NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

ARTHUR G. NEVINS, JR. and AMANDA NEVINS,	:	TAX COURT OF NEW JERSEY DOCKET NO.: 013075-2015
Plaintiffs,	:	
v.	:	Approved for Publication In the New Jersey Tax Court Reports
DIRECTOR, DIVISION OF TAXATION,	:	
Defendant.	:	

Decided: January 8, 2019

Arthur G. Nevins, Jr., for plaintiffs (Pro se)[1].

Abiola G. Miles for defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

BIANCO, J.T.C.

This opinion shall serve as the court's determination of cross-motions for summary judgment concerning the appeal by plaintiffs, Arthur G. Nevins, Jr., and Amanda Nevins (the "Nevinses"), of the final determination by defendant, the Director of the Division of Taxation (the "Director") with regard to the Nevinses' 2008 New Jersey gross income tax ("GIT"). The Nevinses move to bar the Director's claim for the GIT deficiency and to annul the Director's final determination, alleging that the Director failed to timely assess their 2008 GIT within the applicable limitations period under N.J.S.A. 54A:9-4(a). In opposition, the Director moves to dismiss the complaint with prejudice claiming that, exceptions to the statute of limitations under N.J.S.A. 54A:9-4(c) apply as the Nevinses failed to report to the New Jersey Division of Taxation

[1] Arthur G. Nevins, Jr., is not appearing pro se in the traditional sense but rather, he is a licensed attorney in the State of New Jersey representing himself and Amanda Nevins.

("Taxation") one or more changes to their 2008 federal taxable income made by the Internal Revenue Service ("IRS") within ninety days (90) after the final determination of such change.

For the reasons set forth herein, the Nevinses' motion is denied, and the Director's motion dismissing the complaint is granted.

BACKGROUND, FACTS, AND PROCEDURAL HISTORY

On March 24, 2009, the Nevinses timely filed a 2008 GIT return ("NJ-1040") that included on Line 17 an amount of $29,806 as net profits from business which was a net of (1) $63,786 loss from Mr. Nevins's law practice in New York ($120,000 gross receipts, less "cost of goods," less expenses) reported on Schedule C; (2) $100,043 profit from his law practice in New Jersey ($892,789 gross receipts, less "cost of goods," less expenses), reported on Schedule C; and (3) $6,452 loss from farming, reported on Schedule F.[2] A property tax deduction of $10,000 was taken on Line 36c to reduce the taxable income.

On January 11, 2010, Taxation received the Nevinses' amended 2008 GIT return ("NJ-1040X"), which showed net profits from business decreased to an amount of $23,965, and local property tax deduction decreased from $10,000 to $5,750. The explanation accompanying the changes noted that New Jersey only allowed a property tax deduction for improved property (which had a house on it), thus, the tax deduction on Line 36c was reduced to $5,750. The "rest of the property appearing" (sic) on Line 17, thus, $5,841 ("Sch F") was used to reduce business income to $23,965. Accordingly, the Nevinses' 2008 GIT was decreased by $28, which Taxation applied to satisfy a 2005 tax year underpayment.

[2] The "cost of goods" was $80,040 and $598,169 respectively, and explained as "Client Settlements" relative to the respective New York and New Jersey law offices.

On August 16, 2010, the Nevinses received an IRP Reconciliation Workpaper ("Workpaper") from Donna Temmel ("Ms. Temmel"), an IRS representative. The Workpaper showed an inconsistency between the income reported by the Nevinses on their 2008 federal income tax return ("US-1040") and the income which was reported on Form 1099-MISC, which were filed with the IRS by the payors. According to the Workpaper, a total of $1,304,038 should have been reported as income whereas only $1,012,789 was reported by the Nevinses, leaving an unreported amount of $291,249. The $1,304,038 represented attorney fees paid by 14 entities (two of which, United States Fire Ins. Co. and European Country Kitchens, were listed as having paid "non-employee" compensation of $26,877 and $59,661 respectively). One such entity was Gallagher Bassett Services, which had reported a payment of $325,000. The Nevinses' 2008 US-1040 reported attorney fees from only two entities, American Internal Group and AIIC of New Jersey, however, in amounts larger than reported on the 1099-MISC ($120,000 and $892,789 shown on return as opposed to $45,000 and $250,000 shown on the 1099-MISC[3]). Thus, although income from the remaining 12 entities totaled $1,009,038, the over-reporting caused the net variance to be $291,249. Additionally, the Workpaper also showed that the Nevinses failed to report $2,325 of refund from the State of New Jersey on 1099-G.

The Nevinses claimed that the inconsistent reporting was because they failed to include an "insurance payment" from Gallagher Basset Services, at the very end of the year, since they did not receive a 1099. Accordingly, they notified their tax preparer, Henry Meyer ("Mr. Meyer") on August 18, 2010 and August 24, 2010 with regard to the Workpaper, and provided him with the IRS' Form 2848 (a power of attorney to act on their behest before the IRS). Mr. Meyer certified

[3] Note that the Nevinses' 2008 NJ-1040 also reported only $120,000 and $892,789 as business income from Mr. Nevins's New York and New Jersey law practice.

that he then contacted Ms. Temmel on August 24, 2010 and faxed her a *proposed* amended federal return ("US-1040X"), which once approved by the IRS, would be followed by the filing of another US-1040 for 2008 reflecting the approved amendments. The proposed changes (1) increased the adjusted gross income of $43,539 by $97,046 for the "correct" amount of $140,585; and (2) reduced the itemized deductions by $5,841. The explanation noted that since the Nevinses never received a 1099 from Gallagher Bassett Services for "$291,249.00" that amount was never reported. "From that, 2/3" or "$192,224"[4] was "distributed to the client . . . leaving the increase as shown," which then invited the additional federal income tax. An attached clean copy of a 2008 US-1040 showed the adjusted gross income of $140,585 as comprising of $135,282 business income, and -$12,292 as farm income (plus wages and interest of $48,220). Both the proposed US-1040X and the clean copy of the 2008 US-1040 were signed only by Mr. Meyer. According to Mr. Meyer, Ms. Temmel informed him that the new numbers on the proposed US-1040X were acceptable, and that a written confirmation from the IRS would be delivered within six to eight weeks.

Mr. Meyer further certified that on September 10, 2010, he mailed another NJ-1040X (dated August 24, 2010) to Taxation, executed by him and the Nevinses reporting a total revised GIT liability in the amount of $4,847 as a result of an increase in net profits from business from $29,806 to $122,990.[5] After including an underpayment penalty of $147, and less credits for net

[4] Two-thirds of $291,249 is $194,166.

[5] However, unlike the proposed changes to the US-1040 which showed the net profits from business as $135,282, the NJ-1040X showed an amount of $122,990. Again, varying from the reportable amount on the US-1040X as to payments from Gallagher Bassett Services, the NJ-1040X explained that $325,000 was received from Gallagher Bassett Services, and that 2/3 of the same or $216,667 was "distributed to the client," and the balance was now being included.

tax paid, the balance GIT due was reported as $4,355. The return was mailed using a postage meter (first-class letter).[6] The Director has no record of receiving a second amended GIT return.[7]

On September 11, 2010, Mr. Meyer provided copies of the 1099s the Nevinses received in 2008 along with a copy of the proposed adjustments to the 2008 tax return ("US-1040X" and the "amended 1040") to Ms. Temmel in accordance with their "prior agreement."

On October 26, 2010, the Nevinses received a cover letter and Form 4549 (an examination report) from the IRS that showed changes to their federal income tax liability. The adjustments to income were as follows: (1) a deduction of $192,224 for "cost of goods sold" (the amount claimed by the Nevinses' to be two-thirds of the amount received from Gallagher Bassett Services, which was distributed to the client on the Nevinses' proposed US-1040X); (2) an addition of $291,249 as "gross receipts" (the net business income shown as under-reported in the Workpaper); (3) adjustments to deductions for tuition and student loan interest; and (4) an "SE" adjusted gross income adjustment of -$6,278 (the self-employment tax due to adjustments to net earnings from self-employment). On a separate schedule "SE – Computation of Self-Employment Tax," the IRS listed "self-employment income" as $122,990. The adjustments less reported income and taxes paid resulted in a federal income tax balance due of $27,375 (exclusive of interest and penalty). The letter advised the Nevinses to respond by November 5, 2010 if they accepted the changes.

On November 9, 2010, the Nevinses faxed Form 4549 to Ms. Temmel indicating that they had accepted the IRS' changes. On November 24, 2010, the IRS delivered a letter confirming the

[6] The post office's sales receipt shows a date of September 10, 2010 for a first-class mailing to "Trenton, NJ 08646," at a cost of $0.61.

[7] Mr. Nevins argues that the Director acknowledged that Taxation destroys the hard copies of tax returns after two years of filing and uploads them on its system.

Nevinses' acceptance of the Form 4549, and stated that no additional changes would be made for tax year 2008.

On August 4, 2011, Taxation processed the Federal Tax Information ("FTI") that it received from the IRS through an electronic database pertaining to changes made by the IRS to the Nevinses' 2008 US-1040. Almost two and half years later, on June 11, 2014, Taxation adjusted the Nevinses' net profits from business from $23,965 to $128,831 on their 2008 GIT return based on the FTI and issued a notice of deficiency for the 2008 GIT in the amount of $6,463.67, including interest.[8] The notice explained that the changes were engendered by the changes made by the IRS. These were the same changes shown on the IRS's October 26, 2010 Form 4549, which was accepted by the Nevinses on November 9, 2010.

On September 4, 2014, the Nevinses filed an administrative protest to the Taxation's Conference and Appeals Branch ("CAB"). In connection with the protest, and after a request from the CAB, on September 8, 2014, CAB received a copy of Nevinses' second 2008 NJ-1040X paper return dated August 24, 2010.[9]

On April 29, 2015, a conference was held to discuss Nevinses' protests. On June 9, 2015, the CAB upheld the deficiency and rejected Nevinses' argument that the assessment was barred by the statute of limitations on grounds Taxation had no record of receiving either the second amended NJ-1040X or of the amount reported as due on the allegedly filed NJ-1040X of $4,355.

[8] The amount of net GIT was $4,674.20 and interest was $1,789.47. No penalty was assessed. Note that the tax assessed was less than the self-assessed tax reported on the Nevinses' second amended 1040-X allegedly mailed to Taxation on September 10, 2010, which was $4,847, plus underpayment penalty of $147. However, the net reported as due was lower, $4,355, possibly due to additional refunds/credits.

[9] The Director argues that this is the first time Taxation had received the Nevinses' second amended NJ-1040X.

During the CAB conference, Mr. Meyer claimed to have instructed the Nevinses to wait for a bill from Taxation before making any payment because Taxation generally sends a notice of tax due 60 days after a return is filed. The Nevinses acknowledged that they did not pay any GIT for 2008 to Taxation at any time. They argued that they never received a notice, and if received, they would have paid the 2008 GIT.

Thereafter, on June 17, 2015, the Director issued a final determination that the Nevinses owed GIT in the amount of $6,867.66.[10] The Nevinses timely appealed to this court on September 13, 2015.

SUMMARY JUDGMENT

Summary judgment is appropriate where there exists no "genuine issue of material fact requiring disposition at trial." See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995) (quoting Ledley v. William Penn Life Ins., Co., 138 N.J. 627, 641-42 (1995)). See also R. 4:46-2. The court must determine whether "the competent evidential materials presented are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party." Brill, 142 N.J. at 523. Here, the only issue is whether Taxation's deficiency assessment with regard to the Nevinses' 2008 GIT is barred by the statute of limitations. The court finds that there is no genuine issue as to a material fact in the matter; therefore, a decision by summary judgment is appropriate.

APPLICABLE LAW

The court must consider two basic principles. First, "[i]n construing a statute, [the court] first consider[s] its plain language." Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123, 128 (1987) (citing Renz v. Penn Cent. Corp., 87 N.J. 437, 440 (1981); Sheeran v. Nationwide Mut. Ins.

[10] The amount of net GIT is $4,674.20 and interest is $2,193.45.

Co., Inc., 80 N.J. 548, 556 (1979)). Second, "[t]he Director's assessment is entitled to a presumption of correctness." Meadowlands Basketball Assocs. v. Dir., Div. of Taxation, 19 N.J. Tax 85, 90 (Tax 2000), aff'd, 340 N.J. Super. 76 (App. Div. 2001). Therefore, "the Director's construction of the operative law, which is not plainly unreasonable and with which the Legislature has not interfered, is entitled to prevail." Aetna Burglar & Fire Alarm Co. v. Dir., Div. of Taxation, 16 N.J. Tax 584, 589 (Tax 1997) (citing Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 327 (1984)).

There are four relevant statutes at issue in the instant matter: N.J.S.A. 54A:8-7, which requires a taxpayer to report any change or correction made to the federally reported income, N.J.S.A. 54A:9-2, which explains what and when constitutes a notice of deficiency, and its conversion into an assessment, N.J.S.A. 54A:9-3, which specifies the date of assessment, and N.J.S.A. 54A:9-4, which provides the general statute of limitations with regard to assessment of GIT deficiencies and exceptions to the statute of limitations.

A. Reporting Change or Correction in Federal Income to Taxation

A taxpayer is required to report any change or correction in federal taxable income to Taxation. N.J.S.A. 54A:8-7. A change to federal taxable income can be made by filing an US-1040X or by a correction made by the IRS or other competent authority. Ibid. A taxpayer is required to report the change or correction even if he disagrees with the IRS's decision. Ibid. In such case, he must state wherein the change or correction is erroneous. Ibid. Such a report or filing of a NJ-1040X must be done within 90 days "after the final determination" of the IRS initiated change or correction, or within 90 days after filing the US-1040X. Ibid.[11]

[11] An almost identical requirement is imposed upon corporate taxpayers under the Corporation Business ("CBT") Act. See N.J.S.A. 54:10A-13 (where income reported federally is changed or corrected by the IRS, then the taxpayer must report that changed or corrected "taxable income" to

B. Issuing a Notice of Deficiency

After determining that there is a deficiency of GIT, the Director may mail a notice of deficiency to the taxpayer. N.J.S.A. 54A:9-2(a). Usually, once 90 days has passed from the mailing date, the deficiency of the GIT, plus interest and penalties, becomes an "assessment," unless the taxpayer has protested the notice of deficiency. N.J.S.A. 54A:9-2(b). A "deficiency" is the GIT due less "the amount shown as the tax upon the taxpayer's return (whether the return was made or the tax computed by him or by the director)," less amounts "previously assessed (or collected without assessment) as a deficiency . . . plus . . . rebates." N.J.S.A. 54A:9-2(g).

C. Issuing a Notice of Additional Tax Due

If the taxpayer fails to comply with section 54A:8-7, the rule in 54A:9-2(b) does not apply, and "the [D]irector may assess a deficiency based upon such changed or corrected Federal taxable income by mailing . . . a notice of additional tax due . . . and such deficiency, together with the interest . . . and penalties . . . shall be deemed assessed on the date such notice is mailed . . . ." N.J.S.A. 54A:9-2(e)(1). However, if within 30 days of the mailing, the taxpayer files a report of the federal change or an amended NJ-1040 as required by N.J.S.A. 54A:8-7, which report or amended return is "accompanied by a statement" that the federal determination "and notice of additional tax due are erroneous," then the date of mailing by Taxation will not be deemed to be the date when the additional tax is assessed. N.J.S.A. 54A:9-2(e)(1).

Taxation within 90 days "after the final determination of such change or correction" and further "concede the accuracy of such determination or state wherein it is erroneous." Similarly, one who files an amended federal corporate income tax return must file an amended New Jersey CBT return, within 90 days after filing the former).

Note that this notice of additional tax due sent by Taxation when a taxpayer fails to report federal changes or fails to file an amended return due to federal changes, is not deemed to be a "notice of deficiency" for purposes of N.J.S.A. 54A:9-2. See N.J.S.A. 54A:9-2(e).

D. Assessment Date for Self-Assessed Taxes

"The amount of tax which a return shows to be due . . . shall be deemed to be assessed on the date of filing of the return (including any amended return showing an increase of tax)." N.J.S.A. 54A:9-3(a). Also, if a taxpayer chooses to file an amended return or report according to N.J.S.A. 54A:8-7 and "concedes the accuracy of a Federal change or correction," then "any deficiency . . . is deemed to be assessed on the date" that amended return was filed. Ibid. Such assessment will be timely even if it would be considered as untimely under the general limitations period under N.J.S.A. 54A:9-4(a). Ibid. However, the date of the deemed assessment is the mailing date if a "notice of additional tax due" was sent under N.J.S.A. 54A:9-2(e). Ibid.

E. General Statute of Limitations for Assessment of GIT

Generally, any GIT "shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed)." N.J.S.A. 54A:9-4(a). However, if a taxpayer fails to comply with N.J.S.A. 54A:8-7, in that he or she does not report a federal change or correction in federal income, or fails to file an amended NJ-1040, the statute of limitations for GIT assessment does not apply. N.J.S.A. 54A:9-4(c)(1)(C). See also N.J.A.C. 18:2-2.6(c)(1) (Taxation can assess "additional" GIT "within three years after the return was filed," except that such an assessment may be made "at any time if . . . the taxpayer fails to comply with N.J.S.A. 54A:8-7").

If a taxpayer does comply with the reporting requirement of N.J.S.A. 54A:8-7, then the additional GIT as a result of the federal change or correction is deemed assessed on the date the

return is filed. N.J.S.A. 54A:9-4(c)(3). If not so deemed, then, the Director can impose a GIT assessment "at any time within 2 years after such report or amended return was filed." Ibid.[12]

ANALYSIS

A. Self-Assessing Nature of GIT Return

The Nevinses' statute of limitations argument is plainly without merit. Even if the court were to accept that they filed their second NJ-1040X dated August 24, 2010, on September 10, 2010, the date it was allegedly mailed, considering the plain and unambiguous language of N.J.S.A. 54A:9-3(a), the court concludes that their 2008 GIT obligation was assessed against them on September 10, 2010 which is the date that their return was filed.[13] In other words, the general three-year statute of limitations period is not implicated. Also, the inapplicability of the three-year limitations period is particularly relevant because the Nevinses conceded the correction by the IRS. See ibid. ("If an amended return or report filed pursuant to section 54A:8-7 concedes the accuracy of a Federal change or correction, any [GIT] deficiency . . . resulting therefrom shall be deemed to be assessed on the date of filing such. . . amended return, and such assessment shall be timely notwithstanding section 54A:9-4"). Accordingly, the Nevinses must have paid the tax due on their second NJ-1040X, which indicated that they owed $4,355 in GIT (which included a voluntarily assessed underpayment penalty of $147) to Taxation before the due date of the return under N.J.S.A. 54A:8-1(a) (requires GIT to be paid annually "on a return which shall be filed . . . on or

[12] Note that unlike the GIT Act, the CBT Act provides four years "to make deficiency [CBT] assessments" which begins to run "from the date that taxable income is finally changed or corrected by the" IRS. N.J.S.A. 54:10A-13.

[13] A return is filed when it is mailed. See N.J.S.A. 54:49-3.1(c) ("the date the return is transmitted" to Taxation "shall be deemed the date of filing"); N.J.A.C. 18:2-4.3(a) ("the date of the United States postmark as stamped on the envelope . . . will be deemed to be the date of filing").

before April 15" of the year following a calendar year "and the full amount of the tax shall be due and payable on or before the" due date of the return).[14]

B. Notice of Deficiency

A notice of deficiency under N.J.S.A. 54A:9-2(a) is not required to be issued for self-assessed taxes. The plain language of the statute clearly states that the Director may mail a notice of deficiency to the taxpayer if the Director determines that there is a deficiency of income tax. Therefore, considering the plain and unambiguous language of the statute, the Director is not required to issue a notice of deficiency to let taxpayers know the amount of tax on their GIT returns. If a taxpayer is already aware of his tax obligation when he prepares and files a return, he must pay such amount of tax to Taxation. However, the statute applies to GIT due in addition to what the taxpayer reports as self-assessed. See also N.J.A.C. 18:2-5.5(a)(2) (defining an "additional assessment" as an assessment of either "additional tax" under the State Tax Uniform Procedure Law, N.J.S.A. 54:49-6, or a "[d]eficiency assessment," where after a return is filed, "the Director determines that there is a deficiency with respect to the payment of tax due because the amount of tax shown due on the report or return is less than the amount of tax due after adjustment of the amount due upon examination or audit of the return . . . ," but "does not include an assessment issued because the amount of tax actually paid is less than the amount due as shown

[14] A taxpayer cannot appeal the self-assessed tax liability on his return. See N.J. Div. of Taxation Office of Counsel Serv. Conference and Appeals Branch, CAB-300 Protest and Conference Guidebook 3 (2017) (if Taxation "issues a notice without including information about appeal rights, it usually means that the notice cannot be protested. This includes notices" sent by Taxation "when [a taxpayer] file[s] a return but . . . [does] . . . not pay the entire amount that [taxpayer] . . . reported as due. In such a case, the assessment has been self-assessed so [taxpayer] . . . cannot protest the resulting notice for nonpayment."); see also N.J. Div. of Taxation, NJ-601-I, Taxpayer's Bill of Rights (2006) (Taxation "will not accept a protest (appeal) of a self-assessed liability (liability you indicated on the tax return you filed) or a bill that results from a math error you made.").

on the taxpayer's return or report.").[15] If the Director determines to increase a taxpayer's GIT obligation beyond the amount the taxpayer reported to be due on his original return, the Director is required to issue a notice of deficiency, because the taxpayer is not aware of any additional tax that the Director has assessed.

The Taxpayers' Bill of Rights, L. 1992, c. 175 ("Taxpayers' Bill of Rights") does ensure that "all taxpayers are accorded the basic rights of fair and equitable treatment under the law; and all taxpayers receive the information and assistance they need to understand and meet their State tax responsibilities." N.J. Div. of Taxation, Pub. ANJ-1, New Jersey Taxpayers' Bill of Rights 1 (2018). The Taxpayer's Bill of Rights guarantees (1) the right to obtain information from Taxation; (2) the right to appeal with regard to a determination made by the Director; and (3) all notices contain clear purpose of the communication, a guidance to respond to the notice, and a statement of taxpayers' rights. The Taxpayer's Bill of Rights, however, does not place an obligation upon Taxation to issue a notice to remind a taxpayer that taxes shown as owed on a filed return (original or amended) needs to be remitted.

The court finds similarities in the purpose, effect, and operation of a federal notice of income tax deficiency. According to I.R.M. 4.8.9.2(1) (Aug. 11, 2016), a notice of deficiency "is a legal notice in which the Commissioner determines the taxpayer's tax deficiency" (emphasis added). Furthermore, "IRC 6212 and IRC 6213 require that the [IRS] issue a notice of deficiency before assessing additional income tax . . . ." Ibid. "The purpose of a notice of deficiency is . . .

[15] N.J.S.A. 54:49-6 permits assessment of "additional tax" under the same circumstances for the issuance of a GIT deficiency under N.J.S.A. 54A:9-2(a) in that where after a return is filed, the Director "shall cause the same to be examined and may make such further audit or investigation as he may deem necessary, and if therefrom he shall determine that there is a deficiency with respect to the payment of any tax due under such law, he shall assess the additional taxes, penalties, if any, pursuant to any State tax law." N.J.S.A. 54:49-6.

[t]o comply with IRC 6213 . . . [t]o ensure the taxpayer is formally notified of the IRS's intention to assess a tax deficiency . . . [and t]o inform the taxpayer of the opportunity and right to petition the Tax Court to dispute the proposed adjustments." I.R.M. 4.8.9.2(2).

Therefore, the court concludes that a notice of deficiency under N.J.S.A. 54A:9-2(a) is required (1) when Taxation determines the taxpayer's tax deficiency that taxpayer does not agree; or (2) when Taxation assesses additional income tax. By issuing such notice, taxpayers would be aware of any potential additional tax and may appropriately protest any dispute to Taxation.

Here, the Nevinses clearly acknowledged that they were aware of their tax liability on the NJ-1040X when they allegedly filed the same with Taxation; they elected not to submit any payment. In the court's view, the Nevinses acted to their detriment by waiting for a notice from Taxation before remitting any payment.

Furthermore, as noted above, there was no additional tax assessed by the Director, nor additional income included, other than the attorney fee income that should have been undisputedly reported, and which was so reported on the amended US-1040X and the allegedly filed second NJ-1040X. Indeed, according to the allegedly filed second NJ-1040X, the GIT should have been more because the Nevinses' reported the income from Gallagher Bassett Services as $108,333 ($325,000 less two-thirds paid to the client), whereas for the US-1040X, it was reported as $99,025 ($291,249 less $192,224 paid to the client). Again, the second NJ-1040X showed $122,990 as net profits from business whereas the proposed US-1040X showed $135,282. While a portion of the difference of $12,292 may be due to the $10,000 property tax deduction machinations, it still shows that the Director did not impose any additional GIT.

C. A Determination by the IRS must be Final and Supported by Evidence

The Nevinses contend that Mr. Meyer received an approval from Ms. Temmel with regard to the figures in the Nevinses' proposed US-1040X and therefore allegedly filed a NJ-1040X as soon as possible.[16] The inquiry is whether the "final determination" of the IRS was made prior to the allegedly filing of the second NJ-1040X on September 10, 2010 and whether the second NJ-1040X could be considered as a report of the federal change or correction by the IRS.

In H.B. Acquisitions, Inc. v. Dir., Div. of Taxation, 12 N.J. Tax 60 (Tax 1991), the taxpayer and the IRS had a conference with regard to the taxpayer's corporate income tax return and the taxpayer agreed to file an amended return with the IRS. Several months after the conference, the taxpayer filed an amended return with the IRS and sought refunds from Taxation based on the amended return filed with the IRS. The taxpayer argued that the federal amended return was the result of a federal audit. In denying the taxpayer's argument, the court emphasized that a self-assessed return is not a change or correction by the IRS because it is because it is subject to redetermination by the respective taxing authorities. The court explained that "self-assessment and redetermination by the taxing authority are two distinct methods of arriving at a tax liability and are treated as such." Id. at 67 (citing Vicoa, Inc. v. Dir., Div. of Taxation, 166 N.J. Super. 496 (App.Div.1979); Olin Mathieson Chemical Corp. v. Kingsley, 119 N.J. Super. 102 (App.Div.1972)). The court further remarked that:

> "[An] amended return in the context of an audit at the request of the IRS does not change the self-assessing character of that filing. There is no proof that the figures in the second amended federal return were figures changed or corrected by the IRS. The only evidence offered by taxpayer on this issue is a letter prepared by the taxpayer indicating a request by the IRS for the amended return to assist in the audit."

[16] There is no actual proof that Ms. Temmel approved the figures in the Nevinses' proposed US-1040X, only the claim made by Mr. Meyer.

[Id. at 67-68.]

Similarly, in Lenox, Inc. v. Dir., Div. of Taxation, 19 N.J. Tax 437 (Tax 2001), the taxpayer received an examination report from the IRS, which recommended a change in the filed federal corporate income return, on July 27, 1990. On July 31, 1990, the taxpayer consented to the same. After that, the taxpayer received a letter from the IRS dated October 31, 1990, advising "the acceptance of" the taxpayer's "federal income tax returns . . . with the changes noted in the" examination report of July 27, 1990. The parties and the court agreed that the date of the "final determination" of the change in the taxpayer's income was October 26, 1990. Id. at 448 (citing Sharps, Pixley, Inc. v. Dir., Div. of Taxation, 16 N.J. Tax 626, 636-39 (Tax 1997) (which had concluded that the date of the IRS's letter confirming the acceptance of a revenue agent's report was the date of the IRS's final determination for purposes of N.J.S.A. 54:10A-13)).

Applying the analyses in H.B. Acquisitions, Inc. and Lenox, Inc., to the facts in the present matter, this court finds that the "final determination" of the IRS was not made until November 24, 2010 when the Nevinses received a confirmation letter from the IRS, indicating that the IRS accepted the Nevinses' "cost of goods" adjustment of $192,144 and that the Nevinses' accepted the IRS proposed increase to business income in an amount of $291,249. The alleged discussion between Mr. Meyer and Ms. Temmel was merely a part of the examination process. The alleged approval from Ms. Temmel, instigating the proposed US-1040X, was not the IRS's official and final determination. The figures were still subject to redetermination by the IRS until the official letter was issued on November 24, 2010. The IRS could have discovered an error in the amended return, and could have made additional changes to the taxable income until the issuance of the confirmation letter. Accordingly, the court concludes that the Nevinses did not appropriately report the "final determination" of the IRS to Taxation under N.J.S.A. 54A:8-7. As a result, the

Director had an authority to assess the Nevinses' 2008 GIT at any time under N.J.S.A. 54A:9-4(c)(1)(C).

Additionally, Mr. Meyer did not include a statement showing the federal determination in the Nevinses' amended return as required by N.J.S.A. 54A:9-3(a). Assuming, arguendo, that the Nevinses mailed the second NJ-1040X on September 10, 2010, Taxation still would not have known then whether the amended return was also a report of a federal change without having a statement showing the federal determination. Therefore, even if Taxation had received the second NJ-1040X from the Nevinses, it would have assessed additional tax liability based on the FTI from the IRS and not the amended return.

D. Interest

The Nevinses contend that they would have not incurred any interest if they have received a notice or a bill from Taxation earlier after they allegedly filed their second NJ-1040X in September of 2010. To determine the appropriateness of interest, the court divided this matter into two periods and analyzed each. The first period is from April 15, 2009, the date an original GIT return was due, see N.J.S.A. 54A:8-1(a), to June 17, 2015, the date that the final determination was issued to the Nevinses. Considering that the Director's assessment was appropriate until the date of the final determination for the aforementioned reasons, and further considering the clear and ordinary meaning of N.J.S.A. 54:49-3, accrual of interest from the date the tax was originally due, April 15, 2009, is appropriate. That statute clearly states that "any taxpayer who shall fail to pay any State tax . . . shall pay in addition to the tax, . . . interest . . . from the date the tax was originally due until the date of actual payment." Ibid. (emphasis added); see N.J.S.A. 54:9-5(a) ("If any amount of income tax is not paid on or before the last date prescribed in this act for payment, interest on such amount at the rate as is required . . ."); N.J.S.A. 18:2-2.4(a) (failure to

pay tax "within the time prescribed" by the taxing statute will invite interest "on the unpaid tax"). Since the Nevinses' 2008 GIT could have been assessed at any time, any interest relates to 2008 GIT could have been assessed at any time. See N.J.S.A. 54:9-5(j) ("Interest prescribed under this section may be assessed and collected at any time during the period within which the tax or other amount to which such interest relates may be assessed and collected, respectively") (emphasis added).

The second period is from June 17, 2015 to present. The final determination letter clearly states that "interest continues to accrue at the statutory rate as long as any balance remains unpaid." The Nevinses could have paid the GIT demanded and avoided the additional accrual of interest at any point from June 17, 2015. Interest continues to accrue until all outstanding amounts are paid, and until the court decides the matter. If a taxpayer pays the final determination amount, and the assessment is voided, the taxpayer is entitled to a refund with interest. See N.J.S.A. 54:49-15.1. Accordingly, a taxpayer who chooses not to pay, but takes a wait-and-see approach pending the court's decision, can face increased, but avoidable, interest payments.

CONCLUSION

For all of the foregoing reasons, the court finds that the Director's final determination is valid under N.J.S.A. 54A:9-3(a) and 54A:9-4(c)(1)(C). Accordingly, the Nevinses' motion to annul the Director's final determination is denied. Conversely, the Director's cross-motions for summary judgment is granted, and the final determination by the Director is, therefore, affirmed. The Nevinses must pay the GIT amount demanded in the Director's final determination, including interest. In reaching these conclusion the court is satisfied that:

(1) The general three-year statute of limitations under N.J.S.A. 54A:9-4(a) does not apply to a self-assessed tax.

(2) The Director was not required to provide a notice to the Nevinses for the GIT reported by them as due on their second NJ-1040X alleged to have been filed on September 10, 2010.

(3) The Nevinses did not appropriately reported the changes made by the IRS to Taxation according to N.J.S.A. 54A:8-7. As a result, the Director had the authority to assess the Nevinses with GIT for 2008 at any time under N.J.S.A. 54A:9-4(c)(1)(C) for failure to comply with section 54A:8-7.

(4) Interest accrues from the date the tax was originally due, April 15, 2009.

The parties shall submit computations pursuant to R. 8:9-3 within 30 days, showing the assessment amount and interest computed in accordance with this opinion and through the date hereof. The court's order and final judgment consistent with this opinion will thereafter be uploaded on *eCourts*.