

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Kenneth W. & Martha S. Greenawalt : 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. :

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 Kenneth W. & Martha S. Greenawalt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth W. & Martha S. Greenawalt
65 Highridge Rd.
Hartsdale, NY 10530

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

Annmarie D. Hegelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

May 23, 1985

Kenneth W. & Martha S. Greenawalt
65 Highridge Rd.
Hartsdale, NY 10530

Dear Mr. & Mrs. Greenawalt:

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	:	
	:	
KENNETH W. GREENAWALT AND MARTHA S. GREENAWALT	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law for the Year	:	
1975.	:	

Petitioners, Kenneth W. Greenawalt and Martha S. Greenawalt, 65 Highridge Road, Hartsdale, New York 10530, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1975 (File No. 32528).

A formal hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 26, 1984 at 1:15 P.M. Petitioner Kenneth W. Greenawalt appeared pro se and for his spouse. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed petitioners' claimed credit of \$2,300.00 for payments made to an estimated tax account.

II. Whether petitioners are required to include in total New York income Mr. Greenawalt's distributive share of the New York City unincorporated business tax deduction claimed on the partnership return of Davies, Hardy, Ives & Lawther.

III. Whether the Audit Division properly disallowed petitioners' claimed investment credit of \$494.40.

IV. Whether the Audit Division properly imposed a penalty pursuant to section 685(c) of the Tax Law for failure to file and pay estimated tax.

V. Whether the Audit Division properly imposed a penalty pursuant to section 685(a)(1) of the Tax Law for failure to file a return on or before the prescribed due date.

VI. Whether the Audit Division is prohibited from asserting additional penalty and interest on the tax due proposed in a Notice of Deficiency where penalty and interest had been previously assessed against petitioners in a notice dated February 15, 1979 and, if not so prohibited, was there a duplication of penalty and interest charges.

VII. Whether the Notice of Deficiency should be cancelled due to the lapse of a four-year period from the date petitioners filed a petition to the date of the hearing held herein.

FINDINGS OF FACT

1. Petitioners herein, Kenneth W. Greenawalt and Martha S. Greenawalt, filed a New York State Income Tax Resident Return for 1975 on January 27, 1978. On said return, petitioners reported no modifications to Federal adjusted gross income [Tax Law §§612(b) and (c)] and, therefore, total New York income and Federal adjusted gross income were identical (\$57,712.15). Petitioners' return showed a balance due New York of \$2,176.52, said amount having been computed in the following manner:

Tax plus 2½% surcharge	\$4,970.92
Less: investment credit	(494.40)
Balance	<u>\$4,476.52</u>
Less: payments on N.Y.S. estimated tax	(2,300.00)
Balance due	<u><u>\$2,176.52</u></u>

The balance due of \$2,176.52 was paid by petitioners with the filing of their return on January 27, 1978.

2. On February 15, 1979, the Audit Division issued a notice to petitioners assessing total penalty and interest of \$1,078.95. Interest was assessed on the balance due shown on petitioners' return, i.e. \$2,176.52, from the date the return was due (4/15/76) to the date the tax was paid (1/27/78). Penalties were assessed on the \$2,176.52 balance due pursuant to section 685(a)(1) of the Tax Law (for failure to timely file the return) and section 685(a)(2) of the Tax Law (for failure to timely pay the tax due shown on the return). Petitioners paid the \$1,078.95 assessed in the notice dated February 15, 1979.

3. The Audit Division, on July 22, 1980, issued a Notice of Deficiency to petitioners for 1975 proposing additional tax due of \$3,040.03, plus penalty and interest of \$2,060.62, for a total allegedly due of \$5,100.65. Said Notice of Deficiency was based on a Statement of Audit Changes dated December 4, 1979, wherein petitioners were provided with the following explanation and computation:

"Unincorporated Business Taxes imposed by New York City are not deductible in determining personal income tax. On your personal income tax return you failed to increase your Federal income by the amount of \$1,597.58 which represents your share of the New York City Unincorporated Business Tax deduction taken on the partnership return of Davies, Hardy, Ives & Lawther.

The business activities of the above cited partnership does (sic) not qualify for the New York State investment credit since services rendered do not constitute the production of (sic) manufacturing of goods. Accordingly, the investment credit claimed in the amount of \$494.40 at Line 15, Page 1 is disallowed.

Our Estimated Tax Account Records fail to indicate an account under your name and Social Security Number for the tax year 1975. Accordingly, the amount claimed as estimated tax payments on your 1975 return is not allowed.

Penalty is imposed under Section 685(c) for underestimation of personal income tax.

Section 685(a)(1) penalty is imposed on total additional tax due as return was late filed.

COMPUTATION:

Tax on \$1,597.58 @ 15%	\$ 239.64	
Add: Tax Surcharge @ 2.5%	5.99	
Balance	<u>\$ 245.63</u>	
Investment Credit Disallowed	494.40	
Estimated Tax Payments Disallowed	<u>2,300.00</u>	
TOTAL ADDITIONAL TAX DUE		\$3,040.03
Section 685(c) Penalty		202.97
Section 685(a)(1) Addition To Tax		760.00" ¹

4. Petitioners were unable to produce any cancelled checks to substantiate the payment of \$2,300.00 into a 1975 estimated tax account. It is petitioners' position that some of their records for 1975 have been lost or misplaced and, even though they cannot produce any cancelled checks, that the \$2,300.00 credit should be allowed. Petitioners allege that they have in past years always paid into an estimated tax account and that they know of no reason why they would not have paid estimated tax for 1975.

5. During the tax year in question, petitioner Kenneth W. Greenawalt was a partner in the law firm of Davies, Hardy, Ives & Lawther (hereinafter "the partnership"). Mr. Greenawalt's distributive share of partnership income for 1975 totalled \$52,194.62. In the computation of said petitioner's distributive share of income, the partnership deducted \$1,597.58, said amount representing his share of the New York City unincorporated business tax deduction taken on the partnership's 1975 partnership return. Petitioners did not include the \$1,597.58 in the computation of 1975 total New York income.

1 This amount was computed by multiplying the alleged additional tax due of \$3,040.03 by 25 percent, the maximum rate allowed by Tax Law §685(a)(1).

6. Attached to petitioners' 1975 New York return was Federal Form 3468, Computation of Investment Credit. Said Form 3468 indicated that Mr. Greenawalt's share of property which was acquired by the partnership in 1975 and which qualified for Federal investment credit totalled \$7,062.81. His Federal investment credit equalled \$494.40 ($\$7,062.81 \times 7\%$) and the same amount (\$494.40) was also claimed by him as an investment credit on the New York return. No evidence was adduced at the hearing to show that the property in question was principally used in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing.

7. Petitioners presented no evidence to show that they met any of the statutory conditions set forth in section 685(d) of the Tax Law which would prevent the imposition of the Tax Law section 685(c) penalty for failure to file and pay an estimated tax.

8. In late March or early April of 1976, Mr. Greenawalt required emergency surgery which initially prevented him from filing petitioners' 1975 New York State income tax return on or before April 15, 1976. Petitioners filed an application for an automatic two-month extension of time until June 15, 1976 to file their 1975 return. Mr. Greenawalt returned to normal activities after the aforementioned emergency surgery, in early June of 1976. Upon his return to the partnership, Mr. Greenawalt found numerous internal problems which required much of his time. Petitioners' 1975 Federal income tax return was filed in November, 1977; however, their 1975 New York State return was not filed until January 27, 1978, approximately one and one-half months after the Audit Division advised petitioners in writing that it had no record of a 1975 return being filed.

9. Petitioners maintain that the penalty assessed pursuant to Tax Law section 685(a)(1) should be cancelled since reasonable cause existed for failure to timely file the 1975 return. Petitioners assert that they have established that reasonable cause existed by: (a) the aforementioned emergency surgery; (b) the internal problems of the partnership which required an inordinate amount of Mr. Greenawalt's time; and (c) the fact that the accountant who normally prepared their returns had retired.

10. Petitioners also argued that the Audit Division is precluded from assessing penalty and interest in the Notice of Deficiency dated July 22, 1980, since penalty and interest were previously assessed in the notice dated February 15, 1979. In the alternative, petitioners asserted that penalty and interest charges were duplicated in the Notice of Deficiency and in the notice dated February 15, 1979.

11. The Notice of Deficiency was dated July 22, 1980, the petition for redetermination of said notice was dated October 14, 1980 and the formal hearing was held on November 26, 1984. Petitioners assert that a lapse of over four years to provide a hearing is excessive and should therefore cause the Notice of Deficiency to be cancelled.

CONCLUSIONS OF LAW

A. That petitioners have failed to sustain their burden of proof [Tax Law §689(e)] to show that they paid \$2,300.00 into a 1975 estimated tax account. Accordingly, the Audit Division has properly disallowed petitioners' claimed credit of \$2,300.00 for estimated tax payments.

B. That section 612(b)(3) of the Tax Law provides that a taxpayer, in computing total New York income, must increase Federal adjusted gross income by:

"Income taxes imposed by this state or any other jurisdiction, to the extent deductible in determining federal adjusted gross income...."

Petitioners are required to include in 1975 total New York income Mr. Greenawalt's distributive share of the New York City unincorporated business tax deduction claimed by the partnership on its partnership return (Tax Law §§612(b)(3) and 617(a); 20 NYCRR 116.2(c); 20 NYCRR 119.3; Bower v. State Tax Commission, 86 A.D.2d 932).

C. That section 606(a)(2) of the Tax Law provides that in order to be eligible for the New York investment credit, the property must, inter alia, be:

"...principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. For purposes of this paragraph, manufacturing shall mean the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment. Property used in the production of goods shall include machinery, equipment or other tangible property which is principally used in the repair and service of other machinery, equipment or other tangible property used principally in the production of goods and shall include all facilities used in the production operation, including storage of material to be used in production and of the products that are produced."

Petitioners have failed to sustain their burden of proof [Tax Law §689(e)] to show that the property in question qualified for New York State investment credit pursuant to section 606(a)(2) of the Tax Law. Moreover, the nature of services generally performed by a law partnership would seem to exclude any property acquired by such a partnership from qualifying for the more restrictive New York State investment credit. Accordingly, the Audit Division has properly disallowed petitioners' claimed New York State investment credit.

D. That petitioners failed to sustain their burden of proof to show that they met any of the statutory conditions set forth in section 685(d) of the Tax Law which would prevent the imposition of the Tax Law section 685(c) penalty for failure to file and/or pay estimated tax.

E. That the evidence presented by petitioners does not establish that reasonable cause existed for failure to timely file a 1975 New York State income tax return.

F. That there is no provision in the Tax Law which prohibits the Audit Division from assessing additional penalty and interest in a Notice of Deficiency where penalty and interest was assessed in a previous notice. Furthermore, there is no duplication of penalty and interest charges in the instant matter. In the notice dated February 15, 1979, the Audit Division assessed penalties and interest based on the \$2,176.52 of tax due shown on petitioners' return. In the Notice of Deficiency dated July 22, 1980, the Audit Division assessed penalty and interest based on the proposed additional tax due of \$3,040.03.

G. That the argument to dismiss on the ground of laches is denied. "Laches, waiver or estoppel may not be imputed to the State in the absence of statutory authority" and that "This rule is generally applied in connection with tax matters" (Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc. (Catherwood), 31 A.D.2d 981 and G. H. Walker & Co., et al. v. State Tax Commission, 62 A.D.2d 77).

Said argument is also denied for the further reason that the record does not establish that petitioners have been damaged or prejudiced by delay.

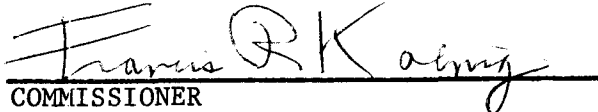
H. That the petition of Kenneth W. Greenawalt and Martha S. Greenawalt is denied and the Notice of Deficiency dated July 22, 1980 is sustained, together with such additional penalty and interest as may be lawfully due and owing.

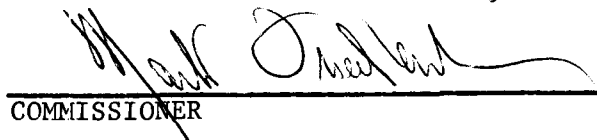
DATED: Albany, New York

STATE TAX COMMISSION

MAY 23 1985


PRESIDENT


COMMISSIONER


COMMISSIONER