

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman Meyer :
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 :
Year 1975. :
_____ :

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

Herman Meyer
147 E. 90th St.
New York, NY 10028

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 May, 1983.

David Parchuck

James A. Haylund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Herman Meyer :
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 Year 1975. :
_____ :

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 May, 1983, he served the within notice of Decision by certified mail upon John Tresnowske the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Tresnowske
233 Broadway
New York, NY 10007

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
27th day of May, 1983.

David Parchuck

James A. Negland

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

May 27, 1983

Herman Meyer
147 E. 90th St.
New York, NY 10028

Dear Mr. Meyer:

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 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: Petitioner's Representative
John Tresnowske
233 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HERMAN MEYER	:	DECISION
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 Year 1975.	:	

Petitioner, Herman Meyer, 147 East 90th Street, New York, New York 10028, 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 year 1975 (File No. 27051).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 13, 1983 at 11:15 A.M. Petitioner appeared by John Tresnowske, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner is subject to penalties imposed as a result of a deficiency due to negligence or intentional disregard of tax rules and regulations.

II. Whether petitioner is subject to penalty imposed as a result of his failure to file a declaration of estimated tax.

FINDINGS OF FACT

1. Petitioner, Herman Meyer, filed a New York State income tax resident return for the year 1975.

2. On February 7, 1979, as the result of a field audit, the Audit Division issued a Notice of Deficiency against petitioner in the amount of \$9,153.67 plus penalty and interest of \$2,061.02 for a total due of \$11,214.69 for the years 1974 and 1975. The penalties imposed were for negligence under section 685(b) of the Tax Law in the amount of \$456.71 and underpayment of estimated tax under section 685(c) of the Tax Law in the amount of \$153.09. Tax year 1974 is not at issue and it will not be addressed, since the tax for that year was paid.

3. Petitioner owned a grocery store, the Janedale Supermarket, during the year in issue. Petitioner sold this business on December 7, 1975.

4. In 1979 the Audit Division conducted a source and application of funds audit of petitioner for the year 1975. As a result of this audit additional income of \$17,287.00 was found. Additionally the sale of petitioner's business in December, 1975, the "Additional Gross Receipts", and other adjustments, resulted in additional income subject to both personal income and unincorporated business taxes.

5. At the hearing the Audit Division pointed out that the item of audit adjustment entitled "Additional Gross Receipts" in the amount of \$19,500.00 was incorrect. This item related to the ending inventory reported on Federal Schedule C for 1975 and included \$13,500.00 in inventory which was sold with the business. The Audit Division conceded that the \$13,500.00 should not have been included since it was included with the sale of the business and that the item entitled "Additional Gross Receipts" should be reduced to \$6,000.00. Petitioner agreed with this reduction as well as with the remainder of the deficiency leaving only the issue of imposition of penalties to be decided.

6. Petitioner testified that his accountant came to the store once a month or once every three months and examined the entries made by petitioner in his books. The accountant would then summarize this information for transfer to formal accounting records. The accountant would also prepare petitioner's tax returns. Petitioner relied completely on the accountant and never discussed or questioned any entries made on the tax returns.

7. No evidence was submitted indicating whether the deficiency was a result of an error made by the accountant or lack of complete information supplied to the accountant by petitioner.

CONCLUSIONS OF LAW

A. That sections 685(b) and 722 of the Tax Law impose a penalty if any part of a deficiency is due to negligence or intentional disregard of Articles 22 and 23 or rules or regulations thereunder.

B. That section 685(b) is modeled after section 6653(a) of the Internal Revenue Code and therefore, Federal law may be looked to for guidance and interpretation (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

C. That "petitioner cannot avoid his duty to file accurate returns simply by shifting the responsibility to his agents. The ultimate responsibility for a correct return lies with the taxpayer, who must at least furnish the necessary information to his agent who prepared the return" (Enoch v. Commissioner, 57 T.C. 781, 802).

D. That to escape the penalty on the ground of reliance on the advice of an accountant, petitioner "must be able to show that the accountant reached his decision independently after being fully apprised of the circumstances of the transactions" (Leonhart v. Commissioner, 414 F.2d 749). In the present case there is a lack of testimony and other evidence as to the nature of the information

upon which the erroneous returns were based. Petitioner "has the burden of showing...that he at least supplied the correct information to his accountant and that the incorrect returns were a result of the accountant's mistakes" (Enoch v. Commissioner, supra at 803). Petitioner has failed to meet that burden here.


E. That sections 685(c) and 722 of the Tax Law impose an addition to tax for underpayment of estimated tax if any taxpayer fails to file a declaration of estimated tax or fails to pay all or any part of an installment of estimated tax. Section 685(d) provides for certain exceptions to the 685(c) penalty which are not applicable herein. The aforesaid statutes make no provision for waiver of the addition to tax for reasonable cause. Therefore, even if petitioner had satisfactorily demonstrated a lack of intent to evade the tax and reasonable reliance on his accountant's advice, no waiver authority exists to which petitioner would be entitled (see Matter of Susan Cohen, State Tax Commission, February 11, 1983).

F. That the petition of Herman Meyer is granted to the extent indicated in Finding of Fact "5" above; that the Audit Division is hereby directed to modify the Notice of Deficiency issued February 7, 1979; and that, except as so granted, the petition is in all other respects denied.

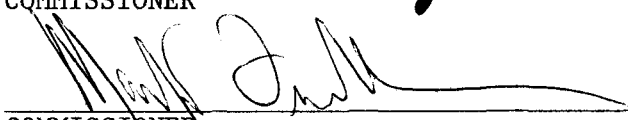
DATED: Albany, New York

STATE TAX COMMISSION

MAY 27 1983


PRESIDENT


COMMISSIONER


COMMISSIONER