

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Gerald L. Gould	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1974.	:	

State of New York
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 21st day of October, 1983, she served the within notice of Decision by certified mail upon Gerald L. Gould, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerald L. Gould
73-37 Austin St.
Forest Hills, NY 11375

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
21st day of October, 1983.

Connie A. Hagelund

Patricia Kupcheni

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 21, 1983

Gerald L. Gould
73-37 Austin St.
Forest Hills, NY 11375

Dear Mr. Gould:

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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GERALD L. GOULD	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

Petitioner, Gerald L. Gould, 73-37 Austin Street, Forest Hills, New York 11375, 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 1974 (File No. 26648).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 8, 1983 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether petitioner had filed a New York State personal income tax return for 1974.

II. Whether petitioner is required to increase his Federal adjusted gross income by his share of the New York City unincorporated business tax deduction taken on the partnership return of Zale, Toberoff and Gould.

FINDINGS OF FACT

1. On September 26, 1978 the Audit Division issued a Statement of Audit Changes to Gerald L. Gould (hereinafter petitioner) wherein his 1974 personal income tax liability was computed "based on available information" since there

was no record of a personal income tax return having been filed by him for said year. The computation incorporated therein credited petitioner with total New York income of \$43,547.88, which was comprised of the following:

Partnership Income - Zale, Toberoff & Gould	\$27,500.00
Unincorporated Business Tax Modification - NYC	6,047.88
Other Income	10,000.00
Total New York Income	<u>\$43,547.88</u>

The standard deduction of \$2,000.00 and one exemption of \$650.00 were allowed to petitioner in said computation.

2. Based on the above, a Notice of Deficiency was issued against petitioner on January 2, 1979 asserting New York State personal income tax of \$4,444.68, plus penalties and interest of \$3,403.65, for a total due of \$7,848.33. Said penalties were asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to file a 1974 personal income tax return and failure to pay the tax determined to be due reasepectively.

3. Petitioner contended that he had filed a New York State personal income tax return for 1974 and had paid the balance due stated thereon. The record herein contains what petitioner contends is a photostatic copy of his 1974 return as filed. Such copy, which was subsequently submitted by petitioner at the Audit Division's request, is undated and shows a balance due of \$107.86. Pursuant to said copy, petitioner allegedly:

- (a) filed jointly with his wife Sylvia Gould;
- (b) claimed four exemptions;
- (c) claimed New York itemized deductions of \$2,040.30;
- (d) reported total New York income of \$32,626.00, of which \$27,500.00 was partnership income;
- (e) made estimated tax payments of \$2,400.00.

4. Petitioner was unable to produce the cancelled check which he claimed was submitted in payment of the balance due as stated on the copy.

5. Prior to the hearing held herein the tax deficiency at issue was reduced from \$4,444.68 to \$1,015.04. The reduced deficiency was computed based on acceptance of the information shown on the purported copy of petitioner's return, adjusted solely by the unincorporated business tax modification of \$6,047.88.

6. Petitioner contended that the unincorporated business tax modification at issue is inapplicable since he was not a partner of Zale, Toberoff and Gould, and accordingly he received no benefit from the New York City unincorporated business tax deduction taken on the partnership return.

7. With respect to his relationship with Zale, Toberoff and Gould, petitioner testified that:

- (a) He was employed by the partnership and paid on a salary basis;
- (b) he was held out to be a partner so that clients would more readily deal with him;
- (c) he had no financial interest in the partnership;
- (d) he did not share in the profits and losses of the partnership;
- (e) he had no capital account;
- (f) his duties were those of an office manager;
- (g) he had no contract of employment with the partnership.

8. Zale, Toberoff and Gould issued petitioner a Federal Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., for 1974 whereon \$27,500.00 was reported as petitioner's "net earnings (loss) from self-employment".

CONCLUSIONS OF LAW

A. That the Commission is not bound to accept petitioner's testimony (cf. Matter of Donato v. Wyman, 32 A.D.2d 1061).

B. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e) of the Tax Law, to show that he had filed a New York State personal income tax return for 1974. Accordingly, it is hereby deemed that no such return was filed by petitioner.

C. That petitioner has failed to sustain his burden of proof, required pursuant to section 689(e) of the Tax Law, to show that he was not a partner of Zale, Toberoff and Gould. Accordingly, it is hereby deemed that petitioner was a partner in said partnership during 1974.

D. That section 612(b) of the Tax Law provides that there shall be added to Federal adjusted gross income:

- (3) Income taxes imposed by this state or any other taxing jurisdiction, to the extent deductible in determining federal adjusted gross income and not credited against federal income tax.

Accordingly, petitioner's share of the New York City unincorporated business tax deduction taken on the partnership return of Zale, Toberoff and Gould must properly be added to petitioner's federal adjusted gross income (See Berardino v. State Tax Commission, 78 A.D.2d 936).

E. That the tax deficiency herein is reduced from \$4,444.68 to \$1,015.04 (see Finding of Fact "5" supra.)

F. That the petition of Gerald L. Gould is granted to the extent provided in Conclusion of Law "E" supra, and except as so granted, said petition is, in all other respects denied.


G. That the Audit Division is hereby directed to modify the Notice of Deficiency dated January 2, 1979 to be consistent with the decision rendered herein.

DATED: Albany, New York

OCT 21 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER