

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Satriale :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income and Unincorporated :
Business Taxes under Articles 22 and 23 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 1975 and 1978. :
:

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 August, 1985, he served the within notice of Decision by certified mail upon John Satriale, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Satriale
29 Rockford Dr.
W. Nyack, NY 10994

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 August, 1985.

David Parchuck

James A. Hays

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John Satriale :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of New York State Personal Income and Unincorporated :
Business Taxes under Articles 22 and 23 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 1975 and 1978. :
:

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 August, 1985, he served the within notice of Decision by certified mail upon Herbert Granoff, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Herbert Granoff
8 Wilshire Drive
Great Neck, NY 11020

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 August, 1985.

David Parchuck

William A. Shepard

Authorized to administer oaths
pursuant to Tax Law section 174

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

August 6, 1985

John Satriale
29 Rockford Dr.
W. Nyack, NY 10994

Dear Mr. Satriale:

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, 722 & 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
Herbert Granoff
8 Wilshire Drive
Great Neck, NY 11020
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
JOHN SATRIALE	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income and	:	
Unincorporated Business Taxes under Articles 22	:	
and 23 of the Tax Law and New York City Non-	:	
resident Earnings Tax under Chapter 46, Title	:	
U of the Administrative Code of the City of	:	
New York for the Years 1975 and 1978.	:	

Petitioner, John Satriale, 29 Rockford Drive, West Nyack, New York 10994, filed petitions for redetermination of deficiencies or for refunds of New York State personal income and unincorporated business taxes under Articles 22 and 23 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 1975 and 1978 (File Nos. 37915, 38114 and 38115).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 10, 1984 at 11:00 A.M. and was continued to conclusion on September 5, 1984 at 11:00 A.M., with all briefs to be submitted by December 7, 1984. Petitioner appeared by Herbert Granoff, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq. of Counsel).

ISSUES

I. Whether the notices of deficiency issued with respect to the years 1975 and 1978 were timely.

II. Whether the estimated deficiencies asserted for 1975 and 1978 were proper.

FINDINGS OF FACT

1. John Satriale (hereinafter "petitioner") and his wife, Pauline Satriale, timely filed joint New York State income tax resident returns for the years 1975 and 1978 whereon petitioner reported business income of \$25,297.53 and \$22,479.00, respectively. Petitioner's occupation was reported on the face of each return as "lawyer" (1975) and "attorney" (1978). According to a schedule annexed to his 1978 return, petitioner characterized his reported business gross income of \$71,085.52 derived during said year as "Income from Business, Legal Fees, Director's Fees, Commissions, etc.". Petitioner did not file an unincorporated business tax return for either year at issue. For 1978, he failed to file a New York City nonresident earnings tax return.

2. On November 16, 1981, the Audit Division issued to petitioner a Statement of Unincorporated Business Tax Audit Changes and a Statement of Personal Income Tax Audit Changes, each pertaining to the year 1975 and indicating, respectively, unincorporated business tax due in the amount of \$9,631.31 and additional New York State personal income tax due in the amount of \$24,572.34, plus penalties and interest. These statements and the amounts of tax computed thereon, were premised upon the following explanations:

Unincorporated Business Tax

"As a result of a field audit your activities as an insurance broker are deemed to be subject to the Unincorporated Business Tax. Your tax has been computed as follows based on information available.

Unreported Commissions	\$159,817.15"
------------------------	---------------

Personal Income Tax

"The following adjustments are made as a result of a field audit based on information available.

Additional Gross Receipts	\$159,817.15"
---------------------------	---------------

3. The aforementioned statements were subsequently cancelled and superceded by two statements pertaining to 1975 which were issued to petitioner on January 11, 1982. These statements provided revised adjustments as follows:

Unincorporated Business Tax

"Commissions	\$ 26,216.96"
--------------	---------------

Personal Income Tax

"Additional Gross Receipts	\$151,628.34"
----------------------------	---------------

Accordingly, a Notice of Deficiency was issued against petitioner for the year 1975 on March 30, 1982 asserting additional New York State personal income tax of \$23,313.32, penalties of \$1,194.14, plus interest of \$12,540.94, for a total due of \$37,048.40. Said penalties were asserted for negligence and for failure to file a declaration of estimated tax pursuant to sections 685(b) and 685(c) of the Tax Law, respectively.

4. The record does not contain a Notice of Deficiency asserting unincorporated business tax for 1975; however, the record does indicate that this issue was resolved prior to the hearing held herein. At the hearing petitioner stated that he had conceded said issue, and in his petition, filed with respect to 1975, he contested only the deficiency asserted for personal income tax purposes. Accordingly, only personal income tax is at issue herein for taxable year 1975.

5. On March 18, 1982, the Audit Division issued to petitioner a Statement of Unincorporated Business Tax Audit Changes and a Statement of Personal Income Tax Audit Changes, each pertaining to the year 1978 and indicating, respectively, unincorporated business tax due in the amount of \$7,360.68 and personal income tax due in the amount of \$19,047.73, plus penalties and interest. The personal income tax due was comprised of New York State personal income tax of \$18,025.84

and New York City nonresident earnings tax of \$1,021.89. These statements and the amounts of tax computed thereon, were premised upon the following explanations:

Unincorporated Business Tax

"As a result of audit your activities as an insurance broker are deemed subject to the Unincorporated Business Tax.

Schedule C Net Income	\$ 22,479.00
Additional Gross Receipts	\$134,734.63"

Personal Income Tax

"The following adjustments are being made as a result of a field audit based on information available.

	<u>State</u>	<u>City Non-Res</u>
Additional Business Income		
Schedule C	\$134,734.63	\$134,734.63

As a result of a Federal audit the following adjustments are being made.

Interest Income	\$ 3,433.00
Other Income	6,641.00

Schedule C Net Income Reported	\$ 22,479.00"
--------------------------------	---------------

Accordingly, a Notice of Deficiency was issued against petitioner asserting New York State personal income tax, unincorporated business tax and New York City nonresident earnings tax of \$26,408.41, penalties of \$4,673.44, plus interest of \$7,745.32, for a total due of \$38,827.17. Said penalties were asserted for: failure to file a 1978 unincorporated business tax return pursuant to section 685(a)(1)¹ of the Tax Law; failure to file a 1978 New York City nonresident earnings tax return pursuant to section U46-35.0(a) of the

1 Sections 685(a)(1), 685(a)(2) and 685(b) of Article 22 of the Tax Law are incorporated into Article 23 by section 722(a).

Administrative Code of the City of New York; failure to pay the unincorporated business tax determined to be due pursuant to section 685(a)(2)¹ of the Tax Law; failure to pay the New York City nonresident earnings tax determined to be due pursuant (according to the Statement of Personal Income Tax Audit Changes) to section 685(a)(2) of the Tax Law and negligence pursuant to section 685(b)¹ of the Tax Law and section U46-35.0(b) of the Administrative Code of the City of New York.

6. The aforesaid Notice of Deficiency issued with respect to 1978 originally bore the date April 27, 1982; however, said date was crossed out and above it the date April 14, 1982 was inserted. Since the three year period of limitation on assessment for the year 1978 expired on April 15, 1982, the issue of whether said notice was timely mailed was raised by petitioner.

7. Petitioner conceded the 1978 adjustments made as the result of the Federal audit (see Finding of Fact "5", supra).

8. Petitioner alleged that the period of limitation on assessment for 1975 had expired prior to the issuance of the Notice of Deficiency on March 30, 1982. The Audit Division, by contrast, contended that said deficiency was timely issued within the six year period of limitations on assessment provided for in section 683(d)(1) of the Tax Law. Petitioner further alleged that the deficiencies asserted for 1975 and 1978 were fictitious and capricious and not based on any facts, figures or evidentiary proof of any kind, but instead were based on conjecture, for the sole purpose of procuring an extension of time to make a new determination of tax claimed to be due. Accordingly, petitioner alleges that such deficiencies were improper in light of

Brown v. State Tax Commission, 199 Misc. 349, affd. 279 App. Div. 837, affd. 304 N.Y. 651.

9. A field audit was not conducted for either 1975 or 1978. The deficiencies asserted for said years were estimated based on the error ratio found on audit of petitioner's 1976 and 1977 tax returns. Said audit, which utilized the cash availability analysis method of income reconstruction, yielded substantial adjustments for additional income. Such adjustments, which were far in excess of 25% of petitioner's New York adjusted gross income stated on the returns, were agreed to by petitioner and the tax computed thereon was paid.

10. Based on the large discrepancies determined for 1976 and 1977 and the fact that petitioner had consented to the audit findings for said years, the audit was extended to taxable year 1975. Additionally, a supplemental audit was commenced for 1978 through 1980. The deficiencies asserted for 1979 and 1980 were paid by petitioner and are not at issue herein.

11. On February 6, 1981, the Audit Division mailed an appointment letter to petitioner scheduling an audit for February 23, 1981 with respect to the year 1975. Petitioner's representative at the time advised the Audit Division that petitioner had no records for 1975. Subsequently a series of unproductive meetings took place during which no records were made available. Accordingly, since petitioner failed to provide records for 1975, on March 30, 1982, the Audit Division issued the aforestated estimated deficiency based on the error ratio found on audit for the 1976 and 1977 tax years.

12. On February 25, 1982, the Audit Division mailed an appointment letter to petitioner scheduling an audit for March 10, 1982 with respect to the year 1978. On March 9, 1982, petitioner's secretary phoned the Audit Division's White Plains District Office requesting a postponement of the audit until

March 30, 1982. Petitioner was advised that postponement of the audit was unacceptable unless a consent to extend the statute of limitations for the year 1978 was executed. Petitioner refused to execute said consent. Accordingly, based on such refusal and petitioner's failure to appear for audit on the scheduled date, the Audit Division issued the aforestated estimated deficiency based on the error ratio found on audit for the 1976 and 1977 tax years.

13. During the years at issue herein petitioner was engaged in activities as an insurance broker and attorney. He also was engaged in the management of real property.

14. During the hearing petitioner submitted copies of his "insurance commission book" relating to 1978 and portions of his cash receipts book relating to both 1975 and 1978. No other evidence was submitted with respect to said years.

15. Petitioner alleged that the audit conducted for 1976 and 1977 was deeply flawed. Some documentation was submitted with respect to the audit for said years; however, such documentation, in and of itself, provided no basis for recomputing the error ratio used for computation of the deficiencies asserted for 1975 and 1978.

16. The Audit Division submitted a Statement of Certified Mailing which established that the Notice of Deficiency issued with respect to 1978 was mailed on April 14, 1982.

CONCLUSIONS OF LAW

A. That section 683(d) of the Tax Law provides, in pertinent part, that:

"The tax may be assessed at any time within six years after the return was filed if --

(1) an individual omits from his New York adjusted gross income or the sum of his items of tax preference an amount properly includible therein which is in excess of twenty-five percent of the amount of

New York adjusted gross income or the sum of the items of tax preference stated in the return..."

B. That the six-year period of limitations on assessment is applicable for taxable year 1975 since the estimated additional income as determined for said year was in excess of twenty-five percent of the amount of petitioner's New York adjusted gross income stated in the return.

C. That since petitioner failed to make his 1975 books and records available for audit, the Audit Division was authorized to estimate the deficiency for said year. Matter of Petition of The Tokens, State Tax Commission, November 10, 1983.

D. That the Notice of Deficiency issued with respect to taxable year 1978 was timely.

E. That since petitioner's actions prevented a timely audit of his 1978 return, the Audit Division acted properly in issuing the estimated deficiency before expiration of the three year period of limitations on assessment as provided in section 683(a) of the Tax Law.

F. That in Brown v. State Tax Commission (supra), the Court of Appeals held that the Tax Department could not issue an estimated assessment without any factual basis where its sole purpose was to extend the statute of limitations. In the instant case, the Audit Division attempted to conduct a timely audit of petitioner's records for 1978. It was the petitioner's decision not to appear for audit on the scheduled date which prevented the Audit Division from conducting an audit prior to the expiration of the three year period of limitations on assessment. Since the Brown case did not concern a situation where the Audit Division was denied an opportunity to conduct an audit, said case is not germane to the present matter. Furthermore, in the instant case, unlike the situation in Brown, there was some factual basis for issuing an

assessment to the petitioner. Specifically, in view of the fact that an audit of petitioner's records for 1976 and 1977 revealed a massive underreporting of income for those years, it was reasonable to infer that petitioner was underreporting his income for the years at issue as well. Accordingly, the Audit Division was justified in seeking to conduct an audit for the years at issue and, given petitioner's failure to supply records for such years, was justified in issuing estimated deficiencies.

G. That the method used to estimate the deficiencies for 1975 and 1978 was reasonable and proper under the circumstances as detailed.

H. That the portion of the penalty asserted pursuant to section 685(a)(2) of the Tax Law, which was applied to petitioner's 1978 New York City tax deficiency, is cancelled since Chapter 46, Title U of the Administrative Code of the City of New York does not provide for assertion of a penalty for failure to pay the tax determined to be due. (See Finding of Fact "5", supra.)

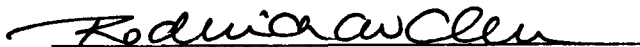
I. That the petitions of John Satriale are granted to the extent provided in Conclusion of Law "H", supra, and except as so granted, said petitions are, in all other respects, denied.

J. That except as provided in Conclusion of Law "H", supra, the notices of deficiency issued March 30, 1982 and April 14, 1982, with respect to the years 1975 and 1978, respectively, are sustained together with such penalties and interest as may be lawfully owing.


DATED: Albany, New York


STATE TAX COMMISSION

AUG 06 1985


PRESIDENT

I abstain.


COMMISSIONER


COMMISSIONER

COMMISSIONER