STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
PAUL O. AND NATALIE I. KOETHER	:	DETERMINATION DTA NOS. 801737
for Redetermination of Deficiencies or for Refunds of New York State Personal Income Tax under Article 22 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 1979 through 1984.	:	AND 804085

Petitioners, Paul O. and Natalie I. Koether, Box 56, Pennbrook Road, Far Hills, New Jersey 07931, filed petitions for redetermination of deficiencies or for refunds of New York State personal income tax under Article 22 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 1979 through 1984.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on February 8, 1989 at 9:45 A.M. and continued in order to permit the parties to prepare a stipulation of facts. Said stipulation was submitted on October 15, 1990, with all briefs to be filed by June 7, 1991. Petitioners filed their briefs on March 21, 1991 and June 7, 1991. The Division of Taxation filed its brief on April 19, 1991. Petitioners appeared by Davidson, Dawson & Clark (T. Randolph Harris, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether petitioner Paul O. Koether was a nonresident partner of a New York partnership within the meaning of Tax Law §§ 632(a)(1)(A) and 637(a)(1).

II. Whether it is unconstitutional for New York State and New York City to impose income tax liability on the income which Mr. Koether received from a partnership located in New York

City.

III. Whether the penalties imposed against petitioners should be abated.

FINDINGS OF FACT

Prior to the closing of the record, the parties entered into a stipulation of facts. To the extent relevant herein, those facts, supplemented with pertinent facts which may be obtained from the exhibits, are set forth as follows:

Petitioners, Paul O. Koether and Natalie I. Koether, resided in Far Hills, New Jersey during the years in issue.

Petitioners filed joint Federal income tax returns with the Internal Revenue Service for the years 1979 through 1984, inclusive, prepared by Klatzkin and Company, CPA's. They were, at all times, cash method, calendar year taxpayers.

Petitioners filed a joint State of New Jersey Gross Income Tax - Resident Return with the State of New Jersey for each of the years in issue, inclusive, prepared by Klatzkin and Company, CPA's.

Prior to the date on which New York State and New York City personal income tax returns would have been due for any of the years in question, Mr. Koether consulted with his regular tax accountant, Lloyd Klatzkin, a CPA licensed in both New York and New Jersey, of Klatzkin & Co., CPA's, as to whether petitioners were required to file New York returns. Mr. Koether provided Mr. Klatzkin with complete background information regarding, among other things, his status as a registered representative and limited partner in Ingalls & Snyder, a stock brokerage firm with which Mr. Koether was affiliated. He also provided Mr. Klatzkin with the Federal schedules K-1 (Partner's Share of Income, Credits, Deductions, Etc.) provided to him each year by the partnership's accountants, together with such accountants' cover letter. Neither Mr. Koether nor Mr. Klatzkin were ever provided with a contemporaneous copy of the partnership's Federal or New York tax returns or with the partnership's New York allocation computation schedule.

Mr. Klatzkin advised Mr. Koether that petitioners had no New York source income and

were therefore not required to file New York State or City income tax returns or to pay any such tax for any of the years in issue. Petitioners reported on both their Federal and New Jersey returns all of the income shown on the partnership K-1's, with no reduction, offset or credit on the New Jersey returns resulting from the New York status of the partnership. For the years 1979, 1980 and 1981, this income was characterized on the Federal returns as both partnership income and as non-farm self-employment income. For the year 1982, this income was characterized as guaranteed payments, partnership income and non-farm self-employment income. For the years 1983 and 1984, the income was shown as partnership income and non-farm self-employment income.

Petitioners did not file New York State or City personal income tax returns for the years 1979 through 1984, inclusive.

The Division of Taxation issued a Statement of Personal Income Tax Audit Changes, dated June 26, 1984, which asserted a deficiency of personal income tax for the years 1979 and 1980. The statement explained that petitioners had additional New York taxable income in the amount of $79,606.00 and $202,845.00, for the years 1979 and 1980, respectively. The statement asserted that the income was subject to New York State and New York City personal income tax because these amounts represented Mr. Koether's payments from the partnership.

The Division issued a Notice of Deficiency to petitioners, dated October 17, 1984, which asserted a deficiency of New York State and New York City personal income tax for the years 1979 and 1980 in the amount of $32,122.00, plus penalties of $17,630.90 and interest of $10,716.74, for a total amount due of $60,469.64. The penalties were asserted pursuant to Tax Law § 685(a)(1), (2); (b), (c).

Petitioners, by their attorneys, filed a petition on January 14, 1985 contesting the assertions in the Statement of Personal Income Tax Audit Changes for 1979 and 1980 and requesting that the Notice of Deficiency for the years 1979 and 1980 be cancelled.

The Division issued a Statement of Personal Income Tax Audit Changes, dated April 11, 1986, which asserted a deficiency of New York State and New York City personal income tax

for the years 1981 through 1984. According to the statement, petitioners' New York taxable income was $294,078.00 in 1981, $626,523.00 in 1982, $1,157,102.00 in 1983 and $728,490.00 in 1984. As before, the statement was based on the Division's position that this income was subject to New York State and New York City personal income tax because the amounts represented Mr. Koether's payments from the partnership.

The Division issued two notices of deficiency, dated August 1, 1986, which asserted a deficiency of New York State and New York City personal income tax. One notice pertained to the years 1981 and 1982 and asserted that tax was due in the amount of $102,138.00, plus penalties of $48,313.00 and interest of $42,776.95, for a total amount due of $193,227.95. The remaining notice asserted that tax was due for the years 1983 and 1984 in the amount of $199,584.00, plus penalties of $74,218.00 and interest of $40,310.52, for a total amount due of $314,112.52. The penalties were asserted pursuant to Tax Law § 685(a)(1), (2); (b).

Petitioners, by their attorneys, filed petitions on October 29, 1986 contesting the assertions in the Statement of Personal Income Tax Audit Changes for 1981, 1982, 1983 and 1984 and requesting that the notices of deficiency for the years 1981, 1982, 1983 and 1984 be cancelled.

On December 30, 1986, petitioners paid $453,773.05 to the New York State Tax Commission. The amount represents tax and interest due to both New York State and New York City for the years 1979 through 1984, inclusive.

On January 13, 1989, the Division prepared a schedule which calculated a revised business allocation percentage for the partnership for the years 1979 and 1980.

In January 1989, the Division prepared a revised Statement of Personal Income Tax Audit Changes. On the basis of petitioners' Federal itemized deductions and a schedule of over-the-counter sales, the Division corrected the percentage of partnership income which was attributable to New York sources. The revisions asserted that petitioners' New York taxable income, tax, interest and penalties were as follows:

Year	New York Taxable Income	Tax	Interest	N.Y. Tax Law §685(c) Penalty	N.Y. Tax Law §685(a)(1),(2);(b) Penalties
1979	$ 74,238	$ 8,471	$ 7,376	$ 384	$ 4,448
1980	192,829	21,864	16,501	990	11,478
1981	231,340	24,399	14,368	1,366	12,809
1982	59,035	62,739	25,859	4,228	31,369
1983	1,005,076	109,511	31,609	6,761	48,176
1984	516,636	55,088	9,146	3,658	20,934
TOTALS	$2,079,154	$282,072	$104,859	$17,387	$129,214

Paul Koether's Affiliation with Ingalls & Snyder

The partnership is a New York limited partnership engaged in the stock brokerage business. It is a member of the New York Stock Exchange among other exchanges and associations. On February 15, 1978, the partnership received approval from the New York Stock Exchange to open and maintain a residence office located at Box 56, Pennbrook Road, Far Hills, New Jersey 07931, the home of petitioner Paul O. Koether. Beginning on June 8, 1978, Mr. Koether was the registered representative in charge of the partnership's New Jersey office. At all times during his affiliation with Ingalls & Snyder, Mr. Koether worked solely in Far Hills, New Jersey, and at no time did he have an office in New York.

Mr. Koether was at no time listed as an allied member with the New York Stock Exchange or any other exchange or association in which the partnership was a member.

Prior to July 1, 1979, the only form of compensation the partnership paid to Mr. Koether was a percentage of the gross commissions earned by the partnership on transactions in which Mr. Koether was the broker, all of which originated from his work in New Jersey. At no time prior to or subsequent to July 1, 1979 did Mr. Koether personally conduct any business in New York.

On July 1, 1979, Mr. Koether invested $40,000.00 in cash as a limited partner in the partnership. This cash investment was increased to $50,000.00 on January 1, 1980. On January 1, 1982, he also invested $25,000.00 in securities.

As a limited partner, Mr. Koether had no right to participate in the management of the

partnership and was not consulted on firm policy or as to general management decisions as a whole. Mr. Koether never attended a partners' meeting and visited the partnership's New York office a total of nine times in ten years.

Subsequent to his investment as a limited partner, Mr. Koether continued to be paid the same percentage of the gross commissions derived from his New Jersey trading activity. In addition, Mr. Koether received interest payments on the limited partnership capital he invested in the partnership.

The partnership filed New York State partnership returns for the years 1979 through 1983, which returns contained a New York State nonresident partnership allocation schedule listing Mr. Koether as a partner. That schedule showed the following amounts which should have been reported on Mr. Koether's New York State personal income tax returns: $25,609.27 for 1979; $39,324.99 for 1980; $67,255.34 for 1981; $171,165.28 for 1982; and $296,726.71 for 1983. The partnership's 1984 return showed a New York allocation on Schedule K, parts I and II, of $188,913.97 to Mr. Koether.

The partnership's Agreement of Limited Partnership, dated as of July 1, 1979, as amended ("Agreement"), provided that Mr. Koether would receive interest payable by the partnership on the last business day in each month, at the rate of 8% per annum on his cash invested and 1% per annum on the value of his invested securities. In addition, if in any fiscal year, net earnings of the partnership for the year reached at least a minimum "floor" amount, additional interest would be payable to Mr. Koether on his average cash and securities invested.

(a) The annual rate of additional interest paid increased from 1% to 6% as net earnings rose from the floor amount to a maximum "ceiling" amount. The floor amount was $200,000.00 prior to 1981, $500,000.00 as of January 1, 1981 and $450,000.00 as of January 1, 1982. The ceiling amount rose from $650,000.00 prior to 1981 to $950,000.00 as of January 1, 1981.

(b) If net earnings in any fiscal year (after 1979) exceeded the ceiling amount, limited partners would receive additional interest on their invested cash at the rate of 1% for each

additional $75,000.00 of net earnings over the ceiling amount.

During the years in issue, the following table shows the total income received by Mr. Koether from the partnership, broken down into commission compensation and interest on his limited partner's capital:

	Commission Compensation	Interest on Capital	Total Income
1979	$ 125,246	$ 2,800	$ 128,046
1980	284,621	12,000	296,621
1981	322,777	13,500	336,277
1982	832,826	23,000	855,826
1983	1,457,633	26,000	1,483,634
1984	924,132	20,438	944,570
Total	$3,947,235	$97,738	$4,044,973

Pursuant to the Agreement, only the general partners of the partnership were entitled to share in the profits or losses of the partnership. Mr. Koether was not entitled or required to share in either profits or losses of the partnership.

Pursuant to the Agreement, only the general partners could vote on whether the partnership would be dissolved. Mr. Koether was never entitled to vote, nor did he ever vote, on partnership dissolution or other management matters.

Pursuant to the Agreement, Mr. Koether was entitled to withdraw from the partnership at any time and would thereupon receive from the partnership his capital contributed plus interest thereon until paid.

On September 6, 1984, Mr. Koether advised the partnership that he wished to resign as a limited partner. Pursuant to his request, the Agreement was amended as of October 1, 1984 to exclude Mr. Koether from the partnership. He continued his status as a registered representative in charge of the New Jersey office, the same status that he had maintained at all times after June 8, 1978.

CONCLUSIONS OF LAW

A. During the years in issue, Tax Law former § 632(a)(1) provided that the New York adjusted gross income of a nonresident individual includes the sum of the net amount of the

items of income, gain, loss and deduction entering into that individual's Federal adjusted gross income which were derived from or connected with New York sources. Tax Law former § 632(a)(1)(A) further provided that these items include the nonresident's "distributive share of partnership income, gain, loss and deduction determined under section six hundred thirty-seven". The income subject to the New York City nonresident earnings tax is governed by the same principles (Administrative Code of the City of New York former §§ U46-1.0[f]; U46-4.0[a]).

B. During the period in issue, Tax Law former § 637(a)(1) defined the portion of income derived from New York sources as follows:

> "In determining New York adjusted gross income of a nonresident partner of any partnership, there shall be included only the portion derived from or connected with New York sources of such partner's distributive share of items of partnership income, gain, loss and deduction entering into his federal adjusted gross income, as such portion shall be determined under regulations of the tax commission consistent with the applicable rules of section six hundred thirty-two."

C. At the outset, it is noteworthy that the partnership, through its preparation of the Schedule K-1's, represented that Mr. Koether was a partner receiving a distribution of partnership income. It is also significant that Mr. Koether characterized this income as partnership income. In the past, a taxpayer's treatment of himself as a partner and the characterization of the income as partnership income has been considered significant (Matter of Heffron v. Chu, 144 AD2d 729, 535 NYS2d 141; Matter of Heller v. New York State Tax Commn., 116 AD2d 901, 498 NYS2d 211), although it is not determinative (Matter of Yohalem v. State Tax Commn., 70 AD2d 996, 417 NYS2d 816).

D. Petitioners' first argument is that Mr. Koether's income was not subject to tax by New York because he was not a "partner" within the meaning of Tax Law former § 637. In support of this position, petitioners argue that Mr. Koether did not share in the profits; that he did not have a right to participate in the management of the partnership; that he would not have been entitled to vote on a proposed dissolution; that his capital contribution was really nothing more than a fancy loan; and that he was not personally liable for the debts of the partnership, which is a traditional attribute of a partner.

E. In general, a partnership is defined as "an association of two or more persons to carry on as co-owners of a business for profit" (Partnership Law § 10[1]). Attributes of a partnership typically include sharing in the profits and losses of the firm (Matter of Steinbeck v. Gerosa, 4 NY2d 302, 175 NYS2d 1, 13, appeal dismissed 358 US 39, 3 L Ed 2d 45; Alleva v. Alleva Dairy, 129 AD2d 663, 514 NYS2d 422, 423; 15 NY Jur 2d, Business Relationships, § 1313) and sharing in the management of the business (Alleva v. Alleva Dairy, supra; 15 NY Jur 2d, Business Relationships, § 1315).

If the question presented was whether Mr. Koether was a general partner, his lack of control over the management of the firm and the fact that he was not liable for the firm's losses might be determinative. However, the pertinent sections of the Tax Law only refer to "partnership income" and "partner". It does not specify the type of partnership or partner (see, Tax Law former §§ 632[a][1][A]; 637[a][1]).

It has been recognized that a tax law should be interpreted as an ordinary person would interpret it (Matter of Steinbeck v. Gerosa, supra, 175 NYS2d at 5). As commonly understood, the term "partnership" is not restricted to a particular type of partnership (see, Webster's Third New International Dictionary 1648 [1986]). Therefore, it is concluded that the terms "partnership" and "partner" in, respectively, Tax Law former §§ 632(a)(1)(A) and 637 include limited partnerships and limited partners.

F. In this instance, the partnership agreement of Ingalls & Snyder designates itself as a limited partnership and lists Mr. Koether as a limited partner. Section 90 of the Partnership Law defines a limited partnership as a:

> "partnership formed by two or more persons...having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership" (Partnership Law § 90).

Section 96 of the Partnership Law further provides that a limited partner will not become liable as a general partner unless, in addition to the exercise of the rights and powers of a limited partner, he participates in the control of the business. Thus, it is a characteristic of a limited partnership that a limited partner, such as Mr. Koether, would not share as a general partner in

the losses of the partnership. Further, the statutory scheme contemplates that a limited partner would not, in the ordinary course of business, participate in the management of the partnership's affairs (see generally, 16 NY Jur 2d, Business Relationships, § 1547). It follows that petitioners' arguments regarding the fact that Mr. Koether was not personally liable for the partnership's debts or the lack of authority over partnership affairs only signifies that Mr. Koether was not a general partner. Contrary to petitioners' position, it does not establish that Mr. Koether was not a partner within the meaning of the Tax Law.

G. Petitioners' remaining arguments are also without merit. The Findings of Fact explicitly state that Mr. Koether did not share in the profits of the partnership (see, Finding of Fact "23"). However, it is also clear from the Findings of Fact that Mr. Koether's compensation, which is designated as interest, was directly tied to the profitability of the partnership (see, Finding of Fact "21"). One principle which must be considered in determining the relative weight to be accorded these Findings of Fact, is that Tax Law former § 637(b)(1) expressly provides that:

> "no effect shall be given to a provision in the partnership agreement which...characterizes payment to the partner as being for services or for the use of capital...."

Therefore, it is concluded that even if one does not wish to characterize a portion of Mr. Koether's distribution as profit, it is clear that Mr. Koether had a financial interest in the profitability of the partnership. Contrary to petitioner's argument, the fact that Mr. Koether's interest income was relatively small compared to his commission income is of no consequence (see, Matter of Weil v. Chu, 120 AD2d 781, 501 NYS2d 515, 519, affd 70 NY2d 783, 521 NYS2d 223, appeal dismissed 485 US 901, 99 L Ed 2d 229).

The record also shows that, in 1979, Mr. Koether invested $40,000.00 in cash in the partnership and that in later years this investment was increased. In light of these findings, it is clear that Mr. Koether made a capital contribution to the partnership. The fact that upon dissolution Mr. Koether would only have been entitled to his capital contribution does not prove that the capital contribution was really a loan.

Petitioners' reliance upon Matter of Farmer v. State Tax Commn. (144 AD2d 720, 535 NYS2d 453) and Matter of Walter Pozen (State Tax Commission, October 4, 1979) is misplaced. In each case, the question presented was whether certain individuals were nonresident general partners of a New York partnership. In each instance, the nonresidents were found not to be members of the New York partnership because the nonresidents did not participate in the management of the partnership and because the nonresidents did not share in the partnership's profits and losses. Neither case raised the question of whether these factors were necessary to be considered a limited partner or whether distributions from a New York partnership to a nonresident limited partner were subject to tax.

In view of the foregoing, it is concluded that Mr. Koether was a partner of Ingalls & Snyder within the meaning of Tax Law § 637 and therefore his adjusted gross income "includes his distributive share of all items of partnership income, gain, loss and deduction entering into his Federal adjusted gross income to the extent such items are derived from or connected with New York sources..." (20 NYCRR 134.1).

H. Petitioners argue that any attempt to impose income tax liability on Mr. Koether's income is unconstitutional because New York does not have a sufficient nexus with petitioners. Petitioners submit that it is undisputed that Mr. Koether's income was not subject to tax when he was merely a registered representative provided that he did not provide any services in New York. Petitioners contend that becoming a limited partner could not have provided the required nexus.

I. The foregoing due process argument was most recently addressed in Matter of Weil v. Chu (supra). In Weil, the Court found that there was a sufficient nexus between nonresident taxpayers' income and New York to validate the tax where the nonresidents were partners of a law firm which maintained a considerable permanent presence in New York. The record does not reveal any reason why a similar holding would not be made here. Further, petitioners' argument that there is no basis for treating the income received by a nonresident partner any differently than that of a nonresident employee is also without merit. As a limited partner of a

stock brokerage firm, Mr. Koether's position was distinguishable from that of an employee who worked out of state (Matter of Knapp v. State Tax Commn., 67 AD2d 1024, 413 NYS2d 237).

Petitioners' reliance upon the New York Supreme Court opinion in Matter of Farmer v. State Tax Commn. (Sup Ct, Albany County, October 12, 1979, Ford. J., affd 144 AD2d 720, 535 NYS2d 453) is misplaced. The Court found that a declaratory judgment in favor of the plaintiffs was proper where the Division was attempting to impose tax on nonresidents who, although having the outward indicia of partnership, were not partners of a New York partnership. Here, Mr. Koether clearly was a limited partner of a New York partnership and received New York source income.

J. Tax Law § 685(a)(1), (2), and (b) provides for the imposition of penalties for failure to file a return, failure to pay tax shown on a return required to be filed and deficiency due to negligence. The first issue to be addressed is the penalties which were imposed for the failure to file a return and failure to pay tax shown on a return required to be filed.

K. The penalties imposed by Tax Law § 685(a)(1) and (2) may be remitted if it is shown that the failure to pay was due to reasonable cause and not due to willful neglect. The burden of proving the existence of reasonable cause is upon the taxpayer (Tax Law § 689[e]).

L. Initially, it is noted that reliance upon a tax advisor does not necessarily constitute reasonable cause for the remission of penalties (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557). It must also be shown "that the taxpayer relied in good faith on the advice which he received and it must have been 'reasonable' for the taxpayer to rely upon the particular advice he was given (citations omitted)" (Matter of Kenneth J. Erickson, Tax Appeals Tribunal, March 22, 1990). In evaluating whether the reliance was reasonable, the taxpayer is required to show that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (id.). In addition, the nature and complexity of the matter giving rise to the dispute is also considered (id.).

M. On the basis of the foregoing standards, petitioners have not established reasonable cause. The record contains no evidence of the experience and expertise of the accountant which

would show that Mr. Koether relied upon competent advice (id.). Nor is there any evidence as to why the accountant made the decision he did (see, Matter of Kenneth R. and Cheryl Etheredge, Tax Appeals Tribunal, July 26, 1990). Lastly, it has been recognized on at least two occasions that the statutes involved are clear (see, Matter of Bachman v. State Tax Commn., 89 AD2d 679, 453 NYS2d 774; Matter of Kenneth R. and Cheryl Etheredge, supra). Although the issue presented here involves a limited partner and not a general partner, petitioners have not shown how this additional factor greatly adds to the complexity. On at least one prior occasion, the former State Tax Commission found that a nonresident limited partner of Ingalls & Snyder was liable for tax on his partnership distributions (Matter of E. C. Sterling McKittrick, State Tax Commission, December 13, 1978).[1]

N. It is noted that petitioner's reliance upon Matter of Roberta Flack (State Tax Commission, August 21, 1985) and Matter of Herman Meyer (State Tax Commission, May 27, 1983) to establish that penalties should be abated is misplaced. Unlike here, the record in Flack was clear that the taxpayer sought advice from someone who had experience in dealing with the tax problems of entertainers. In Meyer, there was no evidence that the taxpayer fully apprised his accountant of all of the facts. Therefore, there was no need to consider the experience or expertise of the accountant. Hence, the Meyer case is also inapposite.

O. Petitioner's reliance upon an Administrative Law Judge determination will not be considered since such determination may not be cited for precedent (Tax Law § 2010[5]).

P. As to the 1984 tax year, petitioners argue that the due date for filing the return (April 15, 1985) occurred after the petitions for the 1979 and 1980 tax years were filed (January 14, 1985). It is submitted that, pursuant to 20 NYCRR 102.7(d)(3), the pendency of the petition constitutes reasonable cause for the failure to file the 1984 return and pay the tax for that year.

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[1]Petitioner's attempt to distinguish McKittrick on the grounds that Mr. McKittrick performed work in New York is of no consequence since both were limited partners (Tax Law § 632[a][1][A]). The fact that Mr. McKittrick later became a general partner or that the case was decided under the former State Tax Commission's small claims procedure is of no consequence.

Q. The Commissioner's regulations at 20 NYCRR 102.7(d)(3) provide that, where clearly established, the following exemplifies reasonable cause:

> "A pending petition to the Commissioner of Taxation and Finance for an advisory opinion or a declaratory ruling, a pending conciliation conference proceeding in the Bureau of Conciliation and Mediation Services of the Division of Taxation, a pending petition to the Division of Tax Appeals or a pending action or proceeding for judicial determination may constitute reasonable cause, until the time in which the taxpayer has exhausted its administrative or judicial remedies, as applicable, for a taxable period or periods the return or returns for which are due subsequent to the filing of the petition with the Commissioner of Taxation and Finance, the commencement of the conciliation conference proceeding, the filing of the petition with the Division of Tax Appeals or the commencement of the judicial action or proceeding provided that:
>
> (i) the petition, action or proceeding involves a question or issue affecting whether or not the individual or entity is subject to tax and/or required to file a New York State income tax return;
>
> (ii) the petition, action or proceeding is not based on a position which is frivolous nor is it intended to delay or impede the administration of article 22 of the Tax Law; and
>
> (iii) the facts and circumstances for such taxable period or periods are identical or virtually identical to those of the taxable period or periods covered by the petition, action or proceeding.
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> Example: An individual is awaiting a determination, after a hearing, of an administrative law judge of the Division of Tax Appeals regarding whether or not such individual was subject to tax and required to file a New York State income tax return in a prior taxable period. The individual's petition on the matter to the Division of Tax Appeals was filed prior to the due date for the return for the current taxable period. The facts and circumstances for the current taxable period are identical to those of the period covered by the petition. The individual's position is arguable and has merit based on case law. This constitutes reasonable cause for failure to file a New York State income tax return and for failure to pay the tax due for the current taxable period."

R. It is concluded that petitioners have satisfied the three criteria of 20 NYCRR 102.7(d)(3) and therefore petitioners have demonstrated reasonable cause for the failure to file and pay for 1984. Obviously, the question presented is whether Mr. Koether's income is subject to tax. Further, although it has been found that the petitions lack merit, they are not frivolous. In addition, the fact that petitioners remitted the tax in issue demonstrates that the petitions were not intended to delay or impede the administration of Article 22 of the Tax Law. Lastly, the

facts pertaining to 1984 are identical to those facts covered by the earlier petition.

S. Tax Law § 685(b) imposes a penalty if any part of the deficiency is due to negligence or intentional disregard of the law. Petitioners also have the burden of proof of establishing that this penalty was improperly imposed (Tax Law § 689[e]). It is concluded that, without more, petitioners' argument that they relied on an accountant is not sufficient to show that the failure to pay was not negligent for the years 1979 through 1983 (see, Kenneth R. and Cheryl Etheredge, supra). However, in accordance with Conclusion of Law "R", petitioners have shown that the failure to pay for the year 1984 was not negligent.

T. Except to the extent the revisions prepared by the Division may result in a refund (Finding of Fact "13"), the petitions of Paul O. Koether and Natalie I. Koether are granted only to the extent of Conclusions of Law "R" and "S"; the petitions are, in all other respects, denied.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE