, no basis was indicated for asserting penalty. Consequently, it is concluded that no rational basis has been established for the Division's assertion of penalty against petitioners in the Consolidated Statement of Tax Liabilities, and penalties are therefore canceled.

F. The petition of Meyer and Cynthia Cohen is granted to the extent indicated in Conclusion of Law "E", but, in all other respects is denied, and the Consolidated Statement of Tax Liabilities dated August 9, 1993, as modified, is sustained.

DATED: Troy, New York
January 11, 2001

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE