

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chaim M. Zelmanowicz & Naomi P. Zelmanowicz :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1971 through 1975. :

In the Matter of the Petition :
of :
Eastchester Park Nursing Home : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 :
of the Tax Law for the Years 1971 through 1975. :

In the Matter of the Petition :
of :
Split Rock Nursing Home :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 :
of the Tax Law for the Years 1971 through 1975. :

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Eastchester Park Nursing Home, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Eastchester Park Nursing Home
2700 Eastchester Rd.
Bronx, NY 10469

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.

Page 2
Affidavit of Mailing

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
7th day of November, 1985.

David Paschuck

William R. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Eastchester Park Nursing Home
2700 Eastchester Rd.
Bronx, NY 10469

Gentlemen:

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
David Bernfeld
Hoffinger, Friedland & Roth
110 E. 59th Street
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chaim M. Zelmanowicz & Naomi P. Zelmanowicz :
for Redetermination of a Deficiency or for Refund :
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In the Matter of the Petition :
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Split Rock Nursing Home :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 :
of the Tax Law for the Years 1971 through 1975. :

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Split Rock Nursing Home, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Split Rock Nursing Home
3525 Baychester Ave.
Bronx, NY 10466

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.

Page 2
Affidavit of Mailing

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
7th day of November, 1985.

David Paschuck

Cornie R. Haggard

Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Split Rock Nursing Home
3525 Baychester Ave.
Bronx, NY 10466

Gentlemen:

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.

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Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
David Bernfeld
Hoffinger Friedland & Roth
110 E. 59th Street
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chaim M. Zelmanowicz & Naomi P. Zelmanowicz :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1971 through 1975. :

In the Matter of the Petition :
of :
Eastchester Park Nursing Home : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 :
of the Tax Law for the Years 1971 through 1975. :

In the Matter of the Petition :
of :
Split Rock Nursing Home :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 :
of the Tax Law for the Years 1971 through 1975. :

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon Chaim M. & Naomi P. Zelmanowicz, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Chaim M. & Naomi P. Zelmanowicz
1401 Mace Ave.
Bronx, NY 10469

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.

Page 2
Affidavit of Mailing

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
7th day of November, 1985.

David Parcheck

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

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Chaim M. Zelmanowicz & Naomi P. Zelmanowicz :
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law for the Years 1971 through 1975. :

In the Matter of the Petition :
of :
Eastchester Park Nursing Home : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 :
of the Tax Law for the Years 1971 through 1975. :

In the Matter of the Petition :
of :
Split Rock Nursing Home :
for Redetermination of a Deficiency or for Refund :
of Unincorporated Business Tax under Article 23 :
of the Tax Law for the Years 1971 through 1975. :

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 7th day of November, 1985, he served the within notice of Decision by certified mail upon David Bernfeld, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

David Bernfeld
Hoffinger, Friedland & Roth
10 East 53rd Street
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.

Page 2

Affidavit of Mailing

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
7th day of November, 1985.

David Parbuck

Gunnar O'Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Chaim M. & Naomi P. Zelmanowicz
1401 Mace Ave.
Bronx, NY 10469

Mr. & Mrs. Zelmanowicz:

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:

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Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
David Bernfeld
Hoffinger, Friedland & Roth
10 East 53rd Street
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
CHAIM M. ZELMANOWICZ AND :
NAOMI P. ZELMANOWICZ :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Years 1971 through 1975. :

In the Matter of the Petition :
of :
EASTCHESTER PARK NURSING HOME : DECISION
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1971 :
through 1975. :

In the Matter of the Petition :
of :
SPLIT ROCK NURSING HOME :
for Redetermination of a Deficiency or for :
Refund of Unincorporated Business Tax under :
Article 23 of the Tax Law for the Years 1971 :
through 1975. :

Petitioners Chaim M. and Naomi P. Zelmanowicz, 1401 Mace Avenue, Bronx,
New York 10469, 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
1971 through 1975 (File No. 39241).

Petitioners Eastchester Park Nursing Home, 2700 Eastchester Road, Bronx,
New York 10469 and Split Rock Nursing Home, 3525 Baychester Avenue, Bronx, New

York 10466, filed petitions for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the years 1971 through 1975 (File Nos. 39842 and 41231).

A consolidated 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 February 5, 1985 at 1:15 P.M., with all briefs to be submitted by June 17, 1985. Petitioners appeared by David Bernfeld, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioners were properly subject to penalties imposed as a result of a deficiency due to negligence or intentional disregard of the Tax Law or regulations promulgated thereunder.

II. Whether the Audit Division properly issued notices of deficiency against two partnerships based on reports of Federal changes of the income tax returns of the individual partners, where the general three-year period of limitations for assessing the partnerships had expired.

FINDINGS OF FACT

1. On March 30, 1982, the Audit Division issued six notices of deficiency against petitioners Chaim M. Zelmanowicz and Naomi P. Zelmanowicz as follows:

<u>Petitioner</u>	<u>Year</u>	<u>Tax</u>	<u>Fraud Penalty</u>	<u>Interest</u>	<u>Amount Due</u>
Chaim	1971	\$5,763.34	\$2,881.67	\$3,659.61	\$12,304.62
Naomi	1971	\$5,763.34	\$2,881.67	\$3,659.61	\$12,304.62
Chaim	1972, 1973	\$8,627.64	\$4,313.82	\$5,771.80	\$18,713.26
Naomi	1972, 1973	\$8,627.64	\$4,313.82	\$5,771.80	\$18,713.26
Chaim	1974, 1975	\$ 755.84	-0-	\$ 431.97	\$ 1,187.81
Naomi	1974, 1975	\$ 755.84	-0-	\$ 431.97	\$ 1,187.81

Statements of audit changes issued July 17, 1981 explained that the deficiencies were based on Federal audit changes as reported by petitioners Chaim M. and

Naomi P. Zelmanowicz on New York State reports of change in Federal taxable income (Form IT-115) and that fraud penalty pursuant to section 685(e) of the Tax Law was being imposed for taxable years 1971 through 1973.

2. On August 18, 1982, the Audit Division issued two notices of deficiency against petitioner Eastchester Park Nursing Home ("Eastchester") asserting unincorporated business tax due as follows:

<u>Years</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Amount Due</u>
1971-1973	\$5,544.20	\$277.21	\$3,961.39	\$9,782.80
1974-1975	\$ 154.01	-0-	\$ 98.20	\$ 252.21

Statements of Audit Changes issued April 15, 1982 explained that the deficiencies were based on additional partnership income per Federal audit changes.

3. On August 18, 1982, the Audit Division issued two notices of deficiency against petitioner Split Rock Nursing Home ("Split Rock") asserting unincorporated business tax due as follows:

<u>Years</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Amount Due</u>
1971-1973	\$7,014.01	\$350.70	\$5,083.52	\$12,448.23
1974-1975	\$ 582.65	-0-	\$ 369.17	\$ 951.82

Statements of audit changes issued April 15, 1982 explained that the deficiencies were based on additional partnership income per Federal audit changes.

4. Eastchester and Split Rock are partnerships each of which operated a nursing home. Petitioners Chaim and Naomi Zelmanowicz were the partners in Eastchester and, along with their daughter, Rebecca Rich, were the partners in Split Rock. At some time in 1979 or 1980, the nursing homes came under investigation by a special prosecutor. As a result of the investigation, Mr. Zelmanowicz was indicted and pleaded guilty to a felony not disclosed by the record in this case. Petitioners entered into negotiations with the Internal Revenue Service at that time and initially discussed the possibility of adjusting the partnership

return of Eastchester and Split Rock for the years in issue and agreeing to a negligence penalty.¹ Similar adjustments were discussed with respect to the individual returns of Chaim and Naomi Zelmanowicz. The Service, however, could not accept such a settlement agreement because the period of limitations for assessment had expired for all of the years in issue for all of the petitioners. It was finally agreed that Mr. Zelmanowicz would agree to the imposition of the fraud penalty for three of the years in order to keep the statute of limitations from barring assessment. The Service adjusted the joint return of Chaim and Naomi Zelmanowicz; however, the fraud was imputed to Mr. Zelmanowicz only, although the penalty was computed on the total amount of adjustment because a joint return was filed. The Service apparently made no formal changes to the returns of Eastchester or Split Rock since there were no Federal tax consequences to the partnerships; however, each Form IT-115 filed by Chaim and Naomi Zelmanowicz clearly stated that the form was filed by a member of a partnership to report a Federal change increasing his or her distributive share of partnership income.

5. Within 30 days of receiving the bill for the Federal taxes, Chaim and Naomi Zelmanowicz filed a Form IT-115 for each of the years in issue. Since Mr. and Mrs. Zelmanowicz had filed separate returns on one form for State purposes, the Audit Division divided the Federal adjustments equally between them and imposed the fraud penalty on each petitioner. At the hearing, the Audit Division withdrew the fraud penalty under section 685(e) of the Tax Law and, instead, asserted the negligence penalty under section 685(b). Petitioners maintain that because Mr. and Mrs. Zelmanowicz filed separate returns for State

1 The felony indictment was apparently tax related since it led to negotiations with the Internal Revenue Service; however, no allegations in this regard were made by either party in the instant matter.

purposes, they should be treated separately for penalty purposes and since the fraud at the Federal level was attributed to Mr. Zelmanowicz only, the negligence penalty at the State level should be attributed only to him and waived with respect to Mrs. Zelmanowicz.

6. Petitioners Eastchester and Split Rock filed no reports of Federal change. The notices of deficiency issued against Eastchester and Split Rock were based solely on information contained on the reports of Federal changes filed by Mr. and Mrs. Zelmanowicz, not on any formal changes to the returns of the partnerships. Petitioners maintain, therefore, that no reports of Federal changes were required and that, moreover, the period of limitations for assessment had expired with respect to the partnerships. No consents extending the period of limitations were executed by any petitioner in this matter for State tax purposes.

CONCLUSIONS OF LAW

A. That section 685(b) of the Tax Law provides for the imposition of a penalty if any part of a deficiency is due to negligence or intentional disregard of the Tax Law or regulations, but without intent to defraud.

B. That inasmuch as Chaim Zelmanowicz admitted to negligence with respect to his Federal tax return and agreed to fraud only to keep the period of limitation from expiring, it was proper for the Audit division to impose the negligence penalty on him for the years 1971 through 1973. However, since the Audit Division based the imposition of the penalty solely on the Federal audit results, it was improper to impose the negligence penalty on Naomi Zelmanowicz inasmuch as no fraud or negligence was attributed to her at the Federal level. Therefore, no basis existed for imposing the penalty for State purposes and the penalty imposed against Naomi Zelmanowicz for the years 1971 through 1973 is cancelled.

C. That section 659 of the Tax Law provides, in pertinent part, that:

"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."

D. That section 659 of the Tax Law is made applicable to Article 23 of the Tax Law by section 722 and, additionally 20 NYCRR 222.6 provides as follows:

"If the amount of the taxpayer's Federal taxable income reported on the Federal income tax return is changed or corrected by the United States Internal Revenue Service or other competent authority or as the result of a renegotiation of a contract or subcontract with the United States or if the taxpayer files an amended Federal income tax return, and such change, correction or amended return pertains to the unincorporated business gross income or unincorporated business deductions of the taxpayer, a report of such change or correction or an amended unincorporated business income tax return must be filed in the form and manner and within the time prescribed by Part 153 of this Title (personal income tax regulations). All of the other provisions of said Part 153 of this Title (personal income tax regulations) shall apply with respect to the determination of liability and the recomputation of tax under this section."

E. That section 683(c)(3) of the Tax Law, made applicable to Article 23 by section 722, provides, in part, as follows:

"If the taxpayer...shall, pursuant to section six hundred fifty-nine, report a change or correction...increasing or decreasing his federal taxable income...the assessment...may be made at any time within two years after such report...was filed. The amount of such assessment of tax shall not exceed the amount of the increase in New York tax attributable to such federal change or correction. The provisions of this paragraph shall not affect the time within which or the amount for which an assessment may otherwise be made."

If a taxpayer fails to comply with section 659 of the Tax Law the assessment may be made at any time. Tax Law §683(c)(1)(C).

F. That the Federal changes to the returns of Chaim and Naomi Zelmanowicz pertained to the unincorporated business income of Eastchester and Split Rock insofar as the increase in income of the individuals was based on an increased distributive share from the partnerships; thus, there was a corresponding increase in partnership income. Although such an increase had no Federal tax consequences, there were unincorporated business tax consequences and Eastchester and Split Rock should have filed reports of Federal changes. Since no reports were filed, the assessment could properly be made at any time.

G. That the petition of Chaim and Naomi Zelmanowicz is granted to the extent indicated in Finding of Fact "5" and Conclusion of Law "B"; that the Audit Division is directed to modify the notices of deficiency issued March 30, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

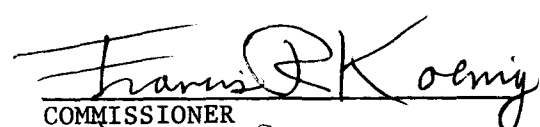
H. That the petitions of Eastchester Park Nursing Home and Split Rock Nursing Home are denied and the notices of deficiency issued August 18, 1982 are sustained.

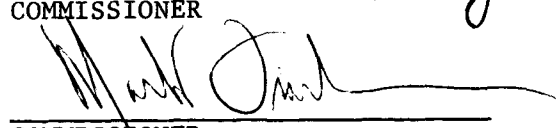
DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER