

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MICHAEL AND JUDITH LACHER : DECISION
 : DTA NO. 823953
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 Administrative Code of the City of New York for the Years 2001 through 2004. :

Petitioners, Michael and Judith Lacher, filed an exception to the determination of the Administrative Law Judge issued on January 30, 2014. Petitioner Michael Lacher appeared pro se and on behalf of his spouse, petitioner Judith Lacher. The Division of Taxation appeared by Amanda Hiller, Esq. (Peter B. Ostwald, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request was heard on June 11, 2015, in New York, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioners' personal income tax liability for the years at issue was resolved by an agreement detailed in a letter, dated August 1, 2008, from the Office of the District Attorney of the County of New York to petitioners' former representative.

II. If not, whether additional tax due as asserted herein should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact 18 and 20, which have been modified to more fully reflect the record. We have also made an additional finding of fact numbered 23 herein. These facts are set forth below.

1. In 2004, the Division of Taxation (Division) began a withholding tax audit of the Law Offices of Michael A. Lacher, LLP, a law practice solely owned by petitioner Michael Lacher.¹ The audit was triggered because the law practice was issuing W-2 forms to its employees indicating the withholding of tax, but was neither filing withholding tax returns nor paying withholding tax to the State of New York. The Division's investigation soon revealed that the practice also had not filed any federal or New York partnership returns for the 2001 through 2003 period, then under review. This led to an audit of the income and expenses of the law practice and ultimately, given the flow-through of partnership income to partners, an audit of petitioner's personal income tax returns. The audit period eventually included the years 2001 through 2005.

2. In September 2005, petitioner,² through his representative, provided the Division with copies of the law practice's federal partnership returns (Form 1065) for the years 2001 through 2004. The 2001-2003 returns were dated May 16, 2005, and the 2004 return was dated June 20, 2005.

¹ The law practice is referred to in the record variously as the Law Offices of Michael A. Lacher, LLP, Michael Lacher, LLP and Michael A. Lacher, P.C. Although the law practice apparently held itself out as a partnership and filed partnership tax returns, petitioner was the only "partner" during the 2001-2003 period. In 2004, the record indicates that the practice added a partner, but petitioner continued to maintain a 100 percent share of profits, losses and capital. Whether the practice properly filed returns as a partnership during any or all of the years at issue (*see* Treas Reg § 301.7701-3) was not addressed on audit.

² "Petitioner" refers to Michael Lacher throughout this decision. Judith Lacher is a petitioner in this matter solely because she filed joint returns with her spouse for the years at issue.

3. The Division also reviewed the law practice's 2001 through 2004 New York partnership returns (Form IT-204) during the audit. The 2004 return was filed in June 2005 and its 2001 through 2003 New York partnership returns were filed in November 2005.

4. In addition, the Division reviewed the law practice's general ledger and bank statements for the audit period.

5. The Division found that expenses as reported on the law practice's general ledger were substantially less than expenses as reported on the partnership tax returns. Petitioner's representative explained that these differences resulted from year-end adjusting entries. The Division reviewed such entries and observed that they were mostly round numbers and that there was no indication in the general ledger that these year-end adjusting entry expense amounts were actually paid. The Division requested substantiation of the year-end adjusting entries, but none was provided. The Division therefore disallowed the year-end adjusting entries in calculating the law practice's audited deductible expenses. Instead, the Division used the general ledger entries exclusive of the year-end adjusting entries to calculate audited deductible expenses, along with a 50 percent subtraction for meals and entertainment as reported in the general ledger (to conform with the Internal Revenue Code's 50% limitation on the deductibility of such expenses) and the addition of depreciation expense as reported on the return (because such expense was not included in the general ledger).

6. Next, the Division determined the law practice's audited net income for the years at issue by subtracting audited deductible expenses, determined as described above, from gross receipts as reported in the general ledger. After adjusting for income previously reported on petitioner's personal income tax returns as flow-through income from the law practice, the

Division determined the difference to be additional taxable income from the law practice. The calculations with respect to the specific years at issue are summarized below.

7. For the 2001 tax year, audited net income from the law practice was determined to be \$352,417.23. Petitioner did not report any flow-through partnership income on his 2001 New York personal income tax return. The Division therefore determined that all of the audited net income of the law practice was additional taxable income to petitioner for 2001.

8. For the 2002 tax year, audited net income from the law practice was determined to be \$703,585.66. Petitioner reported \$165,000.00 in partnership income on his 2002 New York personal income tax return. The Division, therefore, determined that \$538,585.66 of the audited net income of the law practice was additional taxable income to petitioner for 2002.

9. For the 2003 tax year, audited net income from the law practice was determined to be \$241,526.20. Petitioner reported \$160,000.00 in partnership income on his 2003 New York personal income tax return. The Division therefore determined that \$81,526.20 of the audited net income of the law practice was additional taxable income to petitioner for 2003.

10. For the 2004 tax year, audited net income from the law practice was determined to be a loss of \$99,956.74 with a guaranteed payment of \$185,109.00 to petitioner. Petitioner reported \$164,935.00 in partnership income on his 2004 New York personal income tax return. The Division therefore determined that a loss of \$79,782.74 was allowable to petitioner for tax year 2004.

11. Petitioner offered neither evidence nor argument to refute the audit determinations and calculations noted in findings of fact 5 through 10.

12. The general ledger listed an account titled "Loans and Exchanges - MAL" from which,

as explained by petitioner's representative on audit, personal expenses of petitioner were paid. Amounts paid through this account totaled \$316,862.00 in 2001, \$736,125.00 in 2002, \$535,136.00 in 2003 and \$508,893.00 in 2004. According to petitioner's representative, the law practice classified these amounts as loans to petitioner. The Division requested contemporaneous documentation of any loan agreements. None was provided. Consequently, the Division determined that the "Loans and Exchanges - MAL" transactions were not loans, but were properly classified as distributions to petitioner.

13. To determine the extent to which such distributions were taxable income to petitioner, the Division requested documentation to substantiate petitioner's basis in the Law Offices of Michael A. Lacher, LLP. Petitioner provided no such substantiation. The Division therefore determined petitioner's basis in the law practice to be zero as of the start of 2001, the first year of the audit period. The Division then added the law practice's audited net income (calculated as noted above) to the basis and subtracted therefrom the amounts paid to petitioner as reported in the "Loans and Exchanges - MAL" account to arrive at the ending basis for each of the years at issue. Pursuant to such calculations, the Division determined that petitioner received distributions of \$290,594.00 in excess of basis in 2003 and \$508,893.00 in excess of basis in 2004. The Division determined that such distributions were additional taxable income for the 2003 and 2004 tax years.

14. The Division issued to petitioner a Consent to Field Audit Adjustment, dated October 2, 2008, that set forth the Division's calculation of additional personal income due for the years at issue. The Division also provided petitioner's representative with copies of spreadsheets detailing its audit calculations. The Consent and spreadsheets were discussed with petitioner's

representative during a conference call on November 12, 2008. During that conference call, the Division again requested substantiation for the adjusting entries and petitioner's basis in the law practice. No such substantiation was provided.

15. Based on the audit determinations and calculations discussed above, and consistent with the Consent to Field Audit Adjustment, on February 5, 2009, the Division issued to petitioners, Michael and Judith Lacher, a notice of deficiency asserting additional New York State and New York City income tax due for the years 2001 through 2005 in the total amount of \$236,290.00, plus interest and fraud penalty pursuant to Tax Law § 685 (e) for the years 2001 through 2005. As broken down by tax year and by New York State and City income tax components, the tax liability as asserted in the statutory notice is as follows:

Year	State/City	Tax Amount
2001	State	\$25,457.00
2001	City	\$12,731.00
2002	State	\$40,125.00
2002	City	\$21,227.00
2003	State	\$32,361.00
2003	City	\$18,997.00
2004	State	\$37,249.00
2004	City	\$22,376.00
2005	State	\$16,728.00
2005	City	\$9,039.00

16. Pursuant to a conciliation order dated July 30, 2010, the statutory notice was modified by the cancellation of the deficiency with respect to the 2005 tax year. The notice was in all other respects sustained.

17. With its submission of evidence herein, the Division advised that its assertion of fraud penalty was withdrawn and asserted negligence penalties pursuant to Tax Law § 685 (b) (1) and (2).

18. In May 2008, the nonpayment of withholding tax by the Law Offices of Michael A. Lacher, LLP (*see* finding of fact 1), was referred to the District Attorney of the County of New York for further investigation and possible prosecution. By letter dated August 1, 2008, the Assistant District Attorney assigned to the matter advised petitioner's representative that the District Attorney's office had "closed its investigation into the non-payment of New York State/New York City payroll [withholding] tax for the period of April 1, 2001 through March 31, 2007, owed by [petitioner]" because there was an "insufficient basis for further proceedings and in consideration of. . . [certain] representations and undertakings by [petitioner]." Specifically, the letter notes that petitioner had satisfied the outstanding withholding tax liability by making payments totaling \$328,226.00 and had put into place safeguards to insure compliance with withholding tax requirements going forward (District Attorney's letter). The letter concludes its recitation of the terms of the closing of the investigation by noting:

"Therefore, this Office will refer back for civil review to State Tax [the Division] an inquiry relating to Michael Lacher's 2005 New York personal income tax return. However, Michael Lacher has agreed to file an amended 2005 personal income tax return on or before September 30, 2008, if required by State Tax."

The last sentence of the District Attorney's letter states that "[I]f the foregoing is your understanding, please sign and the acknowledgement [sic] below." The acknowledgment is dated August 13, 2008 and signed by Gerald Shargel, Esq., as counsel for both petitioner and Michael Lacher, LLP, and by petitioner, individually and for

Michael Lacher, LLP.

19. Petitioner did subsequently file an amended 2005 return that was accepted as filed by the Division. The acceptance of petitioner's filed amended return was the basis for the cancellation of the asserted 2005 deficiency in the conciliation order (*see* finding of fact 16).

20. Petitioner submitted a copy of an email dated June 19, 2008 from the Assistant District Attorney assigned to the criminal investigation to petitioner's representative that discussed the withholding tax due from petitioner under the settlement, or \$328,225.72, as compared to the withholding tax and penalties due if no agreement was reached, or \$408,017.72. The email refers only to petitioner's liability for withholding tax and makes no reference to his liability for personal income taxes.

21. Petitioner executed several consents extending the period of limitations for assessment of New York State and City personal income tax for the years under audit. The next to last such consent was signed by petitioner's representative on June 22, 2007 and extends the limitations period for the years 2001 through 2003 to July 22, 2008. The last such consent in the record was signed by petitioner on April 23, 2008 and extends the limitations period for the years 2001 through 2004 to May 22, 2009.

22. Petitioner submitted copies of Schedule K-1 of federal Form 1065 (Partner's Share of Income, Credits, Deductions, Etc.) reporting his interest in the law practice for the years 2001 through 2004. The K-1s submitted report a capital contribution of \$1,127,408.00 during 2001 and capital account balance at the end of the years 2001 through 2004 of \$923,576.00, \$803,016.00, \$779,795.00, and \$663,122.00, respectively.

23. Petitioner submitted, with his brief in support of his exception, an affidavit of Stuart

Becker, CPA, including exhibits, dated July 31, 2014 and labeled Exhibit 2. The Secretary to the Tax Appeals Tribunal, by letter dated August 6, 2014, informed petitioner that any evidence submitted by the parties that was not part of the hearing record established before the Administrative Law Judge, would not be considered by the Tax Appeals Tribunal.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge originally explained that petitioner bore the burden of proof on all issues herein, including petitioner's contention that his personal income tax liability for the years 2001 through 2004 had been resolved through an agreement of the parties (Tax Law § 689 [e]). With regard to the particular contention that the Division was estopped from issuing a notice of deficiency for his personal income tax liability for the years 2001 through 2004 based on such agreement, the Administrative Law Judge first noted that estoppel may be enforced against the Division only to avert a manifest injustice in extremely unusual circumstances (*Matter of Sheppard-Pollack, Inc. v Tully*, 64 AD2d 296 [1978]; *Matter of Turner Constr. Co. v State Tax Commn.*, 57 AD2d 201 [1977]). The Administrative Law Judge concluded that such circumstances were not present here, as petitioner did not prove that an agreement with regard to his 2001 through 2004 personal income tax liability existed. Specifically, the Administrative Law Judge found that the District Attorney's letter relied upon by petitioner, while speaking of "an inquiry relating to" petitioner's 2005 personal income tax liability, makes no mention of petitioner's 2001 through 2004 personal income tax liability, and that, therefore, was not evidence of an intention of the parties to resolve such liability. Furthermore, the Administrative Law Judge noted that petitioner provided no evidence, other than the District Attorney's letter and an email limited to the withholding tax issue, in support of his assertion that the agreement

covered his personal income tax liability for these periods.

The Administrative Law Judge then addressed each of petitioner's arguments on the issue of the amount of tax asserted in the notice of deficiency.

The Administrative Law Judge rejected petitioner's argument that he was not provided with any worksheets supporting the audit calculations as inconsistent with the record. Regarding petitioner's argument that the information provided by the Division consisted of reconstructions of the Division's records that are prejudicial to petitioner, the Administrative Law Judge noted that the calculations as shown in the workpapers were based upon the Division's treatment of entries in the books and records of petitioner's law practice and it was incumbent upon petitioner to produce evidence to the contrary. Petitioner did not introduce the books and records relied upon by the Division, nor any other records to show that the Division's calculations were incorrect.

The Administrative Law Judge rejected an argument regarding a transpositional error in the workpapers, as the error was not carried over into the calculations of tax liability.

The Administrative Law Judge noted that petitioner made no argument, nor introduced any evidence, that the Division's disallowance of the year-end adjusting entries utilized in its calculation of the law practice's audited deductible expenses was incorrect.

The Administrative Law Judge concluded that, when taking into account the particular circumstances of this matter, the Schedule K-1s of federal Form 1065 (Partner's Share of Income, Credits, Deductions, Etc.) submitted into evidence, without any substantiation, did not prove that petitioner had any basis in the partnership as of the start of the 2001 tax year.

Based upon the above discussion of the issues and evidence, the Administrative Law Judge

concluded that the Division's notice of deficiency, as modified by the conciliation order and the Division's withdrawal of fraud penalties and assertion of negligence penalties, should be sustained.

ARGUMENTS ON EXCEPTION

Petitioner continues to argue on exception that this matter was resolved through an agreement between himself, the New York County District Attorney's Office and the Division and that the Division is estopped from issuing a notice of deficiency asserting any personal income tax liability for 2001 through 2004. Furthermore, petitioner asserts that the Division bears the burden of seeking to set aside any such agreement. Petitioner also continues to assert that the notice of deficiency was issued outside of the applicable period of limitations, as the consent to extend the applicable period until May 22, 2009 that is contained in the record was executed only for the purpose of completing settlement negotiations, and was subsumed by the settlement agreement set forth in the District Attorney's letter.

With regard to the substance of the audit, petitioner argues that he provided all of the substantiation requested by the Division. In particular, petitioner claims that the copies of Schedule K-1 of federal Form 1065 (Partner's Share of Income, Credits, Deductions, Etc.), reporting his interest in the law practice for the years 2001 through 2004, are alone proof of his basis in the law practice. Petitioner also argues that the affidavit and exhibits he submitted on exception be "considered as supplemental to the petition," based upon the necessity that petitioner supplement the record in this manner in response to the "unsupportable assertions that DTA did not receive critical records from the taxpayers" (Petitioner's Reply Br, pp 2-3.) Furthermore, petitioner continues to assert on exception that the Division never provided him

with copies of the audit workpapers that resulted in the issuance of the notice of deficiency. In particular, petitioner asserts that the supporting documentation provided by the Division with regard to the notice of deficiency at issue in this matter was “created solely on reconstructions created after” the notice was issued (Petitioner’s Brief p 6; Petitioner’s Reply Brief p 2).

Therefore, petitioner concludes that the notice of deficiency at issue in this matter should be canceled. Petitioner made no argument regarding penalties on exception.

The Division argues that its notice of deficiency is presumed correct when issued and that petitioner has the burden of proving that the basis of the assessment was unreasonable or that the amount of tax assessed was incorrect. The Division asserts that a finding of estoppel against the Division is limited to exceptional circumstances. The Division argues that in the present case, petitioner has not shown that there was any agreement with regard to petitioner’s personal income tax liability for 2001 through 2004, and that, therefore, the Administrative Law Judge was correct in concluding that petitioner had failed to prove that estoppel should apply to the facts of this case. Furthermore, the Division contends that as there was no agreement regarding petitioner’s personal income tax liability for 2001 through 2004, the District Attorney’s letter could have no effect on the consent to extend the period of limitations regarding such liability.

The Division also argues that petitioner has not met his burden of proving that the amount of tax assessed in the notice of deficiency is incorrect. The Division notes that its calculations were based upon the application of the law to petitioner’s own records, that it requested substantiation from petitioner on several occasions, and that petitioner failed to provide such substantiation either on audit or during the proceedings before the Administrative Law Judge. The Division asserts that the Administrative Law Judge correctly upheld the imposition of

negligence penalties in this matter. Finally, the Division urges that the determination of the Administrative Law Judge be upheld in its entirety.

OPINION

The first issue to be addressed in this matter is whether an agreement was made between the parties and the New York County District Attorney's office that precludes the issuance of the notice of deficiency in this matter. Petitioner continues to argue on exception that the Division should have the burden of proof in this matter, as it is seeking to set aside the settlement agreement. This argument fails for several reasons. As noted by the Administrative Law Judge, Tax Law § 689 (e) provides that "the burden of proof shall be upon the petitioner," with certain limited exceptions not relevant here. Petitioner has offered no legal support for his proposition, diametrically opposed to Tax Law § 689 (e), that somehow the burden has shifted to the Division in this instance. Accordingly, petitioner's argument must fail.

Petitioner's burden of proof argument, together with his primary argument, must also fail, as petitioner has not proven that there was any agreement between the parties regarding petitioner's personal income tax liability for the years 2001 through 2004. The Administrative Law Judge correctly noted that had petitioner proven that there was an agreement, the Division may well have been estopped from asserting any liability against petitioner for those same years by the issuance of a notice of deficiency (*see Matter of 1555 Boston Rd. Corp. v Finance Adm'r of City of N.Y.* 61 AD2d 187 [1978]). However, where, as here, there is no agreement, there is no estoppel argument.

The opening paragraph of the District Attorney's letter states that the District Attorney's office is closing its investigation regarding petitioner's nonpayment of *payroll, or withholding*

tax for the period of April 1, 2001 through March 31, 2007. The District Attorney's letter then explains that the investigation was closed based upon certain actions of petitioner, namely that petitioner had satisfied the *outstanding withholding tax* liability of \$328,226.00, and put in place safeguards that would provide for compliance with *withholding tax* requirements going forward. The email submitted into evidence by petitioner states that the amount to be paid in settlement of the *withholding tax matter* is \$328,225.72, an amount that is consistent with the the amount actually paid by petitioner, \$328,226.00, according to the District Attorney's letter. There is no mention of petitioner's personal income tax liability for the years 2001 through 2004 in either document. In fact, there is no mention of personal income tax liability at all, with the exception of the next to last paragraph of the District Attorney's letter, wherein it is stated that petitioner's 2005 personal income tax liability was being referred back to the Division for civil review, and that petitioner had agreed to file an amended 2005 personal income return on or before September 30, 2008, if the Division required it. Thus, while petitioner argues that it is obvious he would not have consented to a settlement agreement if it did not include his 2001 through 2004 personal income tax liability, the record in this matter indicates that he did agree to such a settlement. Petitioner had ample opportunity during the proceedings before the Administrative Law Judge to introduce documentary and testimonial evidence in support of his version of what the settlement agreement included. He did neither.

Accordingly, we find nothing in the record to support petitioner's argument and conclude that the settlement agreement as set forth in the District Attorney's letter did not incorporate petitioner's 2001 through 2004 personal income tax liability (*see e.g. Matter of Dallacqua*, Tax Appeals Tribunal, March 2, 1989 [In reviewing a criminal plea agreement, this Tribunal found no

evidence that payments made represented petitioner's total tax liability or that the Division was precluded from assessing civil tax liability.]).

Petitioner's argument that the notice of deficiency was issued after the expiration of the applicable period of limitations, because the District Attorney's letter somehow subsumed an otherwise valid consent to extend such period, also fails. The argument is based upon the premise that the District Attorney's letter constituted a settlement agreement that included petitioner's personal income tax liability for the years 2001 through 2004. As we have determined that there was no such settlement agreement, we agree with the Administrative Law Judge that the District Attorney's letter had no effect on the consent to extend the period of limitations until May 22, 2009.

Having found that the Division is not prohibited from issuing a notice of deficiency regarding petitioner's personal income tax liability for 2001 through 2004, we now turn to the deficiency itself asserted by the Division and whether it had a rational basis or could be found to be erroneous (*see e.g. Matter of Estate of Gucci*, Tax Appeals Tribunal, July 10, 1997 citing *Matter of Atlantic & Hudson Ltd.*, Tax Appeals Tribunal, January 30, 1992).

The audit that resulted in the issuance of the notice of deficiency included a review of the law practice's federal and state partnership returns, general ledger and bank statements for the period in issue. The Division found that the expenses set forth in the general ledger were substantially less than those set forth on the returns. Petitioner's explanation was that there were substantial year-end adjusting entries made. The Division requested substantiation for those entries, but none was provided by petitioner. The Division disallowed the expenses shown on the partnership returns and utilized the expenses from the general ledger, together with allowing

only 50% for meals and entertainment and adding depreciation expenses not found in the general ledger. The Division then subtracted these expenses from the gross receipts reported in the general ledger of the partnership to arrive at the partnership's net income for each of the years in issue. After subtracting the amounts petitioner had listed on personal income tax returns as flow-through income from the law practice, the Division determined that the remainder was additional taxable income to petitioner for each of the years in issue.

Additionally, the Division requested contemporaneous documentation of any loan agreements that would substantiate the amounts listed in the general ledger account "Loans and Exchanges - MAL." No such documentation was provided by petitioner. Therefore, the Division determined that all of the amounts listed in the general ledger account "Loans and Exchanges - MAL" were distributions to petitioner. Finally, the Division requested documentation to prove petitioner's basis in the partnership, so that the amount of the distributions that were income to petitioner could be determined. Having received no documentation, the Division utilized a basis of zero for the start of 2001, the first year in issue. For each year in issue, the Division added the law practice's audited net income to the basis, and then subtracted the amounts paid to petitioner as listed in the "Loans and Exchanges - MAL" general ledger account, to arrive at petitioner's ending basis in the law practice for that year. For each year in issue, petitioner's basis was subtracted from the distributions to arrive at additional taxable income.

A presumption of correctness attaches to a notice of deficiency upon issuance and can stand by itself as a rational basis for the notice (*see e.g. Matter of Estate of Gucci* citing *Matter of Atlantic & Hudson*). In this case, the conduct of the audit described above also provides a

rational basis for the issuance of the notice of deficiency. It was therefore incumbent upon petitioner to rebut the presumption (*id.*). Petitioner has failed to rebut the presumption in this instance, because he submitted no evidence during the proceedings before the Administrative Law Judge over and above the information that was reviewed by the Division during the audit.

Petitioner asserts that all requested substantiation was available to the Division during the audit, but points to no specific documentation that would enable this Tribunal to verify this assertion, and we have found none in the record. The only specific documentation to which petitioner points are the copies of Schedule K-1 of federal Form 1065 (Partner's Share of Income, Credits, Deductions, Etc.) reporting his interest in the law practice for the years 2001 through 2004 that he submitted as part of the record in this matter. As noted by the Administrative Law Judge, under the circumstances herein, these forms alone, without independent substantiation, do not prove that petitioner had any basis in the law practice at the start of 2001.

Petitioner argues that the documentation of the audit submitted by the Division in this matter was not the correct documentation and that the Division did not provide him with the correct documentation even after being asked to do so by the Administrative Law Judge. While a somewhat confusing argument, it appears that petitioner is claiming that there were audit workpapers prepared with regard to the criminal matter that included petitioner's income tax liability for the years 2001 through 2004 and that documentation of the audit in the record was reconstructed not only after the close of the criminal case, but actually after the issuance of the notice of deficiency.

There is no evidence in the record of an additional set of audit workpapers. Pursuant to the

Tribunal's Rules of Practice and Procedure, in particular 20 NYCRR 3000.7, if petitioner thought that there was an additional set of workpapers, he had the option of issuing a subpoena, or having the Administrative Law Judge issue a subpoena, returnable at a hearing. Instead, petitioner chose to submit this matter on papers to the Administrative Law Judge. Furthermore, there is no issue regarding petitioner being unfamiliar with the audit documentation in the record. Computations of the personal income tax liability for the years 2001 through 2004 were provided to petitioner and discussed with his representative prior to the notice of deficiency having been issued. With regard to petitioner's claim that the audit documentation was prepared after the notice of deficiency was issued, the only such document in the record is a document that the Division stated was being provided at the request of the Administrative Law Judge, and which the Division clearly indicated was a document prepared in preparation for litigation, i.e., not a document relied upon by the Division for issuance of the notice of deficiency. Finally, and as previously discussed, the audit documentation contained in the record alone supports the issuance of the notice of deficiency.

In summation, petitioner has not made a record that would support a decision in his favor with regard to any of the issues he has presented. Those records that petitioner did provide, various state and federal returns and a general ledger, were the very documents utilized by the Division to calculate the tax asserted due in the notice of deficiency. Therefore, we conclude that the notice of deficiency had a rational basis at the time it was issued and that petitioner has failed to prove that the deficiency was erroneous. Furthermore, as petitioner has not addressed the issue of penalties on exception, we affirm the determination of the Administrative Law Judge on this issue based upon his reasoning contained in the determination.

Finally, we note that the affidavit labeled Exhibit 2 to petitioner's brief in support of his exception was not considered by the Tax Appeals Tribunal in reaching its decision in this matter. Petitioner was informed at the time of the submission of the document that evidence not in record established by the Administrative Law Judge would not be considered (*see e.g. Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). The Division also objected to the introduction of evidence after the record was closed. Accepting evidence after the record is closed is inconsistent with a fair and efficient hearing process, and also deprives the adversary of an opportunity to question the evidence on the record (*see e.g. Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation & Fin.*, 116 AD3d 1176 [2014] [Wherein, the Appellate Division declined to consider documents not part of the administrative record on appeal.]). Petitioner requests that we accept the evidence into the record in response to the Division's assertion that it did not receive the substantiation it requested from petitioner. However, that was the Division's position during the proceedings before the Administrative Law Judge, and petitioner had ample opportunity at that time to introduce evidence in response. As such, in accordance with our longstanding policy against considering evidence submitted after the close of the record, we reject petitioner's additional evidence.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Michael and Judith Lacher is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Michael and Judith Lacher is denied; and

4. The notice of deficiency, dated February 5, 2009, as modified by the conciliation order dated July 30, 2010 canceling the deficiency with respect to the 2005 tax year (*see* finding of fact 16) and by the Division of Taxation's withdrawal of fraud penalty and assertion of negligence penalties herein (*see* finding of fact 17), is sustained.

DATED: Albany, New York
December 11, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner