

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ALPHA R. SCHOONOVER AND CATHERINE A. SCHOONOVER : DECISION
for Redetermination of a Deficiency or for Refund of Personal Income : DTA No. 800568
Tax under Article 22 of the Tax Law for the Years 1982 through 1984. :

Petitioners Alpha R. Schoonover and Catherine A. Schoonover, 77 R.D. #1, Box 8F, Millerton, Pennsylvania 16936 filed an exception to the determination of the Administrative Law Judge issued on July 19, 1990 with respect to their petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1982 through 1984. Petitioners appeared by Richard D. Keyser, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Both parties filed briefs on exception. Oral argument, at the request of petitioners, was heard on February 29, 1991.

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

ISSUES

I. Whether, under the facts and circumstances herein, the Division of Taxation should be estopped from asserting the period of limitations set forth in Tax Law § 687(a) as a bar to refunds claimed by petitioners for the years 1982 through 1984.

II. Whether the unsworn testimony of the Division of Taxation's representative at the hearing was improper so as to taint the hearing with the result that petitioners did not receive a full, fair and impartial hearing of the issues.

III. Whether the Administrative Law Judge erred in refusing to accept into evidence a warrant issued by the Division of Taxation dated July 20, 1989 seeking collection of taxes, penalties and interest for the period ending December 31, 1983.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

By an agreement dated April 1, 1977, petitioners, Alpha R. Schoonover and Catherine A. Schoonover, agreed to convey to Westover Hills South Mobile Park, a partnership, a certain parcel of real property located in Chemung County, New York. The property had certain improvements and was used as a mobile home park. The terms of the sale provided, inter alia, for the purchasers to make installment payments to petitioners. Such installment payments included interest only for the first five years and principal and interest thereafter.

At the time of the conveyance noted above, petitioners were residents of New York. Petitioners became residents of Pennsylvania in 1978. Petitioners filed a New York State Resident Income Tax Return and New York State Unincorporated Business Tax Return for 1977. Petitioners timely filed New York nonresident income tax returns (Form IT-203) for the years 1978 through 1986.

On April 14, 1981, the Division of Taxation ("Division") issued to petitioners a Notice of Deficiency which asserted unincorporated business tax due of \$423.27, plus penalty and interest, for the year 1977.

On April 8, 1983, the Division issued to petitioners a Notice of Deficiency which asserted \$3,324.78 in personal income tax due, plus penalty and interest, for the years 1978 through 1980.

Both of the aforementioned notices of deficiency assert tax arising from the sale of real property outlined above. Specifically, the Division asserted capital gains tax on the sale and also

asserted tax due on the interest income accruing to petitioners as a result of the deferred payment arrangement in respect of the transfer.¹

On or about July 5, 1983, petitioners filed a petition with the former Tax Appeals Bureau in respect of the April 8, 1983 Notice of Deficiency. A hearing in the matter of said petition was scheduled for hearing in Binghamton, New York on May 23, 1985. At that time, prior to the commencement of the hearing, representatives of the Division² along with petitioners and their representative, Richard D. Keyser, Esq., reached an agreement to settle the dispute arising from the issuance of the notices of deficiency dated April 14, 1981³ and April 8, 1983. Pursuant to this agreement, petitioners conceded their liability in respect of the unincorporated business tax of \$423.27, plus interest, as asserted in the April 14, 1981 Notice of Deficiency. (The Division apparently withdrew or cancelled its assertion of penalty in respect of this notice.) With respect to the April 8, 1983 notice, petitioners conceded their liability with respect to the Division's assertion of capital gains tax arising out of the sale of the mobile home park. In connection with such liability, petitioners agreed to submit to the Division a letter of credit to secure payment of any capital gains taxes due as a result of the transaction in question. Also with respect to the April 8, 1983 notice, the Division conceded that since petitioners were nonresidents of New York from 1978 forward, any interest income to them arising out of the deferred payments due pursuant to the mobile home park contract was not subject to New York State personal income

¹The Division's assertion of tax due was premised upon the provisions of Tax Law former § 654 which required an individual whose status changed from New York resident to nonresident to accrue items of income, gain, loss or deduction (including unrealized income from an installment sale) which, under an accrual method of accounting, would be reportable on the nonresident and part-year resident return for the year that the change of residence occurred. These accruals were required even though such individual normally reported on a cash basis. These special accruals were not required, however, if the taxpayer filed a bond or other acceptable security with the Tax Department and agreed to report the accruable amounts on future returns as if a change of resident status had not occurred. (Cf. Tax Law §§ 636[e]; 637[b]; 638[c].)

²The Division was represented at the meeting by Deborah J. Dwyer, Esq. and Roger Hall, Jr., Tax Technician II.

³Since it appears from the record that no petition was filed in respect of the April 14, 1981 notice, it is unclear how said notice became part of the settlement discussions.

tax. The Division therefore cancelled the portion of the April 8, 1983 deficiency arising from the Division's assertion of tax due on such interest income.

The meeting on May 23, 1985 also included a discussion regarding refunds of personal income tax paid on interest income arising from the deferred payments received on the land contract for the years 1982 through 1984. Petitioners had reported and paid tax on such interest income on its nonresident returns for those years. The discussions at the May 23, 1985 meeting with respect to refunds of such taxes were general in nature. That is, there was general agreement among the parties present that petitioners had overpaid their New York State personal income taxes for the years 1982 through 1984 by their reporting and payment of tax in respect of such interest income. There was no discussion at the May 23, 1985 meeting with respect to the procedural mechanisms by which petitioners could obtain refunds of such overpaid taxes. The Division's representatives did not give any advice (nor did petitioners or their representative request such advice) regarding the filing of amended nonresident returns for the years 1982 through 1984 or the filing of a claim for refund for those years. Also, there was no discussion as to the relevant period of limitations with respect to any such refund claims.

Also at the May 23, 1985 meeting the Division advised petitioners and their representative that Mr. Hall would recompute petitioners' capital gains tax liability arising from the mobile home park sale and thereby determine the amount of the letter of credit necessary to secure payment of such taxes.

By letter dated May 27, 1986, the Division's representative advised petitioners' representative of the amount of the letter of credit necessary to secure the payment of any capital gains tax arising out of the mobile home park sale.

By letter dated June 27, 1986, petitioners' representative sought a reduction in the letter of credit amount to \$14,500.00. Pursuant to a telephone conversation between petitioners' representative and the Division's representative on July 17, 1986, it was agreed that the letter of credit amount should be reduced to \$14,500.00.

Subsequently, by letter dated August 18, 1986, petitioners' representative transmitted to the Division's representative a check in the amount of \$530.31 in payment of the unincorporated business tax due, plus interest, per the April 14, 1981 Notice of Deficiency. Also transmitted in the same correspondence was the letter of credit in the amount of \$14,500.00 and an executed Withdrawal of Petition and Discontinuance of Case in respect of the April 14, 1981 Notice of Deficiency. The August 18, 1986 letter also set forth petitioners' understanding of the terms of the settlement agreement as follows:

"1] Schoonovers will pay to the New York State Department of Taxation and Finance Unincorporated Business Tax in the amount of \$423.27 pursuant to Assessment No. A810406069C, together with interest, and

2] Alpha and Catherine Schoonover will pay Capital Gains Tax to the New York State Department of Taxation and Finance arising out of the sale of the mobile home park located in the Town of Ashland, County of Chemung and State of New York, pursuant to an agreement dated April 1, 1977, and

3] That for the period of time Alpha and Catherine Schoonover are non-residents of the State of New York, interest income arising out of deferred payments due pursuant to the above referenced contract of sale will not be subject to taxation by New York State.

To secure the payment of the Capital Gains Tax which will become due upon receipt of the installment payments pursuant to the aforementioned contract, Alpha and Catherine Schoonover submit the enclosed Irrevocable Letter of Credit No. 196-86.

If the terms of this settlement are acceptable, please process the enclosed documents and advise us of additional interest due on the Unincorporated Business Tax. If these are not the terms of the settlement, please advise immediately."

By letter dated October 20, 1987, petitioners' representative provided the Division's representative with a copy of petitioners' 1986 New York State Nonresident Income Tax Return. This letter also stated the following:

"The only item which I believe still remains open is for a calculation of refunds due the Schoonovers as a result of the years which were open and under question. Specifically [sic], the Schoonovers included interest in those returns which ultimately was

agreed upon in our settlement that need not be included. Consequently, I believe that the tax paid on this interest should be refunded.

Please advise whether we should file amended returns or whether this will be processed by the State."

Subsequently, by letter dated June 21, 1988, the Division's representative advised petitioners' representative as follows:

"In our last communication I advised you that you would have to file amended returns with me and I would have them processed. This advice was given to you in response to your letter of October 20, 1987. To date I have not received the amended returns.

Please advise me what action you wish to take on this matter."

Thereafter, the Division's representative transmitted the following to petitioners' representative by letter dated January 27, 1989:

"The reason why this case has been listed for a potential hearing is because the petition has never been withdrawn. As you know, you were to have supplied me with amended returns several years ago, in order to conclude our settlement. You have never done this, and so, as far as the Division of Tax Appeals is concerned, there is still a viable controversy.

Please advise me as to how you intend to proceed."

By letter dated February 14, 1989, petitioners' representative forwarded amended New York State nonresident income tax returns for the years 1982, 1983 and 1984. Said letter also provided as follows:

"Enclosed herewith please find ammended [sic] Forms IT-203 for the years 1982, 1983 and 1984. Our review of the New York State returns filed by our client indicate that these are the only years in which the interest income earned from the sale of the Mobile Home Park was included in the non-resident returns. Pursuant to the terms of the settlement agreement this amount is not taxable by New York and thus the ammended [sic] returns have been prepared upon that basis."

On their amended returns for the years 1982, 1983 and 1984, petitioners claimed refunds of \$1,589.96, \$857.97 and \$1,599.05, respectively. The Division did not dispute that petitioners had overpaid their New York State personal income taxes for the years in question by said amounts.

The Division's representative acknowledged receipt of the amended returns by letter dated February 21, 1989 as follows:

"I am in receipt of the amended returns in the above-referenced matter. I have sent them to the Audit Division where they will be reviewed. Assuming everything has been correctly done, as soon as I receive confirmation from the Audit Division, I will send you withdrawals of petition, and the case will be concluded."

Subsequent to the Division's receipt of petitioners' amended returns for 1982 through 1984, the Division informally advised petitioners that the amended returns had been filed beyond the applicable period of limitations and that therefore petitioners' refund claims as set forth in the amended returns were denied. This issue was the subject of the hearing held on June 9, 1989 in Binghamton, New York.⁴

Petitioners subsequently filed a petition in respect of the Division's denial of the claimed refunds for the years 1982 through 1984.

The Division declined to exercise its special refund authority under Tax Law § 697(d) with respect to the refunds claimed herein.

In their post-hearing brief, petitioners submitted a copy of a warrant docketed July 14, 1989 by the Division of Taxation indicating personal income tax owed by petitioners for the year 1983 of \$1,603.54. Petitioners reported \$1,603.54 in tax due on their original 1983 return, a copy of which was also submitted with the post-hearing brief. As noted previously, petitioners claimed a refund of \$857.97 on their amended 1983 return.

⁴It should be noted that all issues arising from the notices of deficiency dated April 14, 1981 and April 8, 1983, respectively, and the petition filed on July 5, 1983 have been resolved.

The Division objected to the receipt of the warrant and 1983 return into the record herein contending that the record herein was closed in accordance with the statement of the Administrative Law Judge at the conclusion of the hearing.

OPINION

The Administrative Law Judge denied petitioners' claim for refunds for the years 1982 through 1984.

The Administrative Law Judge rejected petitioners' contention that the period of limitation for the filing for credits and refunds was extended pursuant to the provisions of section 687 of the Tax Law since there was no evidence, in writing, that the period had been extended as required by Tax Law § 683(c)(2).

The Administrative Law Judge rejected petitioners' contention that the extension of the period of limitation could be inferred from the correspondence between the representatives.

The Administrative Law Judge also rejected petitioners' argument that the doctrine of estoppel is applicable to preclude the Division from asserting the statute of limitations to deny petitioners' claims for refund. The Administrative Law Judge determined that the facts of the case do not support a finding of "manifest injustice" necessary to support the application of the doctrine against the Division.

On exception, petitioners assert that the doctrine of estoppel is applicable to preclude the Division from asserting the statute of limitations to deny petitioners' claims for refunds; that the unsworn testimony of the Division's attorney at a hearing in which she represented the Division violates the Code of Professional Responsibility and, thus, tainted the hearings such that petitioners did not receive a full, fair and impartial hearing of the issues; and that the Administrative Law Judge should have received into evidence a warrant issued by the Division dated July 20, 1989 seeking collection of taxes, penalties and interest for the period ending December 31, 1983. Petitioners assert the fact that such warrant was issued by the Division

indicates that the year 1983 was still an "open year" and, thus, the amended returns for that year as well as 1982 and 1984 were timely filed.

On exception, the Division asserts that the sole issue is whether petitioners' claims for refunds for tax years 1982, 1983 and 1984, which were filed on February 14, 1989 by the filing of amended returns for such years, is barred by Tax Law § 687(a). The Division asserts that the Administrative Law Judge correctly determined that the claim was time barred since there was no agreement in writing as required by section 683(c)(2) to extend the statute of limitations to allow petitioners to file a refund after the time periods specified in section 687(a).

The Division also asserts that the Administrative Law Judge correctly ruled that the doctrine of estoppel is not applicable under the facts in this case and that the Administrative Law Judge correctly allowed the unsworn testimony of the Division's representative since the testimony went to the heart of the issue, i.e., the settlement negotiations, of which the Division's representative participated.

We affirm the determination of the Administrative Law Judge.

We deal first with the issue of whether the Administrative Law Judge properly determined that the doctrine of estoppel was not applicable against the Division.

As a general proposition, the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (Matter of Sheppard-Pollack v. Tully, 64 AD2d 296, 409 NYS2d 847; Matter of Turner Constr. Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78). The doctrine as it applies to tax matters was concisely stated in Schuster v. Commissioner (312 F2d 311). There, the court, after recognizing that estoppel should be applied against the government with utmost caution and restraint, stated:

"It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict injury. It is to be emphasized that such situations must necessarily be rare, for the

policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context" (Schuster v. Commissioner, supra, at 317).

This Tribunal has utilized a three part test to determine the applicability of the doctrine to specific cases. We ask if the petitioner had the right to rely on the Division's representation, whether in fact there was such reliance, and whether such reliance was to the detriment of the petitioner (see, Matter of Harry's Exxon Serv. Sta., Tax Appeals Tribunal, December 6, 1988).

The core of petitioners' argument here is that they were entitled to rely on the conduct and the representations of the Division's representatives in implementing the settlement agreement with petitioners and that they did so rely to their detriment.

We disagree.

In this case, the record does not contain facts which support the applicability of the doctrine of estoppel. In particular, we find no evidence of any specific representation by the Division that petitioners did not have to comply with the provisions of section 687(a) which requires that a claim for refund of an overpayment of taxes must be filed within the latter of: (1) three years from the time a return was filed or, (2) two years from the time the tax was paid. The discussions regarding refunds for the 1982-1984 years at the May 23, 1985 meeting only established agreement among the parties that petitioners had apparently overpaid income tax for those years to the extent that they reported interest income in respect to the land contract on their 1982-1984 returns. The record indicates no discussion on the procedure for petitioners to follow to obtain any such refund, nor is there any evidence of a discussion concerning the extension of the period of limitation for application for such refunds. The settlement agreement as represented in petitioner's August 18, 1986 letter is silent on the matter of refunds. In fact, the first mention of refunds is in petitioner's October 20, 1987 letter to the Division.

In summary, we find no representation by the Division which petitioners could have reasonably relied upon. We agree with the observation of the Administrative Law Judge that the fact that the Division did not advise petitioners of the need to file amended returns to obtain a

refund or of the applicable period of limitation does not bar the Division from asserting the statute in this case.

We deal next with petitioners' assertion that the Administrative Law Judge erred in not accepting into evidence the warrant issued by the Division for 1983 and petitioners' 1983 tax return. The documents were submitted as exhibits A and B of a post hearing brief to the Administrative Law Judge. Petitioners asserted in the brief that if the tax for the year 1983 has not been paid, as the warrant indicated, then the statute of limitations for the filing of refunds in section 687 has not yet begun to run. Therefore, the year 1983 is still open and the State must process the amended returns for 1982 through 1984. We affirm the Administrative Law Judge's decision to reject these documents on the basis that they were submitted after the record was closed.

In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988).

We deal next with petitioners' assertion that the Administrative Law Judge erred in allowing into the record the unsworn testimony of the Division's representative. Petitioners, citing People v. Baldi, 76 AD2d 259, 429 NYS2d 677, assert that such testimony tainted the hearing and prevented petitioners from receiving a full, fair and impartial hearing of the issue.

We are not persuaded by petitioners' assertion.

Petitioners' reliance on Baldi is misplaced. Baldi was a criminal case. The client of the attorney who testified asserted that his rights to a fair trial and effective representation were impaired by the testimony of his representative at trial. This is clearly not the situation here since it was the Division's, not the petitioners', representative who made the statements at the administrative hearing.⁵ Further, while this Tribunal has, on several occasions, noted that it is inadvisable, poor practice and potentially damaging to the integrity of the hearing process for the Administrative Law Judge to encourage, condone or permit the offer of unsworn statements as to proof of facts by the representatives (Matter of East 54th Street Assocs., Tax Appeals Tribunal, November 15, 1990; Matter of Cafe Europa, Tax Appeals Tribunal, July 13, 1989), we find no authority for the proposition that such testimony is inadmissible, or that in this case petitioners' rights to a fair and just hearing were impaired by the statements of their adversary's witness.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alpha R. Schoonover and Catherine A. Schoonover is denied;
2. The determination of the Administrative Law Judge is affirmed; and

⁵We note the court in Baldi held that the weight of authority established that a lawyer trying a case is not incompetent to testify during it and the admission of his testimony is not reversible error per se (People v. Baldi, supra, 429 NYS2d 677, 688).

3. The petition of Alpha R. Schoonover and Catherine A. Schoonover is denied.

DATED: Troy, New York
August 15, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner