

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>GARY AND BONITA STONE</b>	:	DECISION DTA NO. 819685
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1995 and 1996.	:	

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Petitioners Gary and Bonita Stone, 10 Harris Road, Saratoga Springs, New York 12866, filed an exception to the determination of the Administrative Law Judge issued on December 9, 2004. Petitioners appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter stating they would not be filing a brief. Petitioners' request for oral argument was denied.

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

***ISSUE***

Whether petitioners, who concede that they failed to report Federal audit changes for the years 1995 and 1996 to New York State within 90 days as required by Tax Law § 659, have established reasonable cause for their failure to do so.

***FINDINGS OF FACT***

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

The Division of Taxation ("Division") issued a Notice of Additional Tax Due to Gary and Bonita Stone, dated August 20, 2001, which asserted additional tax due for the year 1995 in the sum of \$7,901.58, interest of \$3,862.16 and penalty of \$2,464.05 for a total due of \$14,227.79. The notice was issued after the Division received notification of certain Federal audit changes by the Internal Revenue Service as authorized by Internal Revenue Code § 6103(d). The notice provided the following explanation for the deficiency:

Our records indicate that the Internal Revenue Service has made changes to your federal return. Section 659 of the New York State Law requires that federal audit changes be reported to the New York State Tax Department within 90 days of the final federal determination.

A search of our files indicates that you did not report these changes to New York State. If you have reported the federal audit changes, please send a copy of the report and a copy of both sides of the canceled check showing our deposit serial number stamped on the face of the check.

When you do not report federal audit changes as required, the New York Tax Law provides for assessment of the tax due at any time. There is no time limit provided by section 683(c) of the New York Tax Law.

The Division issued a second Notice of Additional Tax Due to Gary and Bonita Stone, dated August 20, 2001, which asserted additional tax due for the year 1996 in the sum of \$14,519.68, interest of \$5,476.77 and penalty of \$3,464.36 for a total due of \$23,460.81. This second notice was also issued as a result of notification of Federal audit changes received from the Internal Revenue Service and contained the same explanation set forth above.

Both notices explained that negligence penalty equal to five percent of the deficiency was assessed pursuant to Tax Law § 685(b)(1). In addition, the notices stated that a penalty equal to 50% of the interest due on the deficiency or portion thereof due to negligence or intentional disregard of the law was assessed pursuant to Tax Law § 685(b)(2).

On March 30, 2000, petitioners, by their representative, executed a consent to income tax audit changes with the Internal Revenue Service (“IRS”), which acknowledged and agreed that they understated taxable income by \$100,282.00 due to modifications in their Schedule C income and disallowed deductions and, as a result, owed additional tax of \$32,117.00 plus penalty and interest for the year 1995. On March 15, 2000, petitioners signed a consent to income tax audit changes with the IRS which admitted that they understated taxable income by \$208,688.00 due to additional Schedule C income and disallowed deductions, resulting in additional tax of \$59,015.00 plus penalty and interest for the year 1996.

Petitioners were represented by Phillip K. Whittemore, CPA, with respect to the IRS matter. However, petitioners retained Richard Dickenson, CPA, with regard to the New York State action. Mr. Dickenson appeared at the conference in the Bureau of Conciliation and Mediation Services, but not in the Division of Tax Appeals.

The IRS asserted penalty under Internal Revenue Code (“IRC”) § 6662(b)(1) and (2), which imposed penalty for negligence or disregard of the rules and regulations or substantial underpayment of tax.

Both revenue agent reports for the years in issue stated that the IRS had agreements with state tax authorities whereby information about changes in income was exchanged with states

and that the taxpayer should file a state form if the changes affected the amount of state income tax.

Petitioners conceded that they never reported the Federal changes for 1995 and 1996 to the State of New York and never filed amended returns for those years. While petitioners filed a timely personal income tax return for 1996, they did not file their income tax return for 1995 until April of 1999.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that pursuant to Tax Law § 659, if the amount of a taxpayer's Federal taxable income reported on his Federal income tax return for any taxable year is changed or corrected, the taxpayer must report the change or correction within 90 days after the final determination of such change or correction. The Administrative Law Judge also pointed out that pursuant to Tax Law § 683(c)(1)(C), if a taxpayer fails to comply with this provision of Tax Law § 659, the Division is authorized to assess the additional tax due at any time.

The Administrative Law Judge found that while petitioners raised the possibility of challenging the redistribution of their net operating losses by the IRS, they offered no evidence or arguments to demonstrate that this was a serious contention.

Further, the Administrative Law Judge observed that petitioners conceded that they never filed the required report of Federal income tax audit changes and they owe the tax and interest thereon. He also noted petitioners' argument that the penalties assessed should be abated because the failure to file the report and pay the tax was due to reasonable cause and not willful neglect, in that the changes made by the IRS were unexpected and beyond their control and

petitioners believed that they reasonably relied on the bad advice of their accountant, to their detriment.

The Administrative Law Judge held that petitioners failed to demonstrate that the position taken by the IRS was unreasonable or incorrect, nor did they fully explain why their application of the net operating losses was deemed incorrect and disallowed. To the contrary, the Administrative Law Judge found that petitioners indicated their acquiescence in the IRS position on the losses with their execution of the consent to the income tax audit changes.

The Administrative Law Judge determined that petitioners could not shield themselves from liability by claiming reliance on the advice of their accountants as they submitted no evidence with respect to their application of the net operating losses or the advice they received on the issue. In failing to provide full disclosure of all the facts surrounding the net operating loss issue, the Administrative Law Judge found that petitioners failed to establish reasonable cause.

The Administrative Law Judge pointed out that reliance on the advice of counsel does not in itself establish reasonable cause and petitioners have not shown that their reliance was in good faith or that it was reasonable for them to have relied upon the particular advice given to them.

As a result, the Administrative Law Judge denied the petition of Gary and Bonita Stone and sustained the two notices of additional tax due.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners repeat the arguments presented to the Administrative Law Judge, noting that they are willing to pay the tax and interest assessed. However, they believe that the penalties imposed should be waived as their failure to report Federal changes to their income

was due to reasonable cause and the absence of neglect in that they relied on the advice of their accountant.

***OPINION***

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioners have offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The petition of Gary and Bonita Stone is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The exception of Gary and Bonita Stone is denied; and
4. The notices of additional tax due dated August 20, 2001 are sustained.

DATED: Troy, New York  
September 29, 2005

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Robert J. McDermott

Robert J. McDermott  
Commissioner