STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
HEIDI ZEITMAN AND JACK ZEITMAN	:	DECISION DTA Nos. 812377
for Redetermination of Deficiencies or for Refund of Personal Income Tax under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1986.	:	and 812378

Petitioners Heidi Zeitman and Jack Zeitman, 2737 Arizona Biltmore Circle, Phoenix Arizona 85016, filed an exception to the determination of the Administrative Law Judge issued on April 20, 1995. Petitioners appeared by Rosensteel & Beckmann LLC. (Edward M. Rosensteel, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief on July 25, 1995, which date began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioners have established that they had reasonable cause for their failure to timely file and pay over taxes due, entitling them to an abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. On May 12, 1989, petitioners, Jack and Heidi Zeitman, filed a New York State Resident Income Tax Return for the year 1986. On this return they selected a filing status of married filing separately on one return. The return listed Mr. Zeitman's occupation as an

executive and showed that the great preponderance of his income was from wages, salaries and tips. Mr. Zeitman reported a net loss of $122,599.00 under the category of rent and royalty income and a net loss of $244,095.00 from a series of partnerships. He also reported that New York State tax was due in the amount of $97,511.00 and that City of New York resident tax was due in the amount of $43,140.00. The return shows that there were total payments of$41,080.00. However, the amount due was increased on lines 76 and 77 of the return because petitioners included interest of $10,509.00 and penalty of $10,067.00, for an amount owed of $120,147.00.

2. The foregoing income tax return listed Mrs. Zeitman's occupation as an administrator and reported that a little more than one-half of her total income was from wages. Mrs. Zeitman reported total New York State taxes due of $1,207.00, plus City of New York tax of $436.00, for a total New York State and City of New York liability of $1,643.00. Tax was withheld in the amount of $542.00, resulting in an amount owed of $1,101.00. In conjunction with their return, petitioners remitted a check in the amount of $121,248.00.

3. Prior to filing their income tax return, petitioners were granted an automatic four-month extension of time to file. They then received an extension until October 15, 1987 to file their New York State income tax return for the year 1986. In their application for the extension petitioners explained that they needed an extension because "[i]nformation from third parties necessary to file a complete and correct return is unavailable at the present time".

4. The Division of Taxation ("Division") issued a Notice of Deficiency, dated December 10, 1990, to petitioner Heidi Zeitman which asserted that she was liable under Article 22 of the Tax Law for the year 1986 for interest of $193.08 and penalty of $436.00, for a balance due of $629.08. The Division also issued a Notice of Deficiency, dated December 10, 1990, to petitioner Jack Zeitman which asserted that Mr. Zeitman was liable under Article 22 of the Tax Law for the year 1986 for interest of $17,461.28 and penalty of $37,426.00, for a balance due of $54,887.28. Penalties were asserted on each of the foregoing notices pursuant to Tax Law

§ 685(a)(1) for failure to file a timely return, Tax Law § 685(b)(1) for negligence and Tax Law § 685(b)(2) which is a 50% interest penalty for negligence.

5. After the foregoing notices were issued, the parties entered into a stipulation which provided that, with respect to Heidi Zeitman, of the $121,248.00 payment remitted by petitioners, $1,101.00 will be applied to tax due and the balance of interest and penalty asserted to be due as of May 12, 1986 is as follows:

Interest	$167.27	
Penalty	$275.00	(Tax Law § 685[a][1])
	55.00	(Tax Law § 685[b][1])
	83.00	(Tax Law § 685[b][2])
	$413.00	

The foregoing stipulation further provided that the Notice of Deficiency issued to Heidi Zeitman shall be deemed revised to conform with this paragraph and that she does not dispute her liability for the amount of interest asserted to be due.

6. The stipulation of the parties also stated that the parties agree that, with respect to Jack Zeitman, of the $121,248.00 remitted by petitioners, $99,571.00 will be applied to tax due and $15,126.03 will be allocated to interest due and owing as of May 12, 1989. Mr. Zeitman claims and the Division disputes that the remaining amount of $5,449.97 should be refunded.[1] The parties further agree that there is no interest due and owing from Mr. Zeitman and that the amount of penalty in controversy with respect to Mr. Zeitman is as follows:

Penalty	$24,893.00	(Tax Law § 685[a][1])
	4,979.00	(Tax Law § 685[b][1])
	7,563.00	(Tax Law § 685[b][2])
	$37,435.00	

7. Petitioners did not personally appear and testify at the hearing because they felt that it would impose a great hardship upon them to personally appear in Troy. In an affidavit Mr. Zeitman explained that, prior to 1987, he owned and operated a company known as FGI Management, Inc. ("FGI"). FGI was a surety bond underwriter for investor notes in tax

[1]$121,248.00 - ($1,101.00 + $99,571.00 + $15,126.03) = $5,449.97.

advantaged limited partnerships. Prior to 1987, FGI had successfully underwritten surety bonds for tax advantaged limited partnerships and employed approximately 30 employees.

8. According to Mr. Zeitman, FGI ceased as a viable business entity the moment the 1986 Tax Reform Act was enacted. After the enactment of the 1986 Tax Reform Act, he and the employees of FGI would have been out of work but for measures which he personally put in place.

9. In 1987, Mr. Zeitman created a new company known as Guaranty Acceptance Credit Corporation ("GACC") and he abandoned FGI. Mr. Zeitman states that as he owned and operated FGI, he similarly owned and operated GACC.

10. GACC was created to provide security for investor notes of limited partnerships (previously secured by investor bonds) and to sell the bonds in private placements. Unfortunately for Mr. Zeitman, various interpretations of the Tax Reform Act of 1986 prevented GACC from being a viable enterprise.

11. In late 1987 or early 1988, Mr. Zeitman again restructured his business. GACC changed its name to Guaranty Acceptance Capital Corporation ("GACC") and the firm evolved into an investment banking services company providing investment banking services to small and medium-size companies.

12. As a result of the foregoing corporate transformations, the business offices which Mr. Zeitman maintained were initially transferred from New York City to Los Angeles and then to Phoenix. As a result of these changes, petitioners relocated from New York to Phoenix in December 1986.

13. In 1987, at the age of 57, against the advice of his accounting and legal advisors, Mr. Zeitman withdrew substantial sums from his pension account to restructure the business. Although GACC remains in existence today, the business restructurings which Mr. Zeitman was forced to undertake from late 1986 to 1988 took a toll on him professionally and on petitioners personally.

14. According to Mr. Zeitman, petitioners' personal relocation from New York to Phoenix compounded the turmoil which he and his wife experienced in the corporate transformations and relocation of the business. In the course of the business and personal relocations, many of the records required for the preparation of their 1986 income tax return were temporarily misplaced in storage.

15. In 1987, Mr. Zeitman and his wife had virtually no income. Petitioners satisfied living expenses from the amounts remaining in Mr. Zeitman's pension plan. Not only were virtually all of petitioners' financial resources utilized in restructuring Mr. Zeitman's business, their personal lives were in turmoil for several years.

16. Mr. Zeitman explained that, in late 1988, GACC started to become a stable enterprise and petitioners were able to escape from the physical, mental and emotional trauma which they had experienced. In late 1988, the accountant who represented Mr. Zeitman, David Katzenberg, CPA, a resident of New York City, was able to reconstruct petitioners' records relating to the 1986 tax year and thereafter prepare and file the 1986 New York State income tax return.

17. Prior to 1986, petitioners always filed income tax returns timely and paid income taxes when due.

18. In support of their position, petitioners submitted an affidavit from an attorney, Howard I. Golden, Esq., who performed legal services for petitioners from April 1985 to May 1991 and for Jack Zeitman's business from April 1985 to May 1991 and from June 1993 to the present. In addition to the information already presented, Mr. Golden states that, prior to 1986, FGI employed approximately 35 individuals and generated substantial annual average underwriting revenue. Shortly after the enactment of the Tax Reform Act of 1986, FGI abruptly went out of existence. Mr. Golden stayed on as general counsel and oversaw the liquidation of assets and eventually lost his job. From 1987 through 1988, as a result of the collapse of the business, Mr. Zeitman became involved in a new business venture involving merger and acquisition of corporations.

19. Mr. Golden's affidavit continues that he is aware of the fact that 1987 through 1989 were catastrophic for petitioners. During the years 1987 through 1989, Mr. Golden had to advance legal services without pay for lengthy periods since petitioners needed to try and support Mr. Zeitman's fledgling venture in the merger and acquisition business. It is Mr. Golden's belief that the reason petitioners' 1986 return was not filed and the tax thereunder not timely paid was the catastrophic circumstances surrounding petitioners' personal and business lives during the years 1987 through 1989.

20. Mr. Golden asserts that the collapse of Mr. Zeitman's business could not have been reasonably predicted. Nor could Mr. Zeitman have provided for the consequences of the collapse of the business. It is noted that Congress enacted a law which retroactively withdrew tax benefits causing the collapse of a multi-billion dollar real estate industry. Mr. Golden concludes that no amount of planning in 1985-1986 could have enhanced petitioners' level of tax compliance.

21. According to Mr. Golden, it was not until early 1989, when Mr. Zeitman's new business started to make money and he started to get his affairs in order, that petitioners could reasonably have properly prepared and filed accurate tax returns for 1986. Mr. Golden asserts that the 1986 return was filed as soon as possible and that the filing of the return was done by people who had left and had no relationship with New York State. It is submitted that this shows petitioners' good faith.

22. Petitioners also submitted an affidavit from David M. Katzenberg, CPA. In addition to statements previously made, Mr. Katzenberg states that he assisted petitioners in the preparation of their individual income tax returns from 1984 to 1992 and was personally involved in the preparation of petitioners' 1986 New York State individual income tax return. It is Mr. Katzenberg's belief that petitioners always filed New York State individual income tax returns timely and paid their taxes when due. Mr. Katzenberg states that he knows petitioners to always have been as compliant as they thought possible with respect to their tax matters.

23. Mr. Katzenberg states that he prepared petitioners' income tax returns based on information provided by petitioners when such information was available from them. In connection with the preparation of the 1986 return, the computer-based income tax return program, which Mr. Katzenberg's office used to prepare tax returns, estimated interest and penalty calculations which were inserted as notes on lines 76 and 77 of the referenced return. According to Mr. Katzenberg, the notes on lines 76 and 77 of the referenced 1986 return were not intended by his office to be determinative of any amount of interest or penalty which might be owing to New York State by petitioners.

24.[2] In accordance with State Administrative Procedure Act § 307(1), proposed Findings of Fact 1, 2 and 3 have been substantially included in the determination. Findings of Fact 2 and 3 have been substituted for proposed Finding of Fact 4. Proposed Finding of Fact 5 is not fully supported by the record. Findings of Fact 5 and 6 have been substituted for proposed Findings of Fact 6 and 7. Findings of Fact 4 and 5 have been substituted for proposed Findings of Fact 8 and 9. Proposed Findings of Fact 10 and 11 are not supported by the record. Proposed Findings of Fact 12 through 15 are rejected as argumentative. The proposed Conclusions of Law are rejected since there is no provision in the State Administrative Procedure Act for submitting proposed Conclusions of Law. It is noted that the original Statement of Audit Changes was not included in the record. Therefore, it was not possible to confirm the accuracy of a portion of the proposed Findings of Fact.

OPINION

The Administrative Law Judge first determined that "the accuracy of the purely factual assertions in petitioners' affidavits have been accepted on their face (see, Matter of Orvis v. Tax Appeals Tribunal, 204 AD2d 916, 612 NYS2d 503, lv granted 84 NY2d 805, 618 NYS2d 7)" (Determination, conclusion of law "C").

---

[2]The Summary of the Parties' Positions set forth as findings of fact "24" through "37" in the Administrative Law Judge's determination have been deleted and finding of fact "38" has been renumbered "24."

The Administrative Law Judge then determined that petitioners did not demonstrate reasonable cause for failing to file their 1986 New York State income tax return from October 15, 1987 until May 12, 1989. The Administrative Law Judge found that petitioners' relocation of their home and business and their uncertainties did not warrant the delay in filing their return. The Administrative Law Judge, relying on Matter of Ross-Viking Merchandise Corp. (Tax Appeals Tribunal, August 8, 1991, affd Matter of Ross-Viking Merchandise Corp. v. Tax Appeals Tribunal, 188 AD2d 698, 590 NYS2d 576) further found that petitioners' good filing record did not excuse their failure to comply with 20 NYCRR former 102.7(e)(2). In addition, the Administrative Law Judge, citing Matter of Dworkin Constr. Co. (Tax Appeals Tribunal, August 4, 1988), found that petitioners' economic difficulties did not warrant the delay in filing and paying tax.

With respect to petitioners' claim of physical, mental and emotional trauma, the Administrative Law Judge found that no medical evidence was submitted to support petitioners' claim. The Administrative Law Judge stated that petitioners were able to move to a new location and start a new business and, therefore, their claim "that they were emotionally unable to prepare their return is not convincing" (Determination, conclusion of law "H").

On exception, petitioners first argue that the Statement of Audit Changes AU251.1, dated September 25, 1990, should have been included in the findings of fact because it was stipulated to by the parties. Petitioners also take exception to the finding that their proposed findings of fact "10" and "11" are not fully supported by the record arguing that they were stipulated to by the parties. Petitioners further take exception to the finding that their proposed findings of fact "12," "13," "14" and "15" are argumentative when the evidence supports such findings.

Next, petitioners argue that the Tribunal's decision in Matter of Ross-Viking Merchandise Corp. (supra) is distinguishable from the instant matter. In Ross-Viking, argues petitioner, there was "insufficient evidence in the record showing that problems, such as financial difficulties or personnel problems, contributed to delay as to tax compliance" but the matter before us "is not

based upon a single independent factor or circumstance or several independent factors and circumstances but based upon many interrelated factors and circumstances and must be decided based upon the totality of factors and circumstances faced by the Petitioners" (Petitioners' brief in support, p. 4).

With regard to the affidavits submitted by petitioners in this matter, petitioners state that they should not be penalized, either by inference or otherwise, for using such affidavits especially as their use is authorized by 20 NYCRR former 3000.10[d][1] and Matter of Orvis v. Tax Appeals Tribunal (supra).

Petitioners also argue that the current regulations at 20 NYCRR 107.6 should have been considered in this matter as these regulations "more fully develop the elements of reasonable cause and the absence of willful neglect, giving rise to the abatement of assessed penalties" (Petitioners' brief in support, p. 10).

In response, the Division states that the Statement of Audit Changes AU251.1, dated September 25, 1990, was included in the record as part of the parties' stipulation. However, the Division goes on to state that because the parties agreed to reallocate the payments through their stipulation, the allocation set forth in the Statement of Audit Changes has been superseded. The Division also states that the Administrative Law Judge properly rejected petitioners' proposed findings of fact "10" and "11" because they were superseded by the stipulation, and findings of fact "12," "13," "14" and "15" because they were argumentative.

With respect to petitioners' reliance on the Appellate Division decision in Orvis, the Division notes that this decision was recently reversed by the Court of Appeals. The Division states that:

> "while the Division of Taxation agrees with the result reached by the ALJ, the ALJ's acceptance of the statements in Petitioners' affidavits at 'face value' based on the Appellate Division decision in Orvis . . . was not correct. Under the circumstances of this case, the failure of Petitioners to appear and testify at the hearing should have resulted in

> the accordance of little or no weight to the conclusory and unsupported statements in their affidavits" (Division's brief, p. 2).

In addition, the Division argues that affidavits submitted by petitioners: do not provide any details concerning the "personal disorder" and "catastrophic circumstances" they experienced; do not provide specifics as to the "physical, mental and emotional trauma" experienced by petitioners; and do not disclose how or where the records were misplaced and when they were found.

In their reply brief, petitioners repeat their arguments that they did not give the formation of their new business priority over filing their income tax return; that the affidavits should be given substantial weight and be sufficient to show that their failure to file was due to reasonable cause; that any newly adopted regulations that provide additional guidance on the issue of reasonable cause should be considered; and that this matter should be decided on a review of all the factors and circumstances and not on an "individual dissection of each factor and circumstance" (Petitioners' reply brief, p. 3).

The Administrative Law Judge correctly and adequately addressed all of the issues raised before him and we find no basis in the record before us for modifying the Administrative Law Judge's determination on these issues. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

With respect to the findings of fact petitioners have requested, we find that the record does not support those findings of fact and that the findings of fact reached by the Administrative Law Judge are correct.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Heidi Zeitman and Jack Zeitman is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petitions of Heidi Zeitman and Jack Zeitman are denied.

DATED: Troy, New York
January 25, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner