

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Harvey M. & Ruth A. Spear :  
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 :  
1974. :  
\_\_\_\_\_ :

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 20th day of January, 1984, he served the within notice of Decision by certified mail upon Harvey M. & Ruth A. Spear, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Harvey M. & Ruth A. Spear  
One Wall St. - Rm. 2125  
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 petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
20th day of January, 1984.

  
pursuant to Tax Law section 174

  
Authorized to administer oaths

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

January 20, 1984

Harvey M. & Ruth A. Spear  
One Wall St. - Rm. 2125  
New York, NY 10005

Dear Mr. & Mrs. Spear:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
HARVEY M. SPEAR and RUTH A. SPEAR	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

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Petitioners, Harvey M. Spear and Ruth A. Spear, One Wall Street, Room 2125, New York, New York 10005, 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 1974 (File No. 32840).

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 May 10, 1983 at 1:15 P.M., with all briefs to be submitted by May 17, 1983. Petitioner Harvey M. Spear appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUES

- I. Whether petitioners' 1974 return was timely filed.
- II. Whether the Audit Division properly asserted penalties under Tax Law sections 685(a)(1), 685(a)(2) and 685(a)(3).

FINDINGS OF FACT

1. Petitioner Harvey M. Spear filed two successive applications for extension of time to file his 1974 New York State income tax return. Such applications were granted and ultimately extended his time to file until August 15, 1975.

2. Based on the granting of said applications, petitioners, Harvey M. Spear and Ruth A. Spear filed a joint 1974 New York State Income Tax Resident Return. Such return, which was dated by petitioners August 15, 1975, was not received by the Department of Taxation and Finance until August 18, 1975. The envelope in which the return was mailed bore a postage meter stamped date of August 15, 1975 in addition to a United States post office cancellation date of August 16, 1975.

3. On October 31, 1975 the Audit Division issued a Notice and Demand to petitioners whereon additional tax of \$2,705.13 was assessed based on a computational error made on petitioners' return. Additionally, interest and penalties were assessed. The penalties, totaling \$146.87, were assessed pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law for failure to timely file the return and failure to pay the tax determined to be due respectively.

4. Since petitioners failed to pay the assessment pursuant to the Notice and Demand, the Department issued a warrant on January 12, 1979 for the additional tax due of \$2,705.13 plus penalty and interest of \$1,580.08, for a total due of \$4,285.21. Included in the penalty and interest figure of \$1,580.08 was an additional penalty of \$405.60 asserted under section 685(a)(3) of the Tax Law for failure to pay the tax required to be shown on the return. Such penalty was asserted since petitioners did not pay the Notice and Demand within the ten day period prescribed.

5. On May 8, 1979, petitioners paid the total tax, penalty and interest due of \$4,285.21 pursuant to the aforestated warrant.

6. On August 29, 1979 petitioners filed a claim for refund of penalties and interest of \$1,715.85. Such amount, pursuant to said claim, consisted of the \$1,580.08 as stated on the warrant, plus an amount of \$135.77. The record

herein is void of information concerning the \$135.77 claim. Further, the Audit Division has no record of such payment being made by petitioners.

7. On March 6, 1980 the Audit Division issued a Notice of Disallowance to petitioners wherein they were advised that their claim had been disallowed in full. The reason stated for disallowing said claim was that "the U.S. Post Office postmark is the controlling date and you did not file your return within the prescribed time period granted by the extension." On June 30, 1980 a Formal Notice of Disallowance was mailed to the petitioners pursuant to section 689(c) of the Tax Law.

8. Petitioners conceded the interest issue, however; they contended that the penalties were improperly assessed.

9. Petitioner Harvey M. Spear alleged that on August 15, 1975 he machine-dated the envelope containing his return at his New York office, had his wife sign the return that evening, and then deposited it in the mailbox at the East Hampton Post Office that same evening. He claimed that since the envelope containing the return was deposited in the mail within the prescribed period his return was timely filed.

10. Petitioners alleged that the penalty imposed under Tax Law section 685(a)(3) was improper. They claimed that prior to the issuance of the Notice and Demand, they were issued a Notice of Deficiency for the additional tax resulting from the computational error together with the penalties asserted for late filing. They further claimed that they then filed a protest with respect to said penalties asserted. Accordingly, they contended that they did not pay the Notice and Demand since the matter was under protest.

11. The record herein shows no indication of either a Notice of Deficiency being issued, or a protest filed, prior to petitioners' receipt of the Notice

and Demand. Although petitioner Harvey M. Spear was given time to submit a copy of the alleged Notice of Deficiency, he failed to do so.

CONCLUSIONS OF LAW

A. That if any return required to be filed on or before a prescribed date is, after such date, delivered by the United States mail to the office with which such return is required to be filed, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subsection shall apply only if the postmark date falls within the prescribed period for the filing of such document including any extensions granted for such filing (section 691(a) of the Tax Law).

B. That since the return was delivered after the extended due date and the postmark date did not fall within the extended period for filing the return, the 1974 return of petitioners Harvey M. Spear and Ruth A. Spear was not timely filed within the meaning and intent of section 691(a) of the Tax Law. Accordingly, the penalties asserted under Tax Law sections 685(a)(1) and 685(a)(2) were properly imposed.

C. That petitioners have failed to sustain their burden of proof, required pursuant to section 689(e) of the Tax Law, to show that the penalty imposed under section 685(a)(3) of the Tax Law was improper or erroneous. Accordingly, said penalty is hereby sustained.


D. That the petition of Harvey M. Spear and Ruth A. Spear is denied and the Formal Notice of Disallowance dated June 30, 1980 is hereby sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 20 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER