

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HARRY M. DRUCKER AND GERTRUDE DRUCKER

DECISION

:

for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 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 Year 1980.

Petitioners, Harry M. Drucker and Gertrude Drucker, 345 East 56th Street, New York, New York 10022, 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 and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1980 (File No. 54645).

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 February 6, 1986 at 9:15 A.M. Petitioner Harry M. Drucker appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioners are subject to a penalty for failure to pay the tax due shown on their return on or before the prescribed due date.

II. Whether petitioners are subject to a penalty for failure to file and pay estimated tax.

III. Whether petitioners are liable for the payment of interest.

FINDINGS OF FACT

1. On November 11, 1981, petitioners, Harry M. Drucker and Gertrude Drucker, filed a New York State and City resident income tax return for the year 1980. Petitioners had a valid extension of time until November 15, 1981 within which to file their 1980 return. Accordingly, the return filed on November 11, 1981 constituted a timely filed return.

2. On their 1980 return petitioners computed a balance due of \$5,528.00, plus interest of \$387.00, for a total due of \$5,915.00. When petitioners filed their return on November 11, 1981, they did not have the funds available to pay the tax and interest due and, therefore, said return was submitted without remittance. On or about February 6, 1982, petitioners submitted payment of the \$5,915.00 shown due on their 1980 return.

3. On January 29, 1982, the Audit Division issued to petitioners a Notice and Demand for Tax Due. Said notice, issued under Assessment Number R8201290876, showed a balance due of \$13,462.94 and also indicated that the tax year in question was 1981. It is undisputed that the notice incorrectly identified the tax year as 1981 and that the \$13,462.94 alleged balance due was for the year 1980. Petitioners, on numerous occasions, wrote to the Audit Division and spoke with its employees regarding the aforementioned notice and the allegation that a balance was due for 1980.

4. On January 13, 1984, the Audit Division issued a Statement of Audit Changes to petitioners for the year 1980. On said statement, the Audit Division indicated, ~~inter alia~~, that:

"A review of your 1980 New York income tax return shows several errors have been made in addition to the error shown on the computer bill issued under #R8201290876 for tax year 1980; therefore, the computer bill issued under Assessment #R8201290876 has been cancelled."

5. The aforementioned Statement of Audit Changes determined an additional tax due of \$6,195.09 and petitioners concede that said tax is due and owing. Said statement also determined that a penalty of \$284.05 was due, pursuant to section 685(c) of the Tax Law and section T46-185.0(c) of the City Administrative Code, for failure to file and pay estimated tax and that a penalty of \$82.82 was due, pursuant to section 685(a)(2) of the Tax Law and section T46-185.0(a)(2) of the City Administrative Code, for failure to pay the tax due shown on the return on or before the prescribed due date.

6. Based on the Statement of Audit Changes, the Audit Division, on May 4, 1984, issued two notices of deficiency to petitioners for the year 1980. One Notice of Deficiency asserted tax due of \$6,195.09, plus penalty of \$139.57 and interest of \$2,873.21, for a total allegedly due of \$9,207.87. The second Notice of Deficiency asserted a penalty of \$227.40.

7. Petitioners maintain that immediately upon receipt of the Notice and Demand for Tax Due dated January 29, 1982, they contacted the Audit Division requesting a hearing to discuss this matter in person. On or about April 24, 1985, petitioner Harry M. Drucker attended a prehearing conference and he apparently received a satisfactory explanation of the tax due at said prehearing conference. Petitioners assert that no interest should be charged from the date of the Notice and Demand for Tax Due (January 29, 1982) to the date of the prehearing conference (April 24, 1985).

8. During the year 1981, petitioner Harry M. Drucker **was** ill and had to be hospitalized on two separate occasions. For tax years both prior and subsequent to the year at issue, petitioners' returns have been timely filed and timely paid.

CONCLUSIONS OF LAW

A. That section 685(a)(2) of the Tax Law and section T46-185.0(a)(2) of the City Administrative Code both impose a penalty of one-half percent per month for failure to pay the tax due shown on a return on or before the prescribe due date. Said penalties may be cancelled if it is shown that the failure to pay on time was due to reasonable cause and not willful neglect. In the instant matter, petitioners' failure to pay on time was primarily occasioned by a lack of available funds at the time their return was filed. Late payment caused by a lack of available funds cannot be considered reasonable cause and, therefore, these penalties are sustained.

B. That section 685(c) of the Tax Law and section T46-185.0(c) of the City Administrative Code both impose a penalty for failure to file and pay estimated tax. Section 685(d) of the Tax Law and section T46-185.0(d) of the City Administrative Code provide that if specific exceptions are met, no penalty is imposed. Petitioners did not meet any of the specific statutory exceptions and, accordingly, the penalties imposed for failure to file and pay estimated tax must be sustained.

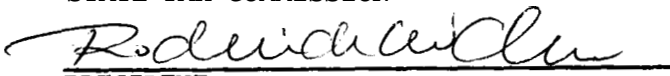
C. That there is no provision in the Tax Law or the City Administrative Code which permits interest charges to be waived, abated or cancelled. Accordingly, petitioners are liable for the payment of interest.

D. That the petition of Harry M. Drucker and Gertrude Drucker is denied and the two notices of deficiency dated May 4, 1984 are sustained, together with such additional penalty and interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986


PRESIDENT
