STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEVEN AND SUSAN SELTZER	:	DETERMINATION DTA NO. 819394
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 1990, 1991 and 1992.	:	

Petitioners, Steven and Susan Seltzer, 299 Law Road, Briarcliff Manor, New York 10510, 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 1990, 1991 and 1992.

A small claims hearing was held before Joseph W. Pinto, Jr., Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 24, 2004 at 1:15 P.M., which date began the three-month period for the issuance of this determination. Petitioners appeared by Ronald Kassover, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Susan Parker).

ISSUES

I. . Whether the Division of Taxation properly assessed petitioners for additional income taxes following amendment of their Federal income tax returns for the years 1990, 1991 and 1992.

II. Whether penalties should be abated due to petitioners' reliance on their tax professional's advice.

FINDINGS OF FACT

1. As part of a settlement of a criminal prosecution of petitioner Steven Seltzer, petitioners agreed to declare additional income in the sum of $85,000.00 in the years 1990, 1991 and 1992.[1] On April 30, 1999 and May 9, 1999, Steven and Susan Seltzer, respectively, executed a consent to the assessment and collection of additional tax, penalty and interest from the Internal Revenue Service on Form 4549-CG, Income Tax Examination Changes. Specifically, petitioners conceded additional tax, fraud penalty and interest in each of the years as follows:

Year	Tax	Penalty	Interest	Total
1990	$7,867.00	$5,900.25	$13,380.36	$27,147.61
1991	7,210.00	5,407.50	9,965.67	22,583.17
1992	8,494.00	6,370.50	9,831.73	24,696.23

Form 4549-CG clearly stated that the Internal Revenue Service exchanged information about Federal tax with State tax agencies, and that if the change in income reflected on the form affected petitioners' State tax liability, the proper forms should be filed with the State.

2. Subsequently, the Internal Revenue Service notified the Division of Taxation ("Division") of the changes made to petitioners' Federal returns for the years in issue. Pursuant to this notification and consistent with the amount of additional tax reported, the Division issued three notices of additional tax due, dated June 19, 2000, to petitioners which set forth additional tax, penalty and interest due as follows:

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[1]No explanation was offered why these particular years were selected.

Year	Tax	Penalty	Interest	Total
1990	$2,757.00	$1,543.91	$2,665.11	$6,966.02
1991	2,387.33	1,132.13	1,917.83	5,437.29
1992	2,027.81	841.58	1,400.26	4,269.65

3. Petitioners requested a conference in the Bureau of Conciliation and Mediation Services on February 16, 2001 which was deemed untimely and dismissed.

4. The parties conceded that the full amount of all three assessments has been paid. However, neither party submitted evidence to establish the date on which the amounts were paid.

5. On April 5, 2002, petitioner filed a claim for refund of personal income tax for the year 1992 in the sum of $3,200.00. As explained on the claim form, this amount represented the Federal tax refund taken by New York State in partial satisfaction of the amount due on the notices. In support of their position, petitioners argued in the claim that the statute of limitations prohibited the Division from assessing tax for the years 1990, 1991 and 1992. The Division did not respond to the claim, but it was deemed denied by operation of Tax Law § 689(c)(3) on October 5, 2002.

6. Petitioners did not file amended New York State income tax returns for the years 1990, 1991 and 1992 because petitioners were advised by their accountant at that time that there was no New York liability, and they relied on that advice in making their decision not to notify New York State of the additional income claimed for the years in issue. Petitioners' accountant believed that since the Federal liability arose from a criminal matter unrelated to tax, the payment made was in the nature of a settlement, although he conceded that petitioners filed amended Federal returns for the years in issue which increased petitioners' taxable income.

CONCLUSIONS OF LAW

A. Tax Law § 659 provides that if the amount of a taxpayer's Federal taxable income reported on his Federal income tax return for any taxable year is changed or corrected, the taxpayer shall report the change or correction within 90 days after the final determination of such change or correction. If a taxpayer fails to comply with this provision of Tax Law § 659, the Division of Taxation is authorized to assess the additional tax due at any time. (Tax Law § 683[c][1][C].) For this reason, petitioners' argument that the Division was prohibited by the statute of limitations from assessing them additional tax for the years 1990, 1991 and 1992 must fail. By not reporting the Federal changes within 90 days, they waived any limitation on assessment provided for by law. Further, petitioners conceded that they amended their Federal returns for the years in issue which increased their taxable income in each year.

B. Petitioners contend that the additional income was in the nature of a settlement with no relationship to taxes owed for the years in issue. The testimony and evidence do not support this characterization. The details of the Federal criminal proceeding were sketchy, at best, and there was no explanation of why the amount paid was applied to the years in issue or why fraud penalties were imposed. The disclosed facts indicated that petitioners amended their 1990, 1991 and 1992 Federal income tax returns which increased their income and tax liability for each of those years. Subsequently, they failed to notify New York State of these changes, as required. In the absence of any explanation for not reporting the changes, other than ignorance of the law, petitioners are liable for the additional taxes due. (20 NYCRR former 107.6[d][4].)

C. Petitioners maintain that they should not be liable for the penalty imposed by the Division pursuant to Tax Law § 685(b). That section of the law imposes penalty for negligence or intentional disregard of the law or regulations thereunder. Clearly, petitioners negligently or intentionally disregarded Tax Law § 659, which mandated that they report any change in income

reported on their Federal return for any taxable year. This is true notwithstanding the advice of their tax advisor.

The New York courts have specifically rejected the view that consulting with and following the advice of a tax professional will by itself constitute reasonable cause (***see, Matter of Auerbach v. State Tax Commn.***, 142 AD2d 390, 536 NYS2d 557, 561 [3d Dept 1988]; ***Matter of LT & B Realty v. State Tax Commn.***, 141 AD2d 185, 535 NYS2d 121, 123.) As stated in ***LT & B Realty***:

> To permit consulting with a tax professional to act as immunity to penalties would effectively remove the penalty provisions. Who would not seek the advice of a sympathetic tax expert? (***Matter of LT & B Realty v. State Tax Commn.***, ***supra***, 535 NYS2d at 123.)

To justify a finding of reasonable cause the reliance must itself be reasonable (***The Neptune Mutual Association, Ltd. of Bermuda v. U.S.***, 13 US Ct Cl 309, 87-2 US Tax Cas ¶ 16,461; ***Matter of Bap Appliance Corp.***, Tax Appeals Tribunal, June 29, 1989).

In this case, the facts show that petitioners were aware of the possibility that they were taxable in New York prior to the due date of the return. The consent signed by petitioners, Federal Form 4549-CG, specifically noted that the Internal Revenue Service shares its information with state tax agencies and that, if the change affects state income, state forms should be filed. Since New York adjusted gross income is directly related to Federal adjusted gross income (New York taxable income is Federal adjusted gross income with certain modifications [Tax Law § 612(a)]), petitioners should have known the Federal change they effected would entail a New York State change as well.

D. The petition of Steven and Susan Seltzer is denied and the Division's denial of petitioners' claim for credit or refund of personal income tax is sustained.

DATED: Troy, New York
July 15, 2004

/s/ Joseph W. Pinto, Jr.
PRESIDING OFFICER