

**Hersko v Hersko**

2025 NY Slip Op 34995(U)

December 22, 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 22nd day of December 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

Plaintiffs,

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

ORDER

MS 62

ABRAHAM WEISEL, as escrow agent,

Defendants.

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The following papers read on this motion:

Notice of Motion/Order to Show Cause/  
Petition/Affidavits (Affirmations) and  
Exhibits  
Cross-motions Affidavits (Affirmations)  
and Exhibits  
Answering Affidavit (Affirmation)  
Reply Affidavit (Affirmation)  
Supplemental Affidavit (Affirmation)

NYSCEF Doc Nos

1168-1172

1182

1183

Defendants move to renew and reargue a decision and order of this Court dated July 30, 2025, which held that the doctrine of tax estoppel was not applicable in this case.

The decision determined four motions: Plaintiffs' 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 had argued that Plaintiffs were barred by the tax estoppel doctrine from claiming an ownership interest in the properties that are the subject of this action because ISAAC HERSKO did not report either the properties or income from the properties in his tax filings.

The Court quashed the subpoenas, denied Defendants' motion to exclude evidence that conflicted with ISAAC HERSKO's tax returns and granted Plaintiffs' motion to preclude evidence relating to the tax estoppel doctrine. For the purposes of deciding the motions the Court assumed as true Defendant's assertion that ISAAC HERSKO did not report any income from the properties on his tax returns.

As more fully discussed in the decision of July 30, 2025, the Court held that tax estoppel cannot be invoked based on an omission in a tax document but only on an affirmative statement or declaration. The Court also held, as a separate ground, that Plaintiffs had offered a reasonable explanation for not ISAAC HERSKO reporting the properties on his tax forms.

Defendants argue that the Court misapprehended the facts when it relied on a statement from Plaintiffs' counsel that ISAAC HERKSO received no income from the properties.

As a preliminary matter, the Court did err in adopting on the representation of Plaintiff's counsel that ISAAC HERKSO received no income from the properties. Morris Hersko testified at the inquest that ISAAC HERSKO had received income from the properties.

However, this would not change the Court's decision because the Court's finding that ISAAC HERSKO offered a reasonable explanation for omitting the properties from

his tax returns was a second independent ground for the Court's determination. The first ground was that an omission in a tax filing by itself is not a basis to apply the tax estoppel doctrine.

Defendants also contend that the Court misapprehended the law by holding that an omission of income in a tax filing alone cannot be a basis for estoppel. They argue that because ISAAC HERSKO was required to report any income from the properties in his tax filings, his failure to do so estops him from asserting an ownership interest in the properties that produced such income.

This position is misplaced for two reasons. First, because a failure to report income from a property is not a basis to estop assertion of a claim of ownership of a property. Second, because an omission alone is not a sufficient basis for tax estoppel.

The failure to report income from the properties on the Plaintiff's tax returns was not relevant to the scope of the inquest, outside of the claim of tax estoppel, because Plaintiffs were no longer pursuing monetary claims for income from the properties, but only a constructive trust on ownership of the Properties.

To the extent that a failure to report income, where it is required to be reported, may be a basis for the application of tax estoppel it would only be as to income that was not reported.

However, the omission of income on a tax return is not a basis for estoppel of a claim of ownership or of an interest in the property that is alleged to have produced the income. (*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]).

Defendants assert that the decision in *Mahoney-Buntzman v Buntzman*, 12 N.Y.3d 415 (2009) established an exception to the rule that omissions alone are not a sufficient basis for tax estoppel in cases where income is required to be reported.

However, *Mahoney-Buntzman* did not involve an omission but an affirmative declaration on a tax return that certain income was business income. The court held that because the Defendant declared the income to be business income on his tax return, he could not in a later divorce proceeding claim the income was proceeds of the sale of stock.

The court did not base its decision on a failure to report income that was required to be reported but on the fact that the defendant had made an affirmative declaration under the penalties of perjury that the income was business income.

The court stated:

“Here, husband does not dispute that, in accordance with his settlement agreement, he reported the \$1,800,000 in settlement proceeds as business income on his federal income tax return, in which he swore that the representations contained within it were true. We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.” (Id. at 422).

In support of their motion, Defendants also cite *Friedman v Ocean Dreams, LLC*, 15 Misc 3d 1146(A) [Sup Ct Kings Cnty 2007], *Rubin v Rubin*, 33 Misc 3d 1214(A) [Sur Ct NY Cnty 2011], and *Gliklad v Cernaya*, 2016 NY Slip Op 31300(U) [NY Sup Ct 2016], for the proposition that an omission of income on a tax return is a basis to estop a party from asserting ownership of the property producing the income.

These cases are distinguishable from the situation in the present case.

In *Friedman v Ocean Dreams, LLC*, 15 Misc 3d 1146(A) [Su Ct Kings Cnty 2007], the plaintiff claimed an interest in the defendant LLC. The court held that plaintiff was estopped from asserting an ownership interest in the LLC because the tax return which

the plaintiff prepared for the for the LLC and for a co-defendant investor, affirmatively stated that the co- defendant investor owned 100% of the LLC.

In *Rubin v Rubin*, 33 Misc 3d 1214(A) [Sur Ct NY Cnty 2011], the court held the defendants were estopped from asserting ownership of a painting of a decedent where the defendants, as executors of decedent's estate, had filed a tax return affirmatively listing the painting as an asset of the decedent's estate.

*Gliklad v Chernaya*, 2016 NY Slip Op 31300(U) [NY Sup Ct 2016], involved a turnover proceeding brought by a creditor against the daughters of a judgment debtor to compel the turnover of monies owed to an LLC that was owned by the judgment debtor. The plaintiff had previously secured a judgment that the assets of the LLC had to be turned over to satisfy the judgment against the judgment debtor.

The defendant daughters had argued that the monies that they received from the LLC were distributions, not loans that had to be repaid to the LLC.

The court held that because the daughters did not report the monies as distributions on their tax returns, they were estopped from claiming that the monies were distributions.

However, in addition to the omission of the monies on their tax returns, the daughters had made affirmative statements that the monies were loans.

The daughters had stated in depositions, and in responses to information subpoenas, that the monies were loans. Further, the daughters had signed promissory notes to the LLC to pay back the monies.

The court in *Gliklad v Chernaya*, cited three cases for the proposition that failing to report income alone without an affirmative statement is a basis for tax estoppel: *Mahoney-Buntzman v Buntzman* 12 NY3d 415 [2009], *Livathinos v Vaughn* 121 AD3d 48 [1st Dept 2014], and *Walsh v Blaggards III Restaurant Corp*, 131 AD3d 854 [1st Dept

2015]. However, in all three of these cases, the estopped party had made affirmative statements about the income or assets in question.

As discussed above, in *Mahoney-Buntzman v Buntzman*, the estopped party had affirmatively reported the income as business income. In *Livathinos v Vaughn* the estopped party had affirmatively asserted that she owned 100% of a company's stock. In *Walsh v Blaggards III Restaurant Corp*, the defendant had affirmatively stated in its tax returns that \$50,000 paid by the plaintiff was a loan.

Defendants also cite *Gliklad v Kessler*, 2016 N.Y. Slip Op. 31301(U) (NY Cnty 2016), for the proposition that the declaration at the end of a tax return made under the penalties of perjury that the statements in the return are true, correct, and complete, is a sufficient basis to apply tax estoppel to any omissions.

However, in *Gliklad v Kessler*, the defendant was estopped from asserting that a payment was compensation for services where he had affirmatively declared on his tax return that the income was a gift from a foreign person.

Here, even assuming ISAAC HERSKO was required to report income from the properties and did not do so, that alone, without an affirmative declaration about the properties is not a basis to apply tax estoppel.

WHEREFORE, Defendants' motion to renew and reargue is denied. This constitutes the Decision and Order of the Court.

ENTER:



JSC

**HON. WAYNE SAITTA**  
**J.S.C.**