

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
George G. Souhan :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income & :  
Unincorporated Business Tax under Articles 22 & 23 :  
of the Tax Law for the Year 1978. :  
:

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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 3rd day of July, 1985, he served the within notice of Decision by certified mail upon George G. Souhan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George G. Souhan  
RD #1, Gravel Rd.  
Seneca Falls, NY 13148

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  
3rd day of July, 1985.

David Parchuck

Bernie A. Haglund

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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23 of the Tax Law for the Year 1978. :  
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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 3rd day of July, 1985, he served the within notice of Decision by certified mail upon Peter L. Faber, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter L. Faber  
Kaye, Scholer, Fierman, Hays & Handler  
425 Park 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  
3rd day of July, 1985.

David Parchuck

James A. Hegeler

Authorized to administer oaths  
pursuant to Tax Law section 174

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

July 3, 1985

George G. Souhan  
RD #1, Gravel Rd.  
Seneca Falls, NY 13148

Dear Mr. Souhan:

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 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  
Peter L. Faber  
Kaye, Scholer, Fierman, Hays & Handler  
425 Park Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
GEORGE G. SOUHAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of the	:	
Tax Law for the Year 1978.	:	

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Petitioner, George G. Souhan, RD 1, Gravel Road, Seneca Falls, New York 13148, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1978 (File Nos. 33506 and 34155).

On August 10, 1984, petitioner's representative, Peter L. Faber, Esq., of counsel, executed on petitioner's behalf a waiver of formal hearing. Petitioner's representative and the Audit Division, by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel), properly executed a Stipulation of Facts, and further agreed that the decision of the Tax Commission was to be based upon said stipulation and exhibits and briefs of the parties to be submitted on or before October 29, 1984. After consideration of said documents, the State Tax Commission hereby renders the following decision.

ISSUE

Whether penalties asserted pursuant to sections 685(a)(1) and 685(a)(2) of the Tax Law, for failure to file an unincorporated business tax return and for failure to pay the tax determined to be due, respectively, should be abated due to reasonable cause.

FINDINGS OF FACT

Findings of Fact 1 through 19 are based on the stipulation between the parties.

1. Petitioner, George G. Souhan (SS# 067-22-7532) resides at RD 1, Gravel Road, Seneca Falls, New York 13148, and lived at this address during 1978, the taxable year at issue.

2. During 1978, Mr. Souhan was engaged in the business of manufacturing and selling knitted products as an unincorporated sole proprietor under the name "Seneca Knitting Mills".

3. Mr. Souhan was not an accountant by training or profession and had no special knowledge or expertise with respect to tax law during 1978-79 beyond that of an ordinary businessman.

4. During early 1979, Mr. Souhan engaged the certified public accounting firm of Ernst & Ernst (now known as Ernst & Whinney) to prepare his income tax returns for 1978. He asked Ernst & Ernst to prepare all necessary United States and New York State income tax returns (including unincorporated business income tax returns) and to do so correctly and completely. As an active businessman, Mr. Souhan did not have the time or the expertise to prepare his income tax returns or to determine which returns were required. He relied during this time on his professional advisors to determine which returns were required and to prepare those returns correctly and completely.

5. Ernst & Ernst is an international certified public accounting firm, one of the "Big 8", and has an international reputation for tax and accounting expertise.

6. Ernst & Ernst had prepared his United States and New York State income tax returns (including unincorporated business income tax returns) since 1969

and its predecessor firm had prepared them starting in the late 1940's, and Mr. Souhan assumed that Ernst & Ernst would prepare his 1978 returns accurately and completely.

7. Mr. Len Hornung, an employee of Mr. Souhan's who was generally responsible for organizing Mr. Souhan's business and tax records, sent Mr. Souhan's tax records for 1978 to Ernst & Ernst on March 29, 1979.

8. Mr. Souhan believed that Mr. Hornung had given Ernst & Ernst all the information that would be necessary for Ernst & Ernst to prepare all required income tax returns.

9. Ernst & Ernst prepared United States and New York State income tax returns for Mr. Souhan for 1978 based on the information they had received from Mr. Hornung, but they inadvertently failed to prepare unincorporated business tax returns.

10. By letter dated April 12, 1979, Ernst & Ernst sent Mr. Souhan his New York State individual income tax return for 1978 on Form IT-208 with instructions to file the return and to pay an additional tax due of \$23,219.61.

11. Mr. Souhan assumed that the income tax returns prepared by Ernst & Ernst were correct and complete and that all United States and New York State income tax returns (including unincorporated business income tax returns) that he was legally required to file for 1978 had been prepared and sent to him.

12. If a hearing were held, Mr. Souhan would testify that he was unaware that a separate unincorporated business tax return was required for 1978. He ordinarily reviewed the tax returns that he received each year from Ernst & Ernst to ensure factual accuracy, but he did not ordinarily question the tax treatment of particular items or the decisions of Ernst & Ernst as to what returns were required.

13. Mr. Souhan timely filed his 1978 New York State income tax return as prepared by Ernst & Ernst and enclosed with the return a check for \$23,219.61 representing the additional balance due. The return was identical to the return sent to him by Ernst & Ernst on April 12, 1979 referred to in Paragraph 10 above.

14. The Internal Revenue Service examined Mr. and Mrs. Souhan's U.S. income tax returns for 1978 and proposed deficiencies in tax based on additions to taxable income. Ernst & Ernst assisted the taxpayers in connection with the examination of their U.S. income tax return. The taxpayers failed to report the changes to the Department of Taxation and Finance.

15. Following notification by the Audit Division of his failure to file both an unincorporated business income tax return (Form IT-202) and a Report of Change in Federal Taxable Income (Form IT-115) for 1978, Mr. Souhan filed such forms on December 31, 1980.

16. On or about March 25, 1981, the Audit Division issued to Mr. Souhan a Notice of Deficiency A8008104071. The amount of tax, penalties and interest assessed against Mr. Souhan for the year 1978, after adjustment for corrections, is:

Tax	\$14,353.55
Penalties	4,728.75
Interest	<u>2,089.16</u>
Total	\$21,171.46

17. Payments totaling \$19,108.01 have been made by Mr. Souhan against this assessment, leaving an amount unpaid of \$2,063.45. The payments were made on December 31, 1980 and were posted on March 10, 1981.

18. Mr. Souhan has executed a Partial Withdrawal of Petition and Discontinuance of Case form, consenting to the taxes and interest assessed for 1978 but

protesting the imposition of penalties. The penalties were assessed for his failure to pay the correct tax on both the delinquent return and the federal audit changes that were made as well as for his failure to file the unincorporated business income tax return.

19. Petitioner does not object to the imposition of the penalties involving his failure to report and pay tax with respect to the federal audit changes. The only issue in dispute is whether he is liable for penalties because of his failure to file a timely unincorporated business income tax return for 1978.

20. Petitioner's New York State Income Tax Resident Return for the year 1977 and the Unincorporated Business Tax Return attached thereto were prepared by Ernst & Ernst of Syracuse, New York.

#### CONCLUSIONS OF LAW

A. That section 685 of the Tax Law provides, in part:

"(a)(1) Failure to file tax return - In case of failure to file a tax return...unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax....

(a)(2) Failure to pay tax shown on return. - In case of failure to pay the amounts shown as tax on any return required to be filed...- unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount shown as tax..."

B. That the question as to what constitutes reasonable cause depends on the facts and circumstances of each case. In the case herein, petitioner did not rely on any professional advice not to file the unincorporated business tax return for the tax year 1978. Based on the many years of satisfactory experience with Ernst & Ernst and its predecessor firm, as well as the measure of dependency on that firm to prepare and submit for the petitioner all the required New York State income tax returns, the petitioner had reasonable cause for the failure to file the unincorporated business tax return for the tax year 1978. Joseph L. Burd and Clara Burd, State Tax Commission, August 6, 1976.

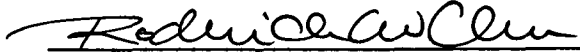


C. That the petition of George G. Souhan is granted to the extent that the penalties set forth in the Notice of Deficiency issued March 25, 1981 are canceled.

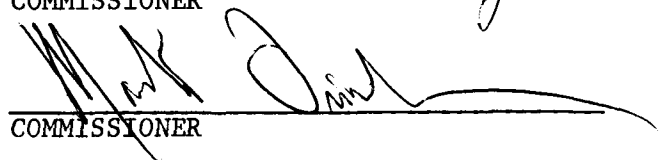
DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER