

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Sylvan L. Greenberger : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of NYS Personal Income Tax under Article 22 of the
Tax Law and NYC Personal Income tax under Article :
30 of the Tax Law and Chapter 46, Title T of the
Administrative Code of The City of New York for the:
Years 1976 & 1977.

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Sylvan L. Greenberger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sylvan L. Greenberger
3355 14th St.
Long Island City, NY 11106

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
6th day of February, 1985.

David Parchuck

James R. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of

Sylvan L. Greenberger : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of NYS Personal Income Tax under Article 22 of the :
Tax Law and NYC Personal Income tax under Article :
30 of the Tax Law and Chapter 46, Title T of the :
Administrative Code of The City of New York for the:
Years 1976 & 1977.

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 6th day of February, 1985, he served the within notice of Decision by certified mail upon Douglas F. Eaton, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Douglas F. Eaton
598 Madison Ave.
New York, NY 10022

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
6th day of February, 1985.

David Parchuck

Conrad A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

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

February 6, 1985

Sylvan L. Greenberger
3355 14th St.
Long Island City, NY 11106

Dear Mr. Greenberger:

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 & 1312 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
Douglas F. Eaton
598 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SYLVAN L. GREENBERGER : DECISION
for Redetermination of a Deficiency or for :
Refund of New York State Personal Income Tax :
under Article 22 of the Tax Law and New York :
City Personal Income Tax under Article 30 of :
the Tax Law and Chapter 46, Title T of the :
Administrative Code of The City of New York :
for the Years 1976 and 1977. :

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 9, 1984 at 10:45 A.M. with final briefs to be submitted on June 25, 1984. Petitioner appeared by Douglas F. Eaton, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

III. Whether the Notice of Deficiency was barred by the three year Statute of Limitations.

FINDINGS OF FACT

1. Sylvan L. Greenberger (hereinafter "petitioner") and his wife, Ida Greenberger, filed a New York State Income Tax Resident Return (with New York City Personal Income Tax) for each of the years 1976 and 1977 under filing status married filing separately on one return. On such returns petitioner reported total income of \$34,441.00 (1976) and \$36,793.00 (1977).

2. On July 15, 1982, the Audit Division issued a Statement of Audit Changes to petitioner wherein, pursuant to a schedule attached thereto, adjustments were made for "additional income (per records in possession of Special Prosecutor)" of \$6,201.00 (1976) and \$6,173.00 (1977). Said adjustments were based on a May, 1979 Supreme Court indictment against petitioner on two (2) counts of "Attempt to Evade Tax". Count One of said indictment (Indictment Number 896-79) charged that petitioner "did, on or about June 27, 1977, with intent to evade tax liability, wilfully, knowingly and unlawfully, make, render and sign a false and fraudulent New York State Income Tax Resident Return for the calendar year 1976..." and that "said Income Tax Resident Return is false and fraudulent in that it states that the defendant (petitioner) had a total income of \$34,441 when in truth and in fact the defendant had a total income of at least \$40,642." Count Two, which made similar charges with respect to calendar year 1977, alleged that petitioner's total income for 1977 was "at least \$42,966" rather than \$36,793.00, as reported on his return. The aforestated adjustments for additional income represent the differences between the total income reported for each of said years and the minimum total income for each of said years as charged in the indictment.

3. On March 18, 1982, petitioner was found guilty, by jury verdict, of the two (2) counts of "Attempt to Evade Tax". On April 22, 1982, petitioner

was sentenced to a \$3,000.00 fine, which was paid to the Department of Taxation and Finance.

4. On October 7, 1982, the Audit Division issued a Notice of Deficiency against petitioner. Said notice, which was based on the aforestated Statement of Audit Changes, asserted additional New York State personal income tax of \$1,879.36, additional New York City personal income tax of \$532.07, fraud penalties of \$1,205.72, plus interest of \$1,161.26, for a total due of \$4,778.41. Said fraud penalties, which were asserted at a rate of 50 percent of the deficiency, were so asserted pursuant to section 685(e) of the Tax Law (for 1976 and 1977 New York State purposes), section 685(e) of Article 22 of the Tax Law, as incorporated into Article 30 by section 1312(a) (for 1976 New York City purposes) and section T46-185.0(e) of the Administrative Code of The City of New York (for 1977 New York City purposes).

5. During the years at issue petitioner was employed as the Assistant Administrator of Boulevard Hospital in Queens, New York. As such, he was responsible for the purchase of food and related supplies. The aforestated indictment and conviction resulted from unreported cash "kickbacks" petitioner received during the years at issue from certain suppliers.

6. Petitioner argued that since the jury in the criminal trial did not return a verdict which included a specific dollar amount of unreported additional income derived from the illegal "kickbacks", the burden in this proceeding is on the State to prove what amount, if any, was received by him during the years at issue.

7. Petitioner alleged that the Notice of Deficiency dated October 7, 1982 was time barred. He further alleged that the fraud penalties were improperly asserted.

CONCLUSIONS OF LAW

A. 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:

(1) Whether the petitioner has been guilty of fraud with intent to evade tax."

Section T46-189.0(e) of the Administrative Code of The City of New York contains a similar provision.

B. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law and section T46-189.0(e) of the Administrative Code of The City of New York, to show that the adjustments for additional income were erroneous or improper. Accordingly, said adjustments are hereby sustained.

C. That the criminal conviction of petitioner on the two counts of "Attempt to Evade Tax" serves to establish that "petitioner has been guilty of fraud with intent to evade tax". Accordingly, the fraud penalties asserted are hereby sustained.

D. That section 683(c)(1) of the Tax Law and section T46-183.0(c)(1) of the Administrative Code of The City of New York provide, in pertinent part, that:

"Assessment at any time. - The tax may be assessed at any time if -

* * *

(B) a false or fraudulent return is filed with intent to evade tax..."

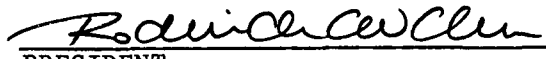
E. That the Notice of Deficiency dated October 7, 1982 was timely issued within the meaning and intent to section 683(c)(1)(B) of the Tax Law and section T46-183.0(c)(1)(B) of the Administrative Code of The City of New York.

F. That the petition of Sylvan L. Greenberger is denied and the Notice of Deficiency dated October 7, 1982 is sustained together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER