

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
Thomas & Betty Heaton
d/b/a Heaton's Restaurant

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for :
the Years 1969 - 1971

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Thomas & Betty Heaton, d/b/a Heaton's Restaurant the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas & Betty Heaton
d/b/a Heaton's Restaurant
16 Parkside Ct.
Utica, NY 13502

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
5th day of June, 1981.

Connie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Thomas & Betty Heaton
d/b/a Heaton's Restaurant

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AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
& UBT under Article 22 & 23 of the Tax Law for :
the Years 1969 - 1971

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Samuel D. Hester 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. Samuel D. Hester
Abelove, Siegel, Abelove & Hester
124 Bleecker St.
Utica, NY 13501

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
5th day of June, 1981.

Carrie P. Haglund

J. Vredenburg

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

June 5, 1981

Thomas & Betty Heaton
d/b/a Heaton's Restaurant
16 Parkside Ct.
Utica, NY 13502

Dear Mr. & Mrs. Heaton:

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
Samuel D. Hester
Abelove, Siegel, Abelove & Hester
124 Bleecker St.
Utica, NY 13501
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
THOMAS HEATON and BETTY HEATON	:	DECISION
D/B/A HEATON'S RESTAURANT	:	
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 1969, 1970 and	:	
1971.	:	

Petitioners, Thomas Heaton and Betty Heaton, d/b/a Heaton's Restaurant, 16 Parkside Court, Utica, New York 13502, filed a petition 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 1969, 1970 and 1971 (File Nos. 13222 and 13223).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on May 13, 1980 at 1:15 P.M. Petitioner Thomas Heaton appeared with Samuel D. Hester, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (J. Ellen Purcell, Esq., of counsel).

ISSUES

I. Whether the Income Tax Bureau properly determined petitioners' tax liability as a result of a field audit.

II. Whether the Notice of Deficiency should be cancelled on the grounds of laches.

III. Whether the Audit Division is estopped from assessing additional taxes plus penalties and interest on the grounds that petitioners lost their records while their matter was pending hearing.

FINDINGS OF FACT

1. Petitioners, Thomas Heaton and Betty Heaton, filed New York State income tax resident returns for 1969, 1970 and 1971. Petitioner Thomas Heaton did not file New York State unincorporated business tax returns for the years at issue.

2. Petitioner Thomas Heaton was owner and operator of a restaurant in Utica, New York.

3. On January 29, 1973, based on a field audit, the Income Tax Bureau issued two notices of deficiency. One notice was issued against petitioners, Thomas Heaton and Betty Heaton, asserting additional personal income taxes of \$1,767.47, plus penalty of \$88.37 pursuant to section 685(b) of the Tax Law and interest of \$177.07, for a total of \$2,032.91. The other notice was issued against petitioner Thomas Heaton asserting unincorporated business taxes of \$1,597.41, plus penalties of \$521.91 (pursuant to sections 685(a)(1) and (2) of the Tax Law) and interest of \$158.18, for a total due of \$2,277.50.

4. The Income Tax Bureau examined the books and records of petitioner Thomas Heaton in accordance with established audit procedures and techniques. It utilized the bank deposit method, along with an analysis of petitioners' living expenses. The Bureau determined that there was additional personal income of \$14,471.30, \$10,743.43 and \$10,533.56 and unincorporated business income of \$8,349.49, \$8,338.74 and \$12,355.65 for the years 1969, 1970 and 1971, respectively.

5. Petitioner sought relief on the grounds that seven years had expired since they filed the petition seeking a redetermination and that during this time span their records were lost.

6. At the hearing petitioners contended that the audit was improper; however, they offered no evidence to support their contention.

7. In a letter dated June 11, 1980, petitioners requested that the penalties and interest be waived. The reason being that petitioners have since retired from active business in which they were engaged during those years and have no source of funds from which to pay the penalties and interest.

CONCLUSIONS OF LAW

A. That petitioners, Thomas Heaton and Betty Heaton, failed to sustain the burden of proof imposed by section 689(e) of the Tax Law which requires them to establish that the notices of deficiency issued on January 29, 1973 were erroneous, arbitrary or capricious.

B. That the motion to dismiss on the ground of laches is denied on the authority of Matter of Jamestown Lodge 1681 Loyal Order of Moose (Catherwood) 31 A.D.2d 981, where it was said that "Laches, waiver or estoppel may not be imputed to the State in the absence of statutory authority" and that "This rule is generally applied in connection with tax matters". We note additionally that the state cannot be estopped from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority (Matter of McMahan v. State Tax Commission) 45 AD 2d 624.

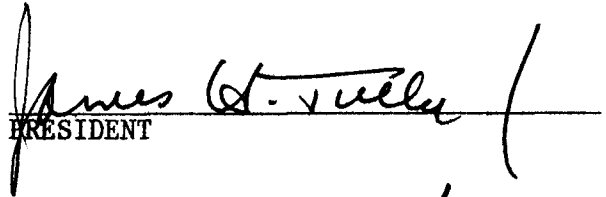
C. That the defense of laches based on the loss of the petitioners records sometime between the time of filing a petition and the hearing is not sufficient basis for abating taxes and penalties at issue. That interest was properly imposed by the Income Tax Bureau, pursuant to section 684 of the Tax Law. There is no statutory authority in the Tax Law allowing for the waiver of interest.

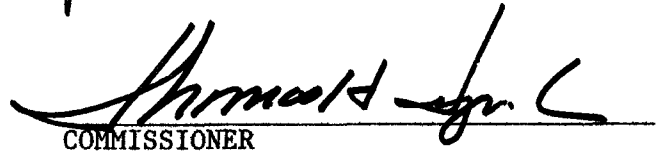
D. That the petition of Thomas Heaton and Betty Heaton is denied and the notices of deficiency issued on January 29, 1973 are sustained, together with such additional interest and penalties as may be lawfully owing.

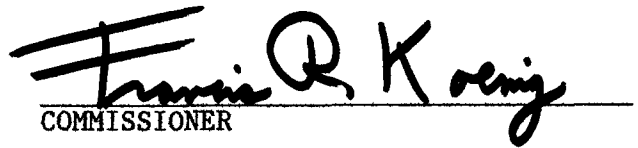
DATED: Albany, New York

STATE TAX COMMISSION

JUN 5 1981


PRESIDENT


COMMISSIONER


COMMISSIONER