

Hersko v Hersko

2025 NY Slip Op 33041(U)

July 30, 2025

Supreme Court, Kings County

Docket Number: Index No. 520492/2021

Judge: Wayne Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of July 2025.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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ABRAHAM HERSKO and MORRIS HERSKO
As CO-EXECUTORS of the ESTATE OF
ISAAC HERSKO a/k/a YITZCHOK SHLOMO
HERSKO Plaintiff,

Index No 520492/2021

-against-

BARRY HERSKO a/k/a ZEV DOV HERSKO
a/k/a BEREL HERSKO, BELLA HERSKO,
WILSON-HINS ASSOCIATES, INC, CLARK
WILSON, INC., WILSON PROPERTIES &
EQUITIES, INC., WILSON FLAT, INC., WILSON
HAN ASSOCIATES, INC., WILSON-MER
ASSOCIATES, INC., B. CLARK ASSOCIATES, INC.,
516 KINGSTON, LLC and

DECISION & ORDER

ABRAHAM WEISEL, as escrow agent,

Defendants.

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The following papers read on this motion:

NYSCEF Doc Nos

Notice of Motion/Order to Show Cause/
Petition/Affidavits (Affirmations) and
Exhibits

1021,1022,1033-1057

1083-1095, 1100-1114

Cross-motions Affidavits (Affirmations)
and Exhibits

1067, 1076-1077

1115-1123, 1132-1138

Answering Affidavit (Affirmation)

1082

Reply Affidavit (Affirmation)
Supplemental Papers

This matter has been set down for an inquest pursuant to the order of Judge Karen Rothenberg that granted Plaintiff's motion for a default judgment.

The scope of the inquest is to determine what equitable relief Plaintiff is entitled to, based on Defendants' default.

In preparation for the inquest, several motions in limine were made. Three of the motions, which remain outstanding, relate to the parties' tax records. They are Plaintiff's motion to quash a subpoena for ISAAC HERSKO's tax records (MS 58), Plaintiffs' motion to exclude evidence relating to the tax estoppel doctrine (MS 61), Defendants' motion to quash a subpoena for Defendant BARRY HERSKO's tax records (MS 60) and Defendants' motion in limine to exclude any evidence conflicting with Plaintiff's tax returns (MS 55).

Defendants intend to offer ISAAC HERSKO's tax returns to show that he did not pay taxes on any income from the properties and did not report ownership or any interest in the properties on his tax returns. Defendants argue that therefore Plaintiffs are barred from claiming an interest in the properties, in the shares of the corporations that hold title to the properties, or other equitable interest in the properties pursuant to the doctrine of tax estoppel.

Plaintiffs contend that the tax estoppel doctrine does not apply here because ISAAC HERSKO had a valid reason for not listing the properties, or any income from the property on his taxes, because he was not the title owner of the properties and received no income from the properties. In this context, Plaintiffs also argue that the tax returns of the corporations that own the properties cannot be a basis for estoppel as ISAAC HERSKO did not sign those returns.

Tax estoppel does not apply where the relevant tax documents are neither sworn nor signed by the party against whom they are used (*United Hay, LLC v Harounian*, 213 AD3d 443 [1st Dept 2023]; *Tradesman Program Managers, LLC v Doyle*, 202 AD3d 456 [1st Dept 2022]; *McGuire v McGuire*, 197 AD3d 897 [4th Dept 2021]). Thus, the tax estoppel doctrine would only apply to returns signed by ISAAC HERSKO, not the corporate tax returns.

Plaintiffs further argue that the tax estoppel doctrine is inappropriate in this case because the doctrine only applies to affirmative statements made in tax forms, not omissions.

For the purpose of deciding these motions, the Court will assume arguendo that Defendants' assertion that ISAAC HERSKO's tax returns did not list the properties or report any income from the properties, is true.

A party to litigation may not take a position contrary to a position taken in an income tax return (*Mahoney-Buntzman v Buntzman* 12 NY3d 415 [2009]; *Matter of Cassini*, 180 AD3d 775 [2d Dept 2020]).

However, this rule applies to specific affirmative statements made about a property in a tax return rather than an omission of a property on a tax return.

“Tax estoppel is applied where a party's subsequently-adopted litigation position flatly contradicts express assertions previously made in tax filings . . . , but the omission of an asset leaves all questions in regard to it open,” (*Robert Owen Lehman Foundation Inc. v Israelitische Kultusgemeinde Wien*, 197 AD3d 865 [4th Dept 2021]; citing *Angiolillo v Christie's Inc.*, 185 AD3d 442 [1st Dept 2020] and *Matter of Elmezzi*, 124 AD3d 886, [2d Dept 2015]).

The court in *Robert Owen Lehman Foundation*, acknowledging *Mahoney-Buntzman*, declined to extend the tax estoppel doctrine to a case where a party did not list a painting on its tax forms, holding,

“Here, tax estoppel does not prevent plaintiff from contending that it owns the artwork because plaintiff did not affirmatively assert in its tax return that it did not own the artwork; it simply did not list the artwork in a schedule of gifts that it received in 2016” (*Robert Owen Lehman Foundation* at 867).

In *Angiolillo v Christie's Inc.*, 185 AD3d 442 [1st Dept 2020], the Appellate Division First Department, upheld the denial of a motion to dismiss pursuant to the tax estoppel doctrine, where a plaintiff did not report a diamond on its tax forms. The Court held, “[t]hat plaintiffs did not include the diamond's value in filings with Italian tax authorities in the years after the Senator's death does not estop them from asserting ownership rights now” *Id* at 443.

In *Matter of Elmezzi*, 124 AD3d 886, [2d Dept 2015], the Appellate Division Second Department affirmed the denial a respondent's motion to dismiss, rejecting the application of the tax estoppel doctrine, where the petitioner merely omitted the contested property from his tax returns and did not report any capital gains on the property.

The cases cited by Defendants involved situations where the party against whom tax estoppel was asserted had made affirmative representations concerning the property or income on their tax forms rather than simply omitting the property or income.

In *Mahoney-Buntzman v Buntzman*, 12 NY3d 415 [2009], the Court held that a husband was estopped from arguing that the funds received from the sale of corporate interests were proceeds from the sale of stock because he had affirmatively reported the funds as business income on the parties' joint tax returns.

In *PH-105 Realty Corp v Elayaan*, 183 AD3d 492 [1st Dept 2020], the court applied tax estoppel where the defendant had made affirmative statements in its corporate tax returns that stated that the plaintiff had a “75% ownership interest” in an LLC.

In *Kalaijian v Grahel Assoc LLC*, 193 AD3d 832 [2d Dept 2010], the court held that a defendant LLC was estopped from denying the plaintiff's interest in the LLC where the LLC's tax returns stated that plaintiff held a 49% interest in the LLC.

In *Matter of Cassini*, 180 AD3d 775 [2d Dept 2020], the court upheld objections to an executor's account of an estate's assets where the account omitted certain items that the executor had affirmatively reported as assets of the estate in a New York State estate tax return.

In *Matter of Chimsanthia*, 200 AD3d 450 [1st Dept 2021], the court held that a claim for constructive trust was barred by the tax estoppel doctrine where it was "logically incompatible" with a specific affirmative statement in a tax form that the transfer was without consideration, and that the sale price was \$0.

In *Liu v 88 Harborview Realty LLC*, 2019 NY Slip Op 33280(U), the Court in fact rejected the tax estoppel claim asserted by the Plaintiff.

In *Gliklad v Kessler*, 2016 WL 3671105 (Sup Ct NY Cnty 2016), a defendant was estopped from contending that a transfer was for consideration where he affirmatively stated.

Also cited by Defendants were: *Braunstein v Braunstein*, 132 AD3d 620 [2d Dept 2015], husband estopped from denying a net operating loss carryover of \$514,307 that he claimed on his tax return; *Man Choi Chiu v Chiu*, 125 AD3d 824, [2d Dept 2015], an LLC member was estopped from arguing that a statement in the LLC's tax returns that his brother had a 25% interest in the LLC was incorrect; *Shyer v Shyer*, 187 AD3d 674, [1st Dept 2020], a party who declared on her tax returns that she sold 7 option shares could not assert that she had not sold the shares; *Rizzo v Nat'l Vacuum Corp.*, 186 AD3d 1094 [4th Dept 2020], a defendant was estopped from contesting an affirmative statement in defendant's tax returns that plaintiff's had a 20% interest in a business; *Livathinos v Vaughan*, 121 AD3d 485 [1st Dept 2014], the court estopped a defendant from asserting another party owned 50% of a company's stock where the company's tax returns state that defendant owned 100% of the stock; *Walsh v Blaggards III Rest. Corp.*, 131 AD3d 854

[1st Dept 2015], a debtor was bound by an affirmative statement in its tax returns that \$50,000 paid by a creditor was a loan and could not later argue that the payment was an investment.

Defendants argue that a declaration included in Internal Revenue Service Form 1040, attesting that the form is complete, constitutes an affirmative statement that Plaintiff had no interest in any properties or income from any properties not listed.

The Court was unable to find any case which held that the declaration of completeness in Form 1040 was a basis to impose tax estoppel. On the contrary, the clear appellate authority holds that tax estoppel will not be imposed based on mere omissions in tax returns (*Robert Owen Lehman Foundation Inc. v Israelitische Kultusgemeinde Wien*, 197 AD3d 865 [4th Dept 2021]; *Angiolillo v Christie's Inc.*, 185 AD3d 442 [1st Dept 2020] and *Matter of Elmezzi*, 124 AD3d 886, [2d Dept 2015]).

In light of this appellate authority, the Court declines to extend the tax estoppel doctrine to include omissions in tax returns based on the declaration at the end of IRS Form 1040.

Further, tax estoppel may not be invoked where the opposing side offers a reasonable explanation for the discrepancy (*Morris v Tausik*, 222 AD3d 969, at 972 [2d Dept 2023]; *Tradesman Program Managers, LLC v Doyle*, 202 AD3d 456 [1st Dept 2022]; *United Hay, LLC v Harounian*, 231 AD3d 588 [1st Dept 2024]). Plaintiffs here assert that ISAAC HERSKO did not list the properties because legal title was held by the corporations, and that he received no income from the properties.

As the doctrine of tax estoppel is not applicable to this case, the tax records sought through the subpoenas are not relevant to the inquest and should be quashed. Similarly, the motion in limine to exclude any evidence conflicting with ISAAC HERSKO's tax returns should be denied.

WHEREFORE, it is hereby ORDERED that Defendants' motion in limine to exclude any evidence conflicting with ISAAC HERSKO's tax returns (MS 55) is Denied; and it is further,

ORDERED that Plaintiff's motion to quash a subpoena for ISAAC HERSKO's tax records (MS 58) is Granted; and it is further,

ORDERED that Defendants' motion to quash a subpoena for Defendant BARRY HERSKO's tax records (MS 60) is Granted; and it is further,

ORDERED that that part of Plaintiffs' motion (MS 61) that seeks to exclude evidence relating to ISAAC HERSKO's taxes is Granted.

This constitutes the Decision and Order of the Court.

ENTER:



JSC