

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MICHAEL AND GRACE PRICE	:	DECISION
	:	DTA No. 808095
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1986.	:	

Petitioners Michael and Grace Price, 305 Evergreen Drive, Batavia, Illinois 60510 filed an exception to the determination of the Administrative Law Judge issued on April 23, 1992 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 year 1986. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioners did not file a brief. The Division of Taxation filed a letter in lieu of a brief. Oral argument was not requested.

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

ISSUES

I. Whether petitioners timely filed additional extensions of the time within which to file their 1986 income tax return.

II. Whether petitioners have established entitlement to abatement of late filing penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On October 15, 1987, petitioners, Michael and Grace Price, filed a New York State and City of New York Nonresident Income Tax Return (Form IT-203) for the year 1986. Attached to

this return was, inter alia, a copy of Form IT-370 ("Application for Automatic Extension of Time to File"), by which petitioners had requested an automatic four-month extension of the time within which to file their 1986 return (i.e., from April 15, 1987 to August 15, 1987), a second copy of Form IT-370 by which petitioners had requested an additional one-month extension of the time within which to file their 1986 return (i.e., from August 15, 1987 to September 15, 1987) and a copy of Federal Form 2688 ("Application for Additional Extension of Time to File"), by which petitioners had requested an additional one-month extension of the time within which to file their 1986 return (i.e., from September 15, 1987 to October 15, 1987). On the Federal Form 2688, petitioners had crossed out the "2688" and had handwritten "IT-372(NY)". The extensions are dated April 14, 1987, August 15, 1987 and September 12, 1987, respectively. In addition, attached to the return was Form IT-2105.9 ("Underpayment of Estimated Income Tax by Individuals"), which indicated estimated tax payments for 1986 as follows:

April 15, 1986	\$ 70.00
June 16, 1986	1,350.00
September 15, 1986	3,250.00
January 15, 1987	<u>3,250.00</u>
Total	\$7,920.00

Petitioners also filed for 1986 an Illinois Individual Income Tax Return (Form IL-1040) in which they reported as income capital gain of \$85,687.00 not reported as Federal income.

Petitioners' Form IT-203 included the following information:

Capital Gain		\$52,722.00
Rents and Royalties		(5,189.00)
Partnership Income ¹		<u>11,962.00</u>
Total Income		\$59,495.00
Less: N.Y. Itemized Deduction		(4,709.00)
Less: Exemption		<u>(1,995.00)</u>
N.Y. Taxable Income		<u><u>\$52,791.00</u></u>
N.Y. State Tax	\$5,712.00	
N.Y. City Tax	<u>65.00</u>	
Total Taxes		\$ 5,777.00
Less: Estimated Tax Paid		<u>7,920.00</u>

¹"Partnership income" consisted of income from a family-owned business located in New York State the dollar amount of which was allegedly not known or ascertainable by petitioners as of the April 15, 1987 due date for petitioners' return (see, above).

Amount Overpaid	<u>\$ 2,143.00</u>
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Petitioners' Forms IT-370 included the following information:

N.Y. State Tax Liability for 1986	\$5,030.00
Total Estimated Tax Paid	<u>7,900.00</u>
Tax Due	<u>\$ 0.00</u>

We modify finding of fact "3" to read as follows:

On November 11, 1987, the Division of Taxation (hereinafter the "Division") issued to petitioners a Statement of Income Tax Audit Adjustment for the year 1986 which stated that a computer review of petitioners' 1986 income tax return revealed that petitioners had erroneously calculated the penalty for the underpayment of estimated taxes and that the correct penalty was \$.28. Petitioners had calculated a penalty of \$24.00 on Form 2105.9. The statement indicated estimated tax paid for the year 1986 of \$7,920.00, which resulted in an overpayment of \$2,143.28, of which \$.28 was applied to the penalty for underpaying estimated tax, and \$2,143.00 was credited for 1987 estimated tax. It is noted that the copy of petitioners' 1986 nonresident income tax return introduced by the Division into the record of this hearing did not include the Form 2105.9. However, the Statement of Income Tax Audit Adjustment establishes that such form was filed by petitioners, as does the reference to Form 2105.9 on line 74 of petitioners' nonresident income tax return.²

On December 9, 1988, the Division issued to petitioners a Statement of Audit Changes for the years 1985 and 1986 in which petitioners' New York State tax liability was recomputed to include minimum income tax. The statement explained as follows:

²The Administrative Law Judge's finding of fact "3" read as follows:

"On November 11, 1987, the Division of Taxation (hereinafter the 'Division') issued to petitioners a Statement of Income Tax Audit Adjustment for the year 1986 which contained an adjustment to the Form 2105.9 filed by petitioners with their 1986 nonresident income tax return. The statement indicated estimated tax paid for the year 1986 of \$7,920.00. It is noted that the copy of petitioners' 1986 nonresident income tax return introduced by the Division into the record of this hearing did not include the Form 2105.9. However, the Statement of Income Tax Audit Adjustment establishes that such form was filed by petitioners, as does the reference to Form 2105.9 on line 74 of petitioners' nonresident income tax return."

We modified this fact to reflect the record in more detail.

"Net long term capital gains are reportable at 40%. Accordingly, the 60% not subject to New York Personal Income Tax is an item of tax preference, and subject to New York minimum income tax.

Penalty for late filing has been applied at 5% per month up to a maximum of 25% (Section 685(a)(1) of the New York State Tax Law)."

For the year 1986, the statement indicated additional income tax due of \$4,125.42, plus penalty of \$1,031.55 and interest. Petitioners paid the tax and interest due for both years and the penalty for 1985. The amount not paid, and at issue in this matter, is the penalty imposed for the late filing of the 1986 nonresident income tax return. Penalties were imposed because the Division had no record of receiving the applications for automatic and additional extensions of time to file prior to the filing of the 1986 return in October 1987.

On March 2, 1989, the Division issued to petitioners a Notice of Deficiency asserting penalty of \$1,031.55, plus interest. Petitioners filed a Request for Conciliation Conference on April 17, 1989 with the Bureau of Conciliation and Mediation Services. The Division did not introduce a copy of the Notice of Deficiency issued to petitioners into the record of this hearing.³ An accounts receivable computer printout and the testimony of an Income Tax Technician were presented which indicated that the Notice of Deficiency was issued on March 2, 1989. In addition, petitioners conceded that they received the Notice of Deficiency and filed the Request for Conciliation Conference in response thereto.

At the hearing, the Division explained that penalty was imposed because the extensions claimed to have been filed by petitioners were not in the Division's records. In addition, it was the position of the Division that, regardless of whether the extensions had been mailed and received, petitioners' initial extension of time was invalid because the total payments received by the return's due date of April 15, 1987 was less than 90% of the tax due. This computation was based upon comparing the estimated tax payments totalling \$7,920.00 to the total of the amount

³The Division requested and was granted additional time to January 24, 1992 to provide a copy of the Notice of Deficiency to the Administrative Law Judge. No correspondence was received from the Division after the hearing.

shown due on the return of \$5,712.00 plus the additional amount determined to be due on audit of \$4,125.42.

During the course of the hearing, petitioner Michael Price explained that his Illinois accountant timely filed the three extensions at issue. Mr. Price further testified that similar extensions were filed and accepted by the Internal Revenue Service and the Illinois Department of Revenue. Mr. Price explained that the extensions were necessary because he was a partner in a family business located in New York City, and the accountants for the partnership were late in getting to him the income tax information needed to complete his personal return. In addition, Mr. Price testified that his accountant erroneously reported the capital gain excluded from Federal income as Illinois income rather than New York income.

OPINION

In the determination below, the Administrative Law Judge held that, based upon the credible testimony of petitioner Michael Price, and the inadequacies of the Division's recordkeeping with regard to these particular taxpayers, petitioners timely filed the automatic extension for filing their 1986 nonresident income tax return. The Administrative Law Judge also held that: 1) the Division's position with regard to petitioners' submission of 90% of the taxes finally determined to be due is contrary to the income tax regulations in effect during the period in issue; 2) under the regulations, petitioners made a proper estimate and payment of the taxes finally determined to be due as of the date of filing their automatic extension request; and 3) petitioners received a four-month extension to August 15, 1987 within which to file their 1986 personal income tax return. With regard to the two additional extension requests filed by petitioners in August and September 1987, the Administrative Law Judge found that the additional extension requests were timely filed, but that petitioners had not proved that these extensions were granted and that, therefore, the filing date for petitioners' return remained August 15, 1987. Finally, the Administrative Law Judge held that since petitioners have not established entitlement to the abatement of the penalties based on reasonable cause, they are

liable for the penalty imposed for late filing their return for the period August 15, 1987 through October 15, 1987.

On exception, petitioners allege that there is circumstantial evidence that the extensions were, in fact, granted so that the filing date was legally extended to October 15, 1987. Petitioners argue that the evidence can only be circumstantial since the Division misplaced the files that pertain to the extensions as well as the Notice of Deficiency. Petitioners argue that the most compelling piece of evidence is the Statement of Income Tax Adjustment dated November 11, 1987 in which a late penalty would have been assessed if any extension of time to October 15, 1987 had not been granted. Petitioners further argue that: 1) such extensions are normally and routinely granted when the taxpayer is making proper estimated payments and has an excellent history of tax compliance, as is the case before us; and 2) it would be a miscarriage of justice to penalize them either because of the Division's inadequate recordkeeping or the unavailability of the precise form required for filing for an additional extension. Finally, petitioners request that the late filing penalty imposed be rescinded.

The Division argues that the Administrative Law Judge correctly determined that the requests for additional extensions of time to file were not granted; that additions to tax were, therefore, due for the period August 15, 1987 through October 15, 1987 and, further, that reasonable cause was not shown for failure to file and pay by August 15, 1987. However, the Division did not respond to petitioners' contention that the November 11, 1987 Statement of Income Tax Adjustment indicates that extensions were granted until October 15, 1987. The Division requests that the determination of the Administrative Law Judge be affirmed and that petitioners' exception be denied.

We reverse the determination of the Administrative Law Judge.

We find persuasive petitioners' argument that the issuance of the Statement of Income Tax Adjustment on November 11, 1987 presents compelling, if circumstantial, evidence that the Division had granted petitioners' requests for extensions to September 15, 1987 and then to

October 15, 1987. The Statement of Income Tax Adjustment indicates that a computer review of petitioners' 1986 return revealed that petitioners had erroneously calculated the penalty for their underpayment of estimated tax at \$24.00 when the correct amount was \$.28. The form states that petitioners had made an overpayment of tax of \$2,143.28, of which \$2,143.00 was credited to estimated tax for 1987 and \$.28 was applied to the penalty for underpayment of the estimated taxes for 1986. Petitioners argue that if the Division had not granted petitioners' requests for extensions until October 15, 1987, the computer review on November 11, 1987 would have found petitioners' return to be six months late and the Statement of Income Tax Audit Adjustment would have assessed a late filing penalty. This explanation of events is completely logical on its face and the Division advanced no response, either before the Administrative Law Judge or on exception, to even attempt to discredit it. Under these circumstances, we conclude that petitioners have proved that the Division granted their additional extensions to file. This conclusion, coupled with those of the Administrative Law Judge to which no exception was taken and, therefore, which we did not review, results in the cancellation of the late filing penalty.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Michael and Grace Price is granted;
2. The determination of the Administrative Law Judge is reversed to the extent that it upheld the penalty for the period after August 15, 1987, but is otherwise affirmed;
3. The petition of Michael and Grace Price is granted; and

4. The Notice of Deficiency issued March 2, 1989 is cancelled.

DATED: Troy, New York
December 31, 1992

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

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

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