

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lincoln & Gina H. Epworth :
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. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

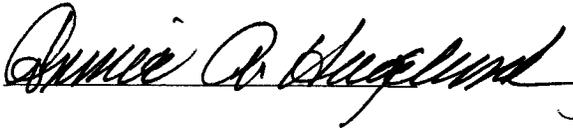
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Lincoln & Gina H. Epworth, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

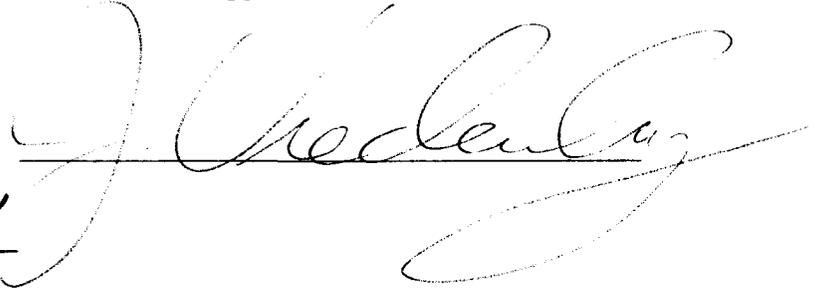
Lincoln & Gina H. Epworth
654 Madison Ave.
New York, NY 10021

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
27th day of November, 1981.


James A. Huglund


Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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for Redetermination of a Deficiency or a Revision :
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State of New York
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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 27th day of November, 1981, he served the within notice of Decision by certified mail upon Norman Levy the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Norman Levy
Lore & Levy
450 Park Avenue
New York, NY 10022

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
27th day of November, 1981.

Annie D. Duplant

Jay Vredenburg

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

November 27, 1981

Lincoln & Gina H. Epworth
654 Madison Ave.
New York, NY 10021

Dear Mr. & Mrs. Epworth:

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
Norman Levy
Lore & Levy
450 Park Avenue
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
LINCOLN EPWORTH and GINA H. EPWORTH
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Year 1969.

DECISION

Petitioners, Lincoln Epworth and Gina H. Epworth, 654 Madison Avenue, New York, New York 10021, 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. 11730).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 28, 1977 and continued to conclusion before Julius Braun, Hearing Officer, on March 24, 1981. Petitioners appeared by Norman Levy, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly computed petitioners' tax liability for the year 1969.

II. Whether petitioners are liable for penalties for failure to file an income tax return and pay the tax.

FINDINGS OF FACT

1. On April 13, 1973, the Audit Division issued a Statement of Audit Changes against petitioners wherein their personal income tax liability for the year 1969 was computed from information on file because of petitioners' failure

to answer an inquiry of May 12, 1971. A penalty of $4\frac{1}{2}$ percent per month not in excess of $22\frac{1}{2}$ percent was imposed pursuant to section 685(a)(1) of the Tax Law for failure to file a return for the year 1969 and a penalty of $\frac{1}{2}$ percent per month not in excess of 25 percent was imposed pursuant to section 685(a)(2) of the Tax Law for failure to pay the tax shown due on the return. Accordingly, on said date a Notice of Deficiency was issued against petitioners in the amount of \$6,627.47, plus penalty and interest of \$3,875.47, for a total sum of \$10,502.94.

2. Petitioner, Lincoln Epworth, is an attorney having been admitted to practice in 1926. His office is and had been at 654 Madison Avenue, New York, New York. In 1969, Gina H. Epworth was a part-time fashion consultant. Their financial records and copies of 1969 returns were in the possession of their accountant which were lost upon his death. They claim that a New York State income tax return was filed for 1969 and that tax was paid. Petitioners secured a copy of their 1969 Federal income tax return from the files of the Internal Revenue Service after a Federal proceeding was decided in March, 1978 before the United States Tax Court. Losses on business property, travel and entertainment expenses were disallowed by the Tax Court but the government stipulated that the tax be computed under income averaging with the 1968 base year to be a net loss and the 1965 base year income to be zero.

3. On the basis of the Federal settlement, petitioners offered the following computation as to their tax liability:

	<u>Joint</u>	<u>Husband</u>	<u>Wife</u>
Federal Deficiency Agreed	9,098.49		
Tax as Originally Adjusted	19,510.97		
Total Tax per Fed. Settlement	28,609.46		
Less Self Employment Tax	<u>(791.50)</u>		
Tax Plus Surcharge	27,817.96		
Less 10% Surcharge	<u>(2,528.91)</u>		
Income Tax per Fed. Settlement	<u>25,289.05</u>		
Amount of Income Producing \$24,420.00 of Tax	64,000.00		
\$ 869.05 Excess	1,580.10		
Actual Taxable Income Agreed	<u>65,580.10</u>		
Taxable Income Per Return as Originally Adjusted	<u>(49,915.78)</u>		
Actual Adjustment to Income	15,664.32	15,664.32	
New York Taxable Income Per Return	<u>53,178.07</u>	<u>30,957.93</u>	<u>22,220.14</u>
Adjusted New York Taxable Income	<u>68,842.39</u>	<u>46,622.25</u>	<u>22,220.14</u>
Tax on Income as Adjusted Per Return	6,765.74	5,087.12	1,678.62
(alleged to have been paid)	<u>4,572.73</u>	<u>2,894.11</u>	<u>1,678.62</u>
New York Deficiency	<u>2,193.01</u>	<u>2,193.01</u>	<u>-0-</u>

4. In addition, petitioners offered another computation on the basis of the Federal settlement wherein they took into account a joint payment of \$1,457.00 according to their Federal return, yielding a joint State deficiency of \$5,308.74. A third alternative computation was offered wherein they based the deficiency upon the presumption that they jointly paid a State tax of \$4,572.73 in 1969, yielding a State tax deficiency in the amount of \$2,718.22.

5. At the hearing, petitioners submitted a copy of their Federal income tax return for 1969. They conceded some deficiency because of a change in their Federal taxable income as shown in the schedules attached to their Federal income tax return. The federal adjustments made for said year resulted

in adjusted gross income of approximately \$100,555.00. Their Federal income tax return showed itemized deductions of \$8,887.54 and exemptions of \$4,800.00. During the hearing, petitioners did not dispute the allowance of the standard deduction for New York State income tax purposes.¹

6. Petitioners offered no documentary or other substantial evidence to show that they filed a New York State tax return or that they paid any income tax for the year 1969.

7. A search of computerized records indicates that income tax return numbers were assigned for petitioner tax years 1969 and 1970 during the period when 1971 returns were being filed by other taxpayers, i.e., 1972. It is not clear if returns were filed late or if dummy returns were prepared by the Income Tax Bureau upon receipt of federal changes or a federal/state computer tape match or for some other reason. The computer printout reveals no tax or payments of tax.

CONCLUSIONS OF LAW

A. That the correct total New York income for 1969 is \$100,555.00 on the basis of petitioner's Federal income tax return which was submitted into evidence during the hearing. Although the Tax Commission is precluded from increasing the Notice of Deficiency since claim was not asserted at the hearing, pursuant to section 689(d)(1) of the Tax Law, it is not precluded from assessing the additional tax due as a result of federal audit adjustments.²

¹ Petitioners are to be allowed itemized deductions in lieu of the standard deduction (Finding of Fact 5) when assessment is made based on federal audit adjustments.

² Additional tax due as a result of federal audit adjustments may be assessed at any time within two years after a federal audit report is filed pursuant to section 683(c)(3) of the Tax Law.

B. That petitioners failed to sustain their burden of proof imposed under section 689(e) of the Tax Law to establish that a tax return was filed for 1969 or that tax was paid for said year.

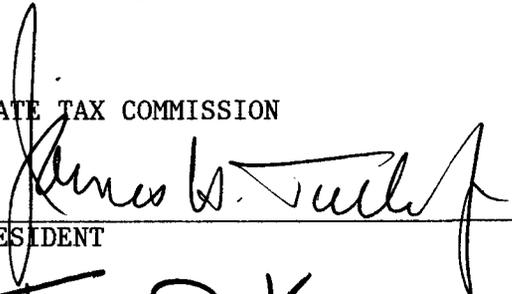
C. That petitioners did not show reasonable cause for their failure to file a New York State income tax resident return for 1969. Therefore, penalties imposed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law are sustained.

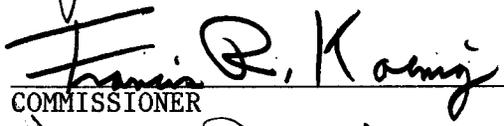
D. That the Notice of Deficiency issued on April 13, 1973, is sustained and should not be modified at this time.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER