

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
PATRICIA DEVESTA-OWRUTZKY : DETERMINATION
for Redetermination of a Deficiency or for Refund of : DTA NO. 826371
Personal Income Tax under Article 22 of the Tax Law :
for the Years 2008 through 2010. :

Petitioner, Patricia DeVesta-Owrutzky, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 2008 through 2010.

A hearing was held before Herbert M. Friedman, Jr., Administrative Law Judge, in New York, New York, on July 7, 2015 at 10:30 A.M., with all briefs to be submitted by November 14, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Kent Gebert, Esq., and Brian J. McCann, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly attributed additional flow-through income to petitioner, as a shareholder of a subchapter S corporation, for the years at issue.

FINDINGS OF FACT

1. During 2008 through 2010 (years in issue), petitioner, Patricia DeVesta-Owrutzky, timely filed New York State resident income tax returns.

2. During the years in issue, petitioner was a 20% shareholder in LQ511 Corporation (LQ), a subchapter S corporation pursuant to the Internal Revenue Code and Tax Law § 660. She inherited her 20% interest in LQ from her husband upon his death in 2005.

3. Petitioner claimed 20% of LQ's ordinary business losses on her personal income tax returns for the years in issue.

4. In 2011, the Division of Taxation completed a sales tax audit of LQ for the period September 1, 2007 through February 28, 2010, found additional sales by the company in excess of \$3 million and, consequently, sales tax due. LQ consented to the results of the sales tax audit.

5. As a result of the sales tax audit, the Division performed a franchise tax audit of LQ and income tax audits of its shareholders, including petitioner, for the years in issue.

6. For 2008, the Division's audit determined that LQ had \$1,950,690.00 in additional sales receipts, which were added back to LQ's income. Hence, additional net ordinary business income of \$390,138.00 was passed through to petitioner for that year as a 20% shareholder of LQ.

7. For 2009, the Division's audit determined \$939,466.00 in additional sales receipts, which were added back to LQ's income. Hence, additional net ordinary business income of \$187,893.00 was passed through to petitioner as a 20% shareholder, which was reduced to \$25,553.00, after application of ordinary business losses of \$162,340.00 from LQ for that year. Additionally, \$21,154.00 in nonpassive losses from LQ, originally reported by petitioner on her 2009 return, were disallowed.

8. For 2010, the Division's audit determined \$405,717.00 in additional sales receipts, which were added back to LQ's income. Hence, additional net ordinary business income of

\$81,143.00 was passed through to petitioner as a 20% shareholder, which was reduced to \$49,851.00, after application of ordinary business losses of \$31,292.00 from LQ for that year.

9. Additionally, for 2008, the Division disallowed \$3,979.00 of itemized deductions on petitioner's New York state return due to the increase in her federal adjusted gross income from the audit. Her New York State itemized deductions remained as reported for 2009 and 2010.

10. Based on the additional income attributed to petitioner from the audit, the Division also disallowed petitioner's 2009 claimed net operating loss of \$57,510.00, which she had carried forward from 2008. Instead, as petitioner claimed a \$134,034.00 net operating loss on her 2011 New York state personal income tax return, \$21,943.00 was carried back and allowed as a net operating loss on her 2009 return.

11. Based on the additional income attributed to petitioner from the audit, the Division likewise disallowed petitioner's 2010 claimed net operating loss of \$63,099.00, which was carried forward from 2009. Instead, the Division applied \$59,758.00 of petitioner's claimed \$134,034.00 net operating loss from her 2011 New York state personal income tax return as a net operating loss on her 2009 return.

12. Moreover, the Division added back \$6,966.00 in non-New York tax-exempt interest on petitioner's 2008 return.

13. The Division added back \$6,494.00 in non-New York tax-exempt interest on petitioner's 2009 return.

14. The Division added back \$6,975.00 in non-New York tax-exempt interest on petitioner's 2010 return.

15. Based on the Division's audit adjustments, on April 23, 2013, petitioner was issued a Consent to Field Audit Adjustment, asserting the following:

Period	Additional Tax	Penalties	Interest	Total
2008	\$23,894.00	0	\$8,605.00	\$32,499.00
2009	\$404.00	0	\$106.00	\$510.00
2010	0	0	0	0
Total	\$24,298.00	0	\$8,711.00	\$33,009.00

16. Petitioner did not sign the proposed consent. On June 6, 2013, however, petitioner paid \$33,009.00 to the Division for the years in issue.

17. On July 11, 2013, the Division issued Notice of Deficiency number L-039632892-4 to petitioner for tax in the amount of \$24,298.00 and interest in the amount of \$8,711.00, for a total liability of \$33,009.00. The statutory notice also reflected that petitioner was credited with payment of \$33,009.00 and a zero balance due.

18. Petitioner subsequently filed a request for conciliation conference with the Bureau of Conciliation and Mediation Services with regard to the statutory notice. The statutory notice was sustained by conciliation order of March 14, 2014.

19. On June 24, 2014, petitioner filed a petition with the Division of Tax Appeals seeking a refund of her payment of \$33,009.00, “minus \$200.00,” which she considered her “proper tax due under the circumstances.”¹

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioner concedes that the assessment at issue is “probably right,” but questions her overall responsibility for LQ. Additionally, she maintains that she was victimized by her various representatives and shareholders.

¹The petition in this matter was filed after petitioner’s payment of the deficiency listed in the statutory notice. As a result, the petition is treated as a refund claim that has been denied by the Division’s answer.

21. The Division asserts that the franchise and personal income tax audits were a proper result of LQ's sales tax audit. As petitioner was a 20% shareholder of LQ, the Division states that the audit adjustments resulting from the company's additional income were correct.

CONCLUSIONS OF LAW

A. A presumption of correctness attaches to a properly issued notice of deficiency (*Matter of Hickey*, Tax Appeals Tribunal, August 12, 2004; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). In proceedings for review of such a notice, the burden of proof is on the taxpayer to demonstrate by clear and convincing evidence that the deficiency assessment is erroneous (Tax Law § 689[e]). The same standard applies for refund claims.

B. In the instant case, the basis for the statutory notice derived from the Division's sales tax audit of LQ. The additional sales receipts resulted in additional business income to LQ, which, in turn, passed through to its shareholders, including petitioner, who owned a 20% interest in the company. The use of sales tax audits to determine income tax liabilities of business owners is an accepted audit method (*see Matter of Bok Hui Nam*, Tax Appeals Tribunal, September 24, 2009). All of the Division's accompanying adjustments rationally emanate from the additional income attributable to the uncontested sales tax audit.

C. Meanwhile, petitioner does not contest the accuracy of the Division's calculations, but essentially argues that as a result of improprieties by her representatives or fellow shareholders, she has been incorrectly left responsible for the activities of LQ. Petitioner, however, has offered no persuasive evidence that would provide a basis for granting her petition. The record is devoid of proof refuting her ownership percentage during the years in issue and the audit results, or convincingly demonstrating misdeeds by her representatives. It must also be noted that this is

not a case involving a responsible person assessment under Tax Law § 685(g), where the scope of petitioner's direct involvement in LQ would be at issue. Instead, petitioner's liability derives from the pass-through of additional income attributable to a subchapter S corporation of which she was undeniably a 20% shareholder. The record supports the conclusion that the Division performed a thorough and correct audit, which was essentially unchallenged by petitioner. Indeed, petitioner did not introduce any evidence to demonstrate that the Notice of Deficiency was erroneous. Therefore, she must yield to the presumption of correctness (*see Matter of Tavolacci v. State Tax Commn.*, 77 AD2d 759 [1980]), and no adjustment to the audit findings is warranted (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]).

D. The petition of Patricia DeVesta-Owrutzky is denied and the Notice of Deficiency, dated July 11, 2013, is sustained.

DATED: Albany, New York
April 7, 2016

/s/ Herbert M. Friedman, Jr.
ADMINISTRATIVE LAW JUDGE