

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Vincent D. & Rose Cardone :

: 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 1979. :

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 23rd day of May, 1985, he served the within notice of decision by certified mail upon Vincent D. & Rose Cardone, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Vincent D. & Rose Cardone
108 W. Center Street
Medina, New York 14103

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
23rd day of May, 1985.

David Parchuck

James P. Hagedorn

Authorized to administer oaths
pursuant to Tax Law section 174

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

May 23, 1985

Vincent D. & Rose Cardone
108 W. Center Street
Medina, New York 14103

Dear Mr. & Mrs. Cardone:

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

In the Matter of the Petition	:	
	:	
of	:	
	:	
VINCENT D. CARDONE AND ROSE CARDONE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1979.	:	

Petitioners, Vincent D. Cardone and Rose Cardone, 108 W. Center Street, Medina, New York 14103, 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 1979 (File No. 45798).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York on December 4, 1984 at 2:45 P.M., with all briefs to be submitted by March 1, 1985. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether penalties asserted against petitioners for late filing of their 1979 tax return and late payment and underestimation of tax due for such year should be sustained.

FINDINGS OF FACT

1. In 1973, petitioners entered into an arrangement with Marine Midland Bank ("Marine") under which several then-existing individual mortgages held by Marine on various parcels of property owned by petitioners were consolidated into one blanket mortgage held by Marine. The total indebtedness secured under this consolidated mortgage was \$415,000.00, based on a five year term note.

Amortization of this amount was, however, based on a fifteen year repayment schedule. The pre-existing individual mortgages, each of which had carried an interest rate of six percent, were thus supplanted by the consolidated mortgage which carried a fluctuating interest rate of two and one-half percent over prime.

2. While petitioners had anticipated an interest rate of approximately eight to eight and one-half percent, the rate steadily increased over the years up to and including 1978, such that the interest rate on the consolidated mortgage ultimately reached approximately sixteen and one-half percent. Petitioners struggled to service this debt over these years.

3. In late 1977, when the term of the five year note was nearing completion, Marine advised petitioners that the note would not be renewed and that its payment in full would be required.

4. Petitioners, notwithstanding substantial non-liquid assets (primarily real estate holdings), were unable to obtain the cash needed to pay off the note, and Marine commenced a foreclosure action against petitioners in 1978.

5. Among the various properties owned by petitioners was a commercial property leased to Liberty National Bank ("Liberty"). Liberty also held a second mortgage of approximately \$90,000.00 on this property. Approximately one year after commencement of the Marine foreclosure action, and allegedly as a result thereof, petitioners found themselves in default on the noted second mortgage held by Liberty.

6. As part of the Marine foreclosure action, an agreement was made whereby, in 1979, petitioners conveyed title to the commercial property to Liberty for \$315,000.00. At the time of conveyance petitioners' debt, including the Marine mortgage, the Liberty (second) mortgage and costs attributable to

having had the various properties seized and placed in receivership, amounted to approximately \$440,000.00. Petitioners borrowed money from Lockport Savings Bank and from petitioner Vincent Cardone's sister-in-law which, together with monies earned from Mr. Cardone's law practice, were applied toward satisfaction of this debt. The \$315,000.00 from the sale of the commercial property to Liberty was paid directly to Marine to satisfy the remaining amount due on the consolidated mortgage. Although petitioners still owned properties (presumably including those previously secured by the Marine consolidated mortgage), they were left with no cash from the above-noted transactions.

7. Petitioners admitted knowing that as a result of the sale of the commercial property there would be a capital gain. However, petitioners assert they did not know the magnitude of the gain and did not have the cash to hire an accountant or attorney to prepare tax returns for 1979.

8. On or about September 25, 1981, petitioners filed a joint New York State Income Tax Return (Form IT-201) for 1979, reflecting a balance due of \$22,325.00. Petitioners remitted \$100.00 with the filing of this return.

9. On June 9, 1983, the Audit Division issued to petitioners a Notice and Demand for Payment of Income Tax Due for 1979 in the amount of \$22,225.00, plus interest and penalties under Tax Law sections 685(a)(1) [late filing of a return] and (2) [late payment of tax due], and 685(c) [failure to file declaration and underpayment of estimated tax].

10. Petitioners concede their liability for the additional tax as asserted, plus accrued interest, and contest only the imposition of the noted penalties, maintaining that such penalties should be abated upon the grounds of reasonable cause. More specifically, petitioners assert that the sale of the commercial property giving rise to the large capital gain was their only option to avoid

foreclosure, that they were hampered by a lack of available cash due to then-existing general economic conditions, and that they did not fully understand the concept of "prime" rate and thus failed to realize the potential for substantial interest rate increases. Petitioners also note that their property was in receivership with the receiver in possession of the books and records, and that at the time the 1979 return was due petitioners had no cash to hire an accountant to prepare their return and could not do so themselves. Petitioners sold their house to pay their Federal tax liability for 1979.

11. Petitioners do not allege nor is there any evidence that they sought any extensions of time for the filing of their 1979 tax return.

12. Depreciation schedules attached to petitioners' tax return for 1979 reflect the acquisition of ownership interests in at least three properties by petitioners during the latter part of 1979.¹

CONCLUSIONS OF LAW

A. That Tax Law sections 685(a)(1) and (2) impose additions to tax, respectively, for failure to timely file a return and for failure to timely remit the tax shown as due thereon, unless such failures are shown to have been due to reasonable cause and not due to willful neglect.

B. That notwithstanding the economic conditions prevalent over the years or the attendant difficulties facing petitioners relative to their real estate

1 The specific properties as listed on the depreciation schedule are the following:

<u>Property</u>	<u>Date Acquired</u>	<u>Cost (basis)</u>
Bldg. 539-45, 547-549 Main	10/79	\$30,345
House - 115 Pearl St.	12/79	\$43,539
Bldg. - E. Carthage, NY	10/79	\$20,000

investments, as described, there has not been a sufficient basis established upon which abatement or reduction of penalties asserted pursuant to Tax Law Sections 685(a)(1) and (2) is warranted. There is no showing that petitioners sought any extensions of the time within which to file their return. Petitioners stated that selling the commercial property was the only option open to them in order to save their other properties from foreclosure, but also stated that in making such choice they were aware that there would be a capital gain. Finally, although it is asserted that there was no money to hire an attorney or accountant to prepare petitioners tax returns for 1979, there is evidence reflecting the acquisition of properties by petitioners in late 1979 (see Finding of Fact "12", footnote "1"). The source or method of financing such acquisitions, during a time of alleged severe financial difficulty, was not explained. Petitioners chose not to file their return in any form when due, and have not shown the existence of facts warranting cancellation of the section 685(a)(1) and (2) penalties. (See Lois L. Stalker v. Commissioner, 42 TCM 1190).

C. That section 685(c) of the Tax Law imposes an addition to tax for underpayment of estimated tax if any taxpayer fails to file a declaration of estimated tax or fails to pay all or any part of an installment of estimated tax. Section 685(d) provides for certain exceptions to the 685(c) penalty which are not applicable herein. The aforesaid statutes make no provision for waiver of the addition to tax for reasonable cause. Therefore, even if petitioners had satisfactorily demonstrated reasonable cause, no waiver authority exists to which petitioners would be entitled (see Matter of Susan Cohen, State Tax Commission, February 11, 1983).

D. That the petition of Vincent D. Cardone and Rose Cardone is denied and the Notice and Demand dated June 9, 1983 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985


PRESIDENT


COMMISSIONER


COMMISSIONER