STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SOL AND ELEANOR FINGAR	:	DETERMINATION DTA NO. 815421
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1978.	:	

Petitioners, Sol and Eleanor Fingar, 1530 Palisades Avenue, Fort Lee, New Jersey 07024, filed a petition for redetermination of a deficiency or for a refund of personal income tax under Article 22 of the Tax Law for the year 1978.

On May 19, 1997 and May 27, 1997, respectively, petitioners by their representative, Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel) and the Division of Taxation by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by October 10, 1997, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly imposed late payment penalties and interest on a tax liability owed by petitioners for tax year 1978.

FINDINGS OF FACT

1. The Internal Revenue Service ("IRS") conducted a Federal income tax examination of the returns of Sol and Eleanor Fingar ("petitioners") for tax years 1977 through 1979, which resulted in a final Federal settlement in November 1984. During the examination, petitioners were represented by a certified public accounting firm. At the conclusion of the examination, New York State Forms IT-115 were not filed to report the final Federal audit changes to New York State.

2. In March 1989, petitioners received correspondence from the Division regarding tax years 1977 and 1979, advising them that New York State had received notice of Federal changes for such years and that Forms IT-115 had not been filed. Petitioners did not receive the same notice from the Division with regard to tax year 1978. In response to the Division's notice, Forms IT-115 were submitted for 1977 and 1979.

In June 1993, the Division notified petitioners that it did not have a record of their filing Forms IT-115 for tax years 1978 and 1979, and a bill was issued to petitioners. In response, petitioners' then representative corresponded with the Division with respect to 1978 and 1979. He advised that no tax was due for 1979 since the firm's records reflected that Form IT-115 was filed for that year, and that no information was ever received from the Division regarding 1978.

The Division issued to petitioners a Notice of Assessment Resolution dated July 19, 1993, asserting additional income tax due for tax years 1978 and 1979 in the amount of $31,840.22, plus interest and penalties for both years, resulting in a total assessment of $104,313.05. An explanation appearing on the Notice of Assessment Resolution showed that the Division had attempted to contact petitioners and acquire information pertaining to tax years 1978 and 1979 on

two prior occasions, with no success. In addition, a search of the Division's computer records for filings between 1984 and 1992 did not disclose Forms IT-115 for the tax years in issue. Thus, the Division deemed the notice correct as issued.

3. Petitioners' representative requested that the Division supply any information that was in its possession with respect to the Federal changes for 1978. When petitioners did not receive any information from the Division, petitioners' representative requested a transcript of petitioners' account from the IRS for tax years 1977 through 1979. Once they received and reviewed the transcript, petitioners' representatives determined tax was due with respect to 1978, and an installment agreement (covering 1978 and the unpaid balance for 1979) was reached with the Division.

4. The tax, penalty and interest for the 1978 tax year were paid by petitioners according to Assessment L007243107-7. Petitioners filed a claim for refund of penalties and interest. The claim was disallowed pursuant to a Notice of Disallowance dated April 24, 1995, following the Division's determination that petitioners' explanation for their late payment did not constitute reasonable cause for waiving the penalty. Petitioners then filed a request for a conciliation conference to protest the notice of disallowance. Petitioners received the following response, dated October 12, 1995, providing in pertinent part:

> "The 1978 assessment in which you are questioning [sic] was issued based on an adjustment or change made by the Internal Revenue Service.
>
> "Section 659 of the New York State Tax Law states, It [sic] is the responsibility of the taxpayer to notify the New York State Department of Taxation and Finance of a change or correction in federal taxable income by the I.R.S. within 90 days of such change or correction.
>
> "Also, regarding your claim that your accountant/representative did not notify you of a change or correction by the I.R.S. for the tax year 1978, based on a 1980 State Tax Commission Decision; Reliance on the advice of an accountant or

> representative is no longer acceptable as reasonable cause. It is the responsibility of the taxpayer to see that his/her accountant is functioning properly and filing tax reports on a timely basis."

A conciliation conference was held on March 11, 1996 to review the notice of disallowance dated April 24, 1995. Pursuant to the conciliation order (CMS No. 147628) dated August 30, 1996, the conferee sustained the statutory notice. Petitioners then filed a timely petition protesting the conciliation order. Petitioners assert that they were never advised by either the Division or their representatives that a Federal adjustment was made for 1978, and now they assert they are unable to locate any information or documentation for 1978.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioners maintain that interest and penalty should be abated in this case because their failure to file notification of the Federal audit changes with New York State was innocent on their part, since neither the IRS, the Division nor petitioners' representatives informed petitioners of their obligation to file Forms IT-115.

In addition, petitioners argue that the doctrine of estoppel should be applied under the facts of this case to avoid an injustice resulting from the State's improper notification with respect to the filings.

6. The Division asserts that filing reports for 1977 and 1979 but not 1978 was an unreasonable course of action. Petitioners cannot blame the Division for their failure since it is petitioners' obligation to file a report of Federal changes notwithstanding the lack of any notification from the Division. Furthermore, when petitioners were notified by the Division of the requirement to file for 1977 and 1979, they should have known, or at least questioned, what was required for 1978. The Division lastly maintains that factors which would justify invoking the doctrine of estoppel do not exist here.

CONCLUSIONS OF LAW

A. Tax Law § 659 provides, in pertinent part:

> "If the amount of a taxpayer's federal taxable income, federal items of tax preference or total taxable amount or ordinary income portion of a lump sum distribution reported on his federal income tax return for any taxable year . . . is changed or corrected by the United States internal revenue service or other competent authority, . . . or if a taxpayer's claim for credit or refund of federal income tax is disallowed in whole or in part, the taxpayer . . . shall report such change or correction in federal taxable income, federal items of tax preference, ... or such disallowance of the claim for credit or refund within ninety days after the final determination of such change, correction, renegotiation or disallowance, or as otherwise required by the tax commission, and shall concede the accuracy of such determination or state wherein it is erroneous. . . . "

If a taxpayer fails to comply with Tax Law § 659, the Division may assess tax at any time without regard to a statute of limitations (Tax Law § 683[c]; 20 NYCRR former 153.6). Additionally, the Division is empowered to charge petitioners with interest and penalties pursuant to Tax Law § 684 and § 685, respectively, for failure to pay the tax required in a timely manner pursuant to a tax return.

B. Petitioners in this matter had an affirmative obligation to file the report of Federal changes with the Division within 90 days of such changes (Tax Law § 659). However, although petitioners and their representatives were aware that the Federal changes involved tax years 1977 through 1979, petitioners concede that no reports were filed with the Division, and petitioners now attempt to claim that they had no knowledge of the 1978 changes. In addition, petitioners attempt to shift the blame for their failure to file to the Division, by claiming that the reason they did not file Form IT-115 for 1978 was because the Division requested such forms only for 1977 and 1979. Petitioners believe these explanations constitute reasonable cause for abatement of both interest and penalties.

Although petitioners eventually conceded tax due for 1978, the Division assessed interest and penalties pursuant to Tax Law § 684 and § 685(a)(2), respectively. Interest on an amount of unpaid income tax is imposed by section 684 irrespective of whether there is reasonable cause for nonpayment of tax due. Other exceptions, such as for mathematical errors, do not apply to the circumstances of this case.

Tax Law § 685(a)(2) provides that no penalty will be assessed if it is shown that the failure to pay tax shown on any return is due to reasonable cause and not willful neglect. During the period in question, reasonable cause was not further defined by New York statutes or regulations. However, 20 NYCRR former 102.1 and Tax Law § 607 provided that terms used in Article 22 would have the same meaning as terms used in the Internal Revenue Code. Internal Revenue Code § 6651 provides that the penalty for the failure to pay tax will not be imposed where the failure is due to reasonable cause and not willful neglect. Reasonable cause has been interpreted by the Tax Court to require the exercise of ordinary care and prudence (Mertens Law of Fed Taxation § 55:76). A taxpayer cannot avoid liability for failing to file a timely return by claiming that the responsibility was delegated to a generally trustworthy agent (*id*., at § 55:77). A failure to pay will be considered due to reasonable cause if the taxpayer has made a satisfactory showing that ordinary business care and prudence were exercised but the taxpayer, nevertheless, either was unable to pay the tax or would suffer an undue hardship if he paid on the due date (*id*., neither of which has been alleged or proven in this case. The courts have repeatedly rejected claims of lack of knowledge, mistaken beliefs and failure by an agent to file a return as reasonable cause *(id*., at § 55:79). If a tax professional provides advice to a taxpayer that no return (and corresponding liability) is due based upon that taxpayer's specific circumstances, and it is determined that there was a reasonable basis for the opinion, and it was relied upon in good

faith by the taxpayer, reasonable cause may then be established (*id*., at § 55:81). The burden of establishing reasonable cause is with petitioners (Tax Law § 689[e]).

Petitioners did not follow the mandates of the Tax Law when they failed to file the report of Federal changes with the Division for all years under audit. It does not appear from the record that petitioners' representatives gave petitioners specific advice, upon which petitioners relied, that the filing of Form IT-115 for each year of the Federal changes was not required. It was unreasonable for such representatives to file Forms IT-115 for 1977 and 1979, but not 1978, and fail to explore further whether such form would be required for 1978. In addition, petitioners themselves are responsible for knowing or for making reasonable inquiries as to what tax filings are required. Reliance upon advice from a professional does not in itself insulate a taxpayer from penalties (*Matter of 1230 Park Assocs. v. Commissioner of Taxation & Fin.,* 170 AD2d 842, 566 NYS2d 957, *lv denied* 78 NY2d 859, 575 NYS2d 455). Accordingly, petitioners have not established reasonable cause to abate the penalties in this case.

C. Lastly, petitioners maintain that the doctrine of estoppel should apply. Generally, the doctrine of estoppel does not apply to government acts unless exceptional facts require the application of the doctrine in order to avoid a manifest injustice *(Matter of Harry's Exxon Service Station*, Tax Appeals Tribunal, December 6, 1988). When a taxing authority is involved, this rule is considered particularly applicable because public policy supports enforcement of the Tax Law (*Matter of Glover Bottled Gas Corp.,* Tax Appeals Tribunal, September 27, 1990). To decide whether estoppel should apply, the following inquiries must be made: whether there was a right to rely on a certain representation, whether there was, in fact, such reliance, and whether the reliance was to the detriment of the party who relied upon the representation (*see*, *Matter of*

Harry's Exxon Service Station, supra; *see also, Matter of Bolkema Fuel Co., Inc.,* Tax Appeals Tribunal, March 4, 1993).

In order for the doctrine of estoppel to be applicable in this case, petitioners must show that there was an affirmative duty on the part of the Division to notify them of their filing requirement; that they were entitled to rely on the Division's failure to notify them of their obligation to file Forms IT-115; that, in fact, petitioners relied upon the Division's notification of a filing requirement for 1977 and 1979, but deduced from the Division's failure to request the same for tax year 1978 that no filing was required; and that such reliance was to the detriment of petitioner (*Matter of Harry's Exxon Serv. Sta.*, *supra)*.

Petitioners' assertion that they relied to their detriment upon the Division's notification of their obligation to file Form IT-115 for 1977 and 1979, with no notification for 1978, is rejected. There is no provision of the Tax Law or regulations that requires the Division affirmatively to notify a taxpayer of a tax liability or seek tax filings that are due according to the Tax Law. Petitioners cannot rely on the Division's failure to notify them of their obligation to file a report of Federal changes for a particular tax year as a basis to claim estoppel as to penalties and interest arising from their failure to pay the tax resulting from the Federal changes affecting such tax year. This is so even where the Division has issued a notification of tax liability for two other tax years. Accordingly, the Division's assessment of interest and penalties is sustained.

D. The petition of Sol and Eleanor Fingar is denied and the Notice of Disallowance dated April 24, 1995 is hereby sustained.

DATED: Troy, New York
March 26, 1998

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE