

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Donald E. Grilley :

AFFIDAVIT OF MAILING

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 Nonresident :  
Earnings Tax under Chapter 46, Title U of the  
Administrative Code of the City of New York for :  
the Years 1979 and 1980. :  
:

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 13th day of September, 1985, he served the within notice of Decision by certified mail upon Donald E. Grilley, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Donald E. Grilley  
138 Old Haverstraw Rd.  
Congers, NY 10920

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  
13th day of September, 1985.

David Parchuck

William A. DeGard

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of  
Donald E. Grilley :

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for Redetermination of a Deficiency or for Refund :  
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22 of the Tax Law and New York City Nonresident :  
Earnings Tax under Chapter 46, Title U of the  
Administrative Code of the City of New York for :  
the Years 1979 and 1980. :  
:

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 13th day of September, 1985, he served the within notice of Decision by certified mail upon Dennis J. Dempsey, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dennis J. Dempsey  
Krass, Keschner & Lund  
419 Park Ave. S.  
New York, NY 10157

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  
13th day of September, 1985.

David Parchuck

William A. Dugan  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

September 13, 1985

Donald E. Grilley  
138 Old Haverstraw Rd.  
Congers, NY 10920

Dear Mr. Grilley:

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 and Chapter 46, Title U of the Administrative Code of the City of New York, 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  
Dennis J. Dempsey  
Krass, Keschner & Lund  
419 Park Ave. S.  
New York, NY 10157  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
DONALD E. GRILLEY	:	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 Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the	:	
City of New York for the Years 1979 and 1980.	:	

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Petitioner, Donald E. Grilley, 138 Old Haverstraw Road, Congers, New York 10920, 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 and New York City Nonresident Earnings Tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1979 and 1980 (File No. 44697).

A 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 October 18, 1984 at 9:15 A.M., with all briefs to be submitted by April 22, 1985. Petitioner appeared by Krass, Keschner & Lund (Dennis J. Dempsey Esq. of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq. of counsel).

ISSUE

Whether the Audit Division properly disallowed, as unsubstantiated, certain expenses claimed on the 1979 and 1980 partnership returns filed by Lerner Heller Gallery, thereby increasing partnership net income and petitioner Donald E. Grilley's distributive share of said partnership net income.

FINDINGS OF FACT

1. Petitioner herein, Donald E. Grilley, filed New York State income tax resident returns for 1979 and 1980 reporting, inter alia, his distributive share of income or loss received from the partnership Lerner Heller Gallery (hereinafter "the Gallery"). For 1979, petitioner reported a distributive share of income from the Gallery of \$2,871.00 and, for 1980, petitioner claimed that his share of the Gallery's loss amounted to \$1,786.00.

2. The Audit Division examined the Gallery's books and records for the years at issue and, as a result of said examination, cash business expenses of \$44,212.00 for 1979 and \$57,195.00 for 1980 were disallowed as unsubstantiated.

3. During the years at issue petitioner was a limited partner of the Gallery, having an interest in partnership profits and/or losses of 34.94% in 1979 and 35.82% in 1980. Based on the disallowance of claimed cash business expenses (see Finding of Fact "2", supra), the Audit Division, on November 19, 1982, issued a Statement of Personal Income Tax Audit Changes to petitioner which contained the following explanation:

"Partners share of partnership adjustment of Lerner Heller Gallery

1979 - 34.94% of \$44,212.00 - \$15,447.67  
1980 - 35.82% of \$57,195.00 - \$20,487.25"

4. Based on the aforementioned Statement of Personal Income Tax Audit Changes, the Audit Division, on March 16, 1983, issued a Notice of Deficiency to petitioner, asserting additional tax due of \$5,224.77, plus penalty<sup>1</sup> of \$220.64 and interest of \$1,454.20, for a total allegedly due of \$6,899.61.

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1 Penalty was imposed under section 685(c) of the Tax Law for 1980 for failure to file and pay estimated tax. No argument was made or evidence presented with respect to this penalty.

5. In its examination of the Gallery's books and records, the Audit Division found numerous partnership checks which were made payable to cash by one Richard J. Lerner, a general partner of the Gallery. Mr. Lerner also endorsed these cash checks. Said cash checks, which totaled \$44,212.00 in 1979 and \$57,195.00 in 1980, were claimed by the Gallery as partnership expenses for advertising, travel and entertainment, exhibits or miscellaneous.

6. During the course of its examination, the Audit Division requested Mr. Lerner to provide documentation to support that the partnership checks written to cash were: (i) properly classified as partnership expenses and (ii) expenses which were properly deductible pursuant to the Tax Law. Mr. Lerner passed away before the requested documentation was submitted to the Audit Division. Neither the Gallery's accountant nor any of its other partners provided said requested documentation and, therefore, the claimed deductions were disallowed as unsubstantiated.

7. Petitioner was a passive investor in the Gallery, having no active role in its management or daily operations. Mr. Grilley visited the Gallery only once or twice a year. After receiving the Statement of Personal Income Tax Audit Changes dated November 19, 1982, petitioner, in an effort to locate the Gallery's books and records, contacted the partnership's two former accountants, one of the remaining general partners and Mr. Lerner's spouse. Each of the aforementioned parties informed petitioner that they had no idea as to the location of the Gallery's books and records. After Mr. Lerner's death, the Gallery was closed and all business activities ceased.

8. Petitioner maintains that the audit performed by the Audit Division was improper since no effort was made by the auditor to contact any of the Gallery's other partners after Mr. Lerner's death. Mr. Grilley also contends that the

auditor improperly relied on statements made by the Gallery's accountant after Mr. Lerner's death since there was no power of attorney authorizing the accountant to act on behalf of the Gallery. No evidence or documentation was submitted concerning the checks payable to "cash".

CONCLUSIONS OF LAW


A. That section 689(e) of the Tax Law and section U46-39.0(e) of the Administrative Code of the City of New York both place the burden of proof on petitioner except in three specifically enumerated instances, none of which is at issue herein. Petitioner has failed to sustain his burden of proof to show that the Audit Division improperly disallowed certain expenses claimed on the Gallery's partnership returns for 1979 and 1980 and that his distributive share of the Gallery's net income should not be increased as the result of said disallowance.

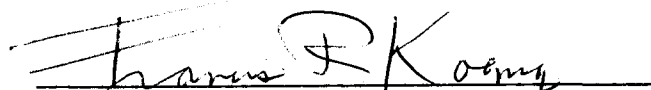
B. That the petition of Donald E. Grilley is denied and the Notice of Deficiency dated March 16, 1983 is sustained, together with such additional penalty and interest as may be lawfully due and owing.

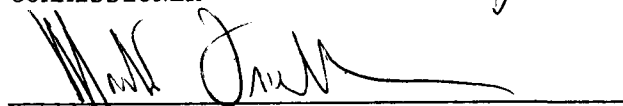
DATED: Albany, New York

STATE TAX COMMISSION

SEP 13 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER