

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition
of
ROBERT VOLPE AND CAROLE VOLPE
for Redetermination of a Deficiency or for
Refund of New York State Personal Income
Tax and Unincorporated Business Tax under
Articles 22 and 23 of the Tax Law for the Years
1973 through 1977.

DECISION
DTA NO. 803371

Petitioners, Robert Volpe and Carole Volpe, 98-05 67th Avenue, Apartment #7D, Forest Hills, New York 11374, filed an exception to the determination of the Administrative Law Judge issued on December 10, 1987 with respect to their petition for redetermination of a deficiency or for refund of New York State personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1973 through 1977 (File No. 803371). Petitioners appeared by Nathan Altman, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of Counsel).

Neither party filed a brief on exception. Oral argument, at petitioners' request was heard on April 14, 1988.

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

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for credit or refund of penalties imposed upon assessments of personal income and unincorporated business taxes

for the years at issue.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated into this decision by this reference.

To summarize, the petitioners did not file Federal personal income tax returns and New York State personal income tax or unincorporated tax returns for the years 1973 through 1977. In 1978, the Internal Revenue Service calculated petitioners' personal income tax liability for the years 1973 through 1977 and also for the year 1978. Based upon the action of the Service, the Division of Taxation assessed personal income tax and unincorporated business taxes against the petitioners for the years 1973 through 1978. Petitioners subsequently paid all taxes, interest and penalties to the Federal government and the State of New York.

In 1984, the petitioners made application to the Internal Revenue Service for abatement of the penalties and/or additions to tax for the years at issue. In 1985, the petitioners received from the Service checks which represented abatement of such Federal penalties and/or additions to tax.¹

Petitioners' application for refund of personal income tax and/or unincorporated business taxes was made on September 10, 1985 and denied on February 24, 1986 on the grounds that petitioners did not provide reasonable cause for abatement of the penalty.

In addition to the above facts, we find petitioners did submit to the Division with their application for refund, proof that Mr. Volpe came under medical care for anxiety, depression and alcoholism in August of 1978.

¹ The record indicates petitioners received refund checks from the United States Treasury, but the amounts of such checks could not be reconciled with the dollar amount of the refunds claimed.

OPINION

Tax Law § 685(a)(1) and (2) imposes penalties for failure to timely file an income tax return and for failure to timely pay the amounts of income tax shown on any return required to be filed, respectively. Tax Law § 722(a) incorporates the aforesaid provisions and imposes such penalties for failure to timely file unincorporated business tax returns and pay amounts of tax shown on the returns.

Where a taxpayer fails to file a New York State income tax return on the last date prescribed for filing the applicable addition or additions to tax, penalty or penalties set forth in section 685 of the Tax Law must be imposed, unless it is shown that such failure was due to reasonable cause and not due to willful neglect (20 NYCRR 102.7[a]).

The serious illness of a taxpayer may constitute reasonable cause under certain circumstances (20 NYCRR 102.7[d][i]). Reasonable cause may also be shown by other circumstances which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect (20 NYCRR 102.7[d][4]).

Petitioners argue that although Mr. Volpe did not come under medical care until 1978, his medical problems, particularly alcoholism, existed for the years in question and that those problems were reasonable cause for not filing personal income and unincorporated business tax returns. Further, petitioners argue that the Division should follow the determination of the Internal Revenue Service and approve petitioners' request for refund.

The Division argues that there was not reasonable cause for the petitioners' failure to file taxes and that the penalty assessment should be sustained.

We affirm the determination of the Administrative Law Judge. Petitioners failed to prove

that Mr. Volpe's medical problems existed for the years at issue and that even if they did, that they were of such a nature as to prevent Mr. Volpe from filing his returns. Further, they failed to prove why Mrs. Volpe did not file the returns. There is nothing in the record to indicate the extent of petitioner's medical problems during the years at issue. The absence of such proof precludes a finding that reasonable cause existed with regard to petitioners' failure to carry out their responsibility under the Tax Law.

Finally, the Division is not required to follow the determination of the Internal Revenue Service. 20 NYCRR 153.4 provides as follows:

"The Tax Commission is not required to accept as correct any change (as set forth in this Part) in a taxpayer's Federal taxable income, Federal items of tax preference, total taxable amount or ordinary income portion of a lump sum distribution, Federal credit for employment-related expenses or the disallowance (in whole or in part) of a claim for credit or refund of Federal income tax or the amount an employer is required to deduct and withhold from wages for Federal income tax withholding purposes. Instead, the Tax Commission may conduct an independent audit or investigation in regard thereto."

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners, Robert Volpe and Carole Volpe, is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Robert Volpe and Carole Volpe for a refund of penalties imposed upon assessments of personal income and unincorporated business taxes is denied.

Dated: Albany, New York
September 15, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner