

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition

of

**YESENIA ALMONTE**

DECISION  
DTA NO. 827891

for Revision of a Determination or for Refund of Personal  
Income Tax under Article 22 of the Tax Law for the Year  
2014.

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Petitioner, Yesenia Almonte, filed an exception to the determination of the Administrative Law Judge issued on December 12, 2019. Petitioner appeared by Greenspan & Greenspan, P.C. (Leon J. Greenspan, Esq., and Michael J. Greenspan, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Ellen Krejci, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on May 18, 2020, the date that petitioner’s reply brief was received.

***ISSUE***

Whether the Division of Taxation’s imposition of tax preparer penalties against petitioner, pursuant to Tax Law former § 685 (aa) (1), was proper and should be sustained.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge, except findings of fact

5, 16 and 17, which we have edited for clarity, and finding of fact 38, which we have omitted. These facts, so modified, are set forth below.

1. Petitioner, Yesenia Almonte, was a New York State registered tax return preparer who prepared over 2,000 personal income tax returns in the year 2015. Petitioner offered tax preparation services at an office located at 275 East Gun Hill Road, Bronx, New York, beginning in January 2015 and lasting through July 2015.

2. The Division of Taxation (Division) has a team within its Income/Franchise Desk Audit Division that analyzes groups of tax returns filed during a tax season for suspicious activity, fraudulent activity, and identity theft.

3. Jason Huneau, a Tax Technician 2 in the Division's Income/Franchise Desk Audit Division, testified at the hearing.<sup>1</sup> Mr. Huneau is part of the Income/Franchise Desk Audit Division analysis team. He was part of the analysis team that analyzed groups of personal income tax returns for tax year 2014 that were filed in the year 2015.

4. Mr. Huneau explained that the analysis team looks at groups of filed returns for patterns of business losses, capital losses, other losses, and itemized deductions claimed on such returns. The team then looks at the geographic location from which the returns were filed based upon the internet protocol address, and the preparer identification number listed on such returns.

5. Mr. Huneau testified that on an unidentified date in February 2015, the analysis team noticed that over 50% of the 2014 returns prepared by petitioner claimed other losses, capital losses, or federal adjustments to income. Shortly thereafter, the analysis team referred petitioner's name to the Division's Office of Professional Responsibility for outreach to discuss

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<sup>1</sup> At the time of the hearing, Mr. Huneau had been a Tax Technician 2 for about a year and a half.

the federal adjustments to income, other losses, and capital losses claimed on the 2014 tax returns prepared by her.

6. On February 23, 2015, Richard S. Ernst, then Deputy Commissioner in the Division's Office of Professional Responsibility, sent a letter to petitioner at her East Gun Hill Road business address, which stated the following:

"It has come to my attention that a large percentage of the 2014 New York State Personal Income Tax Returns that you have prepared claim certain deductions. These include capital losses, other gains or losses, business losses and/or federal adjustments to income for student loan interest.

Of the 1408 returns [sic] 2014 New York State PIT returns that you have prepared, 691 of these returns claim a federal adjustment to income of \$2,500 or more which reduced your client's taxable income.

A taxpayer can only claim a Business Loss on line 6 if they operated a business or practiced their profession as a sole proprietor. Documentation for both the income and expenses should be available for verification.

A taxpayer can only claim a Capital Loss on Line 7 if they sold a capital asset, such as a stock or bond. Documentation of both the cost or basis value and the sales price should be available for verification of the capital loss claimed.

A taxpayer can only claim a loss on line 8, Other Gains or Losses, if they sold or exchanged assets used in a trade or business. For further information, please see the instructions for IRS Form 4797.

Finally, a taxpayer should only take a deduction for student loan interest as a federal adjustment to income if all the following apply.

- The Taxpayer paid interest in 2014 on a qualified student loan - any loan they took out to pay the qualified high education expenses for themselves, their spouse or their dependent.
- Their filing status is any status except married filing separately.
- Their modified adjusted gross income (AGI) is less than: \$80,000 if single, head of household, or qualifying widow(er); \$160,000 if married filing jointly.

- They or their spouse, if filing jointly, are not claimed as a dependent on someone else's (such as their parent's) 2014 tax return. In most cases, form 1098-E will be issued by the lending institution.

Many of the 2014 New York State Personal Income Tax returns that you prepared claim two deductions which your clients may not be entitled to. It is critical that you make sure that your clients have the proper documentation prior to your claiming a deduction [on] [sic] their return [sic].

Thank you for your attention to this matter.”

7. Subsequently, on March 26, 2015, the Division's Office of Professional Responsibility sent a letter to petitioner at a Hoffman Street, Bronx, New York, address. The record includes both the February 23, 2015 and March 26, 2015 letters from the Office of Professional Responsibility to petitioner. Review of those letters indicates that the contents of both letters were identical. Mr. Huneau stated that he did not know why the March 26, 2015 letter was sent to petitioner.

8. The Division's Audit Division-Income/Franchise Desk-AG1 issued a notice of deficiency, notice number L-043263489, dated June 30, 2015, against petitioner asserting penalty in the amount of \$713,000.00 for tax year 2014. The computation section of the notice states, in relevant part, the following:

“Based on a review of your filing history as a tax preparer, we have determined that you have repeatedly prepared returns for taxpayers reporting other losses from federal form 4797 on line 8 of the New York State IT-201. Audits conducted on these returns have established no proof of entitlement to these deductions.

A taxpayer can only claim Other Gains or Losses, if they sold or exchanged assets used in a trade or business.

We have audited 713 returns prepared by you that report other losses, but none of the audited returns conform to these established guidelines.

As a preparer, you should have reasonably known the proper tax treatment for reporting Other Gains or Losses as an adjustment to income.

Therefore, a penalty has been imposed under 685(aa) of the New York State Tax Law. The penalty is \$1,000 for each return reporting the understatement of liability based on the claim for other losses.

This penalty applies to the returns you prepared for the taxpayers on the enclosed attachment.

This notice applies to the returns filed for the 2014 tax year.

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If you have questions concerning this audit determination, please call (518) 453-4874.”

9. In addition to referring petitioner to the Office of Professional Responsibility, Mr. Huneau stated that the analysis team recommended that returns prepared by petitioner that claimed other losses and federal adjustments to income be reviewed by desk audit. He testified that of the 2,176 returns filed by petitioner, 1,019 returns claimed other losses and the Division conducted desk audit reviews of 713 of those returns. Mr. Huneau stated that he did not know if all the taxpayers were issued inquiry letters as part of the audits of their returns.

10. Mr. Huneau did not review all 713 returns. Rather, 8 to 10 members of the analysis team reviewed the returns. No one member of the analysis team reviewed all 713 returns.

11. In discussing the possible imposition of tax preparer penalties, the analysis team looks at the tax preparer's behavior in light of the elements set forth in Tax Law former § 685 (aa) (1) and decides whether the tax preparer's behavior meets the criteria. Mr. Huneau testified that after the analysis team reviewed the returns that petitioner prepared for tax year 2014, it concluded that there was not a reasonable belief for the tax position petitioner had taken on the returns she filed, and the imposition of the tax preparer penalty was appropriate. In forming its conclusion, Mr. Huneau testified that the analysis team relied upon the following:

- (a) The number of returns that claimed the other loss, “which is usually uncommon.”
- (b) The missed information on forms 4797 attached to some returns, i.e., the lack of information other than the loss amount figure reported on line 7 of form 4797.
- (c) “Many” returns had the same sale amount reported for listed property on the form 4797.
- (d) The amount by which the claimed other losses reduced the federal adjusted gross income on the returns and the effects such other losses had on the refunds requested on the returns.
- (e) None of the taxpayers, who were contacted via correspondence, provided to the audit division any evidence corroborating the claimed other losses.

12. Mr. Huneau stated that the analysis team discussed the imposition of the penalty at \$1,000.00 for each return in a “regular meeting.” He further stated that the analysis team decided to issue the penalty at \$1,000.00 for each return based upon the “egregious nature of the full case,” and because her conduct regarding preparing returns claiming other losses did not change even after receiving two letters from the Office of Professional Responsibility advising her of what was required of her as a tax preparer. In addition, Mr. Huneau explained that the analysis team assessed the penalty based upon the improper position taken on all of the returns, on the date each such return was prepared and filed.

13. Someone in the Division’s audit division caused the notice of deficiency to be issued to petitioner on June 30, 2015. Mr. Huneau thought it was Delores Correll, who at that time was a Tax Technician 2 on the analysis team.

14. With respect to the due diligence required by a tax preparer to make a determination regarding whether to file form 4797 for a particular taxpayer, Mr. Huneau stated that the tax

preparer should probably ask the taxpayer a few questions and maybe ask “to see some proof of the sale or exchange.”

15. At the hearing, the Division submitted selected documents from the audit file related to petitioner’s case. Included in this 131-page submission were, among other documents, six returns prepared by petitioner for tax year 2014<sup>2</sup> and a 17-page spreadsheet containing information regarding returns prepared by petitioner for tax year 2014.

16. The 17-page spreadsheet contains information concerning a total of 713 returns petitioner prepared for tax year 2014 and are the returns for which the \$1,000.00 per return penalty was assessed. At the top of each page of the spreadsheet, nine separately-headed columns contain return information including the document locator number, the taxpayer’s first name and possibly middle initial, the taxpayer’s social security number,<sup>3</sup> federal adjusted gross income claimed on the return, wages claimed on the return, business income or loss claimed on the return, other gains or losses claimed on the return, the refund requested on the return, and the refund allowed after adjustments by the Division. The record is silent regarding the creator of this undated spreadsheet.

17. Review of the last column on the 17-page spreadsheet, representing the refund allowed after adjustments by the Division, indicates that the amount of \$0.00 is listed for 231 taxpayers and no dollar amount is listed for three taxpayers. Mr. Huneau testified that he did not know whether each taxpayer whose refund allowed after adjustments by the Division was \$0.00 received an assessment or a notice of refund denial.

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<sup>2</sup> All information concerning the taxpayer has been redacted on each return, except for the first name and last four digits of the social security number.

<sup>3</sup> The first five numbers of all listed social security numbers have been redacted for confidentiality.

18. Of the six returns submitted into the record as examples of the audited returns, only one return was included in the 713 returns listed on the spreadsheet. It was a return prepared by petitioner on February 16, 2015 for a taxpayer named “Kxxxxx.” Review of that return indicates that the only information on form 4797 is a claimed loss of \$9,882.00. It is noted that wages in the amount of \$47,908.00 were reported on this return.

19. The record does not include the date on which each of the 713 returns were filed with the Division, the date and type of inquiry, if any, made by the Division regarding each return, the date and type of response, if any, from each taxpayer, and the date and type of notice issued to the taxpayer regarding the refund amount allowed, if any, and the adjustments made to the refund requested on such return. It also does not include a sample inquiry letter that may have been sent as part of the audit of the 713 returns.

20. The record does not include either the total number of returns that lacked information on the form 4797, or the total number of returns that contained the same sale prices on the form 4797.

21. The Division submitted into the record the “2014 Instructions for Form 4797” (form 4797 instructions). In the “General Instructions” section of the form 4797 instructions, the purpose of the form is set forth as follows:

“Use Form 4797 to report:

- The sale or exchange of:
  1. Property used in your trade or business;
  2. Depreciable and amortizable property;
  3. Oil, gas, geothermal, or other mineral properties; and
  4. Section 126 property.
  
- The involuntary conversion (from other than casualty or theft) of property used in your trade or business and capital assets held in connection with a trade or business or a transaction entered into for profit.



- The disposition of noncapital assets (other than inventory or property held primarily for sale to customers in the ordinary course of your trade or business).
- The disposition of capital assets not reported on Schedule D.
- The gain or loss (including any related recapture) for partners and S corporation shareholders from certain section 179 property dispositions by partnerships (other than electing large partnerships) and S corporations.
- The computation of recapture amounts under sections 179 and 280F(b)(2) when the business use of section 179 or listed property decreases to 50% or less.
- Gains or losses treated as ordinary gains or losses, if you are a trader in securities or commodities and made a mark-to-market election under Internal Revenue Code section 475(f).”

22. In or about 2011, petitioner took a tax preparation course at H&R Block. Other than preparing tax returns as part of the course, petitioner never worked for H&R Block as a tax return preparer. At the time of the hearing, petitioner was pursuing an associate’s degree in accounting at Brown Community College.

23. The year 2015 was the first year that petitioner prepared tax returns professionally. Beginning in January 2015, petitioner rented an office at East Gun Hill Road for 12 months at \$1,100.00 per month. Petitioner bought everything she needed for the business with start-up money from family. She chose Drake software as her tax preparation software because it was a popular tax preparer software that she heard about during conversations at the H&R Block course, and by navigating the internet. Petitioner installed the software herself with telephone help from Drake, and Drake provided her with a CD that had a tutorial on how to use the software. Petitioner developed a standard questionnaire that asked each client for basic information, including, among other items, first and last name, address, date of birth, children, and social security number. This standard questionnaire was used by petitioner at the time she interviewed each client before she prepared the client’s tax return.

24. Some of petitioner's clients were people she knew. However, the majority of her clients were walk-ins who heard about petitioner's tax preparation business from employees of Prestige Car, a local cab company for which petitioner had worked.

25. Petitioner employed two people to help maintain order, book appointments, and collect the client's information. Petitioner paid both employees in cash. She did not file any withholding taxes or file forms W-2 on behalf of those employees.

26. With regard to her preparation of tax returns for her clients, petitioner had a standard procedure. First, the questionnaire would be filled out by the client. Next, one of her employees would attach any tax documents and information that the client had brought to the completed questionnaire. Thereafter, petitioner would meet with the client, at which time, petitioner would review the questionnaire and the attached documents, and conduct an interview of the client. Then, petitioner prepared the tax return for the client.

27. For clients who owned businesses, petitioner would ask them questions about their businesses and the information provided to her regarding the same.

28. Petitioner explained that one of her clients showed her the form 4797 and stated that his losses from a business loaning money to others could be reported on that form. Petitioner stated that she was unfamiliar with claiming business losses on form 4797 before her client came in stating that such losses could be claimed on that form. To determine whether it was appropriate to report the business losses for her client on form 4797, she reviewed her books from H&R Block, the form 4797, and information on the Internal Revenue Service (IRS) website.

29. Many of petitioner's clients had losses from their investments in a business loaning money to others, which business turned out to be a pyramid scheme. To learn about that particular loan business, petitioner used the internet, and asked people knowledgeable about the

subject. Petitioner learned that it had been very popular business in which to invest because it offered to pay interest on amounts invested in the same.

30. Petitioner stated that many of her clients came to her and stated that they had sustained business losses in 2014, and based upon research that they had conducted, they knew that they could report such losses on their returns. In completing the form 4797 for each client, petitioner used the written information provided to her by the client. For losses connected to the loan business, the clients provided their personal notes of dates and amounts provided to the business to use as loans, and the dates the clients requested the return of same from the business. They did not provide copies of cancelled checks showing the amounts invested. Because the losses were so large, petitioner stated that she could not report them on schedule D, so she reported them on form 4797. With respect to the due diligence petitioner used in preparing the forms 4797 and the tax returns, petitioner verified the information that she had on hand, which was the information she received from the clients.

31. In her preparation of all tax returns for tax year 2014, petitioner used and relied upon the back-up documentation and information provided by her clients. She kept a copy of all documents and information used in the preparation of each client's tax return. Petitioner testified that she had the documents used in the preparation of each client's return in storage. Petitioner, at the hearing, emphatically denied having the intent to cheat the state through her preparation of the 713 returns.

32. Petitioner, at the hearing, admitted that she prepared the 713 returns that were used as the basis for the \$1,000.00 per return penalty imposed by the Division. When she received the notice of deficiency, petitioner reviewed the attached list of taxpayers' names and did not recognize any name. Prior to the issuance of the notice of deficiency, no client contacted her

regarding the Division's audit of the return she had prepared for such client. She did not recall any client contacting her after the notice of deficiency was issued.

33. Petitioner stated that she never received either the February 23, 2015 or March 26, 2015 letter from the Office of Professional Responsibility, and the first time she saw the February 23, 2015 letter was at the hearing. With respect to the March 26, 2015 letter, petitioner explained that the letter bore the former address of her mother, and her mother did not reside at that address in 2015.

34. Petitioner charged from \$75.00 to a maximum of \$350.00 for preparation of a tax return. She exercised her discretion and negotiated with the client in determining the amount charged for the preparation of the return. Petitioner prepared returns for people she knew personally for free. She did not charge 50 people for the preparation of their returns.

35. Petitioner admitted that she did not report the income from her tax preparation business on her 2015 personal income tax return because she "didn't know how to handle" the cash and the amounts received through the Drake software system, and acknowledged that she needed to file an amended return for tax year 2015.

36. Petitioner prepared tax returns professionally for tax year 2014 only. At the time of the hearing, petitioner worked as a driver for Lyft.

37. On or about July 3, 2015, petitioner received the notice of deficiency. She immediately retained Leon Greenspan, Esq., as her representative. On August 13, 2015, petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). A BCMS conciliation conference was held on May 3, 2016. Subsequently, BCMS issued a conciliation order, CMS No. 267564, dated September 23, 2016, denying the request and sustaining the notice of deficiency, notice number L-043263489.

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

The Administrative Law Judge began her determination by referring to Tax Law former § 685 (aa) (1), which provides that taxpayers may be liable for a penalty of up to \$1,000.00 per return filed for taking a reporting position for which there was not a reasonable belief that the tax treatment in that position was more likely than not the proper treatment. The Administrative Law Judge continued by noting that the taxpayer bears the burden of showing that a notice of deficiency issued by the Division is incorrect as notices of deficiency are presumed to be correct until the contrary is established.

The Administrative Law Judge next summarized petitioner's argument that an assessment of the tax preparer penalty based on actions that occurred before the statute's expiration on July 1, 2015, cannot be maintained because the notice of deficiency was issued after the expiration of the statute. According to the Administrative Law Judge, petitioner argues that because no enforcement of the penalty can take place before assessment, and because assessment of a penalty arising under Tax Law former § 685 (aa) (1) could not occur until after 90 days from the issuance of the notice of deficiency, the Division cannot assess a penalty for actions that occurred before expiration of Tax Law former § 685 (aa).

The Administrative Law Judge rejected petitioner's arguments that actions and positions taken before the expiration of the tax preparer penalty statute cannot be the basis for a proposed penalty as stated in a notice of deficiency. The Administrative Law Judge found that it does not matter when the proposed assessment, as given in the notice of deficiency, could become fixed and final; rather, what matters is what the law was at the time the actions occurred for which the penalty was imposed. The Administrative Law Judge described the impetus for the Division's determination to assess the penalty as petitioner's filing of 713 tax returns containing a

suspicious reporting position, which happened during the 2014 tax filing season and before the expiration of Tax Law former § 685 (aa). According to the Administrative Law Judge, the repeal of the tax preparer statute did not affect the actions taken by petitioner or the liability incurred based on those actions.

Next, the Administrative Law Judge addressed petitioner's due process argument; namely, that petitioner was not provided notice and opportunity to be heard before issuance of the notice of deficiency here at issue. The Administrative Law Judge found that the Division is not required to request books or records or even to issue a proposed statement of audit changes before issuing a notice of deficiency. All that is required, according to the Administrative Law Judge, is that the Division has a rational basis for its determination. The Administrative Law Judge found the Division's determination of a high incidence of missing or incomplete ancillary return information for the 713 returns filed by petitioner and audited by the Division, together with the taxpayers' inability to substantiate the losses claimed, to comprise the requisite rational basis. As for petitioner's contention that she was not afforded due process, the Administrative Law Judge observed that petitioner was provided with a notice granting the opportunity to be heard, which she exercised by requesting a BCMS conference and initiating an appeal of the subsequent conciliation order with the Division of Tax Appeals.

The Administrative Law Judge next addressed whether petitioner had borne her burden of demonstrating by clear and convincing evidence that the penalty was erroneously imposed. The Administrative Law Judge considered whether petitioner's actions were reasonable in determining what the correct tax treatment was for the 713 returns that formed the basis for the tax preparer penalty. Although petitioner claimed to have done internet research and consulted with others regarding the proper tax treatment for her clients' claimed losses, when considering

petitioner's education and training together with the lack of supporting documentation from petitioner's clients for this tax reporting position, the Administrative Law Judge concluded that petitioner should have known that the chosen reporting position was not likely to be the correct one. As Tax Law former § 685 (aa) is a negligence penalty, it is only required that there not be a reasonable basis for the reporting position taken, and as such, the Administrative Law Judge concluded that the record supported the Division's determination to impose the tax preparer penalty. Furthermore, the Administrative Law Judge found that petitioner's argument that she acted in good faith was undermined by petitioner's failure to report her own income and failure to withhold and submit income tax of her employees while operating her tax preparation business.

The Administrative Law Judge then addressed petitioner's contention that the total amount of the penalty imposed was arbitrary or capricious because the Division failed to consider the proper amount of penalty to impose for each individual return filed. In order to demonstrate entitlement to an abatement of penalties, petitioner is required to establish reasonable cause and absence of willful neglect, according to the Administrative Law Judge. The Administrative Law Judge noted that the evidence presented by the Division regarding the egregious nature of the incorrect reporting position, including the lack of substantiation of the losses claimed, the lack of a reasonable belief that the position taken was more than likely the correct one, and the high percentage of petitioner's clients' returns on which the position was taken, demonstrated that the Division's imposition of the maximum allowable penalty was appropriate. Petitioner, according to the Administrative Law Judge, was unable to meet her burden of showing entitlement to an abatement of the penalty.

The Administrative Law Judge also considered petitioner's constitutional argument, that the tax preparer penalty statute violated the US Constitution's prohibition against bills of attainder and is facially unconstitutional. However, she declined to consider the same as the jurisdiction of the Division of Tax Appeals does not encompass facial constitutional challenges.

The Administrative Law Judge addressed petitioner's arguments that the testimony of the Division's employee, Jason Huneau, should be excluded because he lacked the necessary qualifications to provide expert testimony. The Administrative Law Judge considered the nature of the testimony given and found that Mr. Huneau testified as a lay witness by sharing information about the audit in which he participated. The Administrative Law Judge found that under New York law, such witnesses may give opinion testimony to the extent that opinion is necessary to describe certain facts accurately. In addition, the Administrative Law Judge found that this Tribunal's Rules of Practice and Procedure explicitly allow for evidence that is relevant and material without necessarily complying with the technical rules of evidence. Similarly, the Administrative Law Judge concluded that petitioner's claim that the audit file should be excluded as hearsay was without merit, finding that an administrative decision supported by substantial evidence retains its validity despite the consideration of hearsay evidence.

The Administrative Law Judge thus denied the petition and sustained the notice of deficiency.

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

Petitioner argues on exception that the Administrative Law Judge erred in determining that the Division's imposition of the tax preparer negligence penalty was proper. In support thereof, petitioner argues that the Administrative Law Judge's determination was not based on substantial evidence in that the Division failed to offer admissible proof of how it came to the



determination to impose the tax preparer penalty. As a result, petitioner claims that the burden of proving the determination to be erroneous or improper never shifted to petitioner. Petitioner also argues that because Tax Law former § 685 (aa) had expired as of July 1, 2015, the Division failed to comply with the assessment procedure provided for under Tax Law § 681, and thus the penalty assessment cannot stand. Petitioner also argues that the penalty itself was arbitrary and capricious in that it was disproportionate to the harm it sought to prevent and the Division failed to consider a penalty less than the maximum allowed under the statute.

The Division states that the Administrative Law Judge correctly determined that the tax preparer penalty was properly imposed. The Division argues that because petitioner's actions that led to the Division's determination to impose the penalty were completed before the expiration of Tax Law former § 685 (aa), the proposed assessment in the notice of the deficiency was valid. The Division also argues that the Administrative Law Judge correctly considered the testimony of Mr. Huneau, as hearsay evidence is allowed in the context of a proceeding before the Division of Tax Appeals, and that petitioner did not meet her burden of proof in showing that the proposed assessment was erroneous. In support thereof, the Division posits that the record demonstrates that the Division's determination to impose the penalty had a rational basis. The Division maintains that the Administrative Law Judge properly concluded that petitioner was afforded due process by being served with a notice of deficiency and exercising her right to protest the proposed assessment of the tax preparer penalty. Finally, the Division argues that the amount of the penalty was not arbitrary and capricious insofar that it acted within its discretion by imposing the maximum allowable penalty when it considered the case as a whole.

***OPINION***

We first consider what effect the deemed repeal of Tax Law former § 685 (aa) as of July 1, 2015 had on the Division's ability to impose the penalty. Tax Law former § 685 (aa) provides for imposition of a penalty of up to \$1,000.00 per return on income tax preparers for tax returns filed that contain understatements of liability for reporting positions that the tax preparer did not have a reasonable belief were the correct tax treatment. It provides, in relevant part:

“(aa) Tax preparer penalty.– (1) If:

(A) any part of any understatement of liability with respect to any return or claim for refund is due to a position for which there was not a reasonable belief that the tax treatment in that position was more likely than not the proper treatment,

(B) any person who is an income tax return preparer with respect to such return or claim knew (or reasonably should have known) of such position, and

(C) such position was not disclosed as provided in subsection (p) of this section or there was no reasonable basis for the tax treatment of that position, such person shall pay a penalty of up to one thousand dollars with respect to such return or claim unless it is shown that there is reasonable cause for the understatement and such person acted in good faith.”

Tax Law former § 685 (aa) expired by the terms of its enabling legislation on July 7, 2007 (*see* L 2005, Ch 61, Part N, § 6) but was extended by subsequent legislative acts and was in effect until its expiration on July 1, 2015. This is not in dispute. Petitioner argues that because the procedure for assessment of the penalty relies on service of a statutory notice of deficiency at least 90 days before the proposed assessment becomes fixed and final (*see* Tax Law § 681 [b]-[c]), the Division was foreclosed from imposing the penalty due to the expiration of the statute before the assessment could possibly become final. We do not agree.

We agree with the Administrative Law Judge that when considering whether an expired penalty statute applies to specific acts, it is the timing of the acts designated for the penalty under

the statute that determines when such penalties are incurred. New York's General Construction Law § 93 states that penalties provided for under a statute that were incurred before repeal of the statute are not affected by full or partial repeal. It provides, in relevant part:

“The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected.”

Here, we note that petitioner's acts that led to the Division's imposition of a tax preparer penalty occurred after the beginning of the 2014 income tax return filing season and before the Division's issuance of the notice of deficiency via certified mail on June 30, 2015, shortly before the deemed expiration of the statute. We have had opportunity to consider the survivability of the tax preparer penalty in this context and found that it is the time when the tax preparer filed the returns in question that is operative for determining whether the penalty may be imposed (*see Matter of Garcia*, Tax Appeals Tribunal, December 1, 2016). The penalty asserted by the Division herein was incurred at the time the returns containing the understatements of liability were filed with the Division. The expiration of Tax Law former § 685 (aa), effective July 1, 2015, does not affect the actions taken by petitioner in filing the returns or the liabilities incurred based upon those actions. Accordingly, the Division may assert the penalties at issue and the Division of Tax Appeals and this Tribunal are required to provide petitioner with a process to protest such penalties (*see also* General Construction Law § 94 [“all actions and proceedings . . . commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed”]).

Having determined that Tax Law former § 685 (aa) was in effect for the audit period, we consider petitioner's argument that Tax Law § 681 (c) prevents the Division's assessment of the tax preparer penalty because petitioner filed a petition within the statutory time frame to protest the notice of deficiency. Harmonizing the provisions of Tax Law § 681 (b) and (c) reveals that a notice of deficiency is a statutory notice of a proposed assessment; that is, it serves as notice of an impending assessment that simultaneously provides the taxpayer (or tax preparer, as is the case here) with protest rights before it becomes fixed and final at the expiration of the 90-day period to request review (*see* Tax Law §§ 681[b]-[c]; 689 [b]). Petitioner's argument incorrectly assumes that an assessment of a penalty is foreclosed from ever becoming final following the expiration of the statute upon which the penalty is based, so long as a timely protest of the notice of deficiency is filed. As we have found that the Division's ability to assert a penalty survives the statute's expiration where the acts that incurred the penalty were performed before such expiration, we find petitioner's argument to be without merit.

Petitioner bears the burden of proving by clear and convincing evidence that the deficiency assessment was erroneous (Tax Law § 689 [e]; *see also Matter of Levin v Gallman*, 42 NY2d 32, 34 [1977]; *Matter of Suburban Restoration Co. v Tax Appeals Trib. of State of N.Y.*, 299 AD2d 751, 752 [3d Dept 2002]). Petitioner charges that the evidence offered by the Division was inadmissible hearsay evidence and thus the burden of proof never shifted to her. Petitioner misconstrues the allocation of the burden of proof required of her as provided under Tax Law § 689 (e):

“(e) Burden of proof. In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

(1) whether the petitioner has been guilty of fraud with intent to evade tax;

- (2) whether the petitioner is liable as the transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax;
- (3) whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed, unless such increase in deficiency is the result of a change or correction required to be reported under section six hundred fifty-nine, and of which change or correction the tax commission had no notice at the time it mailed the notice of deficiency; and
- (4) whether any person is liable for a penalty under subsection (q) or (r) of section six hundred eighty-five of this article.”

Petitioner assumes that she does not bear the burden of proof in proving that the notice of deficiency was erroneous or improper in the first instance, and the Division bears the burden of proving a prima facie case. This is not correct. First, Tax Law § 689 (e) clearly assigns the burden of proof to petitioner, who has not demonstrated an exception to the general rule that would shift the burden to the Division. Secondly, petitioner’s argument that hearsay evidence is insufficient to comprise substantial evidence allowing the Administrative Law Judge to draw reasonable inferences in rendering a determination runs counter to established law. It has been recognized that relevant and probative hearsay evidence is admissible in administrative proceedings (*Matter of Flanagan v New York State Tax Commn.*, 154 AD2d 758 [3d Dept 1989]; *see also* SAPA § 306 [1] [providing that “agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law”]). Further, said evidence may constitute substantial evidence to support an administrative agency’s determination (*id.*; *see also Matter of Callicutt*, Tax Appeals Tribunal, February 8, 1996, *confirmed* 241 AD2d 778 [3d Dept 1997]).

Having examined the record and testimony, we do not find that the Administrative Law Judge erred in concluding that petitioner failed to bear her burden of proof in showing the notice of deficiency to be erroneous. The Division’s witness provided testimony about his involvement

in the audit of petitioner and was able to describe the details of the records created in the course of auditing the returns filed by petitioner. While petitioner testified that she attempted to ascertain the correct tax treatment for the business property losses claimed by her clients, her testimony was vague regarding the sources she consulted. While testifying that she retained the records she collected from her clients and continues to store them, petitioner declined to offer those records into the record in support of her assertion that she had a reasonable belief that the tax treatment of her clients' claimed losses was the correct one. Although this Tribunal is granted the authority to review de novo a determination of an administrative law judge (Tax Law § 2006 [7]; *see* 20 NYCRR 3000.11 [e] [1]), we do not see reason to disturb the Administrative Law Judge's determination with respect to petitioner's failure to meet the burden of proof as allocated to her pursuant to Tax Law § 689 (e).

Lastly, we address petitioner's argument that the tax preparer penalty imposed in this case should be canceled because it is arbitrary and capricious. In support of her argument, petitioner claims that the penalty is completely disproportionate to the economic benefit she gained from her tax preparation business and that the Division failed to consider a penalty less than the maximum allowed. However, petitioner has pointed to no legal basis that the Division is required for any reason to consider a penalty in any amount less than the maximum.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Yesenia Almonte is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Yesenia Almonte is denied; and
4. The notice of determination, dated June 30, 2015 is sustained.

DATED: Albany, New York  
November 19, 2020

/s/ Roberta Moseley Nero  
Roberta Moseley Nero  
President

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

/s/ Anthony Giardina  
Anthony Giardina  
Commissioner