STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ADELE ENSLER	:	DETERMINATION 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, c/o Elliot Barron, Public Accountant, 1675 York Avenue, New York, New York 10128, filed a petition 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.

A hearing was held before Carroll R. Jenkins, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on September 30, 1993 at 1:15 P.M. The Division of Taxation filed a letter brief on November 15, 1993 as agreed. Petitioner elected not to file a brief. Petitioner appeared by Elliot Barron, P.A. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

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

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:
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> "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.
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> "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.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner, while conceding at hearing that the tax asserted is correct, claims that the State should not have imposed penalties and interest. Petitioner states that she neglected to tell her accountant that she had received a refund of $2,025.00 based on her 1985 overpayment, and that is why he inadvertently included that amount as part of the credit against tax on her 1987

return. This was inadvertent, states petitioner, and not grounds for imposition of penalty and interest.

The Division asserts that petitioner has failed to demonstrate reasonable cause for abatement of penalty.

CONCLUSIONS OF LAW

A. At the outset, it must be pointed out that for the years at issue the Tax Law provides no authority for the abatement of interest charges on an otherwise proper assessment.

B. As noted earlier, 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 has not disputed the issuance, validity or receipt of this Notice of Deficiency. While a copy of this notice was not placed in evidence by either party, the warrant issued July 3, 1991, and used to collect this assessment, expressly referred to this Notice of Deficiency. No jurisdictional issue regarding the issuance or validity of this notice being raised by petitioner, and collateral evidence as to the existence of this notice being found in said warrant, it is concluded that this Notice of Deficiency is properly before the Division of Tax Appeals.

C. The Notice of Disallowance challenged herein, dated February 26, 1992, denied petitioner's claim for refund or credits taken on her 1987 income tax return, which credits are based on petitioner's claimed income tax overpayments going back to 1984 and 1985. The Notice of Disallowance sustained the tax and penalties asserted for 1987 and 1988. In bringing this proceeding, petitioner originally claimed that the tax, penalties and interest being asserted were improper.

D. However, at hearing, petitioner agreed that the Division's computation of the tax asserted and collected under warrant was correct. Implicit in this concession is the further concession by petitioner that she could not properly claim $5,416.00 as a credit on her 1987 income tax return for the reasons set forth in Findings of Fact "5" and "14".

E. Unless the time therefor is extended, personal income tax returns are required to be filed on April 15th (20 NYCRR 152.1, 152.2).

F. Tax Law § 657(a) provides, in pertinent part:

"Extensions of time

"(a) General. The [Commissioner of Taxation] may grant a reasonable extension of time for payment of tax or estimated tax (or any installment), or for filing any return, statement, or other document required pursuant to this article, on such terms and conditions as [he] may require . . . . [N]o such extension for filing any return, statement or other document, shall exceed six months . . . ."

G. According to the foregoing, the Commissioner of Taxation (formerly the State Tax Commission) is vested with discretion to extend the time to file a return or other document upon such terms and conditions as he may require. Regulations in effect during the years in question and found at 20 NYCRR 151.2(a) specified those terms and conditions which, if met, would automatically result in a valid four-month extension of time to file. These conditions were: (1) that a timely request for extension be filed; (2) that a proper estimate of the tax liability be made, with such estimate deemed proper if it was at least 90% of the taxes as finally determined to be due; and (3) payment of such properly estimated amount, if more than $1,000.00, at the time the request for extension was filed. The "taxes as finally determined" was defined as "the amount of total taxes which the New York State income tax return shows to be due or would have shown to be due except for mathematical errors" (20 NYCRR 151.2[a][3][i], [ii]; emphasis added).

An application for extension granted under these provisions, however, "will not operate to extend the time for the payment of any personal income tax due" (20 NYCRR 151.2[a][5]).

Based on the computation of tax remaining due when petitioner filed her 1987 income tax return ($19,813.00) against a total tax as finally determined to be due ($52,931.94), it is clear that petitioner did not pay 90% of the tax finally determined to be due when she filed her application for extension to file the 1987 return. Similarly, at the time petitioner filed her 1988 return (in August 1989), the tax as finally determined to be due was $2,477.00, but she had only paid $1,903.00 (or 76.8%) by the due date for the tax, not 90%, and the application for extension, which was attached to the 1988 income tax return was late filed in any event. Therefore, it is concluded that petitioner did not file proper applications for extensions to file

her income tax returns in either 1987 or 1988 and was properly denied an extension to file her personal income tax returns for those years. This conclusion is buttressed by the fact that petitioner has not disputed that she failed to timely pay the proper amount of tax upon the filing of her 1987 and 1988 applications for extension. Petitioner's income tax returns were due April 15th for each of the subject tax years. Petitioner's personal income tax returns for 1987 and 1988 were not filed by April 15th in either year, and the payment of tax due was late in each of those years. The question now to be addressed is whether petitioner's late filing and late payment of tax should be subject to additions to tax (penalties and interest in excess of the minimum) or should be abated.

H. Tax Law § 685 addresses additions to tax and civil penalties, stating:

> "(a)(1) Failure to file tax return.--(A) In case of failure to file a tax return under [Article 22] on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return . . . [an amount] not exceeding twenty-five percent in the aggregate.
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> * * *
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> "(3) Failure to pay tax required to be shown on return.--In case of failure to pay any amount in respect of any tax required to be shown on a return required to be filed under [Article 22] which is not so shown (including an assessment made pursuant to subsection (a) of section six hundred eighty-two of [Article 22]) within ten days of the date of a notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount of tax stated in such notice and demand . . . [an amount] not exceeding twenty-five percent in the aggregate . . ." (Tax Law § 685[a][1], [3]; emphasis added).

I. 20 NYCRR 151.7(b), as in effect during the years in question, provided as follows:

> "Additions to tax. The additions to tax for late filing and late payment must be imposed on any balance of New York State personal income tax, City of New York tax and City of Yonkers tax remaining unpaid after the due date of the return, determined with regard to any extensions of time to file or extensions of time to pay, unless it can be shown that a basis for reasonable cause exists pursuant to section 102.7 of this Title for such late filing or late payment or unless the provisions relating to the presumption of reasonable cause pursuant to paragraph (c)(2) of section 102.7 of this Title are met for such late payment." (Emphasis added.)

J. Regulations concerning reasonable cause, found at 20 NYCRR 102.7, provide that the penalties at issue herein may be abated if petitioner can establish that the failures to timely file

and pay were due to reasonable cause and not due to willful neglect.

20 NYCRR 102.7 provides, in relevant part, as follows:

"(d) The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer, employer or other person:

* * *

"(4) Any other cause for delinquency 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 may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause.

"(e)(1) Except as provided for in subparagraph (2)(ii) of this subdivision, an inability to timely obtain and assemble essential information (including wage and tax statements or returns of information from an employer or payor) required for the preparation of a complete New York State income tax return, shall not be a basis for reasonable cause." (Emphasis added.)

K. Petitioner has not established entitlement to abatement of penalties based on reasonable cause. Petitioner has offered no proof that she filed either a 1987 or 1988 application for extension in a timely manner (i.e., before April 15).[1] Petitioner has not disputed that her 1987 and 1988 income tax returns were late. Nor has petitioner disputed that her payment of tax for each of the subject years was late. We know that petitioner's understatement of tax due for 1987 was due, in part, to a claimed credit against tax in the amount of $2,025.00, arising from an overpayment of 1985 estimated tax. However, petitioner had already received that same $2,025.00 as a refund in May 1987. Petitioner claims, as a basis for reasonable cause, that her accountant was not aware that she had

received this refund and thus claimed the credit. While her accountant may not have had knowledge that petitioner had received this refund, petitioner herself certainly knew, and it was petitioner who signed the return. In addition, neither petitioner nor her representative explain why she was attempting to take a credit of $3,391.00 against her 1987 income tax, based on a

[1]It is noted that neither side was particularly forthcoming with "evidence" in this case. However, it is petitioner who has the burdens of proof and persuasion, so the dearth of an evidentiary record must impact more severely on her.

claimed overpayment in 1984 estimated tax. It is, of course, possible that petitioner and her accountant were not aware that any claim for credit or refund must be made within three years from the date the 1984 tax return was required to be filed (Tax Law § 687[a], [e]), but ignorance of the law does not constitute reasonable cause (20 NYCRR 102.7[d][4]).

At the hearing of this matter, the Administrative Law Judge asked petitioner's representative if he had any evidence to submit in support of petitioner's claim that penalties be abated. Petitioner's representative stated, "I have no evidence, but there's no intent to deceive or defraud anybody . . . ." While there was no intent to deceive or defraud, there was no basis in this record to abate penalty either.

L. The petition of Adele Ensler is denied and the Notice of Disallowance dated February 26, 1992 is sustained.

DATED: Troy, New York
March 31, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE