

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Garrett & Beatrice Wuebben : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income :
and UBT under Article 22 & 23 of the Tax Law for :
the Years 1975 & 1976.

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 11th day of February, 1983, he served the within notice of Decision by certified mail upon Garrett & Beatrice Wuebben, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Garrett & Beatrice Wuebben
R.D. #1, Box 278
Deposit, NY 13754

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
11th day of February, 1983.

David Parchuck

Constance A. Magallon

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

February 11, 1983

Garrett & Beatrice Wuebben
R.D. #1, Box 278
Deposit, NY 13754

Dear Mr. & Mrs. Wuebben:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
GARRETT WUEBBEN AND BEATRICE WUEBBEN	:	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 Years 1975 and 1976.	:	

Petitioners, Garrett Wuebben and Beatrice Wuebben, R.D. #1, Box 278, Deposit, New York 13754, 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 1975 and 1976 (File No. 27521).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on September 24, 1981 at 9:15 A.M. Petitioners, Garrett Wuebben and Beatrice Wuebben, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Anna D. Colello, Esq., of counsel).

ISSUE

Whether the petitioners may change their method of accounting and, if not, can there be a correction of the effect of this error on a closed year.

FINDINGS OF FACT

1. Petitioners, Garrett Wuebben and Beatrice Wuebben, timely filed New York State income tax resident returns for 1974, 1975 and 1976. Petitioner Garrett Wuebben timely filed New York State unincorporated business tax returns for 1974, 1975 and 1976. On said business tax returns, the petitioner indicated

that he used a hybrid method of accounting. Attached to the unincorporated business tax return for 1974 and 1975 was the following letter:

District Director
Internal Revenue Service
Andover, Massachusetts 01812

Dear Sir:

From the end of August to mid-November 1974 I worked in Dover Plains, New York. I agreed to take \$8902 income earned in 1974 in 1975 to accommodate the company for which I worked. I was aware there was a considerable amount more work there this year which I very much wanted. I took \$5500 in loans in 1974 payable this year to meet expenses.

I have always done my own bookkeeping and, until I started to prepare my 1974 tax return, had assumed I could just accrue the income since I had actually earned it last year. I now realize the IRS rules call for such a change (from cash to hybrid) to be requested in writing. Actually at the time I agreed to defer the income I was already well past the deadline for such request.

I realize ignorance of the law is no excuse, but I have taken the liberty of submitting a request for transfer from the cash to the hybrid method of accounting for 1974 and subsequent years. I have prepared my 1974 tax returns according to the hybrid method.

I would very much appreciate your favorable consideration of my request. It would be a hardship for me to have to pay income tax for 1975 on \$7854 net income received last year (I also accrued \$1048 in operating costs on this return), since \$5500 of it is going to pay loans and most of the offsetting expenses were paid last year.

2. On October 12, 1978, as a result of a recent audit of the tax years 1975 and 1976, the Audit Division issued a Statement of Audit Changes to petitioner Garrett Wuebben wherein it made the following adjustments:

	<u>1975</u>	<u>1976</u>
1975 Income not Reported	\$8,902.00	\$
1975 Expense not taken	<u>1,047.81</u>	
Net Additional Income	<u>\$7,854.19</u>	
Car Expense	375.00	450.00
Disallowed as unsubstantiated	<u> </u>	<u> </u>
Additional Income Per Audit	\$8,229.19	\$450.00

These adjustments resulted in additional unincorporated business tax. Accordingly, two notices of deficiency were issued on April 10, 1979. One against the petitioners, Garrett Wuebben and Beatrice Wuebben, for 1975, asserting unincorporated business tax of \$204.23 plus interest of \$51.75, for a total due of \$255.98. The second notice was against the petitioner Garrett Wuebben for 1976, asserting unincorporated business tax of \$15.24 and interest \$2.57, for a total due of \$17.81.

3. On October 16, 1978, based on the adjustments stated above, the Audit Division issued a Statement of Audit Changes to petitioners, Garrett Wuebben and Beatrice Wuebben, for personal income tax. Accordingly, a Notice of Deficiency was issued on March 30, 1979 asserting additional personal income tax for 1975 and 1976 in the amount of \$518.33 plus interest and penalty of \$138.02 for a total due of \$656.35.

4. On June 10, 1980, the petitioners consented to the discontinuance of the case dealing with the portion of taxes due for 1976. The petitioners paid in full the taxes, interest and penalty in the amount of \$65.52 for 1976. The only items outstanding are the double inclusion of an item of gross income and the disallowance of car expenses.

5. Petitioners filed a Schedule C, Profit or (Loss) from Business or Profession, with their Federal returns for 1974 and 1975. On the Schedule C's, the petitioners indicate hybrid as their method of accounting. Also attached to the 1974 and 1975 Federal returns was the letter attached to the New York State return for 1974 (see Finding of Fact "1").

6. Petitioner Garrett Wuebben is a carpenter-contractor who reported on his 1974 tax returns all income and expenses from different jobs on a cash basis, except one job which he reported the income on an accrual basis. This

accounting procedure substantially reflects the petitioner's true income in 1974, since the expenses paid in 1974 for that one job were charged against the accrued income.

7. The Audit Division took the position that petitioners did not secure the consent of the Internal Revenue Service to change their method of accounting, in accordance with section 446(e) of the Internal Revenue Code. Therefore, the \$8,902.00 of income reported in 1974 must be reported in 1975. The Audit Division further took the position that erroneous treatment of income in 1974 could not be corrected, since that taxable year was closed by the statute of limitations. (These positions would cause a double inclusion of an item of gross income.)

8. The petitioners took the position that they had received implied consent from the Internal Revenue Service by its inaction and silence to their change in accounting methods for 1974. Therefore, the accrued monies should not be included in their 1975 income.

9. The petitioners contend that, if their treatment of income in 1974 was erroneous, it was grossly unfair for Audit Division not to adjust the 1974 tax returns, since it had notification of the change in accounting methods at the time of filing of the 1974 tax returns.

CONCLUSIONS OF LAW

A. That Section 446(e) of the Internal Revenue Code provides that a taxpayer who changes the method of accounting on the basis of which it regularly computes its income in keeping its books shall, before computing its taxable income under the new method, secure the consent of the Secretary.

Treasury Regulation 1.446-1(e)(3) provides that in order to secure consent to a change in accounting method, the taxpayer must file an application on Form

3115 with the Commissioner within 180 days after the beginning of the taxable year in which it desires to make the change.

In the present situation, the failure by petitioners to timely file the Form 3115 for the taxable year 1974 precludes them from using a hybrid method of accounting in the taxable years 1974 and 1975; therefore, the proper year for inclusion of this item in income (\$8,902.00) is in 1975.

B. That pursuant to section 697(d) of the Tax Law:

"Special refund authority. -- Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller."

Petitioners Garrett Wuebben and Beatrice Wuebben properly advised the State Tax Commission, in writing, of the erroneous inclusion of income in their 1974 New York State income tax return by attaching a letter to their 1974 and 1975 unincorporated business tax returns (Finding of Fact "1"). Therefore, as no questions of fact or law are involved, the Audit Division is directed to authorize a refund of the moneys erroneously collected for the year 1974. The Notice of Deficiency for 1975 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

FEB 11 1983

STATE TAX COMMISSION

ACTING PRESIDENT
Robert M. Barclay

COMMISSIONER
Francis R. Kaemy

COMMISSIONER
Mark J. [Signature]