

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>WALTER AND CHAYA GREENFELD</b>	:	DECISION
	:	DTA NO. 826733
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 2004	:	
through 2006.	:	

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Petitioners, Walter and Chaya Greenfeld, filed an exception to the determination of the Administrative Law Judge issued on September 14, 2017. Petitioners appeared by Cohen, LaBarbera & Landrigan, LLP (Melissa Perry, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Christopher O'Brien, 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 was heard in Albany, New York, on September 27, 2018, 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, upon audit, the Division of Taxation properly increased petitioners' reported income and disallowed certain expense deductions claimed by petitioners for tax years 2004 through 2006.

II. Whether petitioners have established that the Administrative Law Judge's denial of petitioners' request for an extension of the due date for submission of their brief below amounted to personal bias thus resulting in a denial of due process.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except findings of fact 4 and 5, which we have modified to more accurately reflect the record. We have added an additional finding of fact, numbered 12. The facts as determined by the Administrative Law Judge, the modified findings of fact and additional finding of fact are set forth below.

1. Petitioners, Walter and Chaya Greenfeld, filed a form IT-201 resident income tax return for each of the years 2004, 2005 and 2006. More specifically, petitioners' form IT-201 for the year 2004 was filed on November 25, 2005, while their forms IT-201 for the years 2005 and 2006 were filed on March 21, 2008. These latter forms were filed in response to written requests by the Division of Taxation (Division), commencing on or about September 21, 2007. These latter forms were filed directly with the auditor assigned by the Division to conduct an audit of petitioners returns for the years 2004 through 2006. This audit coincided with a then-ongoing audit of an entity known as B & H Healthcare Services, Inc., dba Nursing Personnel Homecare (B & H), of which petitioner Walter Greenfeld was president and in which he held a 2.5% ownership interest during B & H's fiscal year ended June 30, 2005, and a 3.75% ownership interest during B & H's fiscal year ended June 30, 2006.

2. The Division's auditor reviewed the items set forth on the foregoing income tax returns, in comparison to information received from the Internal Revenue Service (IRS) and information set forth on various documents and schedules issued by B & H. This review resulted in various adjustments increasing petitioners' income for the years at issue, as detailed hereafter.

\_\_\_\_ 3. For the year 2004, the Division increased petitioners' income to reflect unreported management fees shown on form 1099-Misc (miscellaneous income) as paid by B & H to petitioner Walter Greenfeld in the amount of \$807,122.00. This increase resulted in additional New York State and New York City taxes in the respective amounts of \$68,805.00 and \$39,902.00.

4. For the year 2005, the Division increased petitioners' income by the amount of \$291,491.00, on the basis of the following adjustments:

- a) an increase representing unreported interest income shown on form K-1 (partner's share of income, credits, deductions, etc.) as paid by B & H to petitioner Walter Greenfeld in the amount of \$621.00;
- b) an increase representing unreported gross receipts per schedule C (profit or loss from business) based on form 1099-Misc as paid by B & H to petitioner Walter Greenfeld in the amount of \$42,036.00;
- c) an increase representing unreported income shown on form 1099-B (proceeds from broker and barter exchange transactions) as paid by an entity known as First Clearing, LLC to petitioner Walter Greenfeld in the amount of \$109,696.00; and
- d) an increase to income representing the disallowance of a claimed deduction for payments to a SEP (Simplified Employee Pension) qualified plan reported as having been made by petitioner Walter Greenfeld in the amount of \$139,138.00.

These increases resulted in additional New York State and New York City taxes in the respective amounts of \$33,670.00 and \$19,459.00.

5. For the year 2006, the Division increased petitioners' income by the amount of \$636,550.00, on the basis of the following adjustments:

- a) an increase representing unreported interest income shown on form K-1 as paid by B & H to petitioner Walter Greenfeld in the amount of \$6,026.00;
- b) an increase representing unreported gross receipts per schedule C based on forms 1099-Misc as paid by B & H to petitioner Walter Greenfeld in the amount of \$312,128.00;

c) an increase representing unreported income shown on form 1099-B as paid by an entity known as First Clearing, LLC to petitioner Walter Greenfeld in the amount of \$211,581.00; and

d) an increase to income representing the disallowance of a claimed deduction for payments to a SEP qualified plan reported as having been made by petitioner Walter Greenfeld in the amount of \$106,815.00.

These increases resulted in additional New York State and New York City taxes in the respective amounts of \$54,359.00 and \$28,949.00.

6. The Division made numerous written requests for documents concerning the foregoing items subjected to audit adjustment, including a "final request," dated May 8, 2013, seeking the following items to be submitted by June 10, 2013:

a) a completed schedule C questionnaire;

b) copies of federal tax returns with all schedules and attachments for the years 2004, 2005 and 2006, as well as copies of all amended federal tax returns for such years;

c) a federal audit history, including information concerning any ongoing or recently completed audits, together with copies of any resulting revenue agent reports as well as information concerning any changes reported to New York State together with copies of any documents filed in connection therewith and proof of payment;

d) breakdowns of all schedule C gross receipts and expenses reported for 2004, 2005 and 2006, including the names and identification numbers of all payors listed thereon;

e) copies of all form 1099-Misc and supporting third party documents supporting the total gross receipts for the years 2004, 2005 and 2006;

f) schedules and a breakdown of all gifts to charity that were reported on schedule A (itemized deductions) for the years 2004, 2005 and 2006;

g) bank statements and cancelled checks to support the gifts to charity in the amount of \$339,789.00 claimed for the year 2006; and

h) third party documents to support the SEP, Simple IRA contributions that were claimed for the years 2005 and 2006.

7. By a letter dated July 31, 2013, the Division noted that petitioners had provided no documents pertaining to the audit for review, and advised petitioners that if the requested documents were not provided by August 30, 2013, the audit would be closed based upon the information available to the Division.

8. On December 13, 2013, the Division issued to petitioners a notice of deficiency (assessment ID L-040530996), asserting additional New York State and New York City personal income taxes due for the years 2004, 2005 and 2006, as follows:

a) 2004: New York State and New York City taxes in the respective amounts of \$68,805.00 and \$39,902.00, plus penalties for negligence under Tax Law § 685 (b) (1) and (2), plus interest.

b) 2005: New York State and New York City taxes in the respective amounts of \$33,670.00 and \$19,459.00, plus penalties for failure to timely file under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2), plus interest.

c) 2006: New York State and New York City taxes in the respective amounts of \$54,359.00 and \$28,949.00, plus penalties for failure to timely file under Tax Law § 685 (a) (1) and for negligence under Tax Law § 685 (b) (1) and (2), plus interest.

9. None of the additional documents requested during the course of the audit were provided by petitioners. On November 10, 2014, the Division's auditor received from petitioners' then-representative an amended resident income tax return (form IT-201-X) for each of the years 2004, 2005 and 2006. Neither the listed preparer of the amended returns, nor either of the petitioners, signed the amended returns, and as a consequence, the auditor did not accept the same for filing or processing.

10. At the hearing, petitioners submitted the following:

a) three identically formatted spreadsheet-style schedules titled "schedule of management fees paid to Walter Greenfeld." These documents reflect, for each of

the fiscal years spanning July 1 through June 30, 2004, 2005 and 2006, columns listing dates, numbers (presumably check numbers), names (including Walter Greenfeld as well as several other names) and dollar amounts. Accompanying these three documents were unsigned copies of federal and New York State income tax returns (form 1040 and form IT-201, respectively), and unsigned copies of amended federal and New York State income tax returns (form 1040X and form IT-201-X) pertaining to petitioners for the years 2004, 2005 and 2006. These schedules and accompanying documents were not further explained on the record, including any means of distinguishing names thereon that would appear to be entities from those that would appear to be individuals;

b) a spreadsheet-style schedule titled "List of Checks Found in Management Fees Payments in B & Healthcare's Books." This schedule reflects columns listing dates, numbers (presumably check numbers), payees, accounts ("NPH Chase" and "NFB Operating"), and amounts for each of the years 2004, 2005 and 2006. Included with this schedule were copies of checks in payment to the names listed on the schedule. There are no listed payments to Walter Greenfeld, but rather each of the listed payee names appear to be entities, including therein four payments listed as made to "Walter Greenfeld Charitable Foundation." This schedule and its accompanying checks were not further explained on the record; and

c) an untitled spreadsheet-style schedule reflecting columns listing "congregation name," "check number," "amount," "date," and "endorsed." Included with this schedule were copies of checks in payment to the names listed on the schedule. The checks accompanying the schedule were drawn on three bank accounts, to wit, Chase Bank, in the name of "W. Greenfeld and C. Greenfeld," Bank of America, in the name of "Walter Greenfeld," and Fleet Bank, in the name of "Walter Greenfeld." Each of the listed payee names appear to be entities, with the exception of a significant number of payments listing the "congregation name" as "cash." This schedule and accompanying checks were not further explained on the record.

11. Petitioners submitted a one-page document summarily disputing the Division's audit adjustment amounts for each of the years in issue (*see* findings of fact 3, 4 and 5), upon the claim that the additional income attributed to petitioners was never received by petitioner Walter Greenfeld. Petitioners offered no argument or evidence with regard to the portion of the audit adjustments for 2005 and 2006 pertaining to disallowed claimed contributions to a pension plan.

12. On March 17, 2017, petitioners requested by correspondence a 60-day extension of the time within which to file a reply brief in this matter. The Administrative Law Judge replied to the parties by correspondence dated March 17, 2017, in which he recounted the history of extension requests by both parties in this matter, including three late-requested extensions by petitioners, and denied petitioners' request for another extension of the due date. By correspondence dated March 21, 2017, petitioners requested that the Administrative Law Judge reconsider his denial of their request for an extension of the due date. That same day, petitioners attempted to file a reply brief. On March 22, 2017, the Administrative Law Judge notified the parties that in light of the history of extension requests in this case, he would not reconsider his denial of yet another extension of the brief due date. By correspondence to the parties dated March 27, 2017, the Administrative Law Judge returned the late-filed brief to petitioners' representative and informed him that it would not be accepted or considered in issuance of the determination in this matter.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge began his determination in this matter by noting the presumption of correctness that attaches to the notice of deficiency and the burden of a petitioner to demonstrate, by clear and convincing evidence, that the deficiency asserted in the notice is erroneous. The Administrative Law Judge identified what petitioners needed to show in order to prevail in this matter, namely, that petitioners did not receive the additional income that was imputed to them pursuant to the audit and that petitioners were actually entitled to the SEP deductions they claimed for the period at issue.

Next, the Administrative Law Judge noted the repeated requests made to petitioners by the Division for documentation supporting their claimed deductions and records that could explain

the discrepancies between B & H and First Clearing LLC filings and the amounts reported by petitioners on their personal income tax returns. The Administrative Law Judge found that petitioners failed to respond in any meaningful manner to those requests during the course of the audit and did not produce any records substantiating their position at the hearing. The Administrative Law Judge made a finding that petitioners only offered unsubstantiated allegations and limited argument at the hearing in response to the Division's audit results. Thus, the Administrative Law Judge concluded that petitioners had not borne their burden of showing that the additional tax asserted in the notice of deficiency was erroneous.

Although the Administrative Law Judge observed that petitioners did not allege that the imposition of penalties in this matter was improper, he noted petitioners' failure to introduce any evidence at the hearing that would support the abatement of such penalties. Accordingly, the Administrative Law Judge concluded that petitioners failed to show reasonable cause for abatement of the penalties imposed and sustained the same.

Accordingly, the Administrative Law Judge denied the petition and sustained the notice of deficiency dated December 13, 2013.

#### ***ARGUMENTS ON EXCEPTION***

Petitioners argue on exception that the Division has not shown that petitioners actually received the additional income resulting in a deficiency of tax for the years 2004, 2005 and 2006 and deny receiving that income. Thus, petitioners argue that the assessment itself is arbitrary and capricious. Petitioners also argue that they were denied due process when the Administrative Law Judge denied their request for an extension of the due date for their reply brief and did not consider their late-filed brief in his determination, claiming that this indicated the Administrative Law Judge's bias against them and prejudgment of their case.



The Division argues that petitioners have not borne their burden of proof in demonstrating by clear and convincing evidence that the notice of deficiency was erroneous. The Division states that it does not bear the burden of showing the propriety of a deficiency. The Division argues that the rational basis needed to sustain a notice of deficiency is provided through the presumption of correctness raised by the issuance of the assessment itself. Finally, the Division argues that petitioners failed to make a motion for the recusal of the Administrative Law Judge as provided under our rules of practice and procedure, and, in any case, petitioners' allegations of prejudicial bias are unsubstantiated.

### ***OPINION***

We begin our decision with a discussion regarding the notice of deficiency issued to petitioners on December 13, 2013. It is well-established that when the Division issues a notice of deficiency to a taxpayer, a presumption of correctness attaches to the notice (*Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993], *Matter of Tavalacci v State Tax Commn.* 77 AD2d 759 [3d Dept 1980]). The Tax Law provides that, except in circumstances not applicable here, a taxpayer bears the burden of proof by showing through clear and convincing evidence that a deficiency assessment is erroneous (*see Matter of O'Reilly*, Tax Appeals Tribunal, May 17, 2004; *Matter of Tavalacci*; Tax Law § 689 [e]).

Here, petitioners did not meet their burden of proof by showing by clear and convincing evidence that the notice of deficiency was incorrect or erroneous. Our review of the record in this matter shows that the Division's multiple requests to petitioners for documentation substantiating the income and deductions that petitioners claimed for the periods at issue went unanswered. Furthermore, the transcript of the hearing demonstrates that Mr. Greenfeld was

aware of the requests for documentation during the course of the audit and that any further opportunity to present additional substantiating documentation would be limited to the hearing itself. Despite this, petitioners failed to present any source documentation (e.g. federal audit results, schedule C gross receipts and expenses, copies of forms 1099-Misc and third party documents supporting total gross receipts and SEP contributions) that could have supported their position that they never received the income imputed to them as a result of the audit of B & H or that they actually incurred the deductible SEP contributions claimed on their personal income tax returns. The submissions that petitioners made at the hearing before the Administrative Law Judge (*see* findings of fact 10 and 11) do not rise to the level of clear and convincing evidence necessary to overcome the presumption of correctness that attaches to the notices of deficiency (*see Bello v Tax Appeals Trib. of State of N.Y.*, 213 AD2d 754 [3d Dept 1995]). While perhaps seeming to support petitioners' position, such submissions lack any underlying testimony explaining their relevance or any accompanying third-party information that would confirm the amounts petitioners claim as gross receipts and SEP contributions. We thus concur with the Administrative Law Judge that petitioners have failed to meet their burden of proving error in the Division's audit results.

In their brief on exception, petitioners claim that the assessment is arbitrary and capricious because the audit results fail to make rudimentary mathematical sense. We cannot agree. Although a determination of tax must have a rational basis in order to be sustained, the presumption of correctness raised by the issuance of the assessment itself provides such rational basis (*Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). Our examination of the auditor's work papers offered into evidence at the hearing by the Division confirms the amounts assessed in the notice of deficiency. We are able to ascertain that

the auditor determined that Mr. Greenfeld received \$807,122.00 in management fees from B & H in 2004, \$598,591.00 in business income and capital gains in 2005 and \$803,454.00 in business income and capital gains for 2006. Petitioners misunderstand that the additional business income and capital gains for years 2005 and 2006 were not included as part of the management fee income imputed to Mr. Greenfeld for 2004 by the auditor.<sup>1</sup> The difference between what the auditor determined and what petitioners reported on their personal income tax returns was \$807,122.00 for 2004, \$152,353.00 in 2005 and \$529,735.00 in 2006, which includes unreported management fee income, other business income and capital gains for those years, according to the auditor's work papers.

We now address petitioners' claim that the Administrative Law Judge assigned to their case developed a personal bias against them and could not serve as an impartial decision maker, thus denying petitioners due process. In support of their claim, petitioners point to the letter dated March 17, 2017 in which the Administrative Law Judge denied petitioners' request for an extension of a due date for their reply brief. Petitioners' reply brief was ultimately filed late and therefore was not considered by the Administrative Law Judge in his determination. Petitioners claim that accepting the late-filed brief would not have prejudiced the Division's case in any way and thus should have been accepted and considered by the Administrative Law Judge.

Under our rules of practice and procedure, any party may make a motion to the supervising administrative law judge for recusal of the administrative law judge assigned to its case on the basis that the administrative law judge has a personal bias with respect to the case (20 NYCRR

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<sup>1</sup> We observe that the \$116,596.73 referred to by petitioners in their brief is a *portion* of the total management fees of \$807,122.00 found by the auditor to have been paid by B & H to Mr. Greenfeld pursuant to the audit of B & H (*see* petitioners' exhibit 2). This is not to be confused with the typographical errors we found in the Administrative Law Judge's determination as issued, which we have corrected as set forth in the findings of fact herein (*see* findings of fact 4 and 5).

3000.8 [a] [1]). Such a motion must be accompanied by an affidavit setting forth the facts upon which the assertion of bias is based with notice to the other party, who is given an opportunity to respond (20 NYCRR 3000.8 [a] [2] - [3]). The supervising administrative law judge then reassigns the case or denies the motion by an order (20 NYCRR 3000.8 [a] [4]). However, we must here note that petitioners did not make a motion to the supervising administrative law judge for recusal of the Administrative Law Judge, despite having six months to do so before the issuance of the determination.

Without the benefit of a statement of facts upon which the claim of bias is predicated, we must consider whether the Administrative Law Judge's denial of petitioners' request for another extension of a brief due date was an abuse of discretion that had the effect of denying petitioners due process. The State Administrative Procedure Act (SAPA) and our rules of practice and procedure authorize administrative law judges to "fix the time for filing of legal memoranda and other documents" (SAPA § 304 [4]; 20 NYCRR 3000.15 [c] [3]). We do not think it was an abuse of discretion by the Administrative Law Judge to deny a request for an extension of a due date under the facts here presented, especially where petitioners requested and were granted multiple prior extensions (*see Matter of Williams*, Tax Appeals Tribunal, September 1, 1994).

We must also consider petitioners' argument that the Administrative Law Judge exhibited bias against petitioners or the substance of their case, thereby denying petitioners due process. Petitioners point to the Administrative Law Judge's refusal to accept the late-filed brief in his correspondence dated March 27, 2017 as evidence of this alleged bias. We do not agree. In that letter, the Administrative Law Judge explained that could not accept the brief after notifying petitioners of the final due date in his prior letter denying the due date extension request (*see* finding of fact 12). As previously discussed, administrative law judges have wide discretion in

fixing the time for the filing of documents pursuant to a proceeding before the Division of Tax Appeals. We will not disturb an administrative law judge's decision to exclude a brief from consideration where there exists a pattern of late-requested extensions of the due date and a clear confirmation of the final due date for that brief (*see Matter of O'Keh Caterers*, Tax Appeals Tribunal, November 5, 1992 [holding that the circumstances of the individual case determine whether the late filing of a brief requires striking the same]). We conclude that petitioners have failed to show that Administrative Law Judge's correspondence demonstrated a bias against them or the substance of their case.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Walter and Chaya Greenfeld is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Walter and Chaya Greenfeld is denied; and
4. The notice of deficiency dated December 13, 2013 is sustained.

DATED: Albany, New York  
March 7, 2019

s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

/s/ Dierdre K. Scozzafava  
Dierdre K. Scozzafava  
Commissioner

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner