

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sheldon & Lillian Epstein : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1973 - 1975.

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 6th day of April, 1984, he served the within notice of Decision by certified mail upon Sheldon & Lillian Epstein, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sheldon & Lillian Epstein
665 Iroquis St.
Oradell, NJ 07649

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
6th day of April, 1984.

David Parchuck

James A. Hargrave
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sheldon & Lillian Epstein : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income :
Tax under Article 22 of the Tax Law for the Years :
1973 - 1975.

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 6th day of April, 1984, he served the within notice of Decision by certified mail upon Gary S. Stein, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

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.

Sworn to before me this
6th day of April, 1984.

David Parcluck

Conner A. Hopkins
Authorized to administer oaths
pursuant to Tax Law section 174

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

April 6, 1984

Sheldon & Lillian Epstein
665 Iroquis St.
Oradell, NJ 07649

Dear Mr. & Mrs. Epstein:

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
Gary S. Stein
Stein & Kurland
E. 106 Ridgewood Ave.
Paramus, NJ 07652
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SHELDON EPSTEIN and LILLIAN EPSTEIN	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1973, 1974 and	:	
1975.	:	

Petitioners, Sheldon Epstein and Lillian Epstein, 665 Iroquis Street, Oradell, New Jersey 07649, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973, 1974 and 1975 (File No. 29385).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 24, 1981 at 2:45 P.M. Petitioner Sheldon Epstein appeared with Gary S. Stein, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether petitioner was a nonresident partner in the New York stock brokerage partnership, Edwards & Hanly.

II. Whether the income derived by petitioner from said partnership during the years at issue constituted a distributive share of partnership income.

FINDINGS OF FACT

1. On July 8, 1977, Sheldon Epstein (hereinafter petitioner) and Lillian Epstein, filed, under protest, joint New York State income tax nonresident returns for the years 1973, 1974 and 1975 whereon each year petitioner reported

income derived from Edwards & Hanly, a New York stock brokerage partnership. Said returns were filed as the result of correspondence received from the Audit Division wherein such request was made.

2. On December 11, 1979, the Audit Division issued a Statement of Audit Changes to petitioners wherein adjustments were made to petitioner's reported income derived from said partnership. Accordingly, a Notice of Deficiency was issued against petitioners on March 13, 1980 asserting personal income tax of \$2,533.63 for the years 1973, 1974 and 1975, penalties of \$1,137.10 pursuant to sections 685(c), 685(a)(1) and 685(a)(2) of the Tax Law for underestimation of tax, failure to file returns for the years at issue and failure to pay the tax determined to be due, respectively, plus interest of \$1,087.43, for a total due of \$4,758.16.

3. Petitioner contended that he was not a partner in Edwards & Hanly. He claimed his income derived from said partnership was salary income rather than a distributive share and was paid solely for services rendered in managing the Paramus, New Jersey, office. As such, he argued that the income at issue was nontaxable for New York State purposes.

4. Petitioner became affiliated with Edwards & Hanly in September, 1972, when he was hired specifically to manage the partnership's Paramus, New Jersey, office on a full-time basis. Since the individual that the petitioner replaced held the title "resident partner", it was decided that petitioner should hold the same title. At that time, he was advised that he was being given approximately 3/10 of one percent interest in the partnership.

5. Petitioner's first year compensation was \$75,000.00, which was comprised of \$50,000.00 salary and \$25,000.00 bonus. Said compensation was determined in

discussions held prior to petitioner's commencement of work and was not contingent upon the profitability of either the partnership or the Paramus office.

6. After petitioner's first year with Edwards & Hanly, his method of compensation was changed. Pursuant to a new agreement, he was to receive salary of \$36,000.00 plus 100 percent of the first \$6,000.00 profit reported quarterly for the Paramus office, with an additional 7 percent of the Paramus quarterly profits in excess of \$6,000.00. Said compensation formula continued until petitioner ended his affiliation with the partnership in June, 1975. The partnership distribution schedule also showed petitioner as receiving a share of dividends and short term and long term gains and losses for the years in issue.

7. During petitioner's affiliation with Edwards & Hanly, he;

(a) made no capital investment in the partnership;

(b) was not compensated based on the profits or losses of the partnership overall or based on the losses of the Paramus office;

(c) did not participate in the partnership's management or policy discussions;

(d) was not invited to attend partners meetings;

(e) was not furnished with the tax returns of the partnership (although he did receive copies of Schedules K-1), and

(f) was not authorized to execute documents on the partnership's behalf.

8. Petitioner had no knowledge of how he was being treated on the books of the partnership.

9. Social Security taxes were withheld from petitioner's compensation.

10. Petitioner did not timely file New York State nonresident returns for the years at issue based on the advice of his accountant, who informed him that his income derived from Edwards & Hanly was not subject to New York State personal income tax.

CONCLUSIONS OF LAW

A. That although petitioner Sheldon Epstein asserted that he did not share in the profits or losses of Edwards & Hanly during the years in issue, he was paid a fixed monthly rate as shown on the partnership distribution schedules which listed him as a partner (see Matter of Axel Baum et al. v. State Tax Comm., 89 A.D.2d 646; Matter of Harold Blasky v. State Tax Comm., 69 A.D.2d 940). Petitioner's assertion that he was not a partner because he did not participate in the management of said firm is unpersuasive (see Matter of Weinflash v. Tully, 93 A.D.2d 373). Therefore, petitioner was a nonresident partner of Edwards & Hanly during the years 1973 through 1975 and, as such, was required to report his distributive share of all items of partnership income, gain, loss and deduction entering into his federal adjusted gross income to the extent such items are derived from or connected with New York State sources (section 637(a) of the Tax Law and 20 NYCRR 134.1).

B. That reliance on the advice of others does not in and of itself constitute reasonable cause for failure to file a tax return. However, considering the entire record in this matter, petitioners did act with reasonable cause rather than willful neglect. Accordingly, penalties asserted under sections 685(a)(1) and (a)(2) of the Tax Law are cancelled.

C. That the petition of Sheldon and Lillian Epstein is granted to the extent shown in Conclusion of Law "B", supra; and that, except as so granted, the Notice of Deficiency issued on March 13, 1980 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1984



PRESIDENT



COMMISSIONER



COMMISSIONER