STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GREGORY AND LINDA FISCHBACH	:	ORDER DTA NO. 819902
for Redetermination of a Deficiency or for Refund of New York City Personal Income Tax under the Administrative Code of the City of New York for the Years 1996 through 1999.	:	

Petitioners, Gregory and Linda Fischbach, 740 Park Avenue, New York, New York 10021-4251, filed a petition for redetermination of a deficiency or for refund of New York City personal income tax under the Administrative Code of the City of New York for the years 1996 through 1999.

On December 8, 2004, petitioners, appearing by Groman, Ross & Tishman, P.C. (Barry C. Feldman, Esq., of counsel), moved for an order fixing the burden of proof on the Division of Taxation. On January 5, 2005 answering papers were filed by the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel). With permission of the Administrative Law Judge, petitioner filed a supplemental brief on January 28, 2005, and such date commenced the 90-day period for issuance of this order. After due consideration of petitioners' motion, the supporting affirmation and affidavit with attached exhibits, the affirmation in opposition with attached exhibits, and the memorandums of law, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation bears the burden of proof of establishing that petitioners were taxable as residents of the City of New York.

FINDINGS OF FACT

1. The audit in this matter was commenced by a letter to petitioners, Gregory and Linda Fischbach, dated August 5, 1997, stating that the Division of Taxation ("Division") was reviewing petitioners' returns for the years 1994 and 1995 with respect to their New York City nonresident status. Among other things, the letter asked petitioners to complete an enclosed residency questionnaire.

2. The Division mailed a second letter, dated December 1, 1997, which advised petitioners that their New York State personal income tax returns had been selected for an audit for the years 1994 and 1995 and that the primary issue to be addressed was petitioners' resident status or income allocation. The letter asked petitioners to complete an enclosed form which requested documents and information in order to assist the Division in establishing their nonresident status.

3. In the course of the audit, petitioners executed a series of waivers to extend the period of limitation for assessment. Each waiver stated that the matter concerned personal income tax under Articles 22, 30, 30A and 30B.

4. At the conclusion of the audit, the Division issued two statements of personal income tax audit changes, one dated September 25, 2002 pertaining to the year 1995 and one dated February 10, 2003 concerning the year 1994. In each document, petitioners were characterized as residents of New York City. Additionally, each statement delineates the amount due in two

separate columns, one column titled New York State and the other title titled New York City. There is no amount due in the New York State column in either statement. However, there is an amount due for each year in the New York City column.

5. The Division issued a Notice of Deficiency to petitioners, dated March 3, 2003, (Assessment # L-022071396), which asserted a deficiency of personal income tax for the years 1994 through 1999 in the amount of $710,418.71, plus interest in the amount of $388,101.97 and penalty in the amount of $300,573.09, for a balance due of $1,399,093.77. The first page of the notice stated that the deficiency concerned personal income tax under Article 22 of the Tax Law. The next seven pages of the notice contained a section for each of the years in issue explaining, among other things, that petitioners filed an IT-201, the amount of tax that was reported on the return, and the "Tax Per Dept of Tax & Finance." When the tax reported on the return was less than the amount of tax determined to be due by the Department of Taxation and Finance, a balance was calculated.

6. Following the issuance of the Notice of Deficiency, petitioners filed a Request for Conciliation Conference dated May 27, 2003. On this form, petitioners checked the box stating that the tax being protested was "Personal Income Tax (NY-Article 30, or Chapters 17 & 19 of Title II of the Admin. Code City of New York." They did not check the box for either personal income tax under Article 22 of the Tax Law or Yonkers tax under Article 30-A or 30-B. The letter which accompanied the request stated, in pertinent part, "Request is respectively made for the scheduling of a conciliation conference in the Manhattan District office to resolve the singular issue (New York City residency)."

7. A conciliation conference was held on October 9, 2003 which resulted in a Conciliation Order dated December 19, 2003. The Conciliation Order referred to Articles 22 and 30 of the Tax Law and stated, in part:

> After giving due consideration to the evidence presented, the requesters are found to be statutory residents for the years 1996, 1997, 1998 and 1999 and non-domicilaries of New York City for the years 1994 through 1999. The following recomputation of the statutory notice is made:

	1994 & 1995	**1996-1999**
Tax	Cancelled	Sustained
Penalty	Cancelled	Sustained
Interest	Cancelled	Sustained

8. Petitioners filed a petition for redetermination of a deficiency of personal income tax. In the petition, petitioners stated, among other things, that:

> The Commissioner erred in his determination that
>
> 1. The petitioners were statutory residents of the City of New York during the years 1996 through 1999, inclusive, . . .
>
> The facts upon which the petitioners rely, as the basis for their case, are as follows:
>
> 1. During the years 1996 through 1999, inclusive, petitioners were domiciliaries of the village of Scarsdale in Westchester County, New York.
>
> 2. During the years 1996 through 1999, inclusive, petitioners were not present in the City of New York for 183 or more days in any single year. . . .

9. The Division filed an answer which stated in pertinent part that, on the basis of an audit, it determined that petitioners were domicilaries or statutory residents of New York City and that they failed to report and pay New York City income tax for the years 1994 through 1999. The answer further stated that on or about September 25, 2002, the Division issued a

Statement of Personal Income Tax Audit Changes which asserted that there was a deficiency of New York City personal income tax for the years 1994 through 1999. Petitioners submitted a reply to the answer which admitted the last sentence.

10. In support of their motion to fix the burden of proof on the Division, petitioners argue that the statutory notice refers only to an amount due under Article 22 which deals solely with New York State personal income taxes. Petitioners note that the notice does not make any reference to Article 30 of the Tax Law and does not make any reference to or contain a discussion of City of New York personal income taxes being due from petitioners. Petitioners acknowledge that they filed their petition seeking a redetermination of proposed deficiencies under Articles 22 and 30 of the Tax Law for the years 1996 through 1999. However, it is submitted that the petition cannot correct a defect in the notice of deficiency. Petitioners posit, that the first time the Division asserted that they were liable for New York City personal income taxes for the years 1996 through 1999 was in the allegations contained in the answer of May 2, 2004.

11. According to petitioners, since the Notice of Deficiency does not assert deficiencies under Article 30 of the Tax Law, the Division's answer must be treated as the assertion of increased deficiencies. Petitioners maintain that as a result, the Division must bear the burden of proof with respect to the increased deficiencies and the factual issues underlying the increased deficiencies.

12. In response, the Division argues that the burden of proof should remain on petitioners because they were not harmed or prejudiced by the *de minimus* error on the notice and that a

notice which provides a taxpayer with sufficient information to prepare a case is adequate to raise the presumption of correctness and place the burden of proof on the taxpayer.

13. In a reply brief, petitioners argue: that petitioners have not challenged the validity of the statutory notice; that the omission of a reference to Article 30 or to New York City personal income taxes cannot be treated as *de minimus*; that the tax must be asserted in the statutory notice and cannot be divined by implication from a document which is not referred to in the notice or required for the purpose of arriving at the determination of tax due; and that neither the waivers nor the statements of proposed audit changes can cure an omission from the statutory notice. Petitioners argue that the allegations made by the Division in its answer must be treated as the assertion of an increased deficiency under Article 30 for which the Division must bear the burden of proof. Petitioners reason that an answer must only make admissions or denials and therefore, the presence of affirmative allegations constitutes an admission that the statutory notice did not contain such deficiencies and that the Division is seeking increased deficiencies under Article 30 of the Tax Law.

CONCLUSIONS OF LAW

A. The decision in ***Matter of Schneier*** (Tax Appeals Tribunal, November 9, 1989) is instructive. In ***Schneier*** the taxpayer claimed an amount, as an adjustment to income, for alimony paid on his 1982 Federal return. He also claimed miscellaneous deductions of which the largest was for tax planning regarding matrimonial division of assets and payment of alimony. For the first eight months of 1982, Mr. Schneier filed a New York nonresident return and, for the remainder of the year, he filed a New York resident return. Mr. Schneier deducted miscellaneous deductions on his resident and nonresident returns. On his nonresident return, Mr.

Schneier reported that 96.99 percent of his income was from New York sources. This portion was deducted on his return.

On his schedule for Change of Resident Status, Mr. Schneier allocated two-thirds of the adjustment for alimony paid to the nonresident period and one-third to his resident period. The miscellaneous deductions and casualty and theft losses were allocated similarly.

The Division issued a Notice of Deficiency which assessed tax, penalty and interest. A Statement of Personal Income Tax Audit Changes, which was previously issued, indicated that the deficiency was computed by disallowing "Miscellaneous Deductions: Legal Deductions" to the extent of 96.99 percent for State purposes and disallowing one-third of that amount for New York City tax purposes. After petitioner filed a perfected petition, the Division filed an answer which referred "to the total miscellaneous deductions of $10,129.92 and state[d] that $9,000.00 was for legal fees related to the divorce, $350.00 was a tax preparation fee and the balance was for 'various deductible expenses'."

Following a hearing, an Administrative Law Judge ("ALJ") determined that certain miscellaneous deductions should have been allowed. The ALJ reasoned that the assertion of the deficiency in the answer was a new matter which, in turn, shifted the burden of proof from petitioner to the Division which had not satisfied its burden.

The Tribunal modified the determination of the ALJ. Relying upon Tax Law § 689(e) and ***Matter of Tavolacci v. State Tax Commn.*** (77 AD2d 759, 431 NYS2d 174, 175), the Tribunal initially pointed out that a presumption of correctness attaches to a notice of deficiency and that the burden is upon the taxpayer to demonstrate that the notice of deficiency is incorrect. Further,

since the notice procedures set forth in Tax Law §§ 681(a)[1] and 685(l) were modeled after comparable Federal provisions, Federal practice may be examined for direction in determining whether the notice of deficiency was adequate. After explaining that neither the New York State nor the Federal statutes prescribe the contents of a notice of deficiency, or 90-day letter, the Tribunal pointed out that under Federal law, "neither an error in the deficiency notice nor a failure to adequately explain the basis of the assessment will necessarily shift the burden to the Internal Revenue Service; a notice which provides the taxpayer with information sufficient for the preparation of his case is adequate to raise the presumption of correctness and to place the burden of proof on the petitioner (***Barnes v. Commr.***, 408 F2d 65, 69-1 USTC ¶ 9257; ***Myers v. Commr.***, 41 T.C. Memo 962)."

Upon reviewing the statement of personal income tax audit changes, the Tribunal concluded that the notice of deficiency together with the statement of personal income tax audit changes were adequate to allow petitioner to prepare a case because the statement contained an amount which included both the legal deduction at issue and other miscellaneous deductions. In reaching this conclusion, the Tribunal found that the essential purpose of the documents had been fulfilled because the taxpayer had been made fully aware of the amount of the deficiency asserted. It further reasoned that, in view of the forgoing, and as well as the fact that the taxpayer was made aware of the Division's position well in advance of the hearing as it was outlined in the answer, a new matter was not raised as a result of the description given on the statement of personal income tax audit changes. Consequently, the taxpayer had to carry the burden of proof.

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[1] The Administrative Code of the City of New York contains comparable procedures (Administrative Code § 11-1781).

B. On the basis of ***Schneier***, it is clear that petitioners' arguments lack merit. The statements of personal income tax audit changes leave no doubt that deficiencies in tax were being asserted against petitioners because the Division concluded that they were taxable as residents of New York City. Further, contrary to petitioners' position, it is significant that the Tribunal in ***Schneier*** did require the notice of deficiency to make a reference to the Statement of Personal Income Tax Audit Changes in order for the Division to rely on that document to establish that a new matter had not been raised. Similarly, as in ***Schneier***, petitioners were made aware of the Division's position, as outlined in its answer, before the scheduled hearing date. Since a new matter was not raised, the burden of proof has not shifted from petitioners to the Division.

C. Petitioners' reliance upon ***Matter of Bernstein*** (Division of Tax Appeals, October 31, 1991, ***reversed*** Tax Appeals Tribunal, December 24, 1992) to support their position is misplaced because the argument impermissibly relies upon the reasoning of the Administrative Law Judge. Tax Law § 2010(5) prohibits the use of the determinations of Administrative Law Judges as precedent. ***Matter of Amherst Cablevision*** (Tax Appeals Tribunal, March 7, 1996) presented a situation where the Division changed its theory of liability from one article of the Tax Law to another. That did not happen in this matter. This case started as an audit of petitioners' liability for taxes as residents or domiciliaries of New York City. The same theory of liability continued through the issuance of the Notice of Deficiency and the Division's answer. Petitioners were well aware of the theory of liability from the beginning of the audit and may not benefit from a mere typographical error in the notice (***see, Matter of Schneier, supra***).

D. Petitioners' motion to shift the burden of proof is denied.

DATED: Troy, New York
March 3, 2005

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE