

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**PETER AND RENNIE PADALINO** : DETERMINATION  
for Redetermination of Deficiencies or for Refund of : DTA NO. 818508  
New York State Personal Income Tax under Article 22 of :  
the Tax Law for the Years 1991, 1992 and 1993. :

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Petitioners, Peter and Rennie Padalino, 132 Oak Brook Commons, Clifton Park, New York 12065, filed a petition for redetermination of deficiencies or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 1991, 1992 and 1993.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on November 7, 2002 at 9:15 A.M. Petitioners appeared by David M. Feiden, CPA. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mary Jo Iacovelli).

Petitioners submitted written arguments on November 15, 2002 and it is this date that commences the three-month period for the issuance of this determination.

***ISSUES***

I. Whether the tax due as shown on petitioners' New York State personal income tax returns for 1991, 1992 and 1993 was paid at the time said returns were purportedly filed.

II. Whether, if it is determined that petitioners did not pay the tax due as shown on their 1991, 1992 and 1993 personal income tax returns, penalties imposed for failure to timely file the returns, negligence and underpayment of estimated tax should be waived or abated.

***FINDINGS OF FACT***

1. On March 11, 1999, the Division of Taxation (“Division”) corresponded with petitioners advising them that “our records indicate that you filed an IT-370, Application for Automatic Extension of Time to File for Individuals. However, we are unable to locate a New York State tax return(s) filed under your name(s) or social security number(s)” for the years 1991, 1992 and 1993. The letter asked petitioners to indicate whether or not they had filed New York State personal income tax returns for the three years at issue and, if returns were filed, to “provide a complete copy of the return(s) filed, including all wage and tax statements. If the return indicates a balance due, include a copy of both sides of the cancelled check or money order showing our deposit serial number stamped on the front.”

2. On or about April 7, 1999, petitioners responded to the Division’s letter of March 11, 1999 indicating that they had filed returns for 1991, 1992 and 1993. Petitioners also submitted a photocopy of their 1993 New York State resident personal income tax return. The 1993 return reported a total tax due of \$1,726.00, less credit for New York State tax withheld from wages of \$1,125.00, leaving a tax due of \$601.00. Petitioners did not submit a copy of the canceled check or money order in payment of the balance shown on their 1993 return as requested by the Division in its letter of March 11, 1999.

3. On July 30, 1999, the Division issued three statements of proposed audit changes to petitioners, one for each of the years in question. The statements for 1991 and 1992 contained the same explanation, i.e., that an additional search of the Division’s files failed to show that New York State income tax returns for 1991 and 1992 were filed under petitioners’ names and social security numbers. The statement for 1993 advised petitioners that the Division had received their late filed 1993 return on April 7, 1999, that an additional search of its records

failed to disclose any previous filing under their names or social security numbers and that it was accepting the copy sent on April 7, 1999 as an original return.

4. On February 14, 2000, the Division issued three notices of deficiency to petitioners asserting that the following amounts were due:

	<b>1991</b>	<b>1992</b>	<b>1993</b>
<b>TAX</b>	\$6,384.38	\$3,895.00	\$1,726.00
<b>INTEREST</b>	4,831.51	2,519.58	950.99
<b>PENALTIES</b>	4,892.99	2,760.69	1,515.71
<b>TOTAL</b>	\$16,108.88	\$9,175.27	\$4,192.70

Penalties were asserted pursuant to Tax Law § 685(a)(1) for failure to timely file the returns; Tax Law § 685(b) for negligence and Tax Law § 685(c) for failure to file and pay estimated income tax.

5. Petitioners protested all three notices of deficiency by filing a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services. A conciliation conference was held on November 13, 2000, and on March 16, 2001 the conferee issued a Conciliation Order wherein the tax asserted due for 1991, 1992 and 1993 was reduced<sup>1</sup> to \$5,266.38, \$2,785.00 and \$601.00, respectively. The Conciliation Order also canceled the Tax Law § 685(c) penalty for 1991 and 1993 and reduced said penalty for 1992. Petitioners disagreed with the amounts determined to be due in the Conciliation Order and this proceeding ultimately ensued.

6. Petitioner Peter Padalino has been a long-time taxpayer in New York having filed tax returns since approximately 1957. Except for the three years at issue herein, Mr. Padalino has

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<sup>1</sup> The tax was reduced as the result of the Division's allowance of New York State tax withheld from wages as a payment of tax due.

never had a dispute with the Division regarding the filing and payment of personal income taxes. The Division's records reflect that petitioners have filed timely tax returns for the years both prior and subsequent to the three years in question herein.

7. The record herein contains photocopies of petitioners' 1991, 1992 and 1993 New York State personal income tax returns. The 1991 return, prepared by Philip J. Mahar, a certified public accountant, was unsigned and undated. However, there is attached to the return two applications of extensions of time to file which extended the due date for the filing of the 1991 return to October 15, 1992.

The 1992 and 1993 returns were prepared by petitioners' current representative and the returns were signed and dated by said representative on May 11, 1994 and May 13, 1994, respectively. The 1993 return also contained an Application for Automatic Extension of Time to File for Individuals which extended the due date for the filing of the 1993 return to August 15, 1994. Petitioners did not sign or date either the 1992 or 1993 return.

8. During the years at issue it was petitioners' practice to mail their New York State income tax returns using ordinary first class mail. Any tax due shown on the returns would have been paid via a personal check, drawn on a Key Bank checking account, which was attached to the return. Petitioners are unable to produce any documentary evidence to establish that the tax due shown on the returns was paid since most of their records were discarded in 1997 or 1998 when they moved from a large home in Troy, New York to an apartment. After some 23 years of employment, petitioner Peter Padalino's job was eliminated in 1996, and this ultimately forced petitioners to file for bankruptcy in 1997. In the bankruptcy, petitioners lost all of their assets including their personal residence. All of petitioners' records were kept in boxes in the basement of their home, and at the time they moved into the apartment, older records were

destroyed. In Mr. Padalino's words "things that were out of date - that we didn't need - were trashed."

9. Petitioners ultimately requested Key Bank to provide them with copies of their checking account statements and canceled checks. By letter dated January 11, 2001, Key Bank advised petitioners that "we are only required to keep microfilm on statements, etc. for 7 years. The information for the years requested would have already been destroyed."

10. The Division has made several searches of its records in an attempt to locate the 1991 return, which was purportedly filed on or before October 15, 1992, and the 1992 and 1993 returns, which were allegedly filed on or about May 15, 1994. In all instances these searches have failed to locate the returns. The Division has also submitted a Certification, pursuant to Tax Law § 691(d), indicating that a search of the Division's files reveals that no personal income tax returns were filed under petitioners' names and social security numbers for the years 1991, 1992 and 1993.

#### ***SUMMARY OF PETITIONERS' POSITION***

11. Petitioners assert that the returns for the years 1991, 1992 and 1993 were filed and that the tax due shown on said returns was paid at the time the returns were filed. Mr. Padalino maintains that during the period in question he routinely balanced his Key Bank checking account and that he most certainly would have noticed if three checks in the sum of \$5,263.00, \$2,785.00 and \$618.00, the amounts shown due on the 1991, 1992 and 1993 tax returns, had not cleared his bank. Petitioners believe their personal income tax returns for the years in dispute were filed and the tax due paid and that the Division has lost the returns and payments.

12. Petitioners also argue that the Division was required to notify them in a more timely fashion of its position that tax returns for the three years at issue had not been filed. Specifically,

petitioners note that the Division first advised them that it had no record of returns being filed for 1991, 1992 and 1993 on March 11, 1999, some six and one-half years after the return for 1991 was filed. Petitioners assert that notice at such late date prevented them from being able to produce any documentary evidence of filing or payment.

### ***CONCLUSIONS OF LAW***

A. Pursuant to Tax Law § 651(a) calendar year taxpayers are required to file their personal income tax return by April 15<sup>th</sup> of the following year. Tax Law § 652(a) provides that a person required to file a return shall “without assessment, notice or demand, pay any tax due thereon to the commissioner on or before the date fixed for filing such return.”

B. In accordance with Tax Law former § 691(a) and regulation 20 NYCRR former 146.4(a) and former 146.14(b), returns and payments are considered to have been filed and made on the date of the United States postmark stamped on the envelope. When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Reeves*, Tax Appeals Tribunal, August 22, 1991; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990; *Matter of Filler*, Tax Appeals Tribunal, August 24, 1989; *Matter of WSD United Transp*, Tax Appeals Tribunal, July 27, 1989).

C. In the instant matter, the Division has established that it has no record of receiving petitioners' returns or payments for 1991, 1992 and 1993. Accordingly, the burden is on petitioners to prove (Tax Law § 689[e]), by one means or another, that they timely filed the returns for 1991, 1992 and 1993 and paid the tax due as shown on said returns. Petitioner Peter Padalino's testimony concerning the mailing of the returns and the payment of the tax due shown on said returns, although forthright and sincere, is not sufficient to permit a conclusion that

petitioners have met their burden of proving that the returns were filed and the tax due paid (*see, Matter of Miller v. United States*, 784 F2d 728, 86-1 US Tax Cas ¶ 9261; *Matter of Sipam*, Tax Appeals Tribunal, March 10, 1988 [for a general discussion on the filing of various documents with the Division and the Division of Tax Appeals]). Petitioners could have avoided any risk of mishandling of the returns and payments by the Postal Service or by the Division had they used certified or registered mail (Tax Law former § 691[a]; 20 NYCRR former 146.4[c]), since certification or registration serves as prima facie evidence that a document or payment was delivered. Petitioners chose to mail their returns using ordinary first class mail and therefore they bear the risk of nondelivery or mishandling. By discarding their records petitioners have no documentary evidence to prove payment. Simply stated, petitioners have placed themselves in a position of being unable to prove that the returns were mailed and that the taxes were paid for the years 1991, 1992 and 1993.

D. Under petitioners' scenario, the Division received their 1991 return sometime on or before October 15, 1992, cashed the check in payment of the tax due and then lost or failed to maintain any record of the return's having being filed or the payment made. This exact same situation occurred a second time to petitioners when they filed their 1992 and 1993 returns sometime on or about May 15, 1994. While it is possible for the Division to receive a tax return, cash the check in payment of the tax due and then fail to maintain any record of the return or payment, the odds that it would lose the same taxpayers' tax returns and payments for three consecutive years are minuscule, especially when one takes into consideration that the 1991 return and the 1992 and 1993 returns would have been mailed in separate envelopes on different dates.

E. While it is unfortunate that the Division was not able to notify petitioners sooner than March 11, 1999 that it had no record of 1991, 1992 and 1993 returns having been filed under their names and social security numbers, it must be noted that Tax Law § 683(c)(1)(A) provides that an assessment can be made at any time if no return is filed. Also, the Division's letter of March 11, 1999 clearly advised petitioners of the need to provide copies of the canceled checks in payment of the tax due as shown on the returns, yet no such copies were provided. The check in payment of the tax due for 1991, if in fact paid, would have been dated on or before October 15, 1992, while the checks for 1992 and 1993 would have been dated in mid May 1994. Since Key Bank retains microfilm records for seven years, petitioners still had sufficient time to obtain copies of the canceled checks in payment of the taxes due for 1991, 1992 and 1993 as requested by the Division in its letter dated March 11, 1999. From the date of the Division's letter petitioners had approximately seven months to obtain a copy of the canceled check for the 1991 tax year, if the purported payment was made on or about October 15, 1992, and two years and two months to obtain copies of the canceled checks for 1992 and 1993, if payments were made as alleged in mid May 1994. In fact, it would appear that the Key Bank letter dated January 11, 2001 indicating that "the information for the years requested would have already been destroyed" would not be accurate with respect to the checks drawn on petitioners' account in May 1994. It must be noted, however, that the record herein does not contain a copy of petitioners' letter to Key Bank so it is not known exactly what years were specified in that letter.

F. Turning next to the issue of penalties, I believe that petitioners' failure to timely file returns for 1991, 1992 and 1993 was due to reasonable cause and not willful neglect of the Tax Law and therefore the Tax Law § 685(a)(1) penalty is canceled. Petitioners have also shown that the deficiencies at issue herein were not due to negligence or intentional disregard of the Tax



Law and accordingly the Tax Law § 685(b) penalty imposed for each year is waived. Finally, under the present circumstances I believe that it is fair and equitable (Tax Law §§ 2012; 685[d][4][A]) to also cancel the Tax Law § 685(c) penalty for failure to pay estimated tax.

G. The petition of Peter and Rennie Padalino is granted to the extent indicated in Conclusion of Law “F”; the three notices of deficiency dated February 14, 2000 are to be modified consistent with this determination; and, except as modified by this determination and the Conciliation Order dated March 16, 2001, said notices are in all other respects sustained.

DATED: Troy, New York  
January 30, 2003

/s/ James Hoefler  
PRESIDING OFFICER