

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
William J. & Eva B. Deline :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
and UBT under Article 22 & 23 of the Tax Law for :  
the Years 1973 - 1975. :

---

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon William J. & Eva B. Deline, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William J. & Eva B. Deline  
Box 155  
Preble, NY 13141

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  
14th day of August, 1981.

*James A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION

---

In the Matter of the Petition :  
of :  
William J. & Eva B. Deline :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision  
of a Determination or a Refund of Personal Income :  
and UBT under Article 22 & 23 of the Tax Law for  
the Years 1973 - 1975. :

---

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 14th day of August, 1981, he served the within notice of Decision by certified mail upon Robert J. Allan the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

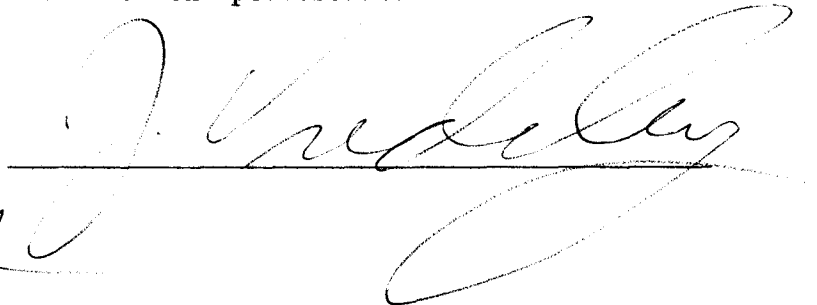
Robert J. Allan  
5100 West Genessee St., P.O. Box #175  
Syracuse, NY 13202

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  
14th day of August, 1981.

  
Anne A. Haglund

  
Jay Vredenburg

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

August 14, 1981

William J. & Eva B. Deline  
Box 155  
Preble, NY 13141

Dear Mr. & Mrs. Deline:

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 & 722 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 J. Allan  
5100 West Genessee St., P.O. Box #175  
Syracuse, NY 13202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petitions	:	
	:	
of	:	
	:	
WILLIAM J. DELINE and EVA B. DELINE	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income and	:	
Unincorporated Business Taxes under	:	
Articles 22 and 23 of the Tax Law for	:	
the Years 1973 through 1975.	:	

---

Petitioners, William J. DeLine and Eva B. DeLine, Box 155, Preble, New York 13141, filed petitions for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1973 through 1975 (File Nos. 15397, 27439 and 27616).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on December 10, 1980 at 9:15 A.M. Petitioner Eva B. DeLine appeared with Robert J. Allan, Esq. and Edward R. Delaura, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether the amount reported on petitioners' tax returns for services performed by petitioner Eva B. DeLine was fair compensation for service rendered.

II. Whether a deficiency may be increased based upon the Law Bureau's answer to a petition or is the State Tax Commission estopped from asserting a greater deficiency pursuant to the limitations on assessment.

III. Whether the notices of deficiency should be dismissed on the grounds of laches.

FINDINGS OF FACT

1. Petitioners, William J. DeLine and Eva B. DeLine, filed New York State combined income tax returns for 1973 through 1975 on which they reported wages paid to Eva B. DeLine of \$7,500.00, \$19,760.00 and \$19,760.00 for said years respectively. Attached to each income tax return was a wage and tax statement for said amounts.

2. On March 29, 1976, the Audit Division issued two notices of deficiency for 1973 and 1974, based on a field audit. One Notice of Deficiency was issued to William J. and Eva. B. DeLine for 1973 and 1974 asserting additional personal income tax of \$2,923.56, plus penalty of \$264.85 and interest of \$324.61. The second Notice of Deficiency was issued to William J. DeLine for 1973 and 1974 asserting additional unincorporated business tax of \$1,702.80, plus interest of \$178.31. The notices were issued on the grounds that there was an error in recording sales in 1973 and petitioner Eva. B. DeLine's salary was not allowable under Internal Revenue Code section 262 for personal living expenses and section 267 with respect to transactions between related taxpayers. The disallowance of petitioner Eva B. DeLine's salary for 1973 and 1974 resulted in insufficient income to file separately, therefore, the Audit Division recomputed the personal income tax as filing a joint return for each year. The error in recording sales in 1973 is not being contested by the petitioner, and therefore, is not at issue.

3. On November 17, 1977, petitioners filed a Notice of Change in Taxable Income, Items of Tax Preference and Claim for Credit or Refund by U.S. Treasury Department Pursuant to Section 659 of the New York State Tax Law (IT-115) for

1975. On said Notice the petitioners claimed an investment credit of \$2,221.60, which produced a refund due for 1975.

4. On March 30, 1979, the Audit Division issued two notices of deficiency for 1975, based on the Federal adjustments as reported on Form IT-115 filed by petitioners on November 17, 1977. One Notice of Deficiency was issued to William J. and Eva B. DeLine for 1975 asserting additional personal income tax of \$2,503.30, plus interest of \$628.42. The second Notice of Deficiency was issued to William J. DeLine for 1975 asserting additional unincorporated business tax of \$1,568.04, plus interest of \$393.64. The notices were issued on the grounds that pursuant to sections 262 and 267 of the Internal Revenue Code the alleged salary payments to Eva B. DeLine are not deductible from the business income of petitioner William DeLine and the investment credit claimed on Form IT-115 was disallowed on the grounds that the equipment did not qualify for New York State investment credit.

5. On February 4, 1980, an answer to petition was served to petitioners which asserted a greater deficiency of unincorporated business tax for 1975 against petitioner William DeLine. The petitioners are not disputing the correctness of the greater disallowance but rather whether the State Tax Commission is estopped from asserting a greater deficiency pursuant to the limitations on assessment.

6. At the hearing, the Audit Division conceded that the petitioners were entitled to the investment credit of \$2,221.60 for 1975.

7. Petitioner William J. DeLine operates a sole proprietorship under the assumed name "Barber & DeLine". The principal activities of Barber & DeLine include: (a) The drilling of water wells for private homes and farms; (b) Hard rock water well drilling, drilling pile and blast holes, relief wells for road

construction, drilling blast holes and quarrie drilling in rock quarries; (c) The sale, installation, maintenance and repair of water pumps. During the years at issue, Barber & DeLine drills approximately forty wells per month and sells between 250 and 300 water pumping systems per year. The gross receipts in the years at issue averaged approximately \$465,000.00 per year.

8. Barber & DeLine claimed as a business expense in the years at issue compensation paid to petitioner Eva B. DeLine. Salary payments were not made by drawing a payroll check for petitioner Eva B. DeLine. Rather checks were drawn to her personal creditors and payments to them made on her behalf. These payments were classified as salary payments to petitioner Eva B. DeLine on the books and records of Barber & DeLine.

9. The administrative office of Barber & DeLine is in an addition to the petitioners' personal residence. Petitioner Eva B. DeLine works approximately sixty hours a week and is in the office by 6:00 a.m. and leaves at 5:00 p.m. She often works one or two hours in the evening.

10. Petitioner, Eva B. DeLine, performs the following clerical duties for Barber & DeLine:

- (a) opening and sorting the mail;
- (b) prepares bank deposits;
- (c) writes the business checks;
- (d) typing;
- (e) reviews and pays bills;
- (f) maintains records on pumps sold including size, type and to whom sold;
- (g) maintains records on wells drilled including the date drilled,

the depth of the well, the gallons per minute capacity, the rock strata at the wells' location and other pertinent information;

(h) analyzes accounts receivable to determine past due accounts;

(i) registers and obtains motor vehicle licenses for trucks and equipment;

(j) obtains insurance coverage for the trucks and equipment.

Petitioner, Eva B. DeLine, also maintains all the records of account for Barber & DeLine including the accounts receivable and accounts payable records, check books and inventory records.

11. Petitioner, Eva B. DeLine, meets and confers at least once a month with the attorney retained by Barber & DeLine for the collection of past due accounts. Petitioner, Eva B. DeLine, also meets with the outside accountant who prepares Barber & DeLine's financial statements and all federal and state information and tax returns. She answers questions concerning the bookkeeping records and signs forms.

12. Petitioner, Eva B. DeLine, was responsible for the following functions:

(a) Schedules work assignments for the other employees and schedules appointments for William J. DeLine.

(b) Screens all job applicants and is responsible for some hiring and firing of personnel.

(c) Gives estimates to prospective customers as to the cost of drilling operations.

(d) Designs the advertisements used by Barber & DeLine in the yellow pages of over forty telephone directories. She meets with the salesmen of five companies that handle the yellow page advertising for the telephone



directories in New York State to arrange for the advertising. She decides what directories will carry the Barber & DeLine advertisement.

(e) When an employee of Barber & DeLine who is operating a vehicle owned by Barber & DeLine is stopped by a police officer petitioner, Eva B. DeLine, answers the officer's questions concerning the proper registration of the vehicle.

(f) Operates the low frequency radio system used by Barber & DeLine to provide radio communication with the repair trucks and the drilling rigs owned by Barber & DeLine.

13. Petitioner, Eva B. DeLine, purchased inventory in the amount of \$124,803.00 in 1973, \$208,667.00 in 1974 and \$194,764.00 in 1975. She deals with approximately one hundred suppliers and estimates what supplies must be kept on hand. She signs for freight when it arrives.

Barber & DeLine rents drill bits for its rigs used to drill wells and other holes. Petitioner, Eva B. DeLine, meets with the agent to handle the rental of the drill bits.

14. Petitioner, Eva B. DeLine, understands the drilling operation of Barber & DeLine. She is knowledgeable of the capabilities of the drilling rigs, the methods of drilling, the problems and hazards which may arise in the drilling operation. This knowledge was acquired over thirty years in the business working first for her father, Franklin Barber, and then for her husband when he acquired the business. Mrs. DeLine also has a thorough knowledge of the many models of water pumps. Petitioner, Eva B. DeLine, answers customers' questions about New York State Health Department requirements, county laws, and town ordinances affecting the drilling of wells.

15. At the hearing, based on his knowledge of petitioner Eva B. DeLine's experience, knowledge and work load, a competing well driller testified "I don't think you could hire anyone to do the work that she does or has done through the years for twenty thousand dollars a year."

#### CONCLUSIONS OF LAW

A. That the petitioners have sustained the burden of proof required by section 689(e) of the Tax Law, in establishing by a fair preponderance of all the available and uncontroverted evidence that the amounts reported for services performed by petitioner Eva B. DeLine did not exceed fair compensation for services rendered; therefore, petitioner's compensation is allowed.

B. That section 689(d)(1) of the Tax Law provides that:

If a taxpayer files with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency and to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at or before the hearing under rules of the tax commission.

C. That the State Tax Commission properly asserted, pursuant to the answer, a greater deficiency than that contained in the Notice of Deficiency issued March 30, 1979, in accordance with the meaning and intent of section 689(d)(1) of the Tax Law and the running of the period of limitation on assessment was suspended in accordance with section 683(e) of the Tax Law.

D. That the State Tax Commission is not estopped from making claims against petitioners. A state agency or body cannot be estopped from asserting its governmental power regarding acts within its governmental capacity. That the record in the instant case shows no undue delay by the State Tax Commission in instituting action, therefore, the remedy of laches claimed by petitioner is unfounded.

E. That the petitioners are entitled to an investment credit of \$2,221.60 for 1975 in accordance with Finding of Fact "6".

F. That the Audit Division is hereby directed to recompute the notices of deficiency issued on March 26, 1976 and March 30, 1979 so as to be consistent with the decision rendered herein. Except as so granted, the petitions of William J. DeLine and Eva B. DeLine are in all other respects denied.

DATED: Albany, New York

AUG 14 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER