

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LADIES SHOES BY SARA JO, LTD.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Years 1978,
1979 and 1980.

DECISION

In the Matter of the Petition

of

SARA ORTREGER

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1978, 1979 and
1980.

Petitioner, Ladies Shoes by Sara Jo, Ltd., Poughkeepsie Plaza Mall,
Poughkeepsie, New York 12601, filed a petition for redetermination of a deficiency
or for refund of corporation franchise tax under Article 9-A of the Tax Law for
the years 1978, 1979 and 1980 (File No. 45013).

Petitioner, Sara Ortregger, **83** Whitter Boulevard, Poughkeepsie, New York
12601, 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 1978, 1979
and 1980 (File No. 45,345).

A consolidated hearing was held before Dennis M. Galliher, Hearing Officer,
at the offices of the State Tax Commission, Building #9, State Office Campus,
Albany, New York, on January 22, 1986 at 10:45 A.M. Petitioner Ladies Shoes by
Sara Jo, Ltd. and Sara Ortregger, Petitioner, appeared at the hearing.

Ortreger appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioners have proven that some or all of the additional income determined upon audit was from nontaxable sources thus warranting reduction or cancellation of asserted deficiencies for the years in question.

II. Whether penalties asserted against petitioners for failure to timely file returns and pay tax should be reduced or abated.

FINDINGS OF FACT

1. On May 25, 1983, the Audit Division issued to petitioner Sara Ortreger a Notice of Deficiency asserting additional personal income tax due for the years 1978, 1979 and 1980 in the aggregate amount of \$3,543.00, plus penalties [Tax Law §685(a)(1) and (2)] and interest. Petitioner Sara Ortreger did not timely file New York State income tax returns for any of the years at Issue.

2. On April 29, 1983, the Audit Division issued three separate notices of deficiency to petitioner Ladies Shoes by Sara Jo, Ltd. ("Ladies Shoes") asserting additional corporation franchise tax due for the years 1978, 1979 and 1980 in the respective amounts of \$2,937.60, \$3,969.40 and \$3,643.10, plus penalties [Tax Law §1085(a)(1) and (2)] and interest for each year. Petitioner Ladies Shoes did not timely file New York State corporation franchise tax reports for any of the years at issue.

3. Petitioner Sara Ortreger is president and sole shareholder of petitioner Ladies Shoes. Ladies Shoes operates a retail shoe store located in the Poughkeeps Plaza Mall in Poughkeepsie, New York.

4. Sara Ortreger and her husband, Yaakov Ortreger, immigrated to the United States from Israel in 1967.

Yaakov Ortregger is an automobile mechanic and was employed as such for a number of years, first by Hy-Grade Foods and later by Avis Car Rentals.

5. In 1978, Sara and Yaakov Ortregger moved to Poughkeepsie, New York and opened petitioner Ladies Shoes in a 600 square foot leased store space in the Poughkeepsie Plaza Mall. The Ortreggers used between \$20,000.00 and \$25,000.00 of personal funds they had saved to meet the initial costs of leasing the store space, installing merchandise display shelves and other items necessary to outfit a shoe store and obtaining initial inventory.

6. Sara Ortregger worked at Ladies Shoes on a daily basis, with the store being open **six** days per week. Ladies Shoes is located near an office of the Dutchess Bank **in** the Poughkeepsie Plaza ~~Mall~~. According to Sara Ortregger, at the start of each day eighty dollars in cash was in the cash register for use in making change on sales. All other sales receipts were allegedly deposited daily in the Dutchess Bank. Mrs. Ortregger stated that all of Ladies Shoes' bills were paid by check, that bills to suppliers of inventory were always paid first because Ladies Shoes did not purchase inventory on credit, and that if there was any money left over, Mrs. Ortregger would pay herself a salary, always by check. Finally, Mrs. Ortregger stated that the only time she withdrew funds in cash from Ladies Shoes was the withdrawal of change from the register during the day to purchase a soda, piece of pizza or hamburger at the mall.

7. When Ladies Shoes first commenced doing business, the Ortreggers retained one Michael Worona as their accountant. Mr. Worona was to maintain books and records for Ladies Shoes and to prepare all required tax returns, both for Ladies Shoes and for the Ortreggers. **All** of petitioners' records and information was turned over to Mr. Worona on an ongoing basis.

8. The audit of petitioners herein resulted from an investigation of Mr. Worona. A pre-audit meeting concerning the audit of petitioners was held with Mr. Worona, where the only records made available to the Audit Division were bank statements from the Dutchess Bank, photocopies of Federal Corporation Income Tax Returns, including Schedules M-1 and M-2, and profit and **loss** statements for Ladies Shoes for the years 1978, 1979 and 1980. No other books or records for Ladies Shoes or Sara Ortregger were presented. The profit and **loss** statements submitted by Mr. Worona reflected that Ladies Shoes was operated at a loss during the years in issue. Neither corporation franchise tax reports nor New York State income tax returns had been filed for any of the years in question.

9. The Audit Division reviewed those documents submitted and increased Ladies Shoes' income for each year by the amount that Ladies Shoes' bank deposits exceeded gross sales per profit and **loss** statements. For 1980, income was also increased by an additional \$5,000.00 based on an unexplained savings account deposit. Finally, Sara Ortregger's personal income was increased by \$20,000.00 per year, based on an estimate of cash withdrawals from Ladies Shoes for personal living expenses.

10. On or about July 26, 1983, corporation franchise tax reports (Forms CT-4) were filed for Ladies Shoes, showing amounts due of \$250.00 for 1978, \$277.70 for 1979 and \$588.16 for 1980, together with a check for the aggregate **of** these amounts (\$1,115.86). The Audit Division has agreed that the asserted corporate deficiencies should be reduced to reflect this payment.

11. As the result of pre-hearing conferences, at which petitioners presented a cash disbursements book, certain adjustments to the deficiencies were made by the Audit Division as follows:

- a) salary check withdrawals by Sara Ortregger from Ladies Shoes in the amount of \$5,000.00 per year, serving to reduce the estimated cash withdrawals for the Ortregger's personal living expenses;
- b) \$7,800.00 of income per year earned by Mr. Ortregger as a mechanic, also serving to reduce the estimated cash withdrawals for the Ortregger's personal living expenses;
- c) \$3,335.00 in personal medical expenses paid by Ladies Shoes in 1978, which was treated as a constructive dividend to Sarah Ortregger.

12. The above-noted items of adjustment serve to reduce the asserted deficiencies to the following amounts (exclusive of penalties and interest):

<u>Year</u>	<u>Ladies Shoes</u>	<u>Sara Ortregger</u>
1978	\$1,990.10	\$304.60
1979	2,689.40	126.50
1980	2,363.10	122.50

13. Sara Ortregger and Yaakov Ortregger claim a limited ability to read and write in English. Mr. Ortregger was schooled in Israel as an automobile mechanic and neither he nor Sara Ortregger received any other formal education, in business, accounting or otherwise, either in Israel or since their immigration to the United States.

14. The Ortreggers maintain that Ladies Shoes made little or no profit during the years in question and that their personal living expenses in excess of Mr. Ortregger's earnings plus amounts of salary withdrawn by check from Ladies Shoes by Mrs. Ortregger were paid out of cash savings

brought by the Ortregers from Israel to the United States, and from cash from the sale of jewelry also brought from Israel. These alleged funds were not kept in bank accounts, but rather were kept at home and were not recorded upon entry into the United States because of restrictive Israeli laws concerning removal of currency from that country. The amount of alleged cash savings was estimated by the Ortregers at \$60,000.00, with an estimate of the value of the jewelry at \$40,000.00.

15. No further books, records or cancelled checks were provided at the hearing herein.

16. The Ortregers recalled signing personal income tax returns and sales tax returns presented to them by Mr. Worona. They were advised by Mr. Worona that all returns were being filed when due.

CONCLUSIONS OF LAW

A. That, with the exception of three specific situations none of which is present herein, petitioners bear the burden of proving the inaccuracy of the asserted deficiencies [Tax Law § 689(e)].

B. That upon the evidence presented, petitioners have not proven that any reduction of the deficiencies, in addition to those already allowed by the Audit Division are warranted. Notwithstanding the assertion of the existence of personal savings in the nature of a cash and jewelry hoard, there were no records of such funds or their disbursement over the years, nor were the Ortregers able to detail specific amounts of such funds as expended.

C. That given petitioner Sara Ortreger's background, including her lack of education, her very limited ability to read and write in English and her complete reliance on Mr. Worona and his


no willful neglect in her failure to timely file income tax returns or in her failure to ensure that corporation franchise tax reports were timely filed by Ladies Shoes. In fact, Mrs. Ortregger did sign tax returns and held a reasonable belief, given the situation, that such returns were, in due course, filed. Accordingly, under the circumstances presented in this case, it is appropriate to abate the penalties asserted pursuant to Tax Law sections 685(a)(1) and (2) and 1085(a)(1) and (2).

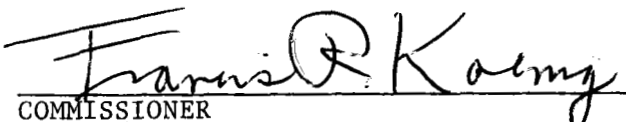
D. That the petitions of Ladies Shoes by Sara Jo, Ltd. and Sara Ortregger are granted to the extent indicated in Conclusion of Law "C", but are otherwise denied and the notices of deficiency dated April 29, 1983 and May 25, 1983, respectively, as reduced (refer Findings of Fact "11" and "12"), are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER