

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Martin & Paula Hodas :
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 Years :
1968, 1969 & 1970. :
:

AFFIDAVIT OF MAILING

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 30th day of August, 1985, he served the within notice of Decision by certified mail upon Martin & Paula Hodas, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Martin & Paula Hodas
37 Harbor Lane
Lawrence Bay Park, NY 11559

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
30th day of August, 1985.

David Parchuck

James O'Donnell

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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of :
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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 30th day of August, 1985, he served the within notice of Decision by certified mail upon John R. Serpico, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Serpico
186 Joralemon St.
Brooklyn, NY 11201

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
30th day of August, 1985.

David Parchuck

James J. [Signature]
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 30, 1985

Martin & Paula Hodas
37 Harbor Lane
Lawrence Bay Park, NY 11559

Dear Mr. & Mrs. Hodas:

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: Petitioner's Representative
John R. Serpico
186 Joralemon St.
Brooklyn, NY 11201
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MARTIN AND PAULA HODAS	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1968, 1969 and	:	
1970.	:	

Petitioners, Martin and Paula Hodas, 37 Harbor Lane, Lawrence Bay Park, New York 11559, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1968, 1969 and 1970 (File No. 37011).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 1, 1984 at 9:15 A.M., with all briefs to be submitted by February 7, 1985. Petitioners appeared by John R. Serpico, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irving Atkins, Esq., of counsel).

ISSUES

I. Whether petitioners properly contested the use of a change in Federal taxable income at the time notices of deficiency were issued rather than at the time the change was reported.

II. Whether the Audit Division properly based a deficiency on a report of Federal income tax changes which resulted from information received by the Internal Revenue Service from books and records illegally seized by the New York City Police Department.

FINDINGS OF FACT

1. Petitioners, Martin and Paula Hodas, filed New York State income tax resident returns for the years 1968 through 1970.

2. On February 11, 1982, the Audit Division issued two notices of deficiency against petitioners. The first was in the amount of \$172.20, plus interest of \$138.94, for a total due of \$311.14 for the year 1968. The second notice was in the amount of \$15,672.72, plus fraud penalty of \$7,922.46 and interest of \$11,498.75, for a total due of \$35,093.93 for the years 1968, 1969 and 1970.

3. A Statement of Audit Changes issued December 9, 1980 explained that petitioner's income tax liability had been recomputed to conform with a final Federal audit of petitioner's Federal income tax returns by the Internal Revenue Service ("IRS"). The fraud penalty under section 685(e) of the Tax Law was imposed at the same rate used by the IRS. The statement also explained that the liability of petitioner Paula Hodas was limited to tax and interest due for the tax year 1968.

4. Petitioner Martin Hodas was the president of East Coast Cinematics, Inc. ("East Coast") located in New York City. On January 27, 1972, the offices of East Coast were searched by New York City police officers under a warrant to seize obscene material. During the search, the police seized all the business records of every kind, nature and description that were on the premises at the time. Petitioner Martin Hodas commenced an action in the United States District Court for the Southern District of New York to seek the return of the business records seized. The court ruled that the records had been illegally seized and ordered that all records be returned to petitioner Martin Hodas (Hodas v. Murphy, 72 Civ. 554, S.D.N.Y., February 15, 1972, Bauman, J.).

5. Before the records were returned to Mr. Hodas, they were made available to the IRS. The IRS made copies of all the records and the originals were returned to Mr. Hodas. Relying solely upon the illegally seized records, the IRS issued notices of deficiency for the years 1968 through 1970 and the Federal government indicted Mr. Hodas for tax evasion.

6. After the Federal courts ruled that the IRS could use the records illegally obtained by the police, petitioners agreed to the deficiencies in United States Tax Court. Petitioners stipulated to deficiencies based on an IRS determination that petitioners had additional dividend income and capital gains from East Coast.

7. As required by section 659 of the Tax Law, petitioners filed a Report of Federal Changes (Form IT-115) for the years 1968, 1969 and 1970 reporting the deficiencies agreed to with the IRS including the fraud penalty. Based solely on the information reported by petitioners, the Audit Division issued the Statement of Audit Changes and notices of deficiency discussed supra.

8. Petitioners did not state that the Federal determination was erroneous at the time of filing the IT-115. They did not file a protest until after the Audit Division issued the notices of deficiency. The Audit Division maintains that by not stating that the Federal determination was erroneous at the time of filing the IT-115, petitioners conceded the deficiency and could not protest it at a later date. Petitioners maintain that they did, in fact, concede the amount of the Federal deficiency but were contesting the Audit Division's use of information originally illegally obtained by the New York City Police Department.

CONCLUSIONS OF LAW

A. That section 659 of the Tax Law provides, in pertinent part, as follows:

"If the amount of a taxpayer's federal taxable income...reported on his federal income tax return for any taxable year is changed or corrected by the United States internal revenue service or other competent authority, ...the taxpayer...shall report such change or correction in federal taxable income...within ninety days after the final determination of such change...and shall concede the accuracy of such determination or state wherein it is erroneous."

B. That, inasmuch as petitioners admittedly conceded the accuracy of the Federal determination and there had not yet been a State notice issued, they were not bound to raise the issue of illegally obtained information at the time of the filing of the IT-115. The issue of the propriety of the Audit Division issuing a Notice of Deficiency based on records which had originally been illegally seized was unrelated to whether petitioners conceded the accuracy of the Federal determination. Therefore, petitioners properly raised the issue of illegal use of records for the first time in their petition.

C. That the records in this case were not obtained by the Department of Taxation and Finance from the New York City Police Department. In fact, the Audit Division never received the records or copies of the records. The only basis for the Audit Division's issuance of a Notice of Deficiency was a report, supplied by the taxpayers, of a final determination of the IRS, agreed to in the Tax Court. It was, therefore, proper for the Audit Division to issue a Notice of Deficiency based on such information.

Moreover, the primary consideration in cases involving suppression of illegally seized evidence "is the relationship between the law enforcement responsibilities and expertise of the seizing officials and the type of proceeding at which the seized material is being offered. The closer the nature of the

proposed use for the evidence is to the seizing officers' 'zone of primary interest,'...the stronger the inference that the officers had this use in mind when they made the seizure." Tirado v. Commissioner, 689 F.2d 307. See also United States v. Janis, 428 U.S. 433. The records in this case were not seized with the participation of or in contemplation of use by the Department of Taxation and Finance in this proceeding before the State Tax Commission. The deterrent effect of the exclusionary rule would not have been served by suppressing in the State Tax Commission hearing the IT-115 which contained information based upon federal income tax changes that resulted from information contained in petitioner's illegally seized records. The Tax Commission hearing was too remote from the zone of primary interest of the police officers who made the seizure of obscene materials and would not have materially influenced the officers in their decision to make the seizure.

D. That, in view of the fact that petitioners agreed to the Federal deficiencies, including the fraud penalty, the Audit Division has met its burden of proving the existence of fraud and it properly included the fraud penalty pursuant to section 685(e) of the Tax Law in the Notice of Deficiency.

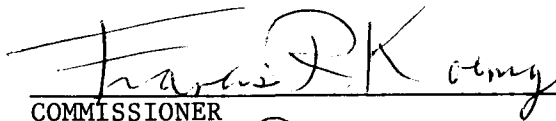
E. That the petition of Martin and Paula Hodas is denied and the notices of deficiency issued February 11, 1982 are sustained.

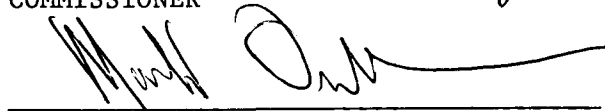
DATED: Albany, New York

STATE TAX COMMISSION

AUG 30 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

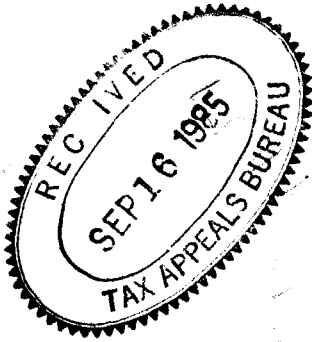
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED

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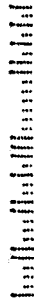
MAIL

John R. Serpico
186 Joralemon St.
Brooklyn, NY 11201



Use of this stamp is optional. It is not required if this envelope is sent by registered mail.

Mwed



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

August 30, 1985

Martin & Paula Hodas
37 Harbor Lane
Lawrence Bay Park, NY 11559

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Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
John R. Serpico
186 Joralemon St.
Brooklyn, NY 11201
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STATE OF NEW YORK

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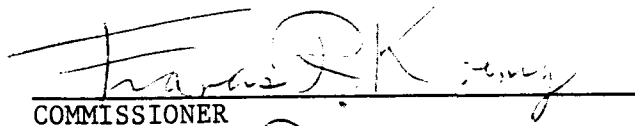
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DATED: Albany, New York

STATE TAX COMMISSION

AUG 30 1985


PRESIDENT


COMMISSIONER


COMMISSIONER