

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ADELE ENSLER	:	DECISION
	:	DTA No. 811342
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law for	:	
the Years 1987 and 1988.	:	

Petitioner Adele Ensler, 310 East 70th Street, New York, New York 10021, filed an exception to the determination of the Administrative Law Judge issued on March 31, 1994. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter brief in opposition to the exception. The six-month period to issue this decision began on June 17, 1994, the date by which petitioner could submit a reply brief. Oral argument, requested by petitioner, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUES

Whether the Notice of Disallowance appealed from, dated February 28, 1993, properly:

- a) Denied petitioner's claimed credit against tax taken on her 1987 resident income tax return, where such credit was based on income taxes allegedly overpaid for tax years 1984 and 1985; and
- b) Sustained the tax due under a Notice and Demand based on the Division of Taxation's recomputation of petitioner's resident income tax return filed for tax year 1987; and
- c) Sustained imposition of penalty and interest for late payment of tax and late filing of

petitioner's 1987 and 1988 resident income tax returns. Subsumed under this issue are the issues of whether petitioner was entitled to extensions to file her resident income tax returns for 1987 and 1988, based on filed applications for extension to file her income tax returns for those years, and whether petitioner has established reasonable cause for the abatement of penalty and interest in excess of the minimum.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

It is undisputed that petitioner, Adele Ensler, filed an Application for Automatic Extension of Time to File (Form IT-370) her 1987 resident income tax return (i.e., from April 15, 1988 to August 15, 1988), but petitioner did not offer evidence to show that the Form IT-370 was filed on or before the due date of her income tax return, April 15th. Petitioner has not denied that she failed to pay 90% of the tax properly reported as due on her 1987 return at the time she filed her Form IT-370. As a result of such failure to remit 90% of the tax finally determined due on her return, by the due date for the tax, petitioner's application of extension to file her 1987 income tax return was denied by the Division of Taxation ("Division"). Neither petitioner nor the Division placed a copy of this application for extension in the record, but none of the facts in this finding are disputed by either party.

Petitioner does not dispute that she late filed her 1987 Resident Personal Income Tax Return for the State and City of New York (Form IT-201). This return reported total New York taxable income of \$405,479.00 and total New York State tax due of \$36,723.00. Total tax reported due to the City of New York ("City") was \$15,518.00, for a total State and City personal income tax reported due of \$52,241.00.

From the total 1987 State and City personal income tax due, petitioner claimed State tax withholding of \$1,453.00, and City withholding of \$559.00.

Petitioner's 1987 income tax return also claimed estimated tax payments for 1987 of

\$25,000.00, plus credits based on claimed overpayments of estimated tax from 1984 (\$3,391.00) and 1985 (\$2,025.00), for total credits against tax of \$5,416.00 (IT-201, Page 2, line 76). Total payments (withholding, estimated tax payments and overpayments and credits claimed) of personal income tax claimed on petitioner's 1987 return was \$32,428.00 (Page 2, line 77), with a balance due of \$19,813.00. Petitioner remitted the \$19,813.00 in income tax due with the filing of her IT-201.

Upon review of petitioner's 1987 income tax return, the Division found two errors. First, petitioner's claimed credit of \$5,416.00 was disallowed. This credit was made up of alleged overpayments of \$3,391.00 and \$2,025.00 for tax years 1984 and 1985, respectively.

The Division informed petitioner that a claim for credit or refund of tax for 1984 was not timely made and was no longer available, since such a claim had to have been made within three years from the date the 1984 return was required to be filed. As a further basis for denying this credit, the Division advised petitioner that it had no record of her filing a return for 1984, and that the Division's records indicated that petitioner had been issued a refund of \$2,025.00 for the 1985 overpayment. At hearing, petitioner acknowledged that she had received the \$2,025.00 refund, but stated that she had in fact filed a 1984 State personal income tax return.

The second error found by the Division on the 1987 return related to petitioner's computation of New York City's personal income tax for 1987. The Division determined that the correct amount of City income tax due for 1987 was \$16,208.64, instead of the \$15,518.00 (a difference of \$690.64) shown on the return. It does not appear that petitioner has ever disagreed with this portion of the tax as recomputed.

As a result of the errors found on petitioner's 1987 return, a Statement of Income Tax Adjustment and Notice and Demand for Payment was issued to petitioner for tax year 1987. After recomputing the tax due the City of New York, the Notice and Demand computed petitioner's 1987 State and City income tax to be \$52,931.94 (instead of \$52,241.00 reported on her return). After disallowing the claimed credit of \$5,416.00 from 1984 and 1985 and

crediting petitioner with payments of \$46,825.00, the tax remaining due and asserted by the Notice and Demand was \$6,106.94. Since petitioner's return was late filed and the correct amount of tax was not paid with the application for extension to file, late filing and late payment penalties totalling \$5,183.99, plus interest, were also asserted.

The record shows that the application for automatic four-month extension to file petitioner's 1988 personal income tax return was attached to said return. This application for extension reported \$1,377.00 in estimated State income taxes and \$526.00 in estimated City income taxes. The application reported State tax withheld of \$1,377.00, a credit of \$526.00 against City income tax, with estimated tax due of \$-0-. The 1988 income tax return to which the application is attached was signed by petitioner on August 14, 1989.

Petitioner's 1988 personal income tax return (Form IT-201) correctly reported total State and City income tax due of \$2,477.00, claimed withholding and credits of \$1,903.00, and a balance due (and paid) with the return of \$574.00. \$2,477.00 was the tax finally determined to be due for 1988 and the Division made no adjustments to that figure. Ninety percent of \$2,477.00 is \$2,229.30.

The Division stated, and petitioner did not dispute, that since the application for automatic four-month extension to file her 1988 income tax return did not include 90% (\$2,229.00) of the tax finally determined to be due on the return, the application for extension was denied. Petitioner offered no evidence that the application for extension was timely filed. In fact, evidence in the record shows that the application for extension was attached to petitioner's return which she filed in August 1989. Accordingly, the Division issued a Notice of Deficiency to petitioner asserting late filing and late payment penalties for the year 1988 in the amount of \$114.80, plus interest. Petitioner does not dispute receiving this Notice of Deficiency. While a copy of this notice was not placed in evidence by petitioner or the Division, a warrant issued July 3, 1991 expressly refers to this Notice of Deficiency.

On July 3, 1991, a warrant was issued against petitioner for tax years 1987 and 1988 asserting total personal income tax of \$6,106.94, penalties of \$5,604.06, plus interest. The total amount asserted was \$15,613.76. Levy was had for that amount against petitioner's account with Republic National Bank on August 23, 1991.

On October 1, 1991, petitioner filed a Claim for Refund of Personal Income Tax for 1987 and 1988 in an unstated amount and challenged the levy on her bank account.

At some point prior to the Division's responding to the claim for credit or refund, petitioner filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Again, the record is silent as to the specific date of this request.

On February 10, 1992, Thomas Dwyer, Conciliation Conferee, sent petitioner a letter regarding her request (CMS# 120023) for conciliation conference, stating, in part:

"Section 689(c)(3) of the Tax Law states that a request can be filed under either of the following conditions:

"A. Six months have expired since the Claim for Refund was filed; or

"B. The Tax Commission has mailed to the taxpayer a Notice of Disallowance.

"Accordingly, this matter initially cannot be processed . . . since neither of the above conditions has occurred." (Emphasis added.)

On February 28, 1992, a Notice of Disallowance of her refund claim was sent to petitioner. This notice advised petitioner that her claim was disallowed, since the Tax Law did not permit a refund or credit claimed on her tax return for 1984. This notice also advised petitioner that the deadline for filing for a refund or credit expired three years from the date the 1984 return was due.

After this Notice of Disallowance, petitioner did not renew her request for a conciliation conference, but instead filed the instant petition dated November 1, 1992.

At the hearing in this matter, petitioner, through her representative, conceded that the Division's calculation of the tax due on the Notice and Demand, and sustained in the Notice of

Disallowance, was correct. Nevertheless, petitioner continues to object to the imposition of penalty and interest (tr., p. 19). Petitioner feels that the State should refund so much of the \$15,725.00 seized from her bank account as represents penalty and interest.

OPINION

In the determination below, the Administrative Law Judge pointed out that for the years at issue the Tax Law did not provide any authority for the abatement of interest charges on an otherwise proper assessment.

The Administrative Law Judge found that, at hearing, petitioner agreed that the Division's computation of the tax asserted and collected under warrant was correct and, further, petitioner implicitly conceded that she could not properly claim \$5,416.00 as a credit on her 1987 income tax return.

The Administrative Law Judge's determination reviewed the requirements under the Tax Law for receiving an extension for filing an income tax return and held that petitioner, who failed to timely pay the proper amount of tax upon the filing of her 1987 and 1988 applications for extension, was properly denied an extension to file her personal income tax returns for those years.

Finally, the Administrative Law Judge held that while there are regulations which provide for abatement of penalties (if petitioner can establish that the failure to timely file and pay were due to reasonable cause and not due to willful neglect), petitioner has not established entitlement to said abatement based on reasonable cause.

On exception, petitioner discusses the Administrative Law Judge's determination, points out that she was shocked to learn there was no record of filing a tax return in 1984, admits that errors were made as to her selection of a representative as well as her failure to supply her accountant with the refund information, but argues there was no intent to defraud, harm or in anyway commit a wrongdoing.

Petitioner further argues that "[w]hile I cannot disagree with the tax due . . . I find the

penalty and interest which has been destructive and damaging to me and my family is excessive" (Petitioner's exception, p. 2).

Petitioner, with reference to the penalties and interest which has accumulated, argues that had she been notified years earlier that monies were due, "I certainly would have paid to avoid this situation" (Petitioner's exception, p. 3).

The Division, in reply, points out that petitioner does not seem to take issue with the Administrative Law Judge's determination that she failed to properly file and pay tax in 1987 and 1988 but only contends that she should not be required to pay penalties and interest that is attributable to her return preparer's errors.

In its letter brief, the Division argues that: 1) it seems certain there was very poor communication between petitioner and her return preparer; 2) the lack of familiarity with the Tax Law does not provide reasonable cause for waiver of penalties under the applicable regulations; and 3) petitioner offered no argument in her exception papers that would support the reversal of the determination of the Administrative Law Judge.

We uphold the determination of the Administrative Law Judge for the reasons stated in that determination. Petitioner has not raised any issues on exception that were not raised below and adequately discussed by the Administrative Law Judge in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Adele Ensler is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Adele Ensler is denied; and

4. The Notice of Disallowance dated February 26, 1992 is sustained.

DATED: Troy, New York
November 3, 1994

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

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