

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Alexander & Katherine Benisatto :  
: 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 :  
1969.

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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 3rd day of July, 1981, he served the within notice of Decision by certified mail upon Alexander & Katherine Benisatto, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alexander & Katherine Benisatto  
225 Crescent Pl.  
Yonkers, NY 10704

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  
3rd day of July, 1981.

*Cornie A. Hagelund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Alexander & Katherine Benisatto :

: 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 :  
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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 3rd day of July, 1981, he served the within notice of Decision by certified mail upon Robert F. Friemann the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert F. Friemann  
375 Fulton St.  
Farminale, NY 11735

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  
3rd day of July, 1981.

*Carmie R. Hagelund*

*J. Vredenburg*

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

July 3, 1981

Alexander & Katherine Benisatto  
225 Crescent Pl.  
Yonkers, NY 10704

Dear Mr. & Mrs. Benisatto:

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:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert F. Friemann  
375 Fulton St.  
Farmandale, NY 11735  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
ALEXANDER BENISATTO and KATHERINE BENISATTO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1969.	:	

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Petitioners, Alexander Benisatto and Katherine Benisatto, 225 Crescent Place, Yonkers, New York 10704, 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 1969 (File No. 20822).

A small claims 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 October 9, 1980 at 10:45 A.M. Petitioner Alexander Benisatto appeared with John Zurek, CPA and Robert Friemann, CPA of the accounting firm of Albrecht, Viggiano, Zurek & Company. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

- I. Whether petitioners filed a 1969 New York State personal income tax return.
- II. Whether petitioners, if determined that no return was filed, are entitled to credit for estimated tax payments alledgedly made for the year 1969.
- III. Whether petitioners reported Federal audit changes for the year 1969 pursuant to section 659 of the Tax Law.

FINDINGS OF FACT

1. On September 26, 1977, the Audit Division issued against petitioners a Notice of Deficiency for the year 1969 asserting that personal income tax was due in the amount of \$1,758.31, together with penalties [pursuant to sections 685(a)(1) and (a)(2) of the Tax Law] and interest.

2. The aforementioned Notice of Deficiency was based on a Statement of Audit Changes originally dated March 14, 1977 which indicated that "A search of our files fails to show a New York State income tax return filed under your name." Accordingly, New York State taxable income was determined to be \$23,023.68. This figure was computed based on information obtained from the Internal Revenue Service [I.R.C. section 6103(b)] and includes an adjustment of \$766.55 made as the result of an Internal Revenue Service audit of petitioners' 1969 Federal income tax return.

3. Petitioners' 1969 Federal, New York State and New York City income tax returns were timely prepared by their former accountant, Peat, Marwick, Mitchell & Co. The Federal and New York City income tax returns were filed on time and received by the respective agencies without delay. Petitioners were unable to produce a copy of their 1969 New York State income tax return from their personal files and any copy which would have been kept by Peat, Marwick, Mitchell & Co. had been lost or destroyed. Had the 1969 New York State income tax return been properly prepared and filed, it would have shown a balance due, however, petitioners did not submit a copy of the cancelled check in payment of said balance due.

4. It was also argued that the Audit Division's computation of tax due failed to give petitioners credit for estimated tax payments made for the year 1969. Petitioners filed a Declaration of Estimated Income Tax for 1969 showing

a total estimated tax of \$1,300.00. This amount was paid in full by applying the overpayment of \$146.11 as shown on petitioners' 1968 return against the 1969 estimated tax declared and with subsequent payments of \$503.89, \$325.00 and \$325.00.

5. No documentary evidence was adduced at the hearing to substantiate that petitioners properly reported the results of the Internal Revenue Service examination of their 1969 Federal income tax return. Said examination resulted in the disallowance of business expenses in the amount of \$766.55.

6. The computation of New York State taxable income as shown on the Statement of Audit Changes contains a mathematical error of \$500.00. Corrected taxable income, including the \$766.55 adjustment to business expenses, is \$22,523.68.

7. Petitioners have filed New York State income tax returns in a timely fashion for years prior to the year at issue. In fact, when unable to file their 1968 returns by April 15, 1969, petitioners applied for and were granted an extension of time to file said returns. Petitioners make it a habit to utilize the services of a reputable accounting firm to prepare their income tax returns and Mr. Benisatto testified that in over 30 years of filing tax returns that this is his first encounter where a taxing authority alleged that a return was not filed.

#### CONCLUSIONS OF LAW

A. That petitioners have failed to meet the burden of proof imposed by section 689(e) of the Tax Law to show that they filed a 1969 New York State income tax return or that they reported to the Audit Division, pursuant to section 659 of the Tax Law, the results of the Internal Revenue Service audit of their 1969 Federal income tax return.

B. That pursuant to Finding of Fact "6", supra, taxable income is determined to be \$22,523.68 and the tax due adjusted to \$1,693.08.

C. That adjusted tax due of \$1,693.08 is reduced by estimated tax payments of \$1,300, leaving a balance of tax due of \$393.08.

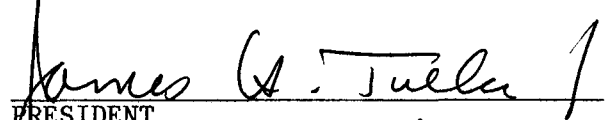
D. That petitioners did not willfully neglect to file a 1969 New York State income tax return and pay the tax due and, accordingly, the penalties imposed pursuant to sections 685(a)(1) and (a)(2) of the Tax Law are cancelled.

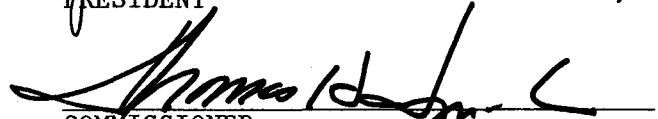
E. That the petition of Alexander Benisatto and Katherine Benisatto is granted to the extent that all penalties are cancelled and that the deficiency in tax is reduced from \$1,758.31 to \$393.08; and that, except as so granted, the petition is in all other respects denied.

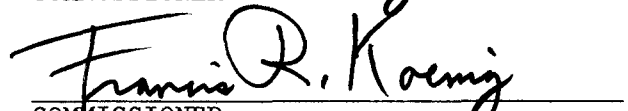
DATED: Albany, New York

JUL 03 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER