STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL A. AND MOYA A. LEWIS	:	DETERMINATION DTA NO. 817323
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1994.	:	

Petitioners, Paul A. and Moya A. Lewis, 935 East 89th Street, Brooklyn, New York 11236, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1994.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 26, 2000 at 10:15 A.M., with all briefs to be submitted by August 18, 2000, which date began the six-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Herbert M. Friedman, Esq., of counsel).

ISSUE

Whether penalties asserted by the Division of Taxation pursuant to Tax Law § 685(b)(1) and (2) should be abated because the deficiency was not due to negligence or the intentional disregard of Article 22 of the Tax Law.

FINDINGS OF FACT

1. On April 10, 1998, the Division of Taxation ("Division") issued to petitioners, Paul A. and Moya A. Lewis, a Notice of Deficiency assessing tax due of $1,252.00, plus penalty and interest for the year 1994. In a statement of Proposed Audit Changes ("Statement") dated January 17, 1997, the Division explained that the deficiency was due to an audit which reduced petitioners' claimed itemized deductions. The statement further explained that negligence penalties pursuant to Tax Law § 685(b)(1) and (2) were being imposed.

2. On their timely filed 1994 New York State Resident Income Tax Return, Form IT-201, petitioners claimed $30,183.00 in total Federal itemized deductions and $23,710.00 in New York itemized deductions. The return was prepared by College Income Tax Service, Inc., 1836 Flatbush Avenue, Brooklyn, New York 11210. Petitioners were unable to locate the preparers upon being notified by the Division that their returns for 1993 and 1994 were being audited. During the course of the audit, the tax amount due for the year 1993 was agreed upon, and the Division abated all penalties. For the year 1994, petitioners were able to substantiate $20,002.00 in total itemized deductions, which included $6,473.00 in state and local taxes, resulting in the Division's allowing $13,529.00 in New York itemized deductions. The disallowed itemized deductions included $3,642.00 in taxes, $1,072.00 in gifts to charities and $4,467.00 in job expenses and other miscellaneous deductions.

3. At the Bureau of Conciliation and Mediation Services' conference held on June 17, 1999, petitioners were able to substantiate an additional $1,000.00 in miscellaneous deductions, bringing the total of New York itemized deductions to $14,529.00 and the tax due to $1,129.00, plus penalty and interest. Following the conference, petitioners paid the tax and interest due, leaving the imposition of the penalties at issue.

CONCLUSIONS OF LAW

A. Tax Law § 685(b)(1) and (2) provides as follows:

> (1) If any part of a deficiency is due to negligence or intentional disregard of this article or rules or regulations hereunder (but without intent to defraud), there shall be added to the tax an amount equal to five percent of the deficiency.
>
> (2) There shall be added to the tax (in addition to the amount determined under paragraph one of this subsection) an amount equal to fifty percent of the interest payable under section six hundred eighty-four with respect to the portion of the underpayment described in such paragraph one which is attributable to the negligence or intentional disregard referred to in such paragraph one, ...

B. In support of their position that penalties should be abated, petitioners argue that they relied upon the tax preparers to prepare their return, that the preparers incorrectly completed their return, that they were unaware of the mistakes on the return and that when the audit began, they were unable to locate the preparers. In considering the argument that the taxpayers did everything that they could to ensure compliance with the Tax Law by hiring an accounting firm, the Tribunal in ***Matter of McGaughey*** (Tax Appeals Tribunal, March 19, 1998, confirmed 268 AD2d 802, 702 NYS2d 415) stated:

> It is a well-settled principle that each taxpayer has a nondelegable duty to prepare and file timely tax returns with payment and the mere assertion, without more, of reliance upon professional advisors or employees does not constitute reasonable cause (***see, Logan Lumber Co. v. Commissioner***, 365 F2d 846; ***see also, Sanderling, Inc. v. Commissioner***, 571 F2d 174).
>
> In making a determination as to whether reasonable cause exists when a taxpayer has relied on the advice of a professional, it must be shown that the taxpayer relied in good faith on the advice he received and it must have been "reasonable" for the taxpayer to rely upon the particular advice he was given (***see***, ***LT & B Realty Corp. v. New York State Tax Commn.***, 141 AD2d 185, 535 NYS2d 121). When determining whether the taxpayer has shown that his reliance was reasonable, the burden is on the taxpayer to demonstrate that he acted with ordinary business care and prudence in attempting to ascertain his liability, if any, for taxes (***see***, ***United States v. Boyle***, 469 US 241; ***Matter of Koether, supra***).

C. In this case, it appears that petitioners are attempting to absolve themselves of their tax obligations. Rather than showing that there was reasonable cause for the abatement of penalties, the argument that petitioners were unaware of the content of their tax return supports the conclusion that petitioners did not act with ordinary business care and prudence. Petitioners were unable to substantiate approximately 40 percent of the claimed New York itemized deductions. These amounts reflected, in part, unsubstantiated figures brought to the tax preparers by petitioners, or the tax preparers placed incorrect figures on the returns. Petitioners either provided incorrect amounts or they failed to carefully review the completed return. Accordingly, petitioners have not established reasonable cause warranting the abatement of penalties.

D. Petitioners contend that because both years were part of the same audit, and the 1993 penalties were abated, the penalties for 1994 should also be abated . However, without the basis for the cancellation of the 1993 penalties, a comparison with the year 1994 cannot be made.

E. The petition of Paul A. and Moya A. Lewis is denied, and the penalties imposed pursuant to the Notice of Deficiency dated April 20, 1998 are sustained.

DATED: Troy, New York
January 25, 2001

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE