

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

ARNOLD LORING and DOROTHY LORING

DECISION

for Redetermination of a Deficiency or for  
Refund of New York State Personal Income and  
Unincorporated Business Taxes under Articles  
22 and **23** of the Tax Law and New York City  
Personal Income Tax under Chapter 46, Title T  
of the Administrative Code of the City of New  
York for the Years 1978, 1979 and 1980.

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Petitioners, Arnold Loring and Dorothy Loring, 166 East 34th Street, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of New York State personal income and unincorporated business taxes under Articles 22 and **23** of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1978, 1979 and 1980 (File No. 47907).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 19, 1985 at 1:15 P.M. Petitioner Arnold Loring appeared pro se and for his spouse. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUES

I. Whether petitioners timely filed a New York State and City personal income tax return for 1978.

II. Whether petitioner Arnold Loring's activities as a commissioned salesman constituted the carrying on of an unincorporated business, thereby

subjecting the income generated from said activities to unincorporated business tax.

III. Whether petitioners are subject to penalties for failure to timely file returns, for failure to timely pay the tax when due and for failure to file and/or pay estimated tax.

IV. Whether petitioners are liable for payment of interest on the tax asserted due.

#### FINDINGS OF FACT

1. Petitioners herein, Arnold Loring and Dorothy Loring, filed separate New York State and City resident income tax returns for the years 1978, 1979 and 1980. The 1978 return was received by the Audit Division on October 15, 1984, while the 1979 and 1980 returns were timely filed. No unincorporated business tax returns were filed for any of the years at issue.

2. On June 30, 1983, the Audit Division issued a Statement of Audit Changes to petitioners for 1978. On said Statement, the Audit Division advised petitioners that it had no record of receiving a 1978 return and, since they had failed to reply to two letters of inquiry, New York income for 1978 was estimated. Total income for petitioner Arnold Loring was estimated at \$33,250.00 (\$250.00 interest income and \$33,000.00 business income). Total income for petitioner Dorothy Loring was estimated at \$11,240.00 (\$250.00 interest income and \$11,000.00 wage income).

3. Based on the aforementioned Statement, the Audit Division, on September 2 1983, issued separate notices of deficiency to each petitioner for the year 1978. The Notice issued to petitioner Dorothy Loring proposed additional New

York State and City personal income tax due of \$691.00, plus penalty' of \$366.94 and interest of \$318.30, for a total allegedly due of \$1,376.24.

The Notice issued to petitioner Arnold Loring for 1978 proposed additional tax due of \$4,679.09. Said amount included New York State and City personal income tax due plus New York State unincorporated business tax due.<sup>2</sup> The Notice also included penalty' of \$2,451.96 and interest of \$2,155.33, for a total allegedly due of \$9,286.38.

4. On June 30, 1983, the Audit Division issued a second Statement of Audit Changes solely to petitioner Arnold Loring for the years 1979 and 1980. On said Statement, the Audit Division held Mr. Loring's reported business income (\$32,227.96 for 1979 and \$19,916.00 for 1980) subject to unincorporated business tax.

Based on the abovementioned Statement, the Audit Division, on September 2 1983, issued a Notice of Deficiency to petitioner Arnold Loring for 1979 and 1980 proposing additional unincorporated business tax due of \$1,409.40, plus penalty' of \$652.45 and interest of \$494.65, for a total allegedly due of \$2,556.50.

5. Based on information provided by petitioners at a pre-hearing conference, specifically the filing of their 1978 return, the deficiency issued to Mrs. Loring for 1978 was reduced to \$43.79, plus penalty under Tax Law sections 685(a)(1)

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1 Penalties were asserted due pursuant to Tax Law sections 685(a)(1), 685(a)(2) and 685(c) and Administrative Code sections T46-185.0(a)(1), T46-185.0(a)(2) and T46-185.0(c) for failure to file a return on time, failure to pay the tax due on time and failure to file and/or pay estimated tax, respectively.

2 Unincorporated business tax was assessed 1/1/81.

and 685(a)(2), and Administrative Code sections T46-185.0(a)(1) and T46-185.0(a)(2) and interest. The deficiency issued to Mr. Loring for 1978 was reduced to \$712.50 (\$555.07 for New York State and City tax due and \$157.44 for New York State unincorporated business tax due) plus penalty as described in footnote 1, supra and interest. No adjustments or revisions were made to the Notice of Deficiency issued to Mr. Loring for the years 1979 and 1980.

6. Petitioners maintain that their 1978 New York State and City personal income tax return was timely prepared by their accountant and also timely filed. The 1978 return, received by the Audit Division on October 15, 1984, is allegedly a photocopy of the 1978 return which petitioners assert was previously timely filed. Petitioners also assert that the tax due shown on the 1978 return of \$598.86 was paid when said return was filed. No documentary evidence was presented by petitioners to support that a payment of \$598.86 was made.

7. For all three years at issue, petitioner Arnold Loring was a sales agent for numerous firms in the textile industry. Mr. Loring was paid strictly on a commission basis and there were no income taxes or social security taxes withheld from his compensation. Mr. Loring reported his commission income on Federal Schedule C, Profit or (Loss) From Business or Profession, and claimed business deductions totalled \$12,164.10, \$16,448.01 and \$16,874.00 for 1978, 1979 and 1980, respectively. Mr. Loring did not receive reimbursement from his principals for the expenses which he incurred nor did said principals provide Mr. Loring with Workmen's Compensation, disability insurance or a pension plan. None of the principals provided Mr. Loring with office space and he had no supervisor. Mr. Loring set his own itinerary, was free to take a vacation at his own discretion and did not have to meet any quotas.

8. Petitioner Arnold Loring maintains that if he is held liable for payment of unincorporated business tax, that penalty and interest should not be charged against him. Mr. Loring asserts that he relied entirely on his accountant to prepare all necessary returns and that if any unincorporated business tax is due, said accountant should be charged the penalty and interest.

CONCLUSIONS OF LAW

A. That section 689(e) of the Tax Law and section ~~T46-189.0~~(e) of the Administrative Code of the City of New York both place the burden of proof on petitioners. Petitioners have failed to sustain their burden of proof to show that they timely filed a New York State and City personal income tax return for 1978 and made a payment of \$598.86.

B. That petitioner Arnold Loring's activities as a commissioned salesman during the years at issue constituted the carrying on of an unincorporated business and the income derived from said activities is therefore subject to unincorporated business tax. Tax Law sections 701(a), 703(a) and 705(a) and 20 NYCRR 203.1 and 203.10.

C. That petitioners have failed to show ~~that~~ reasonable cause existed for their failure to timely file a return and timely pay New York State and City personal income taxes for 1978. Accordingly, the penalties asserted pursuant to Tax Law section 685(a)(1) and 685(a)(2) and Administrative Code section ~~T46-185.0~~(a)(1) and ~~T46-185.0~~(a)(2) are sustained.

D. That petitioner Arnold Loring has also failed to show that reasonable cause existed for his failure to timely file unincorporated business tax returns and for his failure to timely pay unincorporated business tax. Accordingly, the Tax Law section 685(a)(1) and 685(a)(2) penalties are sustained.

E. That a penalty is imposed by Tax Law section 685(c) and Administrative

Code section T46-185.0(c) for failure to file and pay an estimated tax or for underpayment of estimated tax. Section 685(d) of the Tax Law and section T46-185.0(d) of the Administrative Code provides for certain exceptions to the imposition of this penalty; however, petitioners have failed to show that they qualified for any of the statutory exceptions. Accordingly, said penalty must be sustained.

F. That there is no provision in the Tax Law which permits interest to be waived. Although petitioners may have relied on their accountant, they are liable for the payment of penalty and interest.

G. That, pursuant to Finding of Fact "5", supra, the Notice of Deficiency issued to petitioner Dorothy Loring for 1978 is reduced to \$43.79, plus penalties [Tax Law §§685(a)(1) and 685(a)(2) and Administrative Code §§T46-185.0(a)(1) and T46-185.0(a)(2)] and interest. The Notice of Deficiency issued to petitioner Arnold Loring for 1978 is reduced to \$712.51, plus penalties, as described in footnote 1, supra, and interest.

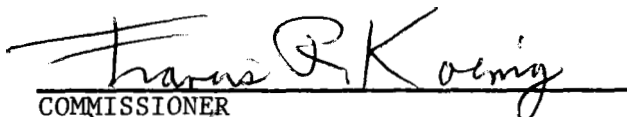
H. That the petition of Arnold Loring and Dorothy Loring is granted to the extent indicated in Conclusion of Law "G", supra; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 03 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER