

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of		
Thomas & Jean Manno	:	
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	:	
1966 - 1968.	:	
	:	

AFFIDAVIT OF MAILING

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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Thomas & Jean Manno, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas & Jean Manno
5 Tappentown Lane
Brookville, NY 11545

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
4th day of February, 1983.

David Parchuck

Annice A. Stagemund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Thomas & Jean Manno :
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 :
1966 - 1968. :

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 4th day of February, 1983, he served the within notice of Decision by certified mail upon Kenneth Carroad the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth Carroad
40 Worth St.
New York, NY

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
4th day of February, 1983.

David Parchuck

Connie A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 4, 1983

Thomas & Jean Manno
5 Tappentown Lane
Brookville, NY 11545

Dear Mr. & Mrs. Manno:

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
Kenneth Carroad
40 Worth St.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
THOMAS MANNO and JEAN MANNO	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Personal Income Tax and Unincorporated	:	
Business Tax under Articles 22 and 23 of the	:	
Tax Law for the Years 1966 through 1968.	:	

Petitioners, Thomas Manno and Jean Manno, 5 Tappentown Lane, Brookville, New York 11545, filed petitions for redetermination of deficiencies or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1966 through 1968 (File No. 11848).

A formal hearing was commenced before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 20, 1978 at 9:15 A.M. and continued to conclusion before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 16, 1982 at 3:45 P.M. Petitioners appeared by Gabriel Friedman, C.P.A. at the hearing on July 20, 1978 and by Kenneth Carroad, Esq. at the hearing on March 16, 1982. The Audit Division appeared by Peter Crotty, Esq. (Robert N. Felix, Esq., of counsel) at the hearing on July 20, 1978 and by Paul B. Coburn, Esq. (Samuel Freund, Esq., of counsel) at the hearing on March 16, 1982.

ISSUES

I. Whether petitioners have sustained their burden of proof of substantiating an interest expense deduction.

II. Whether the propriety of an asserted deficiency of unincorporated business tax has been properly raised before the State Tax Commission.

III. Whether a letter protesting the imposition of penalties in conjunction with an asserted deficiency of personal income tax is sufficient to commence a proceeding before the State Tax Commission and, if so, whether the penalties should be abated.

FINDINGS OF FACT

1. Petitioner Thomas Manno did not file unincorporated business tax returns for 1966, 1967 and 1968.

2. On June 4, 1976, the Audit Division issued a Notice of Deficiency and an explanatory Statement of Audit Changes relating to the liability of petitioner Thomas Manno for unincorporated business tax for 1966, 1967 and 1968. The Statement of Audit Changes claimed that the activity of providing financial consulting services constituted an unincorporated business and that no statute of limitations was applicable since tax returns had not been filed. The taxes alleged to have been due were as follows:

<u>YEAR</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
1966	\$ 376.00	\$206.15	\$ 582.15
1967	376.00	183.59	559.59
1968	385.00	164.89	549.89
TOTAL	\$1,137.00	\$554.63	\$1,691.63

3. On October 17, 1977, Thomas Manno filed a Perfected Petition signed September 26, 1977 seeking redetermination of the unincorporated business tax asserted for 1967 and 1968 against petitioner Thomas Manno.

4. On March 3, 1978, petitioner Thomas Manno mailed a check for \$1,801.15 to the Mineola District Office of the Department of Taxation and Finance in payment of the asserted unincorporated business tax liability for the years 1966 through and including 1968. On the same date this payment was made,

petitioner Thomas Manno filed three Claims for Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax in the amount of the tax plus interest for the years 1966, 1967 and 1968. No determination of these claims for refund have been made by the Department of Taxation and Finance. Moreover, Mr. Manno has not filed a petition pertaining to these claims for refund.

5. On April 10, 1972, the Audit Division issued a Notice of Deficiency accompanied by an explanatory Statement of Audit Changes which asserted personal income tax liability for 1968 against Mr. and Mrs. Manno in the amount of \$3,722.46 plus interest of \$667.14 for a total of \$4,389.60. The Statement of Audit Changes stated that since petitioners had not replied to the Audit Division's letters on two occasions the interest expense deduction was disallowed as unsubstantiated. Petitioners filed a petition challenging this deficiency.

6. On January 15, 1981, the Audit Division issued a Notice of Deficiency which asserted a deficiency of personal income tax for the years 1966, 1967 and 1968 based upon a Federal audit dated June 28, 1973. In addition to the foregoing tax liability and interest thereon, penalties were asserted pursuant to section 685(a) and 685(b) of the Tax Law for respectively failing to file a return and for negligence. The taxes alleged to be due were as follows:

<u>YEAR</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1966	\$ 5,412.39	\$1,623.72	\$ 4,465.22	\$11,501.33
1967	3,626.76	181.34	2,774.47	6,582.57
1968	6,582.15	329.11	4,640.42	11,551.68
TOTAL	\$15,621.30	\$2,134.17	\$11,880.11	\$29,635.58

7. On or about February 19, 1981, petitioners' accountant, Gabriel Friedman, C.P.A., sent two checks to the New York State Department of Taxation and Finance. The first check was in the amount of \$15,621.30 in payment of the asserted personal income tax deficiency and \$11,880.11 in payment of the

interest. The last sentence in the cover letter from petitioners' accountant which accompanied the checks requested that the Department of Taxation and Finance abate the penalty of \$2,134.17 since he believed that the error was caused by the actions of his predecessor accountant and not with petitioners.

8. Petitioner Thomas Manno was unable to personally appear at the hearing because of illness. Petitioners' attorney, who did appear at the hearing, explained that petitioners were stockholders, officers, and employees of a catering organization on Long Island, New York known as Huntington Town House, Inc. ("Huntington House"). During the years 1966 through 1968 Huntington House utilized the services of an internal auditor. This auditor embezzled funds from Huntington House by obtaining the proceeds of checks which were intended for other entities such as the State of New York. The auditor then concealed his action by destroying records. When the actions of this auditor were discovered a new internal auditor was hired. The second internal auditor also embezzled funds and destroyed records. As a result of the conduct of these auditors a number of records including checkbooks, bank statements, and ledgers are no longer available. In addition, Mr. Manno's health has deteriorated since these events occurred to the point where he can no longer clearly remember what happened during the period in issue.

9. With regard to the issue of the substantiation of the interest expense deduction, petitioners' attorney stated that a substantial portion of the interest expense arose out of petitioner Thomas Manno's purchase of an operation known as Queens Terrace. However, no documentary substantiation of the interest expense was presented. Mr. and Mrs. Manno's attorney also maintained at the hearing that since a field audit was conducted by the Internal Revenue Service

for the year 1968 and the interest expense deduction was not disallowed, it should not be disallowed by the Department of Taxation and Finance.

CONCLUSIONS OF LAW

A. That a proceeding before the State Tax Commission is commenced by the filing of a petition within ninety days of the issuing of the Notice of Deficiency (Tax Law §§ 689(a); 689(b); 722). Since the petition of Thomas Manno was not filed within ninety days of the date of issuance of the Notice of Deficiency for unincorporated business taxes for 1966, 1967 and 1968 (i.e. June 4, 1976), the petition was untimely.

B. That Tax Law section 689(c) provides:

"Petition for refund.---A taxpayer may file a petition with the tax commission for the amounts asserted in a claim for refund if---

(1) the taxpayer has filed a timely claim for refund with the tax commission

(2) the taxpayer has not previously filed with the tax commission a timely petition under subsection (b) for the same taxable year unless the petition under this subsection relates to a separate claim for credit or refund properly filed under subsection (f) of section six hundred eighty-seven, and

(3) either (A) six months have expired since the claim was filed, or (B) the tax commission has mailed to the taxpayer, by registered or certified mail, a notice of disallowance of such claim in whole or in part.

No petition under this subsection shall be filed more than two years after the date of mailing of a notice of disallowance, unless prior to the expiration of such two year period it has been extended by written agreement between the taxpayer and the tax commission. If a taxpayer files a written waiver of the requirement that he be mailed a notice of disallowance, the two year period prescribed by this subsection for filing a petition for refund shall begin on the date such waiver is filed."

C. That although the criteria of Tax Law § 689(c)(1), (c)(2) and (c)(3) have been satisfied, Mr. Manno never filed a petition with the Tax Commission for the amounts asserted in the claims for refund of unincorporated business tax. Therefore, the State Tax Commission renders no determination with respect to said claims.

D. That since Mr. and Mrs. Manno are unable to produce documentation substantiating their deduction of the interest expense which was the basis of the Notice of Deficiency dated April 10, 1972, they have not sustained their burden of proof imposed by section 689(e) of establishing that the deficiency was erroneous. It is noted that there is no evidence that the Internal Revenue Service concluded that petitioners had proper substantiation of their interest expense deduction. However, assuming, without deciding, that the Internal Revenue Service did reach such a conclusion, the State Tax Commission is not bound by a federal determination relating to issues before it (20 NYCRR 153.4; see Matter of Ruben Porton and Georgiana Porton, State Tax Commission, July 18, 1980).

E. That the letter from petitioners' accountant dated February 19, 1981 is deemed the petition of Thomas Manno and Jean Manno challenging the penalties asserted on the Notice of Deficiency issued on January 15, 1981. Although the alleged conduct of the internal auditors of Huntington House noted in Finding of Fact "8" was unfortunate, it has no bearing on why petitioners failed to file a personal income tax return or whether the personal income tax deficiency was due to negligence. Therefore, petitioners have failed to sustain their burden of proof, imposed by section 689(e) of the Tax Law, of showing that the penalty was improperly asserted.

F. That the petitions of Thomas Manno and Jean Manno are denied.

DATED: Albany, New York

FEB 04 1983

STATE TAX COMMISSION

ACTING Robert J. Barland
PRESIDENT

Francis Q. Koenig
COMMISSIONER

Mark J. O'Neill
COMMISSIONER