

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Samuel Cohen : 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 :  
1969 - 1971.

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State of New York  
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Samuel Cohen, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Samuel Cohen  
Sunview Dr.  
Glen Cove, NY 11542

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  
11th day of February, 1983.

David Parchuck

James A. Hayland

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

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State of New York  
County of Albany

David Parchuck, 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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Walter Sussman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter Sussman  
55 W. 42nd St.  
New York, NY 10036

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  
11th day of February, 1983.

David Parchuck

Annice A. Hagedorn

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

February 11, 1983

Samuel Cohen  
Sunview Dr.  
Glen Cove, NY 11542

Dear Mr. Cohen:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Walter Sussman  
55 W. 42nd St.  
New York, NY 10036  
Taxing Bureau's Representative

## STATE TAX COMMISSION

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 3, 1981 at 1:15 P.M. Petitioner appeared by Walter Sussman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel).

## ISSUE

Whether petitioner is liable for penalties for failure to file a tax return, for failure to pay the taxes when due and for negligence.

## FINDINGS OF FACT

1. Petitioner admittedly failed to file New York State income tax returns for the years 1969, 1970 and 1971.
2. Petitioner was audited by the Internal Revenue Service for the years 1969 through 1971. The audit resulted in certain charges and adjustments which reflected income that had not been reported for these years. A settlement made

with the Internal Revenue Service for the years in issue was not reported to the State.

3. On April 24, 1979, the Audit Division issued a Statement of Audit Changes against petitioner, Samuel Cohen, wherein tax was computed based on available information. A penalty under section 685(e) of the Tax Law (fraud), was also imposed "to conform with Federal audit results". On June 8, 1979, petitioner paid \$1,410.66, the amount of tax and interest set forth in the Statement of Audit Changes. The payment was not immediately credited to petitioner's account and a Notice of Deficiency was issued on August 31, 1979 in the amount of \$1,900.61.

4. Taxable income was \$8,939.00 for the year 1969, \$11,543.00 for 1970 and \$2,841.00 for 1971.

5. In its answer and at the formal hearing, the Audit Division invoked alternative penalties against petitioner pursuant to sections 685(a)(1) and (2) and 685(b) of the Tax Law. At the hearing, the Audit Division admitted that it did not have "available affirmative evidence to meet the burden of proof with respect to the fraud penalties".

6. Petitioner was an experienced businessman and was aware of his obligation to file New York State personal income tax returns and pay said tax.

#### CONCLUSIONS OF LAW

A. That petitioner is subject to a penalty pursuant to section 685(a)(1) of the Tax Law for failure to file tax returns for the years 1969, 1970 and 1971.<sup>1</sup> He did not show that the failure to file was due to reasonable cause and not due to willful neglect.

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<sup>1</sup> Section 685(a)(1) was relettered from 685(a) by Ch. 1005, Laws of 1970.

B. That petitioner is subject to a penalty under section 685(a)(2) of the Tax Law for failure to pay the tax when due for the years 1969, 1970 and 1971.<sup>2</sup> He did not show that his failure to pay was due to reasonable cause and not due to willful neglect.

C. That petitioner is subject to a penalty under section 685(b) of the Tax Law for a deficiency due to negligence or intentional disregard of the requirements of Article 22 of the Tax Law for the years 1969, 1970 and 1971.

D. That the imposition of the above penalties results in a higher deficiency than that imposed on the Notice of Deficiency. Although such higher deficiency was asserted at or before the hearing, the record does not show petitioner's failure to file his returns and pay the tax was due to willful neglect rather than reasonable cause. Therefore, the Audit Division has failed to sustain the burden of proof as required by section 689(e)(3) of the Tax Law in relation to the greater deficiency and the deficiency is limited to the amount imposed by the Notice of Deficiency.

E. That since the Audit Division had conceded that it could not meet its burden of proof with respect to the fraud penalty, the penalty under section 685(e) of the Tax Law is cancelled.

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<sup>2</sup> Section 685(a)(2) was added by Ch. 1005, Laws of 1970, applicable to returns required to be filed after December 31, 1969.

F. That the petition of Samuel Cohen is denied. The Audit Division is directed to modify the Notice of Deficiency issued August 31, 1971 in accordance with Conclusions of Law "A", "B", "C" and "E", supra.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

*Robert A. Burt*  
ACTING PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*M. J. J. J.*  
COMMISSIONER