

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Oscar & Miriam Wagner : 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 :  
1975.

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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 Oscar & Miriam Wagner, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Oscar & Miriam Wagner  
122-11 82nd Rd.  
Kew Gardens, NY 11415

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.

David Parchuck

James A. [Signature]

Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 20, 1984

Oscar & Miriam Wagner  
122-11 82nd Rd.  
Kew Gardens, NY 11415

Dear Mr. & Mrs. Wagner:

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	:	
OSCAR AND MIRIAM WAGNER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975.	:	

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Petitioner, Oscar and Miriam Wagner, 122-11 82nd Road, Kew Gardens, New York 11415, 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 1975 (File No. 29565).

On May 2, 1983, petitioners advised the State Tax Commission, in writing, that they desired to waive a formal hearing and to submit the case to the State Tax Commission upon the entire record contained in the file with submission of additional evidence and documents by August 1, 1983 which date was later extended to August 29, 1983. After due consideration of said record, the Commission renders the following decision.

ISSUES

I. Whether the Notice of Deficiency was issued after the expiration of the statute of limitations.

II. Whether petitioners were entitled to and substantiated a loss on options.

III. Whether petitioners had reasonable cause for waiver of the penalty imposed pursuant to section 685(a)(1) of the Tax Law.

FINDINGS OF FACT

1. Petitioners, Oscar and Miriam Wagner, filed a joint 1975 New York State Income Tax Resident Return on February 21, 1977. The Internal Revenue Service had granted petitioners an extension to October 15, 1976 to file their Federal income tax return. On their New York State income tax return petitioners claimed a \$24,478.00 loss on options.

2. On October 4, 1979 the Audit Division sent a letter to petitioners which stated in part:

"It is noted in Schedule A, Page 2 you claim a loss on options for \$24,478.00. Please explain, in detail, the type of option and how you are treating it. Also, was this same deduction claimed on the Federal Return. Submit a copy of your final Federal Tax Return including all supporting scheduls (sic) and correspondence pertaining to this deduction."

3. Since petitioners failed to reply to the October 4, 1979 letter, the Audit Division issued a Statement of Audit Changes to petitioners disallowing the loss on options. A penalty pursuant to section 685(a)(1) of the Tax Law in the amount of \$2,815.94 was also imposed. On January 4, 1980 the Audit Division issued a Notice of Deficiency to petitioners imposing additional tax due of \$3,500.77, plus penalty and interest of \$4,237.48 for a balance due of \$7,738.25.

4. Petitioners maintained that they incurred option losses in the sum of \$24,478.00 during 1975. However, petitioners failed to submit any information to substantiate the loss on options. They also argued that the Notice of Deficiency was issued after the expiration of the statute of limitations for 1975 income tax returns.

5. Petitioners did not file their 1975 New York return until February 21, 1977 because of severe medical problems suffered by Mr. Wagner in 1976 and 1977. These problems confined him to a hospital and his home from September 14, 1976 to at least February of 1977.

CONCLUSIONS OF LAW

A. That pursuant to section 683(a) of the Tax Law, any tax under this article is to be assessed within three years after the return was filed whether or not such return was filed on or after the date prescribed.

B. That petitioners filed their return on February 21, 1977. The Notice of Deficiency was dated January 4, 1980. Since three years had not elapsed from the date the return was filed, the Notice of Deficiency was issued within the three year period prescribed by section 683(a) of the Tax Law.

C. That section 689(e) of the Tax Law imposes the burden of proof upon the petitioner except in three instances which are not applicable in this case. Petitioners have failed to submit any information in reference to the option loss. Therefore, they have failed to sustain their burden of proof to show that they are entitled to a loss on options.

D. That in case of failure to file a tax return under this article on or before the prescribed date (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. (Section 685(a)(1) of the Tax Law)

E. That petitioners have sustained their burden of proof to show that they had reasonable cause for failure to file their tax return by the extended due date. Therefore, the Audit Division is directed to cancel the penalty imposed pursuant to section 685(a)(1) of the Tax Law.

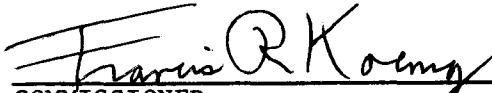
F. That the petition of Oscar and Miriam Wagner is granted to the extent indicated in Conclusion of Law "E", supra and in all other respects denied and the Notice of Deficiency dated January 4, 1980, as modified by the Audit Division, is sustained.

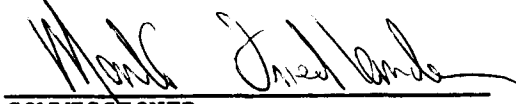
DATED: Albany, New York

JAN 20 1984

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER