

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-89 (6) I
Income Tax
July 12, 1989

STATE TAX COMMISSION
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I890213A

On February 13, 1989, a Petition for Advisory Opinion was received from Zissu Stein and Mosher, 270 Madison Avenue, New York, New York 10022.

The issue raised is whether, under Article 22 of the Tax Law, a "small partnership" is subject to the penalty for failure to file or late filing a partnership return imposed under section 685(h)(2) of the Tax Law, where such partnership is not subject to the failure to file penalty pursuant to section 6698 of the Internal Revenue Code.

Facts

Petitioner is a partnership consisting of three partners. The partners share all items of income, expense, deduction and credit in accordance with their partnership agreement which calls for a 25%, 37 1/2% and 37 1/2% allocation. Interest income attributable to a savings account is specially allocated to one partner inasmuch as the fund represented by the account was loaned to the partnership by him. In addition, this partner receives a guaranteed payment of \$25,000 in accordance with the partnership agreement. The only other "special allocation" is to reimburse two partners for various out of pocket expenses. The "special allocations" account for less than 2% of total partnership profits. Petitioner contends that the "special allocations" are not "partnership items" (See, Internal Revenue Code, section 702), but are properly regarded as guaranteed payments for which Schedule K-1 is merely a convenient reporting vehicle.

Petitioner has been assessed a penalty for the late filing of its 1987 New York State Partnership Tax Return (Form IT-204).

Because Petitioner consists of only three partners, Petitioner argues that it is not a "partnership" pursuant to section 6231(a)(1)(B) of the Internal Revenue Code (hereinafter "IRC"). In addition, Petitioner contends that it is not subject to the penalty imposed pursuant to section 6698 of the Internal Revenue Code. Petitioner states that the penalty contained in section 685(h)(2) of the Tax Law employs substantially the same language as section 6698 of the IRC. Also, Petitioner provides that it has been held that the state tax law is to be interpreted so as to follow federal judicial and administrative determinations and precedents where section 607 of the Tax Law is applicable. Moreover, Petitioner provides that section 607(a) of the Tax Law states that "[a]ny term used in this article [22] shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required.... "

Therefore, Petitioner asserts that based upon section 607 of the Tax Law, the word "partnership" as used in section 685(h)(2) of the Tax Law has the same meaning as under section 6698 of the IRC. Petitioner further asserts that although neither of such statutes contains a definition of this word, various federal authorities restrict its meaning to exclude the partnership in question.

For example, Internal Revenue Procedure 84-35 (1984-1 CB 509) incorporates the definition set forth in section 6231(a)(1)(B) of the IRC to exclude from the coverage of section 6698 of the IRC, partnerships consisting of 10 or fewer partners.

Discussion

Section 658(c)(1) of Article 22 of the Tax Law requires:

Every partnership having a resident partner or having any income derived from New York sources, determined in accordance with the applicable rules of section six hundred thirty-two as in the case of a nonresident individual, shall make a return for the taxable year setting forth all items of income, gain, loss and deduction and such other pertinent information as the tax commission may by regulations and instructions prescribe

Section 685(h)(2) of the Tax Law provides:

If any partnership or S corporation required to file a return under subsection (c) of section six hundred fifty-eight for any taxable year fails to file such return at the time prescribed therefor (determined with regard to any extension of time for filing), or files a return which fails to show the information required under subsection (c), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall, upon notice and demand by the tax commission and in the same manner as tax, be paid by the partnership or S corporation a penalty for each month (or fraction thereof) during which such failure continues (but not to exceed five months)

The term "partnership" is not defined in Article 22 of the Tax Law. However, pursuant to section 607(a) of the Tax Law, such term will have the same meaning as when used in comparable text in the IRC. Section 761(a) of IRC provides that for federal income tax purposes:

the term "partnership" includes a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title [subtitle], a corporation or a trust or estate

In addition, section 6031(a) of the IRC requires:

Every partnership (as defined in section 761 (a)) shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowable by subtitle A, and such other information for the purpose of carrying out

the provisions of subtitle A as the Secretary may by forms and regulations prescribe, and shall include in the return the names and addresses of the individuals who would be entitled to share in the taxable income if distributed and the amount of the distributive share of each individual.

For federal income tax purposes, the penalty for failure to file a partnership return is contained in section 6698(a) of the IRC which provides that,

if any partnership required to file a return under section 6031 for any taxable year -

(1) fails to file such return at the time prescribed therefor (determined with regard to any extension of time for filing), or

(2) files a return which fails to show the information required under section 6031,

such partnership shall be liable for a penalty determined under subsection (b) for each month (or fraction thereof) during which such failure continues (but not to exceed 5 months), unless it is shown that such failure is due to reasonable cause.

Section 6231(a)(1)(B) of the IRC provides that for purposes of subchapter C [Tax treatment of partnership items] of Chapter 63 [assessment] of the IRC

the term "partnership" shall not include any partnership if -

(I) such partnership has 10 or fewer partners each of whom is a natural person (other than a nonresident alien) or an estate, and

(II) each partner's share of each partnership item is the same as his share of every other item.

Pursuant to Internal Revenue Service Rev. Proc. 84-36, section 3:

.01 [a] domestic partnership composed of 10 or fewer partners and coming within the exceptions outlined in section 6231(a)(1)(B) of the Code will be considered to have met the reasonable cause test and will not be subject to the penalty imposed by section 6698 for the failure to file a complete or timely partnership return, provided that the partnership, or any of the partners, establishes, if so requested by the Internal Revenue Service, that all partners have fully reported their shares of the income, deductions, and credits of the partnership on their timely filed income tax returns.

. . .

.03 Although a partnership of 10 or fewer partners may not be automatically excepted from the penalty imposed by section 6698 of the Code under section 3.01, the partnership may show other reasonable cause for failure to file a complete or timely partnership return.

. . . .

Accordingly, for federal income tax purposes, pursuant to section 6031(a) of the IRC, Petitioner would be required to file a partnership return. However, Petitioner may qualify as a "small partnership" for purposes of meeting the reasonable cause test, and thereby not be subject to the penalty imposed by section 6698 of the IRC.

For New York State personal income tax purposes, Petitioner is required to file a partnership return pursuant to section 658(c) of the Tax Law. However, if Petitioner can show reasonable cause for failing to file or late filing such partnership return, the penalty for failure to file a partnership return under section 685(h)(2) of the Tax Law will not be applied. But, it should be noted that meeting the requirements of "reasonable cause" for federal income tax purposes, under section 6698 of the IRC does not necessarily mean that the test for reasonable cause for New York State personal income tax purposes has been met. Reasonable cause must be determined pursuant to the rules set forth in the New York State Personal Income Tax Regulations.

Section 102.7 of the Personal Income Tax Regulations provides that, for New York State personal income tax purposes, the grounds for reasonable cause must be clearly established as stated in subdivision (d) and may include the following:

(1) The death or serious illness of the taxpayer, employer or other person against whom the additions to tax or penalties have been assessed or are assessable, a member of such party's family, such party's personal representative or employer, or the unavoidable absence of the taxpayer, employer, or other person or personal representative from the usual place of business, which precluded timely compliance, may constitute reasonable cause provided that:

(i) in the case of the failure to file any New York State income tax return, the applicable New York State income tax return is filed; or

(ii) in the case of the failure to pay or deposit any tax, such amount is paid or deposited;

within a justifiable period of time after the death, illness or absence...

(2) The destruction of the place of business or business records of the taxpayer, employer or other person against whom the additions to tax or

penalties have been assessed or are assessable, the place of business or business records of such party's personal representative or employer, or the taxpayer's residence or income records, including wage and tax statements and returns of information, by a fire or other documented casualty, which precluded timely compliance, may constitute reasonable cause provided that:

(i) in the case of the failure to file any New York State income tax return, the applicable New York State income tax return is filed; or

(ii) in the case of the failure to pay or deposit any tax, such amount is paid or deposited;

within a justifiable period of time after the casualty takes place...

(3) 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...

(4) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause.

Subdivision (e) of section 102.7 of the Personal Income Tax Regulations provides that:

(e)(1) Except as provided for in subparagraph (2)(ii) of this subdivision, an inability to timely obtain and assemble essential information (including wage and tax statements or returns of information from an employer or payor) required for the preparation of a complete New York State income tax return, shall not be a basis for reasonable cause.

(2)(i) Where an inability to timely obtain and assemble essential information required for the preparation of a complete New York State income tax return exists and extensions of time for filing such return are available pursuant to section 151.1 of this Title, such extensions of time for filing must be obtained, a return which reflects the known tax liability must be filed on or before the extended due date for filing and any balance of tax must be paid with the return on that portion of the tax liability which can be ascertained and shown on such return. The relevant facts affecting that portion of the tax liability which cannot be ascertained must be fully disclosed with the timely filed New York State income tax return. When such liability is ascertained, an amended New York State income tax return must be immediately filed together with any additional tax due.

(ii) However, where a taxpayer:

(a) makes a timely application for an extension of time to file the New York State income tax return;

(b) makes a good faith effort to properly estimate the tax due in accordance with section 151.2 of this Title; and

(c) pays with the application for extension of time for filing any unpaid balance of the tax as estimated;

an inability for reasons beyond the taxpayer's control to obtain and assemble essential information may constitute reasonable cause for failure to file a New York State income tax return and for failure to pay the amount shown as tax on such return, where such inability precluded the taxpayer from properly estimating the tax as finally determined (see section 151.2[a][3][i] of this Title) thereby invalidating the extensions of time for filing the New York State income tax return. In support of this ground as a basis for reasonable cause, the taxpayer or the taxpayer's representative must indicate what information was unavailable and explain the reason or reasons why such information was unavailable, despite reasonable efforts by or on behalf of the taxpayer to obtain the missing information. It must further be explained how the original estimation of tax was derived and what, if any, allowances were included in the estimation to provide for the unknown tax liability.

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Accordingly, for purposes of Article 22 of the Tax Law, Petitioner is required by section 658(c) to file a partnership return. If such return is not filed or is filed late, Petitioner is subject to the penalty for failure to file a partnership return pursuant to section 685(h)(2) of the Tax Law, unless Petitioner can show that such failure is due to reasonable cause. Reasonable cause must be determined under the rules provided in section 102.7 of the Personal Income Tax Regulations. Meeting the requirements for reasonable cause for federal income tax purposes has no bearing on the New York State determination of reasonable cause. However, for New York State income tax purposes, the determination of reasonable cause is a question of fact not susceptible of determination in an advisory opinion. An advisory opinion merely sets forth the applicability of pertinent statutory and regulatory provisions to "a specified set of facts". Tax Law, §171, subd. twenty-fourth; 20 NYCRR 901.1(a).

DATED: July 12, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.