

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CARL D. AND AMIE V. GUSTAVSON : DETERMINATION
for Redetermination of a Deficiency or for Refund of New : DTA NO. 820154
York State Personal Income Tax under Article 22 of the :
Tax Law for the Year 2002. :

Petitioners, Carl and Amie Gustavson, 17008 Winning Colors Place, Leesburg, Virginia 02176, 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 2002.

On June 18, 2005 and June 23, 2005, respectively, petitioners, appearing *pro se*, and the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by October 11, 2005 which date began the six-month period for issuance of this determination. After due consideration of the record, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether penalties asserted by the Division of Taxation pursuant to Tax Law § 685(a)(1) and (2) should be abated.

FINDINGS OF FACT

1. Petitioners, Carl D. and Amie V. Gustavson, filed a 2002 New York State Nonresident and Part-Year Resident Income Tax Return. The return stated that petitioners were residents of

New York State until January 10, 2002 and listed their address as “c/o JMW, 1900 NW CORPORATE BLVD SUIT [sic], BOCA RATON, FL.” The return, which was dated August 6, 2003 by petitioners and August 9, 2003 by petitioners’ representative, allocated a portion of petitioners’ income to New York State. According to the return, petitioners incurred a New York State income tax liability of \$84,318.00. The return included a statement which calculated interest for a late payment of \$1,708.00 and a late payment penalty of \$1,686.00 for the period April 15, 2003 through August 15, 2003. The return did not indicate that there had been any payments for 2002 prior to the filing of their return. Further, it did not include a statement that they qualified for the automatic two-month extension for foreign residents to file their Federal income tax return. Lastly, the return did not show that petitioners had filed a New York Form IT-370, Application for Automatic Extension of Time to File.

2. Petitioners’ New York return included a copy of the corresponding Federal return which shows that petitioners filed a Federal Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return.

3. The Division of Taxation (“Division”) issued a Notice and Demand for Payment of Tax Due (Assessment # L-022985083), dated September 11, 2003, to petitioners which assessed interest in the amount of \$1,618.01 and penalty in the amount of \$16,863.64 less payments of \$3,393.65 for a balance due of \$15,088.00. The notice, which was addressed to “Carol [sic] D. Gustavson and Amie V. Gustavson” at 1900 NW Corporate Blvd., Boca Raton, Florida 33431-8502, explained that the return was received on August 9, 2003. It also stated that penalty and interest was due for the failure to file and pay tax on or before the due date.

4. According to an account transcript from the Internal Revenue Service, petitioners filed a United States personal income tax return on August 12, 2003 pursuant to an extension of time to file.

5. Petitioners sold their home in Shelter Island, New York in early 2002 and established a residency in Cabo San Lucas, Mexico. As a result of the move and financial losses, Mr. Gustavson did not know that he had incurred a capital gain obligation to New York State until the middle of 2003.

6. In February 2004, while in Mexico, Mr. Gustavson received the first notice from the Division asserting that additional amounts were due. The notice was mailed to the former Shelter Island address and it was erroneously addressed to "Carol D. Gustavson." Nevertheless, the notice was forwarded to Mr. Gustavson in Mexico.

7. Mr. Gustavson did not have all of the data needed to calculate his taxes until the middle of 2003.

SUMMARY OF PETITIONERS' POSITION

8. In their letter brief, petitioners argued that the imposition of penalties was inappropriate and should be abated because: petitioners were foreign residents at the time of filing their 2002 return; petitioners allegedly had an extension to file their returns until August 15, 2003; as soon as they knew that they had a liability to New York State they paid \$87,712.00 without hesitation or delay; and New York State sent its correspondence to the wrong address with the wrong name. According to Mr. Gustavson, he filed for an extension of time because the move to Mexico made it difficult to prepare the return and gather the additional information he needed. Mr. Gustavson also explained that it took time to calculate the improvements to the property.

Mr. Gustavson further maintained that he was embarrassed because a levy was placed on one of his accounts at a financial institution.

CONCLUSIONS OF LAW

A. In this instance, the Division asserted that penalties were due pursuant to Tax Law § 685(a)(1) and Tax Law § 685(a)(2). Tax Law § 685(a)(1) imposes a penalty for the failure to file an income tax return under Article 22 of the Tax Law on or before the due date, determined with regard to any extension of time, unless the failure was due to reasonable cause and not willful neglect. Section 685(a)(2) of the Tax Law imposes a penalty for the failure to pay the tax on a return on or before the due date unless the failure was due to reasonable cause and not willful neglect.

B. Since petitioners were penalized for the failure to file a return on or before the due date, it is necessary to determine when petitioners' return was required to be filed. In general, an individual income tax return is due on the 15th day of the fourth month following the close of the taxable year which in most instances is April 15. However, petitioners submit that their due date was extended because they filed for an automatic four-month extension of time to file their return (*see*, 20 NYCRR 157.2[a]).

C. Petitioners have not sustained their burden of proof of establishing that they filed for an automatic extension of time to file their New York State return. In order to obtain an automatic extension of time, a taxpayer must estimate the full amount of his liability and include the full remittance (20 NYCRR 157.2[a][4]). Here, petitioners stated that they did not realize that they had any liability to New York State until the middle of 2003. Further, their return for the year in issue did not indicate that they made any prior payments of tax. Under these circumstances, petitioners' contention that they filed for an automatic extension of time for New

York is rejected. It is recognized that there may be confusion on this issue because petitioners filed for an extension of time to file their Federal income tax return.

D. In general, the due dates for filing New York State returns conform with the Federal rules (Tax Law § 651). Under the Federal rules, there is an automatic two-month extension when the taxpayer is a resident of a foreign nation (Treas Reg § 1.6081-5). Similarly, 20 NYCRR 157.4(a) provides, in pertinent part:

Automatic two-month extension of time to file where Federal extension granted. A taxpayer who qualifies for an automatic extension of two months to file such taxpayer's Federal income tax return, without application, because such taxpayer is a United States citizen or resident who . . . lives outside the United States and Puerto Rico, and whose tax home (within the meaning of section 162[a][2] of the Internal Revenue Code) for Federal income tax purposes is outside the United States and Puerto Rico . . . on the date such taxpayer's Federal income tax return is due, is also entitled to a similar extension of time to file such taxpayer's New York State personal income tax return, as long as such taxpayer attaches to such taxpayer's New York State personal income tax return a statement showing that such taxpayer qualifies for an automatic two-month extension of time to file such taxpayer's Federal income tax return. The time to pay such taxpayer's New York State personal income tax . . . is also similarly extended. However, there will be added to such taxpayer's New York State income tax . . . interest at the rate prescribed by the Commissioner of Taxation and Finance (see Part 2393 of this Title) on any balance of New York State personal income tax . . . due from the due date of such taxpayer's New York State personal income tax return (determined without regard to any extension of time) to the date of payment.

E. In this case, there is no dispute that during the year in issue, petitioners were residing in Mexico and entitled to the Federal automatic extension of time. The difficulty presented is that petitioners' New York return did not indicate that they qualified for the automatic two-month extension to file their Federal income tax return. The purpose of this provision is obviously to put the Division on notice that an extension is appropriate. Since the Division was not on notice that an extension of time was appropriate, the Division properly issued the notice asserting that tax was due from the April 15th date. However, since petitioners have established that they meet

the criteria for an extension, the Division should recompute the amount of penalty due starting with the date of June 15, 2002. The calculation of interest would not be affected since petitioners did not remit any taxes prior to August 9, 2003.

F. Petitioners' contention that the notices were misaddressed does not warrant any relief. The Division was required to mail the notice to petitioners' last known address (Tax Law § 681[a]). Here, there is no indication that petitioners ever advised the Division that they moved from their former Shelter Island, New York address. Second, petitioners have candidly acknowledged that the notice was forwarded to their residence in Mexico. Case law establishes that a notice of deficiency is valid regardless of a mistake in the taxpayer's mailing address if it is actually received in sufficient time for the taxpayer to file a petition (*Matter of Riehm v. Tax Appeals Tribunal*, 179 AD2d 970, 579 NYS2d 228, *lv denied* 79 NY2d 759, 584 NYS2d 447).

G. Petitioners have not established reasonable cause for the cancellation of penalties. The regulations of the Commissioner of Taxation and Finance at 20 NYCRR 2392.1(c)(1) provide:

Reasonable cause shall not be determined to exist as a basis for not imposing or for cancelling the additions to tax for failure to file a return, pursuant to section 685(a)(1) . . . of the Tax Law, or for failure to pay the amount of tax shown on such return, pursuant to section 685(a)(2) . . . of the Tax Law, where it is determined that the taxpayer or the taxpayer's duly authorized representative could have reasonably been expected to timely request extensions of time to file the return or extensions of time to pay the tax due, but failed to do so.

H. In view of the fact that petitioners' representative filed a request for a Federal extension of time, it is concluded that petitioners' representative could have similarly filed a request for a New York extension of time. It is further noted, in the alternative, that in order to establish reasonable cause on the basis of an inability to assemble essential information, the taxpayer must show an inability, for reasons beyond his control, "to timely obtain and assemble essential information required for the preparation of a complete return, despite the existence of

reasonable efforts. . . .” (20 NYCRR 2392.1[d][3].) In this case, there is no evidence of what efforts were made to timely obtain and assemble the information required.

I. The petition of Gary and Amie Gustavson is granted to the extent indicated in Conclusion of Law “E”; the Division is directed to recompute the Notice and Demand dated September 11, 2003 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
March 30, 2006

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE