STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
M. HEIDI OTTO	:	DETERMINATION DTA NO. 818778
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 1989 through 1998.	:	

Petitioner, M. Heidi Otto, 303 North Tower Hill Road, RR1 Box 99, Millbrook, New York 12545, 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 1989 through 1998.

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 February 27, 2003 at 10:30 A.M., with all briefs to be submitted by June 27, 2003. Petitioner appeared by Jay Oher, CPA, and Marvin Weinstein, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel).

A Determination was issued on November 20, 2003, sustaining the Notice of Deficiency issued against petitioner. Petitioner filed an exception to the Determination and, on September 2, 2004, the Tax Appeals Tribunal issued a Decision holding that the Determination was a nullity in light of the automatic stay on proceedings imposed as a result of an allegedly still pending bankruptcy proceeding filed by petitioner on July 25, 2002. The Tribunal remanded the matter

to the Administrative Law Judge for further proceedings to occur upon the earlier of either the conclusion of the bankruptcy proceeding or removal of the automatic stay.

On October 6, 2004, the Division of Taxation brought a motion to reopen or reargue, asserting that on November 14, 2002 the Bankruptcy Court issued a Discharge Order with regard to petitioner's bankruptcy proceeding. The Division of Taxation requested that official notice be taken of such Discharge Order, asserted that as a result of the order the automatic stay was no longer in effect and had not been in effect on the February 27, 2003 date of the hearing in this matter, and requested reconsideration of the Tribunal's decision declaring the Determination to be a nullity.

The Tribunal referred the Division of Taxation's motion to the Administrative Law Judge for further proceedings. By a letter dated October 26, 2004, the Administrative Law Judge advised the parties of his intent to take official notice of the Discharge Order pursuant to State Administrative Procedure Act § 306(4), subject to petitioner's right to be heard in opposition by November 17, 2004. On November 16, 2004 petitioner, appearing *pro se*, submitted an answering affidavit and arguments in opposition to the Division's motion. After due consideration of the motion, the answering papers, and all documents, pleadings, and proceedings had in this matter, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether official notice should be taken of a Discharge Order issued on November 14, 2002 by the United States Bankruptcy Court for the Southern District of New York in the Matter of M. Heidi Otto, formerly doing business as Parc Brook Farms.

II. Whether, with respect to such bankruptcy matter, the automatic stay imposed under Bankruptcy Code § 362 (11 USC § 362) is not currently in effect and was not in effect on the February 27, 2003 date of the hearing held in this matter.

III. Whether petitioner has established any errors warranting reduction or cancellation of the tax, penalties or interest asserted as due by the Division of Taxation for the years in question.

FINDINGS OF FACT[1]

1. Petitioner, M. Heidi Otto, did not file New York State personal income tax returns in a timely manner for any of the years spanning 1989 through 1998. In 1998, the Division of Taxation ("Division") commenced an audit of Ms. Otto for such years. By letters dated September 29, 1998 and December 12, 1998, respectively, the Division requested of Ms. Otto copies of her tax returns and canceled checks showing payment of income taxes for the ten years in question. Petitioner did not respond to either of these letters. In addition, the Division sought but was not able to obtain information from the Internal Revenue Service ("IRS") regarding Ms. Otto's income, since she had not filed income tax returns with the IRS for such years.

2. As the result of an internet search, the Division's auditor found a web site which described a business petitioner operated in Millbrook, New York. This business, known as Parc Brook Farms, included a bed and breakfast inn, a thoroughbred horse breeding farm, and a real estate development operation. The auditor contacted petitioner by telephone in January 1999, and was advised that petitioner's accountant would provide the necessary tax returns and records and information for audit. However, such information was never provided, despite repeated

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[1] In light of proceedings occurring after the November 20, 2003 issuance of the Determination in this matter, including the Tribunal Decision and remand, the Division of Taxation's Motion to Reopen and Reargue, and petitioner's opposition thereto, it will be helpful to first provide the Findings of Fact and Summary of the Parties' Positions as set forth in the November 20, 2003 Determination. Thereafter, Additional Findings of Fact relevant to and necessary for resolution of the issues raised by proceedings subsequent to the issuance of such Determination will be presented.

requests for copies of petitioner's tax returns and other documents necessary to determine petitioner's income and her tax liability for the years in question.

3. The Division's auditor issued subpoenas to certain banks, including Fleet Mortgage Corp., Litchfield Bancorp and Pawlings Savings Bank, seeking documents and information with respect to mortgages on the Parc Brook Farms property. In turn, Litchfield Bancorp provided documents, including two loan applications signed by petitioner for loans she sought to obtain in 1992 and 1996 with respect to the Parc Brook Farms property in Millbrook, New York.

4. The 1992 loan application reflected the following income and asset information pertaining to petitioner:

INCOME

Item	Gross Monthly Income	Gross Yearly Income
Base Employment Income	$49,166.00	$589,992.00
Dividends/Interest	400.00	4,800.00
Rental Income	-----	75,308.00
Total	-----	$670,100.00

REAL ESTATE OWNED

Property	Market Value	Rental Income
3 Villas in Acapulco, Mex.	$400,000.00	$ 74,000.00
Bed and Breakfast	775,000.00	1,308.00
N. Tower Hill Rd. 13.15 acres	450,000.00	----------
N. Tower Hill Rd. 15.00 acres	500,000.00	----------
Total	$2,125,000.00	$ 75,308.00

5. The 1996 loan application reflected the following income information:

Item	Gross Monthly Income	Gross Yearly Income
Base Employment Income	$33,333.33	$399,999.96

Dividends/Interest	287.21	3,446.52
Other Income	8,823.69	105,884.28
Total	-----	$509,330.76

6. The auditor noted that, unlike the 1992 application, the 1996 loan application did not include the villas in Acapulco, Mexico among the real estate owned by petitioner. Thus, the auditor assumed that the villas had been sold. However, with no specific sale year or sale information provided by petitioner, the auditor based the sale price for the villas on the listed market value shown on the 1992 loan application ($400,000.00), and included such amount as income in each of the years during which the sale could have occurred (i.e., 1992 through 1996). The auditor's report noted that upon presentation of additional information, the calculation would be adjusted so as to include the income (gain), if any, from the sale of the villas only in the year of sale, as appropriate.

7. To calculate petitioner's estimated annual income based on the foregoing information, the auditor used the following methodology and assumptions :

YEAR(S)	METHODOLOGY/ASSUMPTIONS
1989 through 1992	income based on income amounts shown on 1992 loan application.
1993 through 1995	income based on income amounts shown on 1992 loan application, plus a 10 % increase thereto for each succeeding year.
1996	income based on income amounts shown on 1996 loan application.
1997 and 1998	income based on income amounts shown on 1996 loan application, plus a 10 % increase thereto for each year.

8. Using the foregoing information and methodology, the auditor calculated the following estimated income amounts for each of the years in issue:

Year	Base Employment Income	Interest and Dividend Income	Rental Income	Other Income	Income from Sale of Villas	Total Estimated Income
1989	589,992.00	4,800.00	75,308.00	----------	---------	670,100.00
1990	589,992.00	4,800.00	75,308.00	----------	---------	670,100.00
1991	589,992.00	4,800.00	75,308.00	----------	--------	670,100.00
1992	589,992.00	4,800.00	75,308.00	----------	400,000.00	1,070,100.00
1993	648,991.20	5,280.00	82,838.80	----------	400,000.00	1,137,110.10
1994	713,890.32	5,808.00	91,122.68	----------	400,000.00	1,210,821.00
1995	785,279.35	6,388.80	100,234.95	----------	400,000.00	1,291,903.76
1996	399,999.96	3,446.52	----------	105,884.28	400,000.00	909,330.76
1997	439,999.96	4,170.29	----------	116,472.21	----------	560,263.84
1998	483,999,95	4,170.29	----------	128,119.98	----------	616,290.22

9. On April 18, 2000, the Division issued to petitioner a Statement of Personal Income Tax Audit Changes showing New York State and New York City personal income tax deficiencies for each of the years 1989 through 1998 in the following amounts:

YEAR	NEW YORK STATE TAX	NEW YORK CITY TAX
1989	51,939.13	22,397.40
1990	51,939.13	25,742.31
1991	52,297.88	29,361.86
1992	83,797.88	47,201.86
1993	89,074.91	50,190.51
1994	94,879.65	53,478.02
1995	97,602.70	57,099.52
1996	64,262.57	40,044.11
1997	37,864.32	24,483.27
1998	41,702.13	26,982.04

The Statement of Audit Changes also reflected the imposition of interest and penalties with respect to each of the years in issue, and was accompanied by a letter explaining that the income upon which the tax was calculated had been estimated based on information supplied by third parties under subpoena. The letter also advised that petitioner had until May 16, 2000 to submit records to the Division for review. Petitioner did not respond to this statement or accompanying letter, or supply any records for review.

10. On July 17, 2000, the Division issued to petitioner a Notice of Deficiency asserting personal income tax due for the years 1989 through 1998 in the aggregate amount of $1,042,341.00, plus interest and penalties pursuant to Tax Law § 685(a)(1)(A); (b), (i). This notice was based on the calculations underlying the Statement of Audit Changes described above.

11. Petitioner challenged the Notice of Deficiency by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). This request, dated September 28, 2000, was accompanied by New York State personal income tax returns for petitioner for the years 1989 through 1998. The returns submitted with petitioner's request for conference reported a loss (i.e., negative income) for each of the years in issue.

12. Petitioner opted to have the conciliation conference, scheduled for July 27, 2001, handled via correspondence rather than in person. As agreed to by the conciliation conferee, the auditor and petitioner (and confirmed in a letter dated June 25, 2001), the auditor agreed to meet with petitioner at petitioner's Park Brook Farms premises for three days, spanning July 31, 2001 through August 2, 2001, to review documents. The letter listed certain relevant documents which petitioner was to provide to the auditor in support of the information shown on the tax returns which had been filed at the time of her conciliation conference request.

13. Two Division auditors traveled to petitioner's Millbrook, New York location and spent three days attempting to review some 14 boxes of documents made available to them by petitioner. The auditors were unable to reconcile such documents to the information contained on the tax returns, noting that the documents in the boxes were in no particular order but rather were disorganized and haphazardly filed, included canceled checks and other information apparently pertaining to both business and personal matters, included years other than those in issue, and in some instances had suffered water damage. Ultimately, the auditors made no changes to the Notice of Deficiency as issued. In turn, by a Conciliation Order dated September 7, 2001, petitioner's request was denied and the Notice of Deficiency was sustained.

14. Petitioner appeared and testified at hearing, describing the purchase of the Parc Brook Farms property in 1986 using money loaned from Four Star Living, Inc., an entity in which petitioner claims to have held a 25 percent ownership interest and the title of "International Director." Petitioner's intent with respect to the Parc Brook Farms property was to develop the same by subdivision and construction of luxury homes, and ultimate sale. In 1989, the property was divided into two parcels. Petitioner had sought to subdivide the property into five lots but this request was denied by the local planning board. Ultimately, after a moratorium period, subdivision approval for three lots was granted in 1992. Petitioner described her involvement in all aspects of the attempts to develop and operate the Parc Brook Farms premises, including pursuing subdivision approvals, designing the buildings and overseeing their construction, operating the bed and breakfast, and overseeing the horse breeding operation. The property was owned in petitioner's name and the loan applications were completed in petitioner's name.

15. In addition to Four Star Living, Inc. and Parc Brook Farms, Inc., petitioner alluded, though without significant detail, to her involvement and ownership interests in other

corporations, including Sterling Holding Corp., Mauritius Corp., and World Class Leadership and Resources Corp., in each of which entities petitioner allegedly held an approximate 50 percent ownership interest. Petitioner did not have personal checking or savings accounts, asserted that she had no "income," and that all monies were "channeled" through the various corporations. She described the "income" as set forth on the bank loan applications as the combined income of the various corporations rather than as her income. Petitioner characterized the information on the loan applications as "related to her entities" and not to her personally.

16. Petitioner's 1992 loan application listed an address for petitioner at 321 East 54th Street in Manhattan, New York. This property was described as a cooperative apartment, which was "lost" in a foreclosure of the entire building in 1992. Petitioner provided no other details concerning this property, the amount of time she spent there in any given year, or the manner in which it was "lost." Petitioner claimed that she did not live in this property during any of the years in issue, since she was fully involved in her efforts to develop the Park Brook Farms property.

17. Petitioner also described, in limited detail, her involvement in "barter clubs." In this regard petitioner noted, by example, that the materials for and installation of a hardwood floor would be equal to a certain number of "barter credits," and that a period of vacation time at the villas would likewise be equal to a certain number of "barter credits." Petitioner was thus allegedly able to obtain certain materials and labor services at Park Brook Farms in exchange for barter credits. Petitioner also noted, without further elaboration, that Sterling Holdings was the corporate entity through which the barter credits and activities were handled.

18. At hearing, petitioner described the villas in Mexico as originally consisting of one building which was subsequently reconfigured into three rental units. Petitioner acquired the

villas by purchase in 1978, and held and rented the units until she sold them to raise cash for the Parc Brook project in 1995. In its post-hearing brief, the Division conceded that the gain from the sale of the villas should be allocated to the year 1995.[2] Accordingly, the Division removed the $400,000.00 value it had previously included in its computation of income and tax due for the years 1992 through 1996. For 1995, (the year of sale) the Division recalculated petitioner's income so as to include only the gain on the sale of the villas. As a result, the Division has reduced the amount of tax asserted as due for each of such years as follows:

Year	NYS/NYC Tax Initially Asserted as Due	Revised NYS/NYC Tax Asserted as Due	Amount of NYS/NYC Tax Reduction
1992	$130,999.74	$81,659.00	$49,340.74
1993	$139,265.42	$89,925.00	$49,340.42
1994	$148,357.67	$99,017.00	$49,340.67
1995	$154,702.22	$131,267.00	$23,435.22
1996	$124,306.68	$57,966.00	$66,340.68

SUMMARY OF THE PARTIES' POSITIONS

19. Petitioner maintains that the Division failed to conduct a proper audit and asserts that she had all necessary records to substantiate the amounts and classification of all of the items set forth on the tax returns submitted at the time of her request for a conciliation conference. In this regard, petitioner claims that she had some 14 boxes in which all of her records for the years in issue were stored, that her accountant went through such records, determined the amount of her items of income, gain, loss and deduction for the years in question and that, as a result of this effort, the returns submitted should be accepted as correct. Petitioner maintains that for some

[2] Petitioner provided the following information concerning the calculation of gain on the sale of the villas:

Selling Price $255,000.00
Cost Basis $101,921.00
Accum. Deprec. 52,500.00
Gain on Sale $205,579.00

period of time following a horse riding accident, she was operating at a diminished mental capacity leaving her unable to fully comprehend financial matters and hence at a disadvantage in the audit process. Petitioner does not dispute her failure to file returns within the requisite time limit for any of the years at issue, but asserts that she was fully engaged during such years in attempting to develop the Parc Brook Farms property, including dealing with ongoing difficulties with the local planning board and subdivision limitations as well as attendant severe financial difficulties.

20. The Division, in contrast, asserts that it made every reasonable effort to obtain information from petitioner concerning her income and tax liability for the years in question. The Division goes on to point out that despite repeated requests made to petitioner for information, the only information it was able to obtain came as the result of subpoenas issued to financial institutions. In turn, the Division maintains that its resulting calculations and assertion of a deficiency were appropriate under the circumstances. The Division goes on to point out that even after issuance of the deficiency in this case, two auditors were dispatched to petitioner's location for the purpose of reviewing petitioner's records, including specific records as requested. In turn, the auditors were provided with some 14 boxes of disorganized records, pertaining to both business and personal financial matters for the years in issue and for other years, with no explanation of how such records might be tied into the returns submitted by petitioner. The Division notes that even at the time of hearing, petitioner's current representative admitted that he had not reviewed the contents of the 14 boxes of records, but rather suggested that the Division should simply pursue petitioner's accountant for an explanation of how the records relate to the returns as submitted. In sum, the Division maintains that no records were provided until after the Notice of Deficiency was issued, and that even when certain records

were made available, the same were not maintained or presented in any coherent organized manner such that they could be reviewed and understood.

ADDITIONAL FINDINGS OF FACT

21. On November 20, 2003, a Determination was issued sustaining the Notice of Deficiency issued against petitioner. Petitioner filed an exception to the Determination and, on September 2, 2004, the Tax Appeals Tribunal issued a Decision holding that the Determination was a nullity in light of the automatic stay on proceedings imposed as a result of an allegedly still pending bankruptcy proceeding filed by petitioner. In support of its Decision, the Tribunal noted petitioner's appearance at the hearing on February 27, 2003 and her testimony that she had filed a petition in bankruptcy under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York on July 25, 2002. The Tribunal observed that petitioner had provided in evidence a copy of her petition in bankruptcy, and also testified that despite the fact that her bankruptcy proceeding was still pending, she wanted to proceed with the hearing. On exception to the Tribunal petitioner changed her position and repeatedly stated that the bankruptcy proceeding was still open and that the Division was wrong to proceed with the matter while the bankruptcy proceeding was ongoing. The Tribunal's Decision was issued upon the premise that the bankruptcy proceeding was, in fact, still ongoing, that the automatic stay was in effect and, notwithstanding petitioner's initial statement at hearing that she nonetheless wished to proceed with the hearing, such stay could not be waived by agreement of the parties. The Tribunal remanded the matter to the Administrative Law Judge for further proceedings to occur upon the earlier of either the conclusion of the bankruptcy proceedings or removal of the automatic stay.

22. Petitioner commenced two separate bankruptcy actions which are relevant to this proceeding. On January 7, 2000, petitioner filed a petition under Chapter 11 of the United States Bankruptcy Code. By an Order entered on September 21, 2000, the Bankruptcy Court dismissed the petition and the case was closed. On July 25, 2002, petitioner filed a petition under Chapter 7 of the United States Bankruptcy Code. At the February 23, 2003 hearing, petitioner's representative distinguished this petition from the earlier filed and dismissed Chapter 11 petition, stating that "[t]his is a new filing . . . which is still in progress."

23. On October 6, 2004, i.e., subsequent to the issuance of the Tribunal's Decision, the Division brought a motion to the Tax Appeals Tribunal seeking to reopen or reargue, asserting that a Discharge of Debtor had been issued with respect to petitioner's Chapter 7 bankruptcy proceeding, and that the automatic stay is no longer in effect and was not in effect on the February 27, 2003 date of the hearing held in this matter. The Division requested that Official Notice be taken of such Discharge of Debtor, and provided a certified copy of such Discharge Order with its motion papers. The Division's motion is premised on section 3000.16 of the Tribunal's Rules of Practice and Procedure which provide that a record may be reopened upon grounds of misrepresentation of an opposing party.

24. The Tribunal referred the Division's motion to the Administrative Law Judge for further proceedings. In turn, the parties were advised by letter of the Administrative Law Judge, dated October 26, 2004, that Official Notice would be taken of the Discharge of Debtor subject to petitioner's right to be heard in opposition. On November 16, 2004, petitioner submitted an answering affidavit and arguments in opposition to the Division's motion.

25. In her response to the Division's motion, petitioner offered no challenge to the existence, accuracy or authenticity of the Discharge of Debtor, or objection to the Division's

request that Official Notice be taken of such Discharge. Accordingly, pursuant to section 306(4) of the State Administrative Procedure Act, Official Notice is hereby taken of a certified copy of an Order of Discharge of Debtor issued by the United States Bankruptcy Court for the Southern District of New York (Judge Cecilia G. Morris). This Discharge of Debtor specifies that it pertains to the July 25, 2002 petition filed by M. Heidi Otto under Chapter 7 of the Bankruptcy Code. The Discharge is dated November 14, 2002, and provides, in relevant part, as follows:

> 1. The above-named debtor [M. Heidi Otto] is released from all dischargeable debts.
>
> 2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:
>
> (a) debts dischargeable under 11 U.S.C. § 523;
>
> (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (6) and (15) of 11 U.S.C. § 523(a);
>
> (c) debts determined by this court to be discharged.
>
> 3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void in paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

27. The record in this matter includes a New York State Resident Income Tax Return (Form IT-201) for petitioner for each of the years 1989 through 1998. These returns were prepared by one Marc J. Rosen, a certified public accountant, and each contains his signature followed by a typed date in the date box located next to the preparer's signature box on the face of each return (presumably indicating the date of Mr. Rosen's signature), as follows:

RETURN YEAR(S)	TYPED DATE
1989 through 1991	12/07/99
1992 and 1993	12/12/99
1994	12/17/99
1995	12/18/99
1996 and 1997	12/19/99
1998	01/04/00

Each of the returns also contains petitioner's signature. However, none of the returns include either a typed or written date in the date box located next to the taxpayer's signature box on the face of each return.

28. Each of the returns is date stamped as received by BCMS on September 28, 2000. Petitioner's Request for Conciliation Conference in this matter (***see*** Finding of Fact "11") includes the following statement:

> See attached copies of state income tax returns from 1988 - through & including 1999 submitted herewith, *the originals of which were filed w/NY State DOTF on 9/14/00* (emphasis added).

29. On direct examination at hearing the Division's auditor explained by testimony, and confirmed by numerous entries in her audit log (which spanned the period September 1998 through July 2000) together with unanswered correspondence sent to petitioner on October 27, 1998 and December 23, 1998, that petitioner had not filed New York State personal income tax returns for the years in issue at any time during the period covered by the audit log. During this testimony, petitioner's representative specifically conceded that returns had not been filed as of the time of the audit. He stated thereafter that the returns had been filed, after completion of the audit, in September 2000 and added, in petitioner's post-hearing brief, that "[t]he petitioner some time in 2000 filed the required Income Tax returns for the time frame in question." Petitioner

alleged in her motion papers that she filed the subject returns in December 1999. She has offered no proof that the subject returns were filed at any time earlier than September 14, 2000.

SUMMARY OF ADDITIONAL ARGUMENTS ON THE DIVISION'S MOTION

30. The Division maintains that petitioner misrepresented the facts concerning the status of her Chapter 7 petition when she claimed that such proceeding was still open and that the automatic stay was in effect at the time of the hearing. The Division points to Bankruptcy Code § 362, which provides that the automatic stay imposed thereunder is in effect until a case is either closed or dismissed or, if a Chapter 7 matter, until issuance of a discharge by the Bankruptcy Court. The Division notes further that Bankruptcy Code § 362(b)(9)(A) provides that the filing of a petition in bankruptcy does not operate as a stay of an audit by a governmental unit to determine tax liability, and posits that the Division was authorized to proceed with the audit in this matter and issue its Notice of Deficiency on July 17, 2000, notwithstanding the first (Chapter 11) bankruptcy filing by petitioner in January 2000. In turn, the Division's position is that since the September 21, 2000 dismissal of the Chapter 11 proceeding ended the automatic stay with regard thereto, and that the November 14, 2002 Discharge of Debtor in the Chapter 7 proceeding ended the automatic stay with regard thereto there was, on the February 27, 2003 date of the hearing, no automatic stay in place and operating as a bar to such hearing or to the issuance of the Determination thereafter.

31. In response to the Division's motion, petitioner does not challenge the existence, accuracy or authenticity of the November 14, 2002 Discharge of Debtor, or specifically object to the Division's request that Official Notice be taken of the same. Rather, petitioner maintains that the bankruptcy proceeding is "still open," that there are still decisions being made concerning such case, and that final distributions have not been paid out. Petitioner also asserts that she

filed New York State (and Federal) income tax returns for the years 1989 through 1998 in December 1999, some two and one-half years prior to her July 25, 2002 petition filed under Chapter 7 of the Bankruptcy Code, and argues that Bankruptcy Code § 523(a)(1) thus does not bar discharge of the liability asserted by the Division's Notice of Deficiency. In this regard, petitioner points out that the Division was among those entities served with notice of the Bankruptcy Court's Discharge of Debtor. She thus posits that the Division's claim against her has been discharged, presumably upon the argument that such claim was the same as that asserted by the Notice of Deficiency and was dischargeable because the underlying tax returns were filed by her more than two years before the petition in bankruptcy was filed.

CONCLUSIONS OF LAW

A. Treated first is the impact of the motion filed by the Division and referred here by the Tax Appeals Tribunal. Petitioner has not argued that her Chapter 11 bankruptcy petition was not dismissed, or that the Discharge of Debtor with respect to her Chapter 7 bankruptcy proceeding was not issued, or even that either of the automatic stays which arose upon the filing of each of her petitions in bankruptcy remain in effect. Rather, petitioner argues that the issuance of the Discharge of Debtor simply means that the debt represented by the Notice of Deficiency has been discharged and eliminated.

B. Bankruptcy Code § 362(c) provides that the automatic stay imposed upon the commencement of a bankruptcy proceeding is in effect until the case is closed or dismissed or, if a Chapter 7 proceeding, until issuance of a discharge by the bankruptcy court. Petitioner's initial bankruptcy filing on January 7, 2000 under Chapter 11 was dismissed by the Court, and the case was thus closed, on September 21, 2000. The automatic stay imposed upon petitioner's Chapter 11 filing thus ended as of such date. While the Division's audit of petitioner was ongoing during

this time period, Bankruptcy Code § 362(b)(9)(A) provides that the filing of a petition in bankruptcy does not stay an audit by a governmental unit to determine tax liability. Thus, petitioner's Chapter 11 filing did not bar the Division's audit activities to determine petitioner's liability for the subject years, or the Division's issuance of the July 17, 2000 Notice of Deficiency. Moreover, since the stay on proceedings imposed as the result of the Chapter 11 filing ended on September 21, 2000, there was no bar remaining from such Chapter 11 filing with respect to the conduct of the hearing on February 27, 2003, or issuance of the resulting Determination thereafter on November 20, 2003.

C. Petitioner's primary argument in response to the Division's motion is that the debt represented by the Notice of Deficiency was discharged by the November 11, 2002 Discharge of Debtor. Petitioner's claim in this regard is premised on the contention that she submitted all of her tax returns for the ten years in issue in December 1999, apparently in connection with her initial Chapter 11 bankruptcy filing, that such returns were thus filed more than two years prior to her July 25, 2002 Chapter 7 bankruptcy filing, and that Bankruptcy Code § 523(a)(1) is therefore not a bar to discharge of her tax debt. Petitioner apparently claims that the listing of the Division among those entities served by the Bankruptcy Court with notice of the Discharge confirms that the debt represented by the Notice of Deficiency at issue herein has been discharged.

D. Petitioner's argument is rejected. Bankruptcy Code § 523(a)(1)(B) provides that a Discharge Order in a bankruptcy proceeding does not discharge an individual debtor from any debt for a tax with respect to which a return, if required, was not filed or was filed less than two years before the petition in bankruptcy was filed. The central premise of petitioner's contention is that the tax debt in issue was discharged because she filed the tax returns in question in

December 1999, i.e., more than two years prior to her Chapter 7 petition filed on July 25, 2002. In fact, petitioner's allegation of a December 1999 filing not only fails to find support in the record, but is directly contradicted by petitioner's own statements. As detailed in Finding of Fact "29", the audit file and log are replete with notes and correspondence which consistently indicate that the returns had not been filed during the audit. The returns themselves are signed by petitioner, but are not dated by her (***see,*** Finding of Fact "27"). Most importantly, petitioner's Request for Conciliation Conference specifically states that the originals of the returns for the years in issue were filed with the Division on September 14, 2002, i.e., after the audit and after the July 25, 2002 filing of the Chapter 7 petition, as opposed to more than two years prior to such filing (***see,*** Finding of Fact "28"). Accordingly, and in light of Bankruptcy Code § 523(a)(1), it cannot be concluded that the debt represented by the Notice of Deficiency was discharged by the November 14, 2002 Discharge of Debtor. Furthermore, the automatic stay imposed upon the filing of petitioner's Chapter 7 petition ended, pursuant to Bankruptcy Code § 362(c), upon the Court's issuance of the Discharge of Debtor, and thus was not a bar to the conduct of the hearing on February 23, 2003, or to issuance of the resulting Determination thereafter on November 20, 2003. Finally, in light of the foregoing conclusion, it is unnecessary to address the Division's contention that the returns submitted by petitioner on September 14, 2002 did not contain sufficient data to allow calculation of the tax and thus did not constitute "filed returns."[3]

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[3] Petitioner's argument that the Division's inclusion among those entities served by the Bankruptcy Court with notice of the Discharge proves that the tax debt in issue in this matter was discharged is likewise rejected. Being so listed as an entity served does not mean that the debt in question has been discharged, for the Discharge Order itself pertains only to "dischargeable" debts. Here, Bankruptcy Code § 523(a)(1) bars discharge of the subject debt. Moreover, there is no evidence to establish that the Division's listing as an entity served was made with respect to the debt pertaining to the tax at issue herein, as opposed to a claim for taxes of a different type (e.g., sales tax) or for different periods or amounts.

E. The Tribunal's September 2, 2004 Decision, concluding that the November 20, 2003 Determination in this matter was a nullity, was premised upon the misrepresentation that an automatic stay of proceedings under the Bankruptcy Code was in effect as of the February 27, 2003 date on which the hearing was held in this matter. But for such misrepresentation, the Tribunal likely would not have concluded that the proceedings and resulting Determination were a nullity, and instead would have reached the merits of the case. As set forth above, there was no automatic stay in place on the date of the hearing or thereafter. Consequently, it is appropriate under these circumstances to reissue the Determination as initially drafted. Such Determination set forth the following Conclusions of Law.

F. It is well established that a Notice of Deficiency issued by the Division is presumed to be correct until the contrary is established, and the burden of showing that such a notice is incorrect rests upon the petitioner (Tax Law § 689[e]; ***Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383, ***lv denied*** 81 NY2d 704, 595 NYS2d 398; ***Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174). In this case, petitioner has failed to provide such evidence as would support any adjustments or reductions to the Notice of Deficiency, save for that conceded by the Division with regard to the gain on the sale of the villas in Acapulco, Mexico (***see,*** Finding of Fact "18"), and thus the notice must be sustained.

G. Petitioner has argued that the Division failed to adequately review her records in their entirety, incorrectly concluded that such records were not in a form susceptible to audit, drew unreasonable conclusions as to the amount of petitioner's income, incorrectly concluded that petitioner was subject to New York City personal income tax as a resident, and inappropriately imposed penalties. In contrast, however, the record bears out that petitioner failed to file income tax returns for any of the ten years at issue, and that despite the Division's repeated requests for

records and information, petitioner supplied nothing. Ultimately, the Division obtained under subpoena two loan applications made by petitioner, and in turn used the income and asset information shown thereon, as supplied by petitioner to the lending institution, as the basis for determining petitioner's income and her resulting tax liability for the years in question. Under the circumstances, the Division's resort to this method of determining petitioner's income and her tax liability was clearly appropriate (***see, Matter of Dickinson***, Tax Appeals Tribunal, February 3, 2000).

H. In response to the Division's notice, petitioner submitted tax returns for the ten years in issue. These returns report a loss (i.e., negative income) for each year in question. The returns are allegedly based on a reconstruction of petitioner's income and deductions as undertaken by an accountant hired by petitioner, and allegedly reflect the results of that accountant's review of the checks and other documents contained in the 14 boxes of records.[4] The Division, in turn, sent two auditors to petitioner's premises for the purpose of reviewing the 14 boxes of records in comparison to the returns submitted by petitioner. Despite spending three days reviewing the contents of the boxes, the auditors were unable to relate the records to the returns or substantiate the amounts set forth on the returns. Rather, the auditors found various records, disorganized and haphazardly filed in the boxes, pertaining to various corporate entities as well as to petitioner. The documents in the boxes covered years other than (i.e., in addition to) those at issue, were in some instances water damaged, and related to both business and personal matters. There was no coherent organization or method of filing such records which would have allowed the auditors to relate the same to the returns submitted. Accordingly, no adjustments were made to the Notice of Deficiency.

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[4] Contrary to petitioner's assertions in her brief, the 14 boxes of records were not provided for review and examination "on audit," but rather were only made available *after* the issuance of the Notice of Deficiency.

I. At hearing, petitioner continued to assert that all of the necessary information and substantiation was contained in the 14 boxes of records. However, such information and substantiation was not provided in evidence at hearing, nor was any explanation or example provided by which one could comprehend how such allegedly complete documentation related to and supported the returns submitted by petitioner or refuted the results of the Division's computations. Petitioner did provide a transaction listing and a general ledger listing cash receipts and disbursements for the years in issue. However, petitioner did not present the testimony of the accountant who reconstructed her records and prepared the after-the-fact transactions listing, general ledger and tax returns for the subject years, so as to explain the methodology used or identify the specific documents upon which he relied, or even to explain how business versus personal items were distinguished or substantiated. In fact, while alluding frequently to the 14 boxes of documents and their alleged completeness, petitioner's representative admitted at hearing that he had not even looked at the documents in the boxes. Petitioner may indeed have accumulated a great number of documents over the course of the ten years at issue, as well as documents for years both prior to and after those in issue. Ultimately, however, the record does not support petitioner's claim that she maintained, in a manner subject to review and verification as required, adequate records of her items of income, gain loss and deduction for any of the years in issue (Tax Law § 658[a]; 20 NYCRR 158).

J. As to petitioner's complaint that the Division incorrectly imposed New York City personal income tax against her, it remains that petitioner herself informed the Division that she had owned a cooperative apartment in New York City at 321 East 54th Street before as well as during at least some portion of the audit period. Petitioner listed this apartment as an asset (real property interest) on the bank loan application, and continued to own the premises until at least

sometime in the mid-1990s. Petitioner also stated that she maintained an office in New York City in connection with her employment position as an International Director of Four Star Living, Inc. Under these circumstances, the Division was justified in concluding that petitioner was properly subject to tax as a resident of New York City. In turn, petitioner's testimony concerning her loss of the cooperative apartment as the result of a foreclosure of the entire building at some point in 1992 (***see,*** Finding of Fact "15") was vague and unconvincing. Petitioner offered no documents concerning such foreclosure or the loss of the apartment nor any specific information concerning the amount of time she spent in New York City during any of the years at issue. Under these circumstances, petitioner has failed to establish that she was not subject to tax as a resident of New York City or that the Division's imposition of tax on such basis was improper.

K. Finally, the imposition of penalties was proper and is sustained. Petitioner failed to file tax returns for any of the ten years in issue. Furthermore, petitioner failed to maintain or make available records from which her income and her tax liability could be determined.

L. The petition of M. Heidi Otto is hereby denied and the Notice of Deficiency dated July 17, 2000, as reduced only insofar as to reflect the Division's adjustment based on the sale of the villas in Acapulco, Mexico (***see,*** Finding of Fact "18"), together with penalty and interest, is sustained.

DATED: Troy, New York
January 20, 2005

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE