

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Joseph J. Einhorn : 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 Years :  
1972 & 1973.

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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 29th day of January, 1982, he served the within notice of Decision by certified mail upon Joseph J. Einhorn, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph J. Einhorn  
21 E. 40th St..  
New York, NY 10016

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  
29th day of January, 1982.

*Connie A. Hagelund*

*J. Vredenburg*

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

January 29, 1982

Joseph J. Einhorn  
21 E. 40th St..  
New York, NY 10016

Dear Mr. Einhorn:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JOSEPH J. EINHORN	:	DECISION
for Redetermination of a Deficiency or for Refund	:	
of Personal Income Tax under Article 22 of the Tax	:	
Law for the Years 1972 and 1973.	:	

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Petitioner, Joseph J. Einhorn, 21 East 40th Street, New York, New York, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972 and 1973 (File No. 18421).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 24, 1979 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (William Fox, Esq., of counsel).

#### ISSUE

Whether a penalty pursuant to section 685(b) of the Tax Law may be imposed based solely on a Federal audit report issued by the United States Treasury Department.

#### FINDINGS OF FACT

1. Petitioner, Joseph J. Einhorn, timely filed New York State income tax resident returns for the years 1972 and 1973.

2. On March 14, 1975, the Income Tax Bureau received two forms (IT-115), reporting an increase in petitioner's New York State taxable income for the years 1972 and 1973, based on an audit conducted by the United States Treasury Department.

3. On August 19, 1976, the Audit Division issued a Statement of Audit Changes, on which additional personal income tax of \$197.70 was imposed due to a capital gains modification for the year 1973, pursuant to section 612(b) (11) of the Tax Law. The aforementioned personal income tax was paid with interest of \$32.50 and is not at issue. In addition, a penalty of \$62.53 was imposed in accordance with section 685(b) of the Tax Law for the years 1972 and 1973. On February 28, 1977, a Notice of Deficiency was issued against petitioner for the years 1972 and 1973 for \$62.53. In a letter issued by the Audit Division to petitioner, it was explained that:

"The section 685(b) penalty of 5% was assessed on your Federal audit for 1972 and 1973 as the Internal Revenue Service also assessed a 5% negligence penalty. This penalty is in no way connected with the capital gains modification shown on your Statement of Audit Changes."

4. The United States Treasury Department imposed a 5 percent negligence penalty for the years 1972 and 1973 pursuant to section 6653(a) of the Internal Revenue Code. The Treasury Department's audit report did not indicate the reasons or basis for imposing such a penalty. Petitioner contended that he agreed to the penalty as a compromise, but never conceded to the penalty. He argued that the Federal adjustment resulted from a difference of opinion as to when a particular stock became worthless, and from the lack of acceptable documentary evidence, but not from negligence or intentional disregard of the law.

5. The Audit Division did not conduct an examination of petitioner's books and records to determine if any part of the Federal audit adjustments or subsequent New York State tax liability was due to negligence or intentional disregard of Article 22 of the Tax Law.

CONCLUSIONS OF LAW

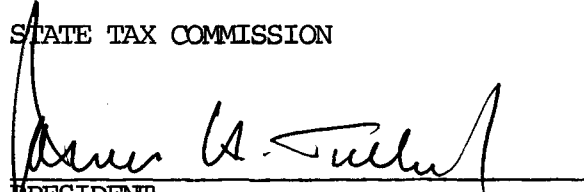
A. That petitioner, Joseph J. Einhorn, has proven by his uncontradicted testimony that he had not acted negligently or in disregard of the Tax Law. Accordingly, the penalty imposed by section 685(b) of the Tax Law is cancelled.

B. That the petition of Joseph J. Einhorn is granted and the Notice of Deficiency dated February 28, 1977 is cancelled.

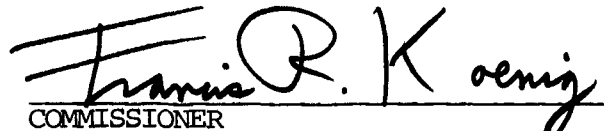
DATED: Albany, New York

JAN 29 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER