STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GERTRUD PAPP	:	DETERMINATION DTA NO. 815578
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1983.	:	

Petitioner, Gertrud Papp, Postfach 75080, D-8000 Munchien 75, Germany, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1983.

On October 8, 1997 and October 20, 1997, respectively, petitioner, appearing by Weaver and Tidwell, L.L.P. (M. Clifton Maxwell, Esq.), and the Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Justine Clarke Caplan, Esq., of counsel), consented to have the controversy determined on submission without a hearing with all briefs to be submitted by April 2, 1998, which date began the six-month period for the issuance of this determination.

Upon review of the documents and brief submitted in connection with this matter, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly imposed penalties for petitioner's failure to timely file her New York State Nonresident Income Tax Return for tax year 1983.

FINDINGS OF FACT

1. Gertrud Papp ("petitioner"), a German citizen and a nonresident alien, was a partner in a German partnership known as US Kino during 1983. During that tax year, US Kino had 13 properties in New York and New Jersey which were sold, requiring allocation and computation of profits arising from the sale of the properties in the two states. Some properties were sold at a profit and others at a loss. The only income requiring petitioner to file a nonresident New York State income tax return arose from the sale of the aforementioned properties. The information which petitioner needed to complete her New York return in a timely manner was to be provided to her by the German partnership. The partnership was required to file financial statements in accordance with German law prior to the time it could file its New York return. Petitioner's information was to be derived from the partnership return. Since the information was not made available to petitioner to file her return without an extension, petitioner relied upon her certified public accountants in the United States to properly file extension requests to obtain the time needed to acquire the information. According to petitioner's Form IT-203 as filed, petitioner sought an automatic extension to June 15, 1984, a further four-month extension to October 15, 1984 (indicating an estimated tax liability of zero for 1983), and a final extension to December 15, 1984. The application for extension of time to file, which sought to extend petitioner's time to file her New York State return for 1983 until December 15, 1984, indicated that the New York State Tax Department would show whether petitioner's application was approved by placing a checkmark in a box. No box on the form contained a checkmark. A statement which appears as an attachment to the petition filed in this matter indicates that an extension for 1983 was granted until November 15, 1984. The Division of Taxation ("Division") has not refuted that November 15, 1984 was the date the return was due.

2. Petitioner's Form IT-203, the New York State Nonresident Income Tax Return was filed on or about December 3, 1984, as indicated by the Division's date stamp. The return bears petitioner's name on the signature line and the date November 14, 1984 across from her name. The preparer name of Hecht & Co. appears below petitioner's name. The return shows total New York income as a loss of $104,920.00, and petitioner's New York State tax liability in the amount of $59,970.00, to which $3,183.00 of interest was added, reflecting a balance due on the return of $63,153.00. The liability is based on the minimum income tax due resulting from the 60% capital gain deduction as a tax preference item. The Division's exhibits reflect receipt of payment in the amount of $63,153.00.

3. The Division issued a notice and demand for payment of income tax due to Gertrud Papp, 1500 Broadway/Hecht & Co., New York, New York 10036, dated September 16, 1985, in the amount of $12,978.88, consisting of penalties in the amount of $8,811.00 and interest in the amount of $4,167.88. Interest was stated to be for late payment or underpayment, and penalties were imposed for late filing as well as for late payment.

4. Prior to the filing of a claim for refund, petitioner paid the penalties and interest due. On or about September 30, 1993, petitioner filed a claim for refund in the amount of $16,831.26, stating as her basis for refund that either the penalty was barred by the statute of limitations or that, if timely, the penalty should be waived for reasonable cause.

5. The Division issued petitioner a notice of disallowance of her refund claim, dated March 31, 1994, stating that a notice and demand, along with additional follow-up bills, was issued to petitioner within the statutory three-year period after the filing of the return and, thus, within the statute of limitations. The notice of disallowance also stated that petitioner should have been able to make a reasonable estimate of tax due after the sale of the properties and, thus,

rejected petitioner's request to waive the penalties.

6. On or about February 27, 1995, petitioner filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). In lieu of a conference, the matter was considered by the conferee on the basis of correspondence submitted by petitioner. The conferee issued a conciliation order (CMS No. 146161) dated September 27, 1996, sustaining the notice of disallowance.

7. Petitioner filed a timely petition with the Division of Tax Appeals on December 23, 1996, stating that the penalty was imposed beyond the statute of limitations and that the penalty for failure to timely file petitioner's 1983 return was imposed in error.

8. The Division's answer supported the Division's actions and stated that petitioner has the burden of proving that the refund denial was improper.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner maintains that she relied entirely upon her New York City CPAs to file appropriate extension requests if needed, and she should not be penalized for their omission.[1]

10. The Division asserts that it is petitioner's burden to prove that the penalties imposed were erroneous and improper.

CONCLUSIONS OF LAW

A. Tax Law § 685(a)(former[1], [2]) imposed additions to tax and civil penalties in the following manner, in pertinent part:

> (1) Failure to file tax return.--In case of failure to file a tax return under this article 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

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[1]Inasmuch as petitioner's brief does not address the issue of the statute of limitations, it is deemed waived, and no longer at issue.

shown as tax on such return five per cent of the amount of such tax if the failure is for not more than one month, with an additional five per cent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five per cent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five per cent in the aggregate. . . .

(2) Failure to pay tax shown on return.--In case of failure to pay the amounts shown as tax on any return required to be filed under this article on or before the prescribed date (determined with regard to any extension of time for payment), *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 shown as tax on such return one-half of one per cent of the amount of such tax if the failure is not for more than one month, with an additional one-half of one per cent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five per cent in the aggregate. (Emphasis added.)

The income tax regulations at 20 NYCRR former 102.7 provided guidance as to what constituted "reasonable cause":

Reasonable cause as basis for cancellation, modification or waiver of penalties. (a) An addition to tax or penalty which has been assessed or is assessable for :

(1) failure to file a New York State income tax return (section 685(a)(1) of the Tax Law);

(2) failure to pay New York State income tax shown on a New York State income tax return (section 685(a)(2) of the Tax Law);

* * *

(7) failure to make deposits of New York State personal income taxes (section 685(o) of the Tax Law) may be cancelled, modified or waived if the taxpayer, employer or other person against whom such penalty has been assessed or is assessable, establishes that the failure to comply with the Tax Law was due to reasonable cause (see subdivision (b) of this section) and was not due to willful neglect.

(b) Reasonable cause. In determining whether reasonable cause exists as a basis for the cancellation, modification or waiver of the assessed or assessable additions to tax or penalties referred to in subdivision (a) of this section, the taxpayer's, employer's or other person's previous filing or compliance record may be taken into account. However, reasonable cause for failure to comply with the Tax Law must be affirmatively shown by the taxpayer, employer or other person

> in a written statement. Grounds for reasonable cause, where clearly established, may include the following:
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> (7) inability to obtain and assemble essential information required for the preparation of a complete New York State income tax return despite reasonable efforts;
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> * * *
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> (10) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a New York State income tax return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause.

B. Petitioner maintains that the penalties imposed should be canceled and moneys paid refunded since petitioner (through her representative) made every effort to obtain the information needed to file her New York State income tax return, and when the information was unavailable, appropriate extensions were sought. As additional support for her position, petitioner cites to ***Rohmer v. Commissioner of Internal Revenue*** (21 TC 1099 [where the court held that reliance of a nonresident alien, then residing in England, upon his American attorney for counsel as to United States taxes was reasonable cause for failure to submit a required ratification]).

Petitioner has carried her burden of proving that reasonable cause exists sufficient to cancel the penalties for late filing and underpayment. Under the circumstances of this case, petitioner was clearly unable to obtain the information required for the filing of her New York State income tax return until the German reports had been filed, the New York partnership return had been prepared, and the individual partnership information was determined and distributed. She hired tax professionals in two countries to handle the liabilities in both countries and two states. When the information was unavailable, petitioner requested extensions of time to file.

Such extensions were granted until November 15, 1984. The returns for all the partners of the partnership were handled by the same CPA firm that prepared petitioner's extension requests. The fact that the extensions estimated a zero tax liability was not unreasonable in this case, since the information required to prepare the return was completely unavailable to petitioner. It appears from the record that the return was prepared shortly after the final date of the last granted extension request, and receipt of the partnership information. As shown on the return submitted into evidence for 1983, total New York income was in fact a loss of $104,920.00. The tax which became due resulted from the computation of minimum income tax due to a tax preference item, the 60% capital gain deduction. This information would have been impossible for petitioner to estimate without all the details of each partnership transaction. Until the partnership K-1 information was available, and provided to petitioner, she had no idea of her correct tax liability. Once the partnership information became available, the return was filed by December 3, 1984 (as date-stamped by the Division). The record reflects that the payment due as shown on the return was made, including interest calculated voluntarily by petitioner.

C. In addition to the Division's reliance upon the fact that petitioner must carry the burden of proving that the penalties have been improperly imposed, the Division's audit documents indicate reliance on the Tax Court decision in ***Crocker v. Commissioner*** (92 TC 899). The taxpayers in ***Crocker*** consisted of an attorney and his wife, who had income from a family partnership controlled by her father. The husband performed legal work for oil companies, in addition to maintaining a law practice. Petitioners therein were found to have kept inadequate records; lost or misplaced 1099s provided to them; failed to seek the information pertinent to the family partnership; mistakenly recorded deductions for expenses paid in connection with the work performed for the oil companies for which the husband had been reimbursed, when the reimbursements were not included in income; and relied on the erroneous advice of an insurance salesmen regarding a Keogh plan. The court upheld penalties pertaining to the untimely filing of petitioners' returns and the underpayment of tax due to negligence, on the basis that the taxpayers did not make a bona fide and reasonable estimate of their tax liabilities, nor did they make a reasonable attempt to secure the information necessary to make such an estimate. Despite all the facts in ***Crocker*** that did not aid the taxpayers' cause, the court found that petitioners were not negligent in deducting the Keogh plan contributions in reliance on the advice of the salesman and the treatment of the item by their accountant. Clearly this portion of the ***Crocker*** case supports a finding that, under the extraordinary circumstances exhibited in the present case, reliance in good faith on professional advice should not be punished if such advice is determined to be faulty. The other facts in Crocker which resulted in a decision adverse to the taxpayers therein simply do not exist in this case.

D. The petition of Gertrud Papp is granted and the Notice of Disallowance is hereby modified to the extent that the Division of Taxation will refund penalties imposed for the 1983 tax year that have been paid by petitioner.

DATED: Troy, New York
October 1, 1998

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE