

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MICHAEL WAITE AND CAROL WAITE

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1979.

Petitioners, Michael Waite and Carol Waite, 5 Hills Lane, Smithtown, New York 11787, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1979 (File No. 56832) .

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 27, 1986 at 1:15 P.M., with all briefs to be submitted by March 27, 1986. Petitioners appeared by Louis M. Ambrico. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

ISSUE

Whether regular periodic payments made to petitioner in the form and nature of salary can be retroactively recharacterized by his employer as repayments of a loan.

FINDINGS OF FACT

1. Petitioners, Michael Waite and Carol Waite, timely filed a joint New York State Income Tax Resident Return whereon Michael Waite (hereinafter "petitioner") reported salary income derived from Harrison Radio Corporation ("Harrison") of \$25,000.00. According to petitioner's Wage and Tax Statement

from Harrison, the following amounts were withheld on his reported salary of \$25,000.00:

Federal Income Tax withheld	\$31,028.92
New York State Income Tax withheld	10,471.26
FICA Tax withheld	1,403.77
State unemployment/disability withheld	<u>15.60</u>
Total withheld	<u>\$42,919.55</u>

2. On February 9, 1984, the Audit Division issued a Statement of Personal Income Tax Audit Changes to petitioner and his wife wherein an adjustment was made increasing petitioner's reported salary income from Harrison by \$75,000.00, to \$100,000.00. Accordingly, a Notice of Deficiency was issued against petitioner and his wife on August 23, 1984 asserting additional personal income tax of \$5,863.27, plus penalty of \$293.16 and interest of \$2,957.08, for a total due of \$9,113.51. Said penalty was issued for negligence pursuant to section 685(b) of the Tax Law.

3. Petitioner alleged that the Notice of Deficiency was untimely since it was issued more than three years from the date the return was filed. The Audit Division maintained that said notice was timely issued since the period of limitations on assessment is six (6) years where there is an omission from New York adjusted gross income of an amount properly included therein which was in excess of 25 percent of the amount of New York adjusted gross income.

4. The New York adjusted gross income reported on the return at issue was \$20,570.00. Examination of the return shows that the \$75,000.00 omission was not disclosed in the return.

5. During 1979, petitioner was paid biweekly gross wages of \$3,846.16 for a total of \$100,000.16. Appropriate Federal and State taxes were withheld from such payments.

6. Petitioner alleged that the \$75,000.00 at issue represented a partial repayment by Harrison of loans he had previously made to the business, rather than salary income.

7. A resolution of the "Stockholders & Directors Meeting" held December 20, 1979, shows that the Board confirmed and approved an adjustment of the stockholder payable account and payments to petitioner. Petitioner was listed thereon as "President, Director, & Secretary."

8. Subsequent to the approval of said resolution, Harrison's schedule of loans from petitioner was reduced by \$75,000.00. The "gross pay" column of Harrison's employee earnings record for petitioner was also reduced by \$75,000.00.

CONCLUSIONS OF LAW

A. That section 683(d) of the Tax Law provides, in pertinent part, that:

"The tax may be assessed at any time within six years after the return was filed if --

(1) an individual omits from his New York adjusted gross income ...an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income ...stated in the return.

* * *

For purposes of this subsection there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return or in a statement attached to the return, in a manner adequate to apprise the tax commission of the nature and amount of the item of income..."

B. That since the \$75,000.00 omission represented more than 25 percent of the adjusted gross income reported on the return and such amount was not disclosed on the return, the tax may properly be assessed within six years after the return was filed. Accordingly, the Notice of Deficiency dated August 23, 1984 was timely issued within the meaning and intent of section 683(d)(1) of the Tax Law

C. That petitioner cannot retroactively recharacterize salary payments as repayments of loans to Harrison (see Raymond L. Weiland and Dorothy J. Weiland v. Commissioner, 44 T.C.M. 1396 E. Merl Young and Laurretta W. Young v. Commissioner, 20 T.C.M. 150).

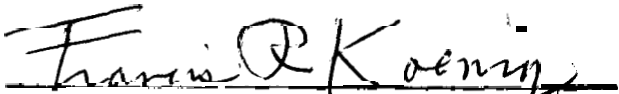
D. That the petition of Michael Waite and Carol Waite is denied and the Notice of Deficiency issued August 23, 1984 is sustained, together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER