

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Philip G. Ludwig :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Gift Tax under :
Article 26A of the Tax Law for the Period 1978 - :
1981. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of November, 1984, he served the within notice of Decision by certified mail upon Philip G. Ludwig, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip G. Ludwig
112-20 72nd Dr.
Forest Hills, NY 11375

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
9th day of November, 1984.

David Parchuck

James A. Delaney

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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for Redetermination of a Deficiency or Revision :
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Article 26A of the Tax Law for the Period 1978 - :
1981. :
_____ :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of November, 1984, he served the within notice of Decision by certified mail upon David S. Rhine, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David S. Rhine
Seidman & Seidman
15 Columbus Circle
New York, NY 10023

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
9th day of November, 1984.

David Parchuck

James A. Seidman
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

November 9, 1984

Philip G. Ludwig
112-20 72nd Dr.
Forest Hills, NY 11375

Dear Mr. Ludwig:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 & 1007 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
David S. Rhine
Seidman & Seidman
15 Columbus Circle
New York, NY 10023
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PHILIP G. LUDWIG	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Gift Tax under Article 26-A of the	:	
Tax Law for the Period 1978 through 1981.	:	

Petitioner, Philip G. Ludwig, 112-20 72nd Drive, Forest Hills, New York, 11375, filed a petition for redetermination of a deficiency or for refund of gift tax under Article 26-A of the Tax Law for the period 1978 through 1981. (File No. 38498)

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 20, 1984 at 1:20 p.m., with all documents to be submitted by May 1, 1984. Petitioner appeared by Seidman & Seidman, CPA's (David S. Rhine, CPA). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether there existed reasonable cause for petitioner's failure to have timely filed certain gift tax returns during the periods at issue, thereby warranting cancellation of penalties asserted against petitioner for such late filing.

FINDINGS OF FACT

1. Petitioner, Philip G. Ludwig, by his accountants, Seidman & Seidman, CPA's, filed New York State Resident Quarterly Gift Tax Returns (forms TP-400) for each of the quarterly periods ended December 1978, December 1979, March

1980, December 1980 and March 1981. Petitioner concedes and does not contest the fact that none of these returns were timely filed.

2. Payment of gift tax shown due on each of the resident quarterly gift tax returns for the above-noted quarterly periods, together with payment of interest accrued in conjunction therewith, has been made by petitioner. However, petitioner has not made payment on penalties asserted by the Audit Division for late filing of the noted quarterly returns, more specifically detailed as follows:

<u>Quarterly Period Ended</u>	<u>Penalty As Originally Computed</u>	<u>Penalty Asserted After Application of Overpayment</u> ¹
December 1978	\$581.25	\$581.25
December 1979	596.25	-0-
March 1980	1,386.67	1,386.67
December 1980	187.04	187.04
March 1981	788.25	496.35

3. Assertion of the above detailed penalty amounts was made by the issuance to petitioner of notices of deficiency as follows:

<u>Quarterly Period Ended</u>	<u>Date of Notice of Deficiency</u>
December 1978	July 23, 1981
December 1979	(No notice issued; see footnote "1")
March 1980	November 25, 1981
December 1980	November 25, 1981
March 1981	November 25, 1981

¹

It is noted that petitioner overpaid his tax liability for the quarterly period ended December, 1979 by the amount of \$1,236.93. (This overpayment was not refunded, but was applied by the Audit Division against penalties and interest asserted for the quarterly periods ended December, 1979 and March, 1981.) Furthermore, for the quarterly period ended March, 1981, unpaid tax in the amount of \$35.98 is owed by petitioner. Accordingly, if cancellation of all penalties at issue is found to be warranted, petitioner will be entitled to a net refund of tax in the amount of \$1,200.95 (\$1,236.93 less \$35.98), plus appropriate interest.

On January 22, 1982, petitioner filed a petition seeking cancellation of the penalties asserted as due.²

4. Petitioner, who is in his late seventies, has suffered two strokes, one in January of 1969 and one in December of 1978, respectively. He was hospitalized and placed on medication as a result thereof and has been subject to certain restrictions in his activities since the latter episode. In addition, petitioner's wife died in November of 1978 and his brother, who was president of Eagle Electric (petitioner's family-owned corporation), died in December of 1979. Petitioner has a constant attendant (a male nurse) and, although he does spend time at Eagle Electric's office, he is not in a position of great responsibility there due to his declining health.

5. Petitioner's daughter, Arlene Goffner, indicated by affidavit that she has witnessed a steady decline in petitioner's physical abilities and mental capacity over a period of years. She notes that "he has become increasingly disoriented and frequently unable to grasp the significance of financial transactions", and that his "...memory has frequently been wanting; he has been making substantial mistakes in the keeping of his checking records, payment of bills and other financial transactions...".

6. According to petitioner's accountant, petitioner generally made his gifts during the final quarter of a given calendar year, and gift tax returns were timely prepared and transmitted to petitioner for signing and filing. Petitioner, allegedly due to his general mental condition, did not follow through with filing these returns. In those instances where gifts were made in

²

No issue has been raised by the Audit Division challenging the timeliness of the petition with regard to the Notice of Deficiency issued for the earliest quarterly period at issue. Accordingly, that issue is not addressed herein.

quarterly periods other than those ending in December, returns were prepared and filed as soon as petitioner's accountants became aware that taxable gifts had been made.³

7. Certain of petitioner's checks to the Audit Division in payment of gift tax due were initially dishonored for lack of funds when presented for payment, assertedly attributable to and an indication of petitioner's declining mental capabilities and his inability to handle his financial affairs.

8. Petitioner has been filing New York State gift tax returns since 1972, with no record of untimely or inadequate filing prior to the periods under consideration herein. Petitioner has a record of timely filing personal income tax returns during the years 1978 through 1981.

9. It is asserted that the late filings at issue were due to petitioner's diminished capacity, as detailed by the foregoing facts, and that there was no willful neglect on petitioner's part with respect to the filing requirements under Article 26-A of the Tax Law. Finally, petitioner's representative noted that the extent of petitioner's diminished health was not, during the period at issue clearly recognized, but that the consequences thereof, including the instant deficiencies, revealed clearly the extent of the problem. Remedial steps have been taken to assure that such problems do not occur again, including such safeguards as the direct involvement of petitioner's daughter in petitioner's financial affairs, in handling his checkbook and in assuring that tax returns are timely filed.

³ In one instance, involving a gift of securities, the gift was not discovered until petitioner's accountants noted dividends not received from the various securities and, upon tracing, found that petitioner had made a gift of the securities.

CONCLUSIONS OF LAW

A. That the penalties at issue herein were computed and asserted against petitioner in accordance with section 685(a)(1) of the Tax Law which, pursuant to the terms of section 1007(b) of the Tax Law, is adopted by reference and made applicable to Article 26-A of the Tax Law.

B. That section 685(a)(1) of the Tax Law provides for a penalty of five percent per month or fraction thereof (up to an aggregate of twenty-five percent) "[i]n case of failure to file a tax return...on or before the prescribed date..., unless it is shown that such failure is due to reasonable cause and not due to willful neglect, ..." (emphasis added).

C. That 20 NYCRR 102.7(b), promulgated after the periods at issue herein but evidencing the Commission's position during such periods, provides, in relevant part, as follows:

"(b) Reasonable cause. In determining whether reasonable cause exists as a basis for the cancellation, modification or waiver of the assessed or assessable additions to tax or penalties referred to in subdivision (a) of this section, [including inter alia, penalty under Tax Law section 685(a)(1)], the taxpayer's, employer's or other person's previous filing or compliance record may be taken into account... Grounds for reasonable cause, where clearly established, may include the following:

(1) death or serious illness of the taxpayer, a member of his family or his employer;

* * *

(6) timely prepared New York State income tax returns misplaced by taxpayer or by a responsible tax preparer of the taxpayer and discovered after the due date;

* * *

(10) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a New York State income tax return and which clearly indicates an absence of gross negligence of willful intent to disobey the taxing statutes. Past performance will be taken into account.

Ignorance of the law, however, will not be considered reasonable cause." [20 NYCRR 102.7(b); effective August 25, 1983].


D. That in view of all the facts and circumstances, including specifically petitioner's declining physical health and mental capacity, coupled with the death of his wife and his brother, there existed reasonable cause for the late filing of petitioner's quarterly gift tax returns during the periods at issue and the penalties asserted are cancelled.

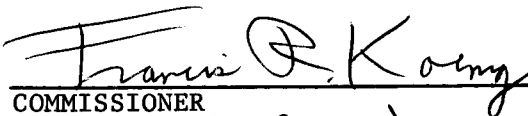
E. That the petition of Philip G. Ludwig is granted and the Audit Division is directed to refund to petitioner the net amount of overpaid tax, as noted in footnote "1", plus appropriate interest.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER