

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Shelley Griffler	:	
for Redetermination of a Deficiency or Revision	:	AFFIDAVIT OF MAILING
of a Determination or Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1976.	:	

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 21st day of March, 1984, he served the within notice of Decision by certified mail upon Shelley Griffler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Shelley Griffler
812 Fanwood Ave.
N. Woodmere, NY 11598

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
21st 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 :
Shelley Griffler :
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 Year :
1976. :
_____ :

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 21st day of March, 1984, he served the within notice of Decision by certified mail upon Harvey L. Goldstein, 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 L. Goldstein
Finkel, Goldstein & Berzow
67 Wall St.
New York, NY 10005

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
21st day of March, 1984.

David Parchuck

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

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

March 21, 1984

Shelley Griffler
812 Fanwood Ave.
N. Woodmere, NY 11598

Dear Ms. Griffler:

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 L. Goldstein
Finkel, Goldstein & Berzow
67 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SHELLEY GRIFFLER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1976.	:	

Petitioner, Shelley Griffler, 812 Fanwood Avenue, North Woodmere, New York 11598, 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 1976 (File No. 37850).

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 June 20, 1983 at 1:15 P.M. Petitioner appeared with Harvey L. Goldstein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

I. Whether the deficiency was deemed assessed pursuant to section 681(e)(1) of the Tax Law, therefore rendering Shelley Griffler's petition untimely filed.

II. Whether a prior bankruptcy relieved petitioner of the deficiency asserted.

III. Whether a negligence penalty asserted subsequent to the issuance of the Notice of Deficiency was proper.

FINDINGS OF FACT

1. Shelley Griffler, (hereinafter petitioner) timely filed a New York State Income Tax Resident Return for the year 1976 whereon he reported a partnership loss of \$7,007.68 from S&S Distributing Company (S&S).

2. The Internal Revenue Service conducted an audit of the 1976 Partnership Return of S&S. As a result thereof, the following audit changes were made to the Partnership Return.

<u>Partnership Audit Changes</u>	<u>Adjustment</u>
Partnership loss	\$14,015.36
Long Term Capital Gain (derived from the sale of the business and business assets)	36,080.00
Total Adjustments	<u>\$50,095.36</u>

3. As the result of the partnership audit, a proportionate share of the aforestated adjustment flowed to petitioner, a partner in S&S, as follows:

<u>Federal Audit Changes</u>	<u>Adjustments</u>
Partnership Loss	\$ 7,007.68
Long Term Capital Gain (distributions from partnership in excess of basis)	9,020.00
Total Adjustments	<u>\$16,027.68</u>

On March 12, 1979 petitioner consented to the Federal assessment of 1976 personal income tax resulting from said audit changes.

4. Petitioner failed to report the Federal audit changes to New York State within the time prescribed under Section 659 of the Tax Law. Accordingly, the Audit Division issued a Statement of Audit Changes to petitioner on February 3, 1982 wherein the \$16,027.68 Federal adjustment was made for New York State purposes. Additionally, the resulting statutory adjustments were made with respect to the 20 percent capital gain modification, minimum income tax and the modification for allocable expenses. Based on said statement, a Notice of Deficiency was issued against petitioner on May 5, 1982 asserting additional

personal income tax of \$2,033.25, plus interest of \$948.01, for a total due of \$2,981.26. There is no indication in the record that a notice of additional tax due was issued by the Audit Division.

5. Petitioner did not contest the adjustments made as the result of the Federal audit. His position for contesting the deficiency at issue, pursuant to his petition¹ dated June 16, 1982, was that:

"I filed a personal petition in bankruptcy in the United States District Court, Eastern District of New York, and in said petition I set forth that any income tax that was due was predicated upon funds that were due from my partnership known as S&S Distributing Co. S&S Distributing Co. also filed a petition on the same date in the same court under #77 B 1656, and the New York State Tax Department filed a claim of \$2,376.49²; the aforesaid claim was paid in full. Since all of these taxes are due from S&S Distributing Co., the fact that the New York State Tax Department failed to file any additional claims or amended claims in the bankruptcy proceeding forever bars the New York State Tax Department from proceeding against me or my deceased partner."

6. Petitioner alleged that the deficiency at issue was asserted against S&S and that since S&S did not pay it, it was then shifted over to him individually. He argued that New York State's failure to file an amended claim in the S&S bankruptcy proceeding, based on the Federal audit changes, bars New York State from asserting a deficiency against him personally.

7. Petitioner contended that his petition in bankruptcy was filed sometime in 1977 and that the bankruptcy proceeding was closed in 1981. However, no documentation was submitted to support such contentions.

8. In its Answer of April 21, 1983, the Audit Division asserted for the first time, a negligence penalty under Section 685(b) of the Tax Law. Such

¹ The original petition of Shelley Griffler was inadvertently filed on a perfected petition form.

² The record contains no information as to whether the unincorporated business taxes of S&S Distributing Co. have been paid.

penalty was asserted due to petitioner's failure to comply with the reporting requirements of section 659.

9. The Audit Division alleged that Mr. Griffler's petition was untimely filed since he failed to comply with the requirements of section 681(e)(1) of the Tax Law.

CONCLUSIONS OF LAW

A. That section 659 of the Tax Law provides that if the amount of a taxpayer's federal taxable income reported on his federal income tax return for any taxable year is changed or corrected by the United States Internal Revenue Service or other competent authority, the taxpayer shall report such change or correction within ninety days after the final determination of such change or correction.

B. That section 681(e)(1) of the Tax Law provides in pertinent part that:

(1)"If the taxpayer fails to comply with section six hundred fifty-nine in not reporting a change or correction increasing his federal taxable income.... as reported on his federal income tax return..., instead of the mode and time of assessment provided for in subsection(b) of this section, the tax commission may assess a deficiency based upon such federal change...by mailing to the taxpayer a notice of additional tax due specifying the amount of the deficiency, and such deficiency, together with the interest, additions to tax and penalties stated in such notice, shall be deemed assessed on the date such notice is mailed unless within thirty days after the mailing of such notice a report of the federal change...is filed accompanied by a statement showing wherein such federal determination and such notice of additional tax due are erroneous.

(2) Such notice shall not be considered a notice of deficiency for the purposes of this section...or subsection(b) of section six hundred eighty-nine (authorizing the filing of a petition with the tax commission, based on a notice of deficiency)...." (emphasis added).

C. That since there is no indication in the record herein that the Audit Division had mailed a "notice of additional tax due" to petitioner, the provisions of sections 681(e)(1) and 681(e)(2) are inapplicable. Accordingly, the mode

and time of assessment provided for in section 681(b) are applicable herein and the petition therefore was timely filed pursuant to section 689(b) of the Tax Law.

D. That the deficiency asserted against petitioner is a personal income tax liability which is separate and distinct from any assessment against S&S.

E. That the deficiency at issue herein was not dischargeable in bankruptcy since it was for a tax which became legally due and owing by petitioner subsequent to the date upon which he may have been adjudicated a bankrupt. Furthermore, petitioner has failed to sustain his burden of proof, required pursuant to section 689(e) of the Tax Law, to show the actual date he allegedly was adjudicated a bankrupt.

F. That section 689(d)(1) of the Tax Law provides that:

"If a taxpayer filed with the tax commission a petition for redetermination of a deficiency, the tax commission shall have power to determine a greater deficiency than asserted in the notice of deficiency and to determine if there should be assessed any addition to tax or penalty provided in section six hundred eighty-five, if claim therefore is asserted at or before the hearing under rules of the tax commission."

G. That section 689(e) of the Tax Law provides in pertinent part that:

"In any case before the tax commission under this article, the burden of proof shall be upon the petitioner except for the following issues, as to which the burden of proof shall be upon the tax commission:

(3) Whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a notice of deficiency was mailed and a petition under this section filed,...."

H. That the Audit Division has not sustained its burden of proof imposed under section 689(e)(3) of the Tax Law to show that petitioner's failure to report changes in federal taxable income was due to negligence or intentional disregard of Article 22 or rules or regulations hereunder. Therefore, the

Audit Division's claim for a greater deficiency, based on the assertion of a negligence penalty under section 685(b) of the Tax Law, is denied.

I. That the petition of Shelley Griffler is denied and the Notice of Deficiency dated May 5, 1982 is sustained together with such additional interest as may be lawfully owing.

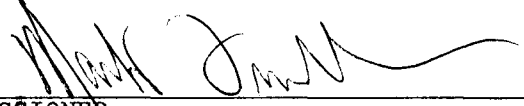
DATED: Albany, New York

STATE TAX COMMISSION

MAR 21 1984


PRESIDENT


COMMISSIONER


COMMISSIONER