STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition of **TED M. BACH** **A/K/A MOSHE BACHRAMOV** for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law, New York City Personal Income Tax under Chapter 46, Title T of the Administrative Code of the City of New York and Unincorporated Business Tax under Article 23 of the Tax Law for the Year 1979.	:	DECISION DTA NO. 801421/ 801422

Petitioner, Ted M. Bach a/k/a Moshe Bachramov, 345 East 93rd Street, Apt. #31K, New York, New York 10028, filed an exception to the determination of the Administrative Law Judge issued on May 12, 1988 with respect to his petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law, New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York and unincorporated business tax under Article 23 of the Tax Law for the year 1979 (File Nos. 801421 and 801422). Petitioner appeared by Barry K. Honigman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

Petitioner submitted a brief on exception. The Division submitted a letter outlining its position.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner properly reported capital gain derived from the sale of his business, Alco Locksmiths & Hardware Co.

II. Whether the notices of deficiency were issued after the expiration of the period of limitations on assessment.

III. Whether penalties were properly asserted.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts are summarized below.

Ted Bach a/k/a Moshe Bachramov (hereinafter "petitioner") submitted a 1979 New York State Income Tax Resident Return (with City of New York Personal Income Tax), form IT-201, which was received by the Department of Taxation and Finance on May 28, 1981. Said form reported total New York income of $5,711.00, the standard deduction and a tax balance due of $112.44 for both New York State and New York City. One item of income reported on the form was a capital gain of $1,640.00. According to a copy of petitioner's 1979 Federal Schedule D submitted at hearing, the aforesaid capital gain was derived from the sale of his business, Alco Locksmiths & Hardware Co. ("Alco"), and was computed as follows:

Gross sales price less expense of sale	$75,000.00
Less cost or other basis	70,900.00
Balance	$ 4,100.00
Less 60% of $4,100.00 (capital gain deduction)	2,460.00
Net long-term capital gain reported	$ 1,640.00

Copies of petitioner's 1979 Federal Schedules C and D were not attached to his 1979 New York personal income tax return. Petitioner did not file an unincorporated business tax return for 1979.

The Division alleged that the form IT-201 did not constitute the filing of a return because it appears that petitioner's signature may have been crossed out. The space allotted for the date of the signature contains only the number "4". Review of other signed documents contained in the record indicates that petitioner's signature on the 1979 IT-201 was not crossed out. The lines running through petitioner's signature appear to be an integral part of his signature.

The Special Investigations Bureau ("SIB") conducted a sales tax audit of Alco for the period March 1, 1977 through May 31, 1979 resulting in additional sales tax due of $1,980.20, plus penalty

and interest. Petitioner consented to and paid the additional sales tax, interest and penalty determined to be due.

According to the office report of the SIB, petitioner purchased Alco, which was located at 1448 Hylan Boulevard, Staten Island, New York, on May 27, 1976 for $15,289.00 and subsequently sold Alco on August 15, 1979 for $75,000.00.

On March 16, 1984, the Division issued a Statement of Personal Income Tax Audit Changes as well as a Statement of Unincorporated Business Tax Audit Changes to petitioner wherein his reported net long-term capital gain was adjusted, based on the information provided on the SIB report, as follows:

Gross sales price less expense of sale	$72,500.00[1]
Less cost or other basis	15,289.00
Balance	$57,211.00
Less 60% of $57,211.00 (capital gain deduction)	34,326.60
Net long-term capital gain as adjusted	$22,884.40[2]

Based on the adjustment increasing petitioner's reported long-term capital gain, the Division issued two notices of deficiency as follows:

(a) The first, issued June 22, 1984, asserted unincorporated business tax for 1979 of $2,235.00, plus penalties of $1,173.35 and interest of $1,070.56, for a total amount due of $4,478.91.

(b) The second, issued July 16, 1984 asserted additional New York State personal income tax of $3,833.00, additional New York City personal income tax of $1,318.00, plus penalty of $258.00 and interest of $2,490.14, for a total amount due of $7,899.14.

[1]The gross sales price of $72,500.00 as determined by the Division was based on the Notification of Sale, Transfer or Assignment in Bulk filed by the purchaser, Smile Sales Corporation.

[2]Such amount was rounded to the nearest dollar in the computations prepared by the Division. The parties did not address the issue of whether any of the gain should have been treated as ordinary as opposed to capital gain.

The Division maintains that the second notice was timely issued within the six-year period of limitations on assessment provided under Tax Law section 683(d)(1). The penalty asserted for personal income tax purposes was for negligence pursuant to Tax Law section 685(b). The penalties asserted for unincorporated business tax purposes were pursuant to Tax Law sections 685(a)(1), 685(a)(2) and 685(b)[3] for failure to file a return, failure to pay the tax determined to be due and negligence, respectively.

The actual sales price, pursuant to the closing statement (which shows dates of closing as August 16, 1979 and December 5, 1979 [sic]) and according to petitioner's testimony, was $75,000.00 and not $72,500.00 as reported on the bulk sale report filed by the purchaser.

Petitioner submitted the following documentation which was not considered by the Division but which petitioner claims reduces the long-term capital gain as determined by the Division by either increasing his basis in Alco or reducing the sales price:

(a) Assets purchased during 1977 and 1978

(i) a sales invoice from Motorola Communications and Electronics, Inc. ("Motorola") dated April 24, 1978 in the amount of $3,975.00 for a two-way radio system. Attached to said invoice is a copy of a Franklin Savings Bank teller check dated April 24, 1978 for $3,975.00 payable to Motorola.

(ii) a sales invoice from Motorola dated April 13, 1978 in the amount of $5,269.00 for a two-way radio system.

(iii) a sales invoice from Standard Wholesale Hardware, Inc. dated November 1, 1977 in the amount of $899.00 for a Medeco key cutting machine.

(iv) a sales invoice from Sweda International, Inc. ("Sweda") dated May 17, 1977 in the amount of $966.60 for a cash register. Attached to said invoice is a copy of a Franklin Savings Bank teller check dated May 19, 1977 for $966.60 payable to Sweda.

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[3]Tax Law {{ 685(a)(1), 685(a)(2) and 685(b) are incorporated into Article 23 of the Tax Law by section 722(a).

(v) a sales invoice from GMC Truck & Coach Division ("GMC") dated June 29, 1978 in the total amount of $6,274.80 for a 1978 van. Attached to said invoice is a receipt from GMC indicating full payment.

(b) A bill dated December 3, 1979 indicating that petitioner paid legal fees of $923.00 for services rendered with respect to the sale of Alco.

(c) An Assignment and Assumption of Lease indicating that petitioner assigned his security deposit of $1,500.00 to the purchaser and that the landlord of the premises was Metal Lathers Holding Corporation.

(d) A copy of his 1979 Federal Schedule C indicating that Alco's inventory at the end of the year was $17,000.00.

(e) An agreement dated December 5, 1979 indicating that he paid $500.00 to the landlord to induce it to modify and extend the lease dated August 10, 1978 so as to allow said lease to be assigned.

It appears that the sales invoice from Motorola dated April 13, 1978 may be, at least in part, duplicative of the sales invoice of April 24, 1978. No documentation was submitted to evidence payment of said invoice.

No evidence was submitted to show that petitioner's 1979 reported ending inventory of $17,000.00 was correct or that the ending inventory was not included in the items transferred on the sale of Alco to Smile Sales Corporation. The purchaser's bulk sale report indicates that inventory was a component of the sales price.

A schedule of assets transferred to Smile Sales Corporation by petitioner as a result of the sale of Alco establishes that the 1978 GMC van, the two-way radios and related equipment, the Sweda cash register and the Medeco key cutting machine were transferred. Petitioner's 1979 Federal Schedule C indicates that he failed to claim depreciation on the aforesaid assets purchased subsequent to his purchase of the business in May 1976.

As part of his brief, petitioner submitted a depreciation schedule for the aforesaid assets purchased. The depreciation method used was the straight line method. Scrap value reported appears to be arbitrarily determined. The useful life of said assets was reported as follows:

Two-way radio system	10 years
GMC van	5 years
Sweda cash register	10 years
Medeco key cutting machine	10 years

For the year at issue, Alco was a cash-basis taxpayer. As of November 16, 1979, petitioner owed New York Telephone Company $17,458.93 for advertisements listed in the telephone directory. Petitioner contended that said amount was paid during the year at issue. However, no documentation was submitted to support said contention.

Petitioner claims that the purchase price of Alco in May 1976 was $50,000.00, comprised of an actual purchase price of $48,000.00 plus $2,000.00 in legal fees relative to the purchase. No documentation relative to petitioner's purchase of Alco was submitted. Petitioner alleged that the contract was either misplaced or discarded by his attorney.

Petitioner contends that he is properly entitled to adjustments to his basis and selling price based on evidence submitted. He claims that such adjustments, together with an allowance of his telephone directory expense as a Schedule C deduction, reduces his omission of gross income to an amount less than 25 percent of his reported gross income. Accordingly, he claims that the three-year period of limitations on assessment applies rather than the six-year period of limitations on assessment provided under Tax Law section 683(d)(1).

Petitioner argues that the New York State form IT-201 he submitted constitutes the filing of a return.

Petitioner alleges that the penalties asserted under Tax Law sections 685(a)(1), 685(a)(2) and 685(b) should be abated. No evidence of reasonable cause for failure to file returns and pay tax was provided.

OPINION

The Administrative Law Judge increased petitioner's basis in Alco by taking into account the adjusted basis of certain equipment purchased by petitioner. In addition the Administrative Law

Judge determined that the six-year period of limitations on assessment provided by Tax Law section 683(d)(1) was applicable to the assessment herein and that the Notice of Deficiency for personal income tax and unincorporated business tax was timely issued.

On exception, the petitioner asserts that the Administrative Law Judge erred in applying the six-year period of limitations and in applying penalty to petitioner. In addition, the petitioner asserts that the Administrative Law Judge erred in not increasing petitioner's basis in Alco by the adjusted basis in the two-way radio system and the ending inventory of $17,000. Finally, the petitioner challenges the Administrative Law Judge's imposition of the negligence penalty pursuant to section 685(b) of the Tax Law.

The Division asserts that the Administrative Law Judge's determination is proper in all respects and that petitioner, generally, has failed to substantiate his assertions.

We deal first with the issue of the period of limitations on the assessments for unincorporated business tax and personal income tax.

Tax Law section 683(a) generally provides for a three-year period of limitations on assessment. Tax Law section 683(c)(1) provides that:

> "The tax may be assessed at any time if --
>
> (A) no return is filed."

A six-year period of limitations on assessment is provided by Tax Law section 683(d)(1), which states as follows:

> "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 . . . an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income . . . stated in the return." (Emphasis added.)

The section further provides:

> "For purposes of this subsection there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the tax commission of the nature and amount of the item of income, tax preference, or total taxable amount or ordinary income portion of a lump sum distribution."

Section 683(d) is patterned after section 6501(e)(1) of the Internal Revenue Code.

Petitioner asserts that notwithstanding his failure to attach a copy of 1979 Schedule D to his 1979 New York personal income tax return the Division, on audit, had in its possession a copy of petitioner's federal income tax return which included such Schedule D and thus was adequately apprised of the capital gain issue within the meaning of section 683(d).

The Division computed petitioner's net long-term capital gain as $22,884.40 -- more than 25 percent of $5,711.00 of the New York adjusted gross income stated in petitioner's personal income tax return. The Administrative Law Judge determined that the six-year period of limitations was applicable.

We sustain the determination of the Administrative Law Judge.

The leading case on the purpose of the six-year statute of limitations prescribed in section 6501(e)(1) of the Internal Revenue Code is Colony, Inc. v. Commr. (357 U.S. 28 [1958]) which dealt with section 275(c) of the 1939 Internal Revenue Code, the predecessor of section 6501(e)(1). The reasoning is applicable to our interpretation of section 683(d).

In Colony, Inc. v. Commr. (supra, at 36), the Supreme Court stated that the purpose behind the additional period of time granted the Commissioner of Internal Revenue within which to audit a return was to offset the disadvantage to the Commissioner in detecting errors where the return on its face provides no clue to the existence of the omitted item. In each case then the question becomes whether the tax return is sufficient to apprise the Commissioner of the nature and amount of the transaction, essentially a factual inquiry (see, Estate of Fry, 88 T.C. 1020).

Stated in the language of section 683(d) the omitted income cannot be taken into account by the Division for purposes of the six-year period of limitations if the amount of the income " . . . is disclosed in the return, or in a statement attached to the return in a manner adequate to apprise the [Division] of the nature and amount of the item of income . . .". Here, petitioner's 1979 personal income tax return merely indicated $5,711.00 in adjusted gross income of which $1,640.00 is listed as capital gain income. The Schedule D from petitioner's Federal return was not attached. We conclude the 1979 personal income tax return was not sufficient on its face to apprise the Division

of the nature and amount of the income (see, Colony, Inc. v. Commr., supra, at 36). The fact that a sales tax audit was conducted is also of no relevance. The omitted income must be evident from the return (see, Insulglass Corp. v. Commr., 84 T.C. 203; Rutland v. Commr., 89 T.C. 1137).

We deal next with petitioner's assertion that the burden of proof with regard to the applicability of section 683(d)(1) is on the Division. Petitioner relies on C. A. Reis v. Commr. (1 T.C. 9 [1942]). We are cognizant of the line of cases under Federal law which hold that the Commissioner of Internal Revenue has the burden of proving the applicability of the six-year statute of limitations (see, e.g., Lenz W. Gmelin and Ingborg U. Gmelin v. Commr., 55 TCM 1410 and cases cited therein at 1417). However, we distinguish those decisions from the case at hand based on Tax Law section 689(e) which provides that the burden of proof in proceedings before this Tribunal is on the petitioner, with certain exceptions not here relevant (see also, 20 NYCRR 3010[d][4]). Further, we perceive no fundamental considerations of fairness which require that the burden of proof on this issue be on the Division (compare, Matter of Ilter Sener d/b/a Jimmy's Gas Station, Tax Appeals Tribunal, May 5, 1988). Accordingly, we conclude the burden of proof is on the petitioner to demonstrate that the Division's assessment is erroneous and that section 683(d)(1) is not applicable.

We deal next with petitioner's assertion that the cost of the two-way radio system should be added to petitioner's basis.

No documentation was submitted to evidence payment of the invoice submitted by petitioner, other than the invoice itself, which indicated that the $5,269.00 balance had been paid. Absent such documentation of actual payment, the cost of the system cannot be added to petitioner's basis in Alco.

We deal next with petitioner's assertion that the Administrative Law Judge erred in not adjusting petitioner's basis to include the $17,000 of ending inventory.

Petitioner submitted a copy of his 1979 Federal Schedule C indicating that the cost of Alco's inventory at the end of the year was $17,000.00. Further, the purchaser's bulk sale report indicates that inventory was a component of the sales price.

The Administrative Law Judge, aside from finding the above facts, (see finding of fact "10" of the Administrative Law Judge's determination which has been incorporated into this decision) did not explicitly treat the inventory issue in his determination. Based on the record before us, we conclude that the petitioner's basis in Alco should be adjusted to reflect the year end inventory.

We deal finally with petitioner's assertion that negligence penalty was improperly imposed.

Penalties were asserted by the Division pursuant to Tax Law sections 685(a)(1), 685(a)(2) and 685(b) for failure to file a return, failure to pay the tax determined to be due and negligence, respectively. Petitioner has excepted to the penalty imposed pursuant to section 685(b).

We sustain the penalty.

Petitioner provided no explanation for his failure to timely file the unincorporated business tax return and remit the tax due. Moreover, petitioner's personal income tax return for 1979 was incomplete and understated his tax liability by an excess of 25%. Even with the adjustments to basis made by the Administrative Law Judge and by this Tribunal, petitioner's income was understated by 25%.

A determination of negligence by the taxpayer or intentional disregard by the taxpayer of the Tax Law and rules and regulations promulgated thereunder is not to be taken lightly and must be borne out by the actions of the taxpayer as reflected in the record. Petitioner's assertion on exception that the negligence penalty should not be imposed because he had a good faith belief that he did not owe additional tax is not persuasive. Wholly aside from the question of good faith, a taxpayer may be guilty of negligence requiring the imposition of an addition to tax on account of negligence (see, American Properties, Inc., 28 T.C. 1100, affd 262 F2d 150).

The record here shows that the deficiency found to exist resulted from a claimed basis in the business sold which petitioner could not establish.

While both the Administrative Law Judge and this Tribunal have made significant adjustments to petitioner's basis, these adjustments do not mitigate fully petitioner's less than exemplary conduct with regard to his responsibility as a taxpayer. Our review of the record indicates that petitioner has

not proved that he was not negligent with regard to his responsibilities within the context of section 685(b) (see, for example, Bennett v. Commr., 139 F2d 961).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ted M. Bach a/k/a Moshe Bachramov is granted to the extent that his basis in Alco is increased by $17,000.00 to reflect its ending inventory but, except as so granted, is in all other respects denied;

2. The determination of the Administrative Law Judge is modified as indicated in paragraph "1" above, but except as so modified is affirmed; and

3. The petition of Ted M. Bach a/k/a Moshe Bachramov is granted to the extent indicated in paragraph "1" above and in conclusions of law "A", "B", "C", "D" and "J" of the Administrative Law Judge's determination but except as so granted is in all other respect denied.

Dated: Albany, New York
January 20, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner