STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CENTRAL YESHIVA TOMCHEI TMIMIM LUBAVITZ, INC.	:	SMALL CLAIMS
	:	DETERMINATION
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1997, 1998 and 1999.	:	DTA NO. 821075

Petitioner, Central Yeshiva Tomchei Tmimim Lubavitz, Inc., filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1997, 1998 and 1999.

A hearing was commenced before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 11, 2007 at 9:15 A.M. and continued to conclusion at the same location on September 10, 2007 at 10:30 A.M., with all briefs to be submitted by December 17, 2007, which date began the three-month period for the issuance of this determination. Petitioner appeared by David Wilschanski, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Daniel Segal [at hearing], Robert A. Maslyn, Esq. [on motion[1]]).

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[1] By the filing of motion papers, petitioner raised the issue designated "I" in this determination. Pursuant to 20 NYCRR.13(c)(3), there is no motion practice in small claims proceedings, and therefore this issue has been addressed in this determination.

ISSUES

I. Whether the period of limitations for assessing tax had expired before the issuance of the Notice of Deficiency based upon an ineffective consent to extend the period of limitations because such consent was executed by petitioner's corporate officer, without the knowledge and approval of petitioner's representative.

II. Whether petitioner was required to withhold and remit New York State and New York City income taxes from the compensation it paid to its rabbis and teachers for the years 1997, 1998 and 1999 and, if so required, whether it is liable for payment of interest and penalty for its failure to withhold and remit said taxes.

III. Whether the Division of Taxation failed to consider the parsonage exemption which would have reduced the wages subject to income tax withholding of petitioner's rabbis and thereby account for the large number of employees exempt from withholding tax.

IV. Whether penalty should be abated in light of petitioner's inability to present documents for 1997 and 1998, which might have proven no actual underpayment of tax, since petitioner's documents were disposed of unintentionally during reconstruction of its facilities.

FINDINGS OF FACT

1. Petitioner, Central Yeshiva Tomchei Tmimim Lubavitz, Inc. (Central Yeshiva), a religious school exempt from income tax under Internal Revenue Code (IRC) § 501(c)(3), has provided Jewish education to students since 1947. Central Yeshiva provided religious education for 364 students in 1997, 434 students in 1998, and 465 students in 1999 at the undergraduate and graduate level, with many of its students receiving instruction and training so as to become rabbis and cantors. Located in the Crown Heights and Ocean Parkway sections of Brooklyn,

Central Yeshiva maintained classrooms as well as dormitory space, study halls and cafeterias for its students.

2. During 1997, petitioner had 48 employees and a total payroll of $592,513.00, with yearly W-2 salaries ranging from as little as $440.00 to the highest of $34,705.00. Of these 48 employees, petitioner withheld New York State and New York City income tax on the wages of only 10 employees. During 1998, petitioner had 45 employees and a total payroll of $620,410.00, with yearly W-2 salaries ranging from as little as $400.00 to the highest of $36,909.00. Of these 45 employees, petitioner withheld New York State and New York City income tax on the wages of only 12 employees. During 1999, petitioner had 37 employees and a total payroll of $405,072.00, with yearly W-2 salaries ranging from as little as $645.00 to the highest of $32,197.00. Of these 37 employees, petitioner withheld New York State income tax on the wages of only 10 employees and New York City income tax on the wages of only 9 employees. Compensation provided to the three trustees, who were responsible for petitioner's operation, was equally modest. For example, in 1997, their compensation ranged from $10,400.00 to $33,169.00. Petitioner's employees were mostly teachers and many were ordained rabbis.

3. As noted in Finding of Fact "2", more than 75% of petitioner's employees did not have income tax withheld from their wages. For the three years under audit, petitioner had available for review W-4 forms only for 1999, on which most of its employees noted that they were "exempt" from withholding on the basis that they met the following two specified conditions for exemption:

> Last year I had a right to a refund of ALL Federal income tax withheld because I had No tax liability AND

> This year I expect a refund of ALL Federal income tax withheld because I expect to have NO tax liability.

Nonetheless, petitioner concedes that the W-4 forms were "sloppily" prepared and some forms, despite claiming an exemption from withholding, showed marital status and requested withholding. The Division gave the W-4 forms little credence because they appeared to have been prepared by the same person, i.e., petitioner's bookkeeper, given the similarity of handwriting on the forms. Nonetheless, the signatures on each of the forms are distinct and were not made by the same person.

4. Petitioner had available for review W-4 forms only for the year 1999. During the conversion of a storage room into a needed classroom area in late December of 2000, the W-4 forms for 1997 and 1998 were disposed of by mistake. Because petitioner could not provide W-4 forms for 1997 and 1998, the auditor initially treated all of petitioner's employees during such years as single and calculated withholding tax due at the higher rate for singles. The auditor's initial calculation of tax due for each of the years at issue based on petitioner's total payrolls and tax withheld as noted on W-2 forms, which he had for all of petitioner's employees, was as follows:

Year	Jurisdiction	Tax Due
1997	New York State	$ 6,275.00
1997	New York City	6,367.00
1998	New York State	6,606.00
1998	New York City	6,681.00
1999	New York State	3,839.00
1999	New York City	2,526.00
Total		$32,294.00

The auditor then determined from a review of the Division's records "people who did file" and pay tax and recalculated tax due as follows:

Year	Jurisdiction	Tax Due
1997	New York State	$ 4,593.00
1997	New York City	5,098.00
1998	New York State	3,960.00
1998	New York City	4,469.00
1999	New York State	3,839.00
1999	New York City	2,526.00
Total		$24,485.00

5. After even further consideration[2] of tax returns actually filed by petitioner's employees and review of additional information on employee filing status provided by petitioner, the auditor significantly reduced his calculation of tax due against petitioner, and the Division issued a Statement of Proposed Audit Adjustments dated July 26, 2004 against petitioner, as an employer who allegedly failed to deduct and withhold New York State and New York City income tax as required from its employees, in a substantially reduced amount from the initial calculations shown in Finding of Fact "4". Additional tax, penalty and interest asserted due in the statement dated July 26, 2004 were as follows:

Year	Jurisdiction	Income tax due	Penalty	Interest	Total
1997	New York State	$1,682.00	$1,095.36	$1,563.00	$ 4,340.36
1997	New York City	1,269.00	1,041.78	1,446.79	3,757.57
1998	New York State	2,646.00	1,219.76	1,778.92	5,644.68

[2] However, due to secrecy provisions in the Tax Law, the Division would not specify which of petitioner's employees might have failed to file and pay tax due.

1998	New York City	2,212.00	1,154.06	1,639.90	5,005.96
1999	New York State	-0-	360.12	336.13	696.25
1999	New York City	-0-	236.93	221.16	458.09
Totals		$7,809.00	$5,108.01	$6,985.90	$19,902.91

The penalty asserted due was for negligence or intentional disregard of the Tax Law and regulations under Tax Law § 685(b)(1).

6. As noted above, the Division has not asserted additional tax due for the year 1999. However, for 1997 and 1998, the Division determined that income tax was due on certain specified payrolls in the following amounts:

Jurisdiction and year	Date of payroll	Tax Due
New York State 1997	11/07/97 11/28/97 12/28/97 Total:	$ 418.33 418.33 845.34 $1,682.00
New York City 1997	10/31/97 11/07/97 11/28/97 Total:	$ 422.48 424.46 422.06 $1,269.00
New York State 1998	08/07/98 08/28/98 09/30/98 10/09/98 10/30/98 11/27/98 12/31/98 Total:	$ 310.40 347.68 347.68 347.68 347.68 347.68 597.20 $2,646.00

New York City 1998	08/07/98 08/28/98 09/30/98 10/09/98 10/30/98 11/27/98 12/31/98 Total:	351.63 351.63 351.63 351.63 351.63 351.63 102.22 $2,212.00
Total tax asserted due		$7,809.00

The Division allocated tax due to the later payroll periods within each of the years at issue as noted above, which was beneficial to petitioner when interest and penalty were calculated. Nonetheless, such allocation was not based upon any actual underpayment of tax for those specific payroll periods.

7. The Division issued six notices of deficiency each dated August 23, 2004 which conform to its determination of tax due as noted in Finding of Fact "5", with merely an arithmetical adjustment for penalty and interest based upon the later date of August 23, 2004 in comparison with the date of July 26, 2004 for the Statement of Proposed Audit Adjustments. Separate notices were issued for New York State and New York City income tax so that two notices were issued for each of the three years in dispute, resulting in the six notices of deficiency.

8. In September of each year, petitioner's practice was to request that its employees, who were rabbis or cantors, complete a form labeled "Estimated Expenses - Parsonage" in order to be entitled to utilize a parsonage exemption. These employees would set forth their estimated expenditures for housing which they anticipated incurring in the subsequent year. At a meeting of petitioner's board of trustees, the completed estimates would be reviewed and the board would

"fix" a parsonage allowance in a specific amount, which would then be specified in a letter from petitioner to each of such employees with the following advice:

> In accordance with the provisions of Section 107 of the Internal Revenue Code, you are allowed to exclude from gross income the parsonage allowance to the extent used to provide a home. Accordingly, you should maintain an accurate record of your expenditures in providing a home to be able to substantiate the amounts excluded from gross income.

However, petitioner, did not offer for review the actual employee estimates and letters of the board of trustees approving specific parsonage allowances.

Procedural Permutation

9. In mid-November of 2003, petitioner's representative submitted to the Division a power of attorney dated November 11, 2003, which authorized his representation. Nonetheless, the Division mailed directly to one of petitioner's trustees a consent extending the period of limitation for assessment for the period at issue at any time on or before September 30, 2004 for execution. This consent was executed on December 10, 2003 by Abraham Rosenfeld, who petitioner concedes was an individual authorized to act on its behalf. However, petitioner's representative was not aware of Mr. Rosenfeld's execution of the consent and asserts that he would have advised against doing so.

CONCLUSIONS OF LAW

A. The consent executed by petitioner's trustee, Abraham Rosenfeld, on December 10, 2003 was effective to extend the period of limitation for assessment to "any time on or before September 20, 2004." Although petitioner was represented by Mr.Wilschanski on December 10, 2003, the Division was not prohibited by either case law or statute, or by any regulation from contacting the taxpayer's trustee directly to obtain consent to the extension of the period of limitation for assessment. The Division's contention that the "taxpayer could have refused

communication, or directed the Division to its representative, or . . . could also have consulted with its representative prior to taking any action" has merit. Further, if the taxpayer had refused to consent, it would be reasonable to presume that the notices would have been issued forthwith in order to be timely issued. By the taxpayer's execution of the consent, the Division was able to continue the review of its initial audit results to the taxpayer's benefit. In addition, the Division is *not* contending that petitioner failed to timely *contest* the notices of deficiency at issue, and consequently case law which tolls the running of the period of limitations for a taxpayer to *contest* a notice of deficiency, due to the failure of the Division of Taxation to serve a copy of the notice upon the taxpayer's representative, is not relevant (***see Matter of Multi Trucking, Inc.***, Tax Appeals Tribunal, October 6, 1988).

B. Pursuant to Tax Law § 671(a)(1) petitioner, as an employer, was required to deduct and withhold from the wages paid to its employees "an amount substantially equivalent to the tax reasonably estimated to be due. . . ."

C. Pursuant to Tax Law § 676:

> If an employer fails to deduct and withhold tax as required, and thereafter the tax against which such tax may be credited is paid, the tax so required to be deducted and withheld shall not be collected from the employer, but the employer shall not be relieved from liability for any penalties, interest, or additions to the tax otherwise applicable in respect of such failure to deduct and withhold.

D. Petitioner has never denied that there are "a large number of exempts on the W4's for 99," but, most importantly, it has also provided a reasonable explanation, for the large number of its employees who are exempt from withholding tax due to the minimal wages paid to them:

> Frankly, we greatly respect our teachers, but lack of funds and abundance of urgent expenses means that we unfortunately pay them a fraction of what they are worth. Nobody comes to our Institution to make money and it follows that the non monetary benefits such as spiritual satisfaction, far outweigh the monetary

> earnings. Many of our staff work long extra hours on a voluntary basis and few have side jobs or businesses and investments.

The Division's concern that W-4 forms for 1997 and 1998 were never made available for review was understandable. Nonetheless, as noted in Finding of Fact "5", for 1999, the year for which W-4 forms were available for its review, no additional tax was determined to be due. Furthermore, the lack of availability of such forms for the earlier two years was unintentional as noted in Finding of Fact "4".

E. The Division is correct that an employee must file a withholding exemption certificate with his employer showing the number of exemptions to which he is entitled in order to be allowed any withholding exemptions (IRC § 3402[f][2][A]). Otherwise, withholding must be computed as if the employee were single and claiming no other exemptions. As noted in Finding of Fact "3", petitioner concedes that its employees' W-4 forms were sloppily prepared. Nonetheless, if an employee noted he was "exempt" from withholding on the basis that he met the two specified conditions for exemption specified on the W-4 form, petitioner was entitled to rely on such claim regardless of whether the form was prepared with the sloppy handwriting of petitioner's bookkeeper. Most important is the undeniable fact that petitioner's employees were extremely low paid, based upon their placing value on spiritual and religious satisfaction in lieu of monetary benefits from their employment. Consequently, when petitioner's employees filed W-4 forms and noted "exempt," such declarations were credible regardless of the sloppiness of the forms or their preparation for signing by one individual, i.e., petitioner's bookkeeper. The fact that for the year that petitioner provided W-4 forms, no tax was computed as due by the Division, as detailed in Finding of Fact "5", bolsters petitioner's position with regard to the two earlier years for which it had lost relevant documents. In addition, for the earlier two years, as

noted in Findings of Fact "4" and "5", the total amount of tax asserted due has been substantially decreased to $7,809.00 after the Division considered the actual tax filings by petitioner's employees. Even this final lesser amount of tax asserted due by the Division might have been explained away by petitioner, if the Division was able to specify which of petitioner's employees failed to file and pay tax due. Petitioner suggests that the income of such individuals might have been sufficiently low so as not to require the filing of tax returns. As noted in Footnote "2", the Division, due to secrecy provisions in the Tax Law, was unable to so specify.

F. Moreover, petitioner's position that a parsonage allowance might account for such remaining difference seems reasonable (***see*** Internal Revenue Service Publication 517, Social Security and Other Information for Members of the Clergy and Religious Workers, p. 8 [wherein it is specifically noted that "Ordained, commissioned, or licensed ministers of the gospel may be able to exclude the rental allowance . . . that is provided to them as pay for their services," which are defined to include "teaching"]). Petitioner was unable to provide documentary evidence to support such allowances, although it established its procedure for designating parsonage allowances, due to the unintentional loss or destruction of documents. In conclusion, despite petitioner's inability to shoulder the burden of establishing a specific explanation for the remaining tax deficiency (as the result of secrecy provisions of the Tax Law and the unintentional loss of documents), in this situation where petitioner's employees are all low paid and nearly all have *no income tax liability* on their earnings, the Division's assertion of interest and penalty is simply unjust and inequitable so that interest and penalty should be abated on the remaining amount of tax asserted due by the Division of $7,809.00 (***see*** Tax Law § 2012 [which allows the *equities* to be considered in small claims proceedings]).

G. The petition of Central Yeshiva Tomchei Tmimim Lubavitz, Inc. is granted to the extent indicated in Conclusion of Law "F", and the notices of deficiency dated August 23, 2004 are to be modified to so conform by the abatement of interest and penalty, but, in all other respects, the petition is denied.

DATED: Troy, New York
March 13, 2008

/s/ Frank W. Barrie
PRESIDING OFFICER