

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Henry & Delores Jarvis :
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 1973 & 1974. :
_____ :

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 27th day of April, 1983, he served the within notice of Decision by certified mail upon Henry & Delores Jarvis, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Henry & Delores Jarvis
Box 17
Schuyler Falls, NY 12985

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 April, 1983.

David Parchuck

David A. Hayland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE TAX COMMISSION

State of New York
County of Albany

Richard V. D'Alessandro
111 Washington Ave.
Albany, NY 12210

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.

David Paruch

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 27, 1983

Henry & Delores Jarvis
Box 17
Schuyler Falls, NY 12985

Dear Mr. & Mrs. Jarvis:

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

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Richard V. D'Alessandro
111 Washington Ave.
Albany, NY 12210
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
HENRY JARVIS and DELORES JARVIS :
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 1973 and 1974. :

DECISION

Petitioners, Henry Jarvis and Delores Jarvis, Box 17, Schuyler Falls, New York 12985, 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 1973 and 1974 (File No. 26742).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Building #9, Room 107, State Campus, Albany, New York, on July 21, 1982 at 9:15 A.M. Petitioners, Henry Jarvis and Delores Jarvis, appeared by Richard V. D'Alessandro, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Harry Kadish, Esq., of counsel).

ISSUES

I. Whether the Notice of Deficiency, Statement of Audit Adjustment and the Consent to Fixing of Tax Not Previously Determined and Assessed were properly admitted into evidence.

II. Whether the Audit Division properly determined petitioners' tax liability as a result of a field audit.

III. Whether fraud penalties were properly asserted against petitioners, and if not, whether negligence penalties may be asserted against petitioners.

FINDINGS OF FACT

1. Petitioners, Henry Jarvis and Delores Jarvis, timely filed New York State income tax resident returns for 1973 and 1974. They did not file New York State unincorporated business tax returns for such years.

2. On November 10, 1978, "as a result of the audit of your returns", the Audit Division issued a Statement of Audit Changes against petitioners claiming additional business income of \$48,235.00 and \$17,473.00 for the 1973 and 1974 tax years, respectively. Such additional income resulted in unincorporated business tax due of \$2,044.52 and \$358.80 for 1973 and 1974, respectively, and additional personal income tax due of \$6,760.29 and \$1,893.88 for 1973 and 1974, respectively. A fraud penalty of \$5,528.75 was also asserted against petitioners.

3. On February 23, 1979, the Audit Division timely issued a Notice of Deficiency against petitioners showing "additional tax due or tax deficiencies" of \$11,057.49 and "total penalty and/or interest" of \$9,474.08. A copy of the Statement of Audit Changes described in Finding of Fact "2" was attached to the Notice of Deficiency. (Consents extending the period of limitation until April 15, 1979 were properly executed.)

4. The Notice of Deficiency and Statement of Audit Adjustment were introduced into evidence by the Audit Division over the objection of petitioners' representative.

5. Henry Jarvis, hereinafter "petitioner", operated a vehicle salvage business under the name Jarvis Auto Parts. He sold vehicle parts, automobiles, snowmobiles, and clothing, helmets and boots for snowmobiling.

6. Petitioners reported net losses from the operation of Jarvis Auto Parts, an unincorporated business, on their tax returns for 1973 and 1974.

They also reported rental income from "apartments", income from wages earned by Henry Jarvis and interest income.

7. William Riddervold and Thomas O'Conner, the two auditors who reconstructed petitioners' income for the tax years at issue by performing a cash availability audit, testified and were available for cross-examination at the hearing held herein. Mr. Riddervold testified that when he reviewed the books and records of the business, there were missing sales slips and missing bank statements for the business. He compared the sales reported on petitioners' sales tax returns to (i) the sales reported on petitioners' income tax returns, (ii) the sales invoices available and (iii) the sales noted by the sales tax audit.¹ Mr. Riddervold testified further that he made schedules of deposits and withdrawals from petitioners' bank accounts. Mr. O'Connor testified that deposits by petitioners into their bank accounts were in excess of the sales reported on their returns. He documented some deposits as non-business monies, including a pension check for \$10,984.47, and further testified that he considered expenses paid by cash and wages received by Henry Jarvis in performing the cash availability audit. Mr. O'Connor calculated that petitioners understated their business income by \$48,235.00 and \$17,473.00 for 1973 and 1974, respectively.

8. The Audit Division, prior to issuing the Notice of Deficiency against petitioners, sent petitioners' representative copies of the workpapers concerning the cash availability audit described in Finding of Fact "7" herein.

¹ On August 19, 1975, Henry Jarvis agreed that "there is due and payable to the State Tax Commission..." sales and/or use tax totaling \$6,842.62 for the period beginning June 1, 1972 and ending May 31, 1975. Such additional sales and/or use tax liability was the result of a sales tax audit of petitioner's unincorporated business. The Consent to Fixing of (Sales) Tax Not Previously Determined and Assessed was introduced into evidence by the Audit Division over the objection of petitioners' representative.

9. Petitioners did not testify or present any evidence at the hearing. No request for adjournment was made on their behalf, and no explanation was offered as to their absence at the time of the scheduled hearing.

10. The Audit Division, at the hearing herein, requested that the negligence penalty be applied against petitioners if the Tax Commission concluded that the fraud penalty should not be imposed.

CONCLUSIONS OF LAW

A. That the State Administrative Procedure Act §306.2 provides, in part, that:

"All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference."

Therefore, the Notice of Deficiency, Statement of Audit Adjustment and the Consent to Fixing of Tax Not Previously Determined and Assessed were properly admitted into evidence.

B. That the Audit Division established a reasonable basis for the issuance of the Notice of Deficiency against petitioners. The Notice of Deficiency was based upon an income reconstruction audit by the cash availability method, performed by the Audit Division, which included an examination of petitioners' books, records, bank accounts, tax returns and a prior sales tax audit. Therefore, the personal income tax and the unincorporated business taxes found to be due by the Audit Division are presumed to be correct. Matter of Bernard J. Muller-Thym (Deceased) and Mary C. Muller-Thym, State Tax Commission, March 21, 1980. Petitioners failed to introduce any testimony or evidence to show that their tax liability was incorrectly determined and therefore have not shouldered their burden of proof under Tax Law §689(e) and §722 of the Tax Law.

C. That "(t)he standard of proof necessary to support a finding of fraud by the Tax Commission requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts of omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing." Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982. The Audit Division has failed to sustain its burden of proof of fraud under Tax Law §689(e)(1). However, the petitioners have failed to show that the understatement of income was not due to negligence, and penalties under Tax Law §685(b) may be imposed pursuant to Tax Law §689(d)(1) which provides, in part, that:

"the tax commission shall have power...to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefor is asserted at...the hearing..."

D. That the petition of Henry Jarvis and Delores Jarvis is granted to the extent of cancelling the fraud penalty under Tax Law §685(e); that a negligence penalty is imposed against petitioners as described in Conclusion of Law "C" herein; that, except as so granted, the petition is denied; and the Audit Division is hereby directed to modify the Notice of Deficiency dated February 23, 1979 to be consistent with the decision rendered herein.

DATED: Albany, New York

STATE TAX COMMISSION

APR 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER