

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Harry & Frances Rosenblum : 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 Year :
1972.

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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Harry & Frances Rosenblum, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harry & Frances Rosenblum
3125 Tibbett Ave.
Bronx, NY 10463

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
28th day of September, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Harry & Frances Rosenblum : 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 Year :
1972.

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 28th day of September, 1983, she served the within notice of Decision by certified mail upon Jerrold Rosenblum the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

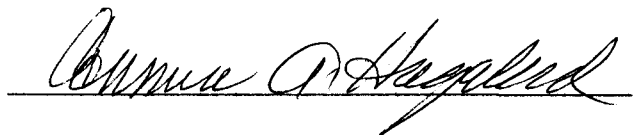
Jerrold Rosenblum
57 Old Country Rd.
New Rochelle, NY 10804

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
28th day of September, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 28, 1983

Harry & Frances Rosenblum
3125 Tibbett Ave.
Bronx, NY 10463

Dear Mr. & Mrs. Rosenblum:

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: Petitioner's Representative
Jerrold Rosenblum
57 Old Country Rd.
New Rochelle, NY 10804
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
HARRY ROSENBLUM AND FRANCES ROSENBLUM	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

Petitioners, Harry Rosenblum and Frances Rosenblum, 3135 Johnson Avenue, Bronx, New York 10463, 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 1972. (File No. 15284).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1981 at 1:15 p.m. Petitioner Harry Rosenblum appeared with Jerrold Rosenblum, his son. The Audit Division appeared by Ralph J. Vecchio Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether the period of limitations expired for the issuance of a Notice of Deficiency.
- II. Whether the disallowance of partnership expenses was arbitrary.
- III. Whether the Audit Division properly exercised its authority in its attempt to examine the partnership's books and records.
- IV. Whether petitioner Frances Rosenblum, a housewife, was properly named and included on the Notice of Deficiency.

FINDINGS OF FACT

1. Petitioners, Harry Rosenblum and Frances Rosenblum, timely filed a joint New York State Income Tax Resident Return for the year 1972, on which they deducted New York itemized deduction of \$3,122.67, a capital loss of \$905.79 and a partnership loss of \$5,905.39.

2. On April 14, 1976, a Notice of Deficiency was issued against the petitioner imposing tax due of \$1,818.73, plus interest of \$408.08 for the year 1972, along with an explanatory Statement of Audit Changes, dated November 20, 1975, on which the following adjustments resulted from petitioners failure to appear for audit:

- (a) Petitioners' taxable income was increased by \$16,187.39 as a result of a disallowance imposed against a partnership conducting business under the name and style of Food Family Supermarket.
- (b) New York itemized deductions of \$3,122.67 were disallowed and replaced by a standard deduction of \$2,000.00.
- (c) A capital loss of \$905.79 was disallowed.

Subsequent to the issuance of the aforementioned deficiency, petitioners submitted documentary evidence substantiating the New York itemized deductions of \$3,122.67, as well as the capital loss of \$905.79. Accordingly, these two items are not at issue.

3. Petitioner Harry Rosenblum was a member of a partnership conducting business under the name and style of Food Family Supermarket (Food Family/ Partnership). Sometime in 1973, Food Family was subjected to an involuntary bankruptcy proceeding whereby all its assets, including all its books and records, were seized and turned over to a trustee appointed by the United States District Court for the Southern District of New York.

4. On September 17, 1974 and again on December 16, 1975, the Audit Division corresponded with petitioner Harry Rosenblum and petitioner Frances Rosenblum whereby they were requested to appear on a scheduled date with the business books of Food Family and with their personal records. However, petitioner did not appear since they no longer had possession of the business books of Food Family. Accordingly, the Audit Division disallowed the following partnership expenses:

Theft	4,274.79
Insurance	1,000.00
Salaries and Protection	2,000.00
Cost of Goods Sold	25,000.00
Total Disallowed	<u>32,274.79</u>

Fifty percent (50%) of the total disallowance was distributed to petitioners, which increased their taxable income by \$16,187.39 for New York State personal income tax purposes. (Findings of Fact #2(a)).

5. On June 28, 1977 an auditor from the Audit Division visited the "Bankruptcy Court in New York City" and was given the name and address of the trustee who had custody of all the books and records of Food Family. Although the auditor made several attempts to contact the trustee, he was unable to do so. However, petitioners argued that the auditor was not zealous enough in his attempts, and that he should have utilized the subpoena powers vested in the Department of Taxation and Finance. Therefore, petitioners also argued that the Audit Division was negligent and that the disallowance at issue (Findings of Fact #4) were arbitrary and without merit.

6. Petitioners contended that the personal and partnership returns filed for the year 1972 were based on the records in their possession at the time of

filing, and that these records as well as the resulting tax returns were in order and very accurate. In support of their contentions they pointed out that any disallowances imposed on their personal income tax returns (Findings of Fact #2(b) and 2(c)) were substantiated in full by their personal records which had always remained in their possession.

7. There is no evidence in the file that petitioners contacted the trustee, who had custody of the books and records of Food Family, to make arrangements with him to allow the auditor to examine the books and records. There is no evidence in the file that petitioner Harry Rosenblum could not have substantiated the partnership expenses by means other than the partnership books and records.

8. Petitioners contended that the statute of limitations had expired on December 31, 1975 for the year 1972, and that petitioner Frances Rosenblum should not be a party in this matter since she was not a member of the partnership, and the deficiency at issue arose from the disallowance of partnership expenses.

CONCLUSIONS OF LAW

A. That section 683(a) of the Tax Law provides that any tax under Article 22 shall be assessed within three years after the return was filed. Section 683(b) of the Tax Law states that a return of income tax filed before the last day prescribed by law shall be deemed to be filed on such last day. Section 651(a) of the Tax Law states that on or before the fifteenth day of the fourth month following the close of the taxable year as the time an income tax return shall be made and filed.

B. That petitioners filed their income tax return on or about April 9, 1973 and such return is deemed to be filed on April 15, 1973. Therefore, the period of limitations did not expire until April 15, 1976 and the Notice of Deficiency dated April 14, 1976 was issued within period permitted by Section 683(a) of the Tax Law.

C. That "(i)f records are available from which the exact amount of tax can be determined the estimate procedures adopted by the respondent become arbitrary..." (Chartair, Inc. v. Tax Commission, 65 A.D.2d 44). Since the partnership books and records were not available to the auditor, the disallowance of partnership expenses was not arbitrary.

D. That in any case before the Tax Commission the burden of proof is upon the petitioner except in three instances which are not present herein (Section 689(e) of the Tax Law). The evidence in the file indicates that the auditor made several attempts to examine the partnership's books and records after the Notice of Deficiency. However, the burden of proof is not upon the Audit Division to show that the Notice of Deficiency is incorrect. The Audit Division properly exercised its authority in its attempt to examine the partnership's books and records. Further, since the burden of proof is upon the petitioners, petitioners should have used other indirect methods to substantiate the disallowed partnership expenses. For instance, a police report may have been used in conjunction with an insurance claim to prove the theft. Evidence for insurance expense may have been received from an insurance agent. However, no evidence was submitted by petitioners to sustain their burden of proof to substantiate the disallowed partnership expenses.

E. That if a husband and wife file a joint New York State income tax return, their tax liabilities will be joint and several and each will be liable for the entire tax on such joint return, even though one spouse has no income.

[20 NYCRR 145.10(b)(1)(i)]. Petitioner Frances Rosenblum was properly named and included on the Notice of Deficiency in accordance with 20 NYCRR 145.10(b)(1)(i).

F. That the petition of Harry Rosenblum and Frances Rosenblum is granted to the extent indicated in Finding of Fact "2", supra and that the Notice of Deficiency issued April 14, 1976 for the year 1972 is sustained as modified by the Audit Division.

DATED: Albany New York

SEP 28 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER