

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Paul & Angela D'Ambrosio : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and New York City Nonresident Earnings Tax :
under Chapter 46, Title U of the Administrative :
Code of the City of New York for the Years 1977 & :
1978.

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Paul & Angela D'Ambrosio, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul & Angela D'Ambrosio
31 Hampshire Rd.
Washington Township, NJ 07675

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of March, 1984.

David Parchuck

James P. Haggard

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Paul & Angela D'Ambrosio : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the
Tax Law and New York City Nonresident Earnings Tax:
under Chapter 46, Title U of the Administrative
Code of the City of New York for the Years 1977 & :
1978.

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Harvey R. Poe, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey R. Poe
160 S. Livingston Ave.
Livingston, NJ 07039

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of March, 1984.

David Parchuck

[Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1984

Paul & Angela D'Ambrosio
31 Hampshire Rd.
Washington Township, NJ 07675

Dear Mr. & Mrs. D'Ambrosio:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Harvey R. Poe
160 S. Livingston Ave.
Livingston, NJ 07039
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Rose D'Ambrosio

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Years 1977 &
1978.

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Rose D'Ambrosio, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Rose D'Ambrosio
77 88th Street
Brooklyn, NY 11209

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of March, 1984.

David Parchuck

James J. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Rose D'Ambrosio : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and Chapter 46, Title T of the Administrative :
Code of the City of New York for the Years 1977 & :
1978. :

State of New York }
ss.:
County of Albany }

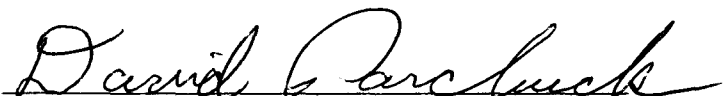
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Harvey R. Poe, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

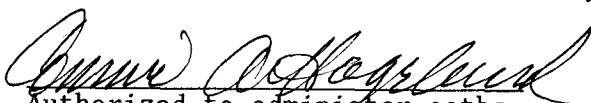
Harvey R. Poe
160 S. Livingston St.
Livingston, NJ 07039

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of March, 1984.




Authorized to administer oaths
pursuant to Tax Law section 174

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

March 14, 1984

Rose D'Ambrosio
77 88th Street
Brooklyn, NY 11209

Dear Ms. D'Ambrosio:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Harvey R. Poe
160 S. Livingston St.
Livingston, NJ 07039
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Five Brothers Carting Co. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1977 & 1978. :

State of New York }
ss.:
County of Albany }

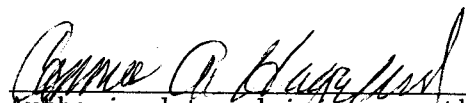
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Five Brothers Carting Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Five Brothers Carting Co.
84 Williams St.
New York, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of March, 1984.


Authorized to administer oaths
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Five Brothers Carting Co. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Unincorporated :
Business Tax under Article 23 of the Tax Law for :
the Years 1977 & 1978. :

State of New York }
ss.:
County of Albany }

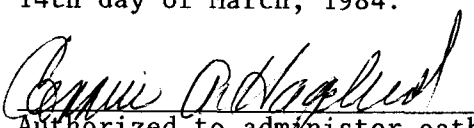
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 14th day of March, 1984, he served the within notice of Decision by certified mail upon Harvey R. Poe, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Harvey R. Poe
160 S. Livingston Ave.
Livingston, NJ 07039

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
14th day of March, 1984.


Authorized to administer oaths
pursuant to Tax Law section 174



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

March 14, 1984

Five Brothers Carting Co.
84 Williams St.
New York, NY

Gentlemen:

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) 722 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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
Harvey R. Poe
160 S. Livingston Ave.
Livingston, NJ 07039
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
PAUL and ANGELA D'AMBROSIO :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and New York City Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1977 and 1978. :
:

In the Matter of the Petition :
of :
ROSE D'AMBROSIO : DECISION
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1977 and 1978. :

In the Matter of the Petition :
of :
FIVE BROTHERS CARTING CO. :
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1977 :
and 1978. :

Petitioners, Paul and Angela D'Ambrosio, 31 Hampshire Road, Washington Township, Westwood, New Jersey 07675; Rose D' Ambrosio, 77-88th Street, Brooklyn, New York 11209 and Five Brothers Carting Co., 84 William Street, New York, New York 10038, each filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22

and 23 of the Tax Law and Chapter 46, Titles T and U of the Administrative Code of the City of New York for the years 1977 and 1978 (File Nos. 31101, 31100 and 31099).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on May 14, 1982 at 9:15 A.M. and continued to conclusion on May 24, 1982 at 9:55 A.M., with all briefs to be submitted by October 15, 1982. Petitioners appeared by Harvey R. Poe, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Robert Plautz, Esq., of counsel).

ISSUE

Whether the late filing of petitioners' New York State income tax returns and the late payment of the taxes due thereon were due to reasonable cause thereby precluding assertion of penalties under sections 685(a)(1) and (a)(2) of the Tax Law and sections T46-185.0(a)(1) and (a)(2) and U46-49.0 of the Administrative Code of the City of New York.

FINDINGS OF FACT

1. Petitioners Paul and Angela D'Ambrosio and Rose D'Ambrosio filed their 1977 and 1978 personal income tax returns late. Petitioner Five Brothers Carting Co. ("the Partnership") filed its 1977 and 1978 unincorporated business tax returns late. The taxes due with all of the aforesaid returns were filed and paid late as follows:

	<u>Tax Year</u>	<u>Date Due</u>	<u>Date Filed</u>
Partnership	1977	4/15/78	11/30/79
Partnershp	1978	4/15/79	11/30/79
Rose	1977	4/15/78	12/31/79
Rose	1978	4/15/79	12/31/79
Paul and Angela	1977	4/15/78	11/30/79
Paul and Angela	1978	4/15/79	11/30/79

2. The Audit Division determined that the late filing of the tax returns in issue herein and late payment of tax were due to willful neglect and accordingly assessed penalties under sections 685(a)(1) and (a)(2) of the Tax Law against petitioners for each taxable year as follows:

<u>Petitioner</u>	<u>Year</u>	<u>Amount</u>
Rose D'Ambrosio	1977	\$9,477.86 ¹
	1978	\$8,157.04 ²
Paul and Angela D'Ambrosio	1977	\$8,412.38 ³
	1978	\$7,864.58 ⁴
Five Brothers Carting Co.	1977	\$4,986.45
	1978	\$4,821.48

3. Petitioners paid the amounts set forth in the schedule below in partial payment of said penalties.

<u>Petitioner</u>	<u>Year</u>	<u>Amount</u>
Rose D'Ambrosio	1977	\$ 100.00
	1978	\$ 100.00
Paul and Angela D'Ambrosio	1977	\$ 100.00
	1978	\$ 100.00
Five Brothers Carting Co.	1977	\$ 100.00
	1978	\$ 100.00

Each petitioner then filed timely claims for refund of \$200.00 with the Audit Division. Said refund claims were were disallowed on September 10, 1980.

¹ This amount also includes a penalty pursuant to section 685(c) of the Tax Law for failure to file a declaration of estimated tax. No issue was raised about this penalty.

² Both parties stipulated that a Notice and Demand was issued to Rose D'Ambrosio for late filing of the 1978 tax year return for both New York State and City.

³ This amount includes interest of \$2,511.57.

⁴ This amount includes interest of \$1,303.13.

4. Thereafter, in response to the disallowances, petitioners filed timely petitions for a review of the Audit Division's determination.

5. Petitioner Paul D'Ambrosio, hereinafter called "Paul", was a fifty percent partner in petitioner Five Brothers Carting Co., a New York partnership, having its principal place of business at 84 William Street, New York, New York. The remaining partner was Paul's mother, petitioner Rose D'Ambrosio, hereinafter called "Rose". The partnership was engaged in the business of collecting, hauling and disposing of garbage in the City of New York.

6. Paul was also a fifty percent shareholder of Pamavita, Inc., a New York corporation having its principal place of business at 84 William Street, New York, New York, hereinafter called "Pamavita". The remainder of Pamavita's stock was owned equally by Rose and Paul's sister, Vita D'Ambrosio, hereinafter called "Vita". Pamavita's principal asset was a certain parcel of real property, which it leased to the Partnership.

7. Five Brothers Carting Co., Inc., a New Jersey corporation having its principal place of business at 264 Broadway, Jersey City, New Jersey, hereinafter called the "Corporation", was organized for the purpose of engaging in the business of collecting, hauling and disposing of garbage in the State of New Jersey, and to obtain better access to New Jersey dumping sites for the Partnership. On May 1, 1975, Paul moved his entire operation from New York to New Jersey at the aforesaid address. Paul was a fifty percent shareholder in the Corporation and Rose and Vita owned the remaining percentage of the Corporation's stock.

8. Throughout the period in issue herein, by agreement with Rose and Vita, Paul managed the day to day operations of the Partnership and the Corporation.

During such period, Paul and Rose derived substantially all of their income from the Partnership.

9. Throughout their respective existences, and until early 1979, when Sally Barton, an accountant in Westfield, New Jersey, was retained, the Partnership, Pamavita, and the Corporation, hereinafter sometimes collectively called the "Companies", and Paul and Rose had retained the services of Paul's brother, Vincent T. D'Ambrosio, hereinafter called "Vincent", an attorney at law of the State of New York, for the purpose of handling all of their respective financial affairs. The petitioners considered Vincent a tax expert, as did Vincent himself. Vincent's duties included but were not limited to: maintaining payroll records; preparing payroll checks; paying creditors; paying Federal, State and City taxes; depositing income and posting same in the appropriate ledgers; preparing periodic financial statements; preparing and filing of all required Federal, State and local income and information tax returns for the Companies, including payroll returns and estimated tax returns; maintaining all of the Companies' ledgers, books and records; preparing analyses of all the financial transactions between the Companies; and, because of the direct affect of the Partnership's financial operations on the individual finances of the Partners, the preparation and filing of the Federal, State and City individual income tax returns of Paul and Rose.

10. Petitioners relied upon Vincent to prepare and file the income tax returns in issue; however, he completely neglected to do anything with respect to preparing and filing said returns.

11. Vincent testified that he was aware of all Federal and State laws pertaining to the filing requirements for individual, corporate and partnership income tax returns, since he held himself out as a tax expert and filed such

returns for his other clients. Vincent had expertise with respect to maintaining books and records for clients so he was qualified to perform the duties for which he was retained by petitioners.

12. During the years 1976 through 1978, Vincent had complete and full access to any books and records that he would have required or needed to prepare the income tax returns for said years, since he maintained all such books and records at his office. He had access to the books and records at all times.

13. For a period over ten (10) years, 1966 through 1976, Vincent performed all of the duties for which he had been retained by petitioners in a competent and timely manner.

14. During 1976, the Corporation's business began to expand rapidly, necessitating more and more intercompany financial transactions, such as payments between and among the Companies for rent; equipment leasing; shared maintenance; payroll and overhead costs; sales taxes; depreciation; repairs and purchases.

15. Vincent testified that at the same time that the volume of the inter-company financial transactions was increasing, his separate law practice was also expanding, requiring him to spend more time attending to the legal affairs of his other clients. As a result, Vincent began to neglect his duties with respect to petitioners.

16. During 1977 and 1978, instead of abating, the volume of inter-company transactions constantly increased, again preventing Vincent from completing any of the Companies' books and records. Without completing the Companies' respective books and records, Vincent was unable to complete or file any of the petitioners' Federal or State income tax returns.

17. Notwithstanding the fact that he had been unable to complete Pamavita's books and records for the fiscal year ended June 30, 1976, or the rest of the Companies' books and records for the calendar year 1977, and therefore did not prepare the income tax returns for said fiscal and calendar years, when questioned by Paul as to the status of the tax returns in early 1978, Vincent advised him that he was working on it. Vincent, however, never completed the Companies' books and records for 1977 or for any period thereafter.

18. When Paul again questioned Vincent in early 1979 as to the status of the income tax returns for the Companies, himself and Rose for the years 1977 and 1978, Vincent finally admitted to Paul, that he had not completed his analyses of the Companies' inter-company transactions for either 1977 or 1978; had not completed the books and records of the Companies for said years, and had not prepared and filed the income tax returns in issue.

19. Upon receiving this information, Paul immediately made inquiries within the industry to find and retain an accountant to take over the duties previously performed by Vincent for petitioners. As a result of his inquiries, Paul was referred to Sally Barton, who was immediately retained by the Companies. Ms. Barton, after a short delay caused by her scheduling conflicts, completed all of the Companies' books and records for all periods from and after 1976, and prepared and filed all of the required Federal, State and City income tax returns for all of the petitioners for each year with respect to which the Department now asserts late filing and late payment penalties. All taxes due were paid and the Audit Division stipulated that all accrued interest thereon had also been paid.

20. The Internal Revenue Service had assessed late filing and late payment penalties against petitioners Paul and Rose under Section 6651(a)(1) and (a)(2)

of the Internal Revenue Code of 1954 and then subsequently cancelled said penalties.

21. Along with their brief, petitioners filed proposed findings of fact, all of which have been incorporated herein except for the proposed ultimate finding of fact which was not supported by the evidence in this case.

CONCLUSIONS OF LAW

A. That section 685(a)(1) of the Tax Law provides for the addition to tax due of a penalty for failure to file a tax return unless "such failure is due to reasonable cause and not due to willful neglect." Section 685(a)(2) provides for a penalty for failure to pay tax on time unless reasonable cause is shown as in section 685(a)(1). Sections T46-185.0(a)(1) and (a)(2) of Chapter 46, Title T of the Administrative Code of the City of New York are identical to sections 685(a)(1) and (a)(2) of the Tax Law. Section U46-49.0 of Chapter 46, Title U of the Administrative Code of the City of New York incorporated sections 685(a)(1) and (a)(2) of the Tax Law into Title U.

B. That the aforementioned statutes are modeled after Sections 6651(a)(1) and (a)(2) of the Internal Revenue Code and, therefore, Federal law may be looked to for interpretation (see Yellin v. New York State Tax Commission, 81 A.D.2d 196).

C. That Treasury Regulation 301.6651-1(c)(1) provides that there is a reasonable cause for delay in filing a return when the taxpayer exercises ordinary business care and prudence and is nevertheless unable to file the return within the prescribed time.

D. That although a taxpayer, who, without knowledge that a return is required, relies upon a competent tax advisor, may have reasonable cause for failure to file a return, that is not the case "where a third person is relied

upon to prepare and timely file a tax return for a taxpayer who knows that a return must be filed." In the latter case, a taxpayer, knowing a return has to be filed but relying on an attorney to file the return, is not excused from timely filing (Duttenhofer v. Commissioner of Internal Revenue 49 T.C. 200, 206, aff'd. per curiam, 410 F.2d 302 [6th Cir.]).

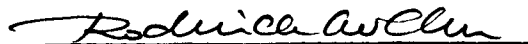
E. That "(a)ny layman with the barest modicum of business experience knows that there is a deadline for the filing of returns and knows that he must sign the return before it is filed." In the present case, failure of petitioners' attorney to present them with the returns for their signatures before the due date put them on notice that reliance on their attorney was not an exercise of ordinary business care and prudence (United States v. Kroll, 547 F.2d 393, 396 [7th Cir.]). Petitioners, therefore, did not demonstrate reasonable cause for failure to file and pay the taxes in issue herein.


F. That the petitions of Paul and Angela D'Ambrosio, Rose D'Ambrosio and Five Brothers Carting Co. are denied and the disallowance of refund issued September 10, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 14 1984


PRESIDENT


COMMISSIONER


COMMISSIONER