

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Morris Schwartz :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the Year 1972. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of August, 1979, he served the within Notice of Decision by certified mail upon John H. Dennis the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. John H. Dennis
Dennis & Rowland
41 State St., Suite 1005
Albany, NY 12207

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
8th day of August, 1979.

Victoria Hery

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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of :
Morris Schwartz :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the Year 1972. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 8th day of August, 1979, he served the within Notice of Decision by certified mail upon Morris Schwartz, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morris Schwartz
4 Queensbury Pl.
Glens Falls, NY 12801

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
8th day of August, 1979.

Victoria Gray

Jay Vredenburg

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 8, 1979

Morris Schwartz
4 Queensbury Pl.
Glens Falls, NY 12801

Dear Mr. Schwartz:

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 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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 the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,



cc: Petitioner's Representative
John H. Dennis
Dennis & Rowland
41 State St., Suite 1005
Albany, NY 12207
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MORRIS SCHWARTZ A/K/A MOE SCHWARTZ : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Year :
1972. :

Petitioner, Morris Schwartz a/k/a Moe Schwartz, 4 Queensbury Place, Glens Falls, New York 12801, 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 1972 (File No. 11499).

A small claims hearing was held before Harry Huebsch, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on May 2, 1978 and continued on May 22, 1978. Petitioner appeared by John H. Dennis, Esq. The Income Tax Bureau appeared by Peter Crotty, Esq. (Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether petitioner's understatement of business income for 1972 was due to his fraudulent intent to evade the payment of tax, within the meaning of section 685(e) of the Tax Law.

II. Whether dismissal of the criminal penalty asserted in accordance with section 695 of the Tax Law for 1972 relieves petitioner of his liability for the civil law penalty imposed under section 685(e) of the Tax Law.

FINDINGS OF FACTS

1. Petitioner, Morris Schwartz a/k/a Moe Schwartz, timely filed New York State personal income and unincorporated business tax returns for the only year at issue, i.e., 1972.

2. Petitioner's 1971 unincorporated business tax return was computer-selected for audit by the Income Tax Bureau. When a large discrepancy was discovered in the course of the audit, the audit was extended to include 1972. The audit for 1972 revealed another large discrepancy. The discrepancies resulted from the understatement of gross receipts of \$34,000.00 for 1971 and \$27,000.00 for 1972. The audit results were turned over to the Special Investigations Bureau which initiated fraud proceedings through the Attorney General's Office, in accordance with section 695 of the Tax Law.

3. An information was filed in the City Court of Glens Falls, New York, charging petitioner (pursuant to section 695 of the Tax Law) with four counts of having unlawfully, willingly, knowingly and with intent to evade payment of taxes, made, rendered, signed and certified false and fraudulent New York State personal income and unincorporated business tax returns for 1971 and 1972, by omitting \$35,000.00 and \$27,000.00 of the gross receipts from his business for said years, respectively.

4. An agreement was reached between petitioner and the New York State Attorney General's office, whereby petitioner would plead guilty to one count of knowingly filing a fraudulent unincorporated business tax return for 1971 and whereby the other counts would be dismissed. The Court allowed this disposition of the matter and the sentence imposed was a conditional discharge, the condition being that petitioner was to satisfy his ultimate New York State tax liability.

5. Petitioner paid the personal income and unincorporated business taxes, plus penalty and interest due New York State, for 1971. For 1972 he paid the personal income and unincorporated business taxes, plus interest. He did not pay the penalty and a small amount of the interest that was due.

6. The Income Tax Bureau issued a Notice of Deficiency against petitioner on January 26, 1976 for 1972 in the amount of \$2,818.12 in penalty pursuant to section 685(e) of the Tax Law, plus \$125.19 in interest, for a sum of \$2,943.31.

7. Petitioner, had operated a wholesale electric supply business since 1947. His books and records were kept on an inventory and cash basis method of accounting and were found to be well kept, with good internal control. The method used in keeping the aforementioned records could have resulted in distortions of income from year to year, as large amounts of accounts receivable and accounts payable were involved. A certified public accountant prepared petitioner's tax returns from information supplied to him by petitioner. The accountant did not audit the books and records.

8. Petitioner's accountant contended that he was given the incorrect gross receipts figure by petitioner over the telephone and that this incorrect figure was entered on the tax return. Petitioner contended that he gave all the books and records required to prepare the returns to his accountant and that only the inventory figure was given by telephone. The accountant's work papers contained both the correct and the incorrect amount of gross receipts. Petitioner's accountant could not explain this discrepancy. He stated that another person of unknown qualifications in his office assisted in the preparation of the work papers, from which the tax returns were prepared. Petitioner subsequently discharged his accountant.

9. During the year at issue, petitioner borrowed \$27,000.00 from banks for his personal use.

10. Petitioner's net profit as reported on his 1972 unincorporated business tax return was \$33,902.08. His reported net profit was understated by \$27,000.00. Petitioner contended that the understatement was caused by an error made by his accountant as a result of the \$27,000.00 borrowed in 1972.

11. During the audits by the Income Tax Bureau and the Special Investigations Bureau, petitioner's demeanor was cooperative. There was no evidence of concealment or other indicia of fraudulent activity. All income was recorded in petitioner's books and records. The Special Investigations Bureau examined petitioner's books and records for 1969, 1970 and 1973 and found no discrepancies.

CONCLUSIONS OF LAW

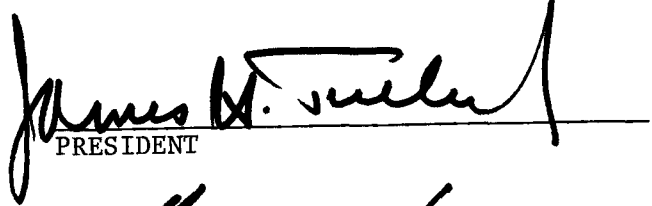
A. That although dismissal of the criminal charges for 1972 does not bind the Income Tax Bureau in pursuit of its civil remedy, the Bureau has failed to sustain the burden of proof imposed on it by section 689(e) of the Tax Law, to show that the understatement of business income in said year was due to petitioner's fraudulent intent to evade the payment of tax, within the meaning and intent of section 685(e) of the Tax Law.

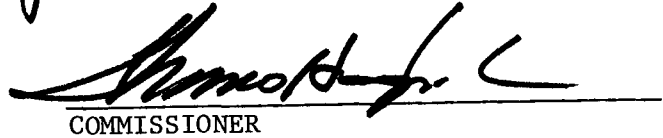
B. That the petition of Morris Schwartz a/k/a Moe Schwartz is granted to the extent that the penalty of \$2,818.12 is cancelled; that the Income Tax Bureau is

hereby directed to so modify the Notice of Deficiency issued January 26, 1976;
and that, except as so granted, the petition, with respect to the interest shown
to be due, is denied.

DATED: Albany, New York
August 8, 1979

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

COMMISSIONER