

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	ORDER
ESTATE OF RICHARD SIEGAL, GAIL SIEGAL, ADMINISTRATOR	:	DTA NOS. 826661 AND 826750
	:	
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law of the Tax Law for the Year 2002.	:	

Petitioner, Estate of Richard Siegal, Gail Siegal, Administrator, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2002.

Petitioner, by its representative, Latham & Watkins LLP (Brian C. McManus, Esq., of counsel), brought a motion, dated October 16, 2015, to dismiss the petition pursuant to 3000.9 of the Tax Appeals Tribunal Rules of Practice and Procedure. Accompanying the motion was the statement of Brian C. McManus, Esq., and attached exhibits in support of the motion. On November 9, 2015, the Division of Taxation, appearing by Amanda Hiller, Esq. (Kathleen O'Connell, Esq., of counsel) requested an extension of time to respond to the motion to dismiss and, on November 12, 2015, the Division of Taxation requested leave to amend its answer and offered, as an attachment, a proposed amended answer. On November 20, 2015, the Division of Taxation was given until on or before December 18, 2015 to respond to the motion to dismiss. On December 18, 2015, the Division of Taxation responded to petitioner's motion to dismiss.

Based upon the motion papers and all pleadings associated with this matter, Arthur S. Bray, Administrative Law Judge, renders the following order.

ISSUE

Whether petitioner's motion to dismiss should be granted on the basis that the answer fails to set forth allegations to substantiate the assertion of fraud.

FINDINGS OF FACT

1. The Division of Taxation issued a Notice of Deficiency, dated December 18, 2013, to the Estate of Richard Siegal, Gail Siegal "EXEC/ADMIN." The notice asserted a deficiency of personal income tax in the amount of \$1,094,491.36 plus interest of \$1,307,680.73 and penalty of \$2,751,892.04 for a balance due of \$5,154,064.13. The computation section of the notice explained, among other things, that the asserted deficiency of tax was premised upon the disallowance of schedule E deductions claimed for certain entities. It further explained that a fraud penalty of 50% of the additional tax due is was imposed pursuant to Tax Law § 685(e). A penalty was also asserted for failure to participate in the Voluntary Compliance Initiative.

2. Petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the subject Notice of Deficiency. On November 14, 2014 BCMS issued a conciliation order denying the request and sustaining the statutory notice.

3. On or about December 15, 2014, the Division of Tax Appeals received the petition in this matter. The petition challenged the assertion of the fraud penalty and asserted, among other things, that the Notice of Deficiency was invalid because it failed to provide the basis for the assertion of the fraud penalty.

4. The Division of Taxation filed an answer that denied petitioner's allegations. The Division did not make any affirmative allegations.

5. By the instant motion, petitioner seeks to dismiss any allegation of fraud and any deficiency of tax. Petitioner states that by the time the Notice of Deficiency was issued, the period of limitation to assess tax for the year 2002 had expired unless the Division established that a false or fraudulent return was filed with the intent to evade tax. Petitioner also notes that section 3000.4(b)(2)(ii) of the Rules of Practice and Procedure of the Tax Appeals Tribunal (Rules) requires that an answer contain a statement of any additional facts upon which the Division has the burden of proof. Petitioner points out that the answer fails to set forth any facts to sustain its burden of proof of establishing fraud. It is also argued that the failure to plead any facts in its answer prevents petitioner from having fair notice of the matters in controversy as called for in section 3000.4(a) of the Rules. Petitioner also notes that CPLR 3016(b) requires that the circumstances constituting the fraud be stated in detail. On the basis of the foregoing, petitioner requests that the fraud claim be dismissed and a determination entered that there is no deficiency of tax.

6. In response to the motion, the Division submitted a letter that requested leave to amend the answer. The Division also noted that it had a pending request for an extension of time to respond to the motion to dismiss. The Division's response pointed out that petitioner has been aware that the Division has long considered the Siegal oil and gas partnerships as abusive tax avoidance transactions and has litigated this issue in the Division of Tax Appeals.

7. On November 20, 2015, the Division's request for an extension of time to respond to the motion to dismiss and for permission to file an amended answer was granted. On December 12, 2015, the Division filed its amended answer and, in a subsequent letter, argued that the

alleged deficiencies in its answer have been cured and the issues raised in its motion to dismiss are rendered moot.

8. In essence, the amended answer asserts: that petitioner, with the intent to evade tax, created oil and gas partnerships designed to generate intangible drilling costs far in excess of actual costs by grossly inflating the price of turnkey drilling contracts; that petitioner, through his wholly-owned company, purchased interests in oil and gas wells and then fragmented and sold such interests at a profit in excess of 500 percent; that petitioner established the prices for turnkey drilling contracts between partnerships and drilling companies that were each under his direction and control; that petitioner's investments in partnerships were financed mostly through long-term debt instruments that did not constitute bona fide debt; that the investments lacked economic substance; that petitioner with intent to evade tax developed an investment scheme that resulted in intangible drilling costs that were grossly disproportionate to actual drilling costs; and, that the exception to the statute of limitations provided by Tax Law § 683(c)(1)(B) is applicable because petitioner filed false and fraudulent returns with the intent to evade tax.

CONCLUSIONS OF LAW

A. The Division has the burden of establishing each of the elements of fraud by clear and convincing evidence (*Matter of Fahy*, Tax Appeals Tribunal, April 5, 1990; *Matter of Ilter Sener*, Tax Appeals Tribunal, May 5, 1988). Accordingly, it was required to comply with the section 3000.4(b)(2)(ii) of the Rules, which requires that the answer plead those facts upon which it has the burden of proof. The amended answer satisfies this burden and therefore the motion to dismiss the allegation of fraud and any associated deficiency is denied.

B. The motion to dismiss the petition is denied. The matter will proceed to hearing in due course.

DATED: Albany, New York
February 18, 2016

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