

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

TSB-A-92 (6) I
Income Tax
July 14, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. I920423A

On April 23, 1992, a Petition for Advisory Opinion was received from Sidney and Freda (dec'd) Esikoff, 5500 Collins Avenue - Apt. 303, Miami Beach, Florida 33140.

The issue raised by Petitioners, Sidney & Freda (dec'd) Esikoff, is whether the statute of limitations has expired with respect to Petitioners' 1987 New York State personal income tax return including their amended return for 1987.

The Petitioners filed timely joint Federal and New York State income tax returns for 1987 on or about October 15, 1988. The taxpayers' 1987 personal income tax return was filed on Form IT-203 Nonresident Income Tax Return (the "original 1987 return"). No entry was made in the box at Item C on Form IT-203 and Form IT-360 was not attached to the original 1987 return.

The original 1987 return reported a higher federal adjusted gross income than New York State adjusted gross income, the difference being predominantly the exclusion of certain interest income, dividend income and capital gains because Petitioners claimed nonresident status. On June 30, 1989, Petitioners filed an amended 1987 personal income tax return ("amended 1987 return").

Section 683(a) of the Tax Law provides that "[e]xcept as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed" The subsequent filing of an amended return for such taxable year does not extend the time during which an assessment can be issued.

However, section 683(c)(1) of the Tax Law provides that "[t]he tax may be assessed at any time if ... (B) a false or fraudulent return is filed with intent to evade tax" The determination of whether "a false or fraudulent return is filed with intent to evade tax" is a factual matter 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. Twenty-fourth; 20 NYCRR 2376.1(a). Since this question arose within the context of an audit, the necessary factual determination will be made within such context and not by an Advisory Opinion.

Section 683(d) of the Tax Law provides that the tax may be assessed at any time within six years after the return was filed if an individual omits from his or her 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 or the sum of the items of tax preference. For purposes of section 683(d), 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 Commissioner of Taxation and Finance of the nature and amount of the item of income or tax preference.

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In the Matter of Bernard Weinflash and Ruth Weinflash, Dec St Tax Comm, June 5, 1981, TSB-H-81(197)I, it was held that where income was reported on petitioners nonresident return under the federal amount column, but the petitioners used an incorrect allocation percentage in determining New York income, to the extent the income was included in the federal amount column, it was not an omission of income for purposes of section 683(d) the Tax Law.

Herein, Petitioners filed their 1987 personal income tax return as nonresidents of New York State on Form IT-203. Petitioners did not mark the box at Item C with respect to part-year residents nor did they attach Form IT-360 as required by Item C. Petitioners did complete the return as nonresidents for the entire year and did disclose all items of income for the taxable year in the federal amount column on page one of the return.

Accordingly, when determining whether Petitioners omitted an amount in excess of twenty-five percent of the amount of New York adjusted gross income for purposes of section 683(d) of the Tax law, an amount that is included in the federal amount column of their nonresident return should not be taken into account as omitted New York adjusted gross income.

However, it should be noted that section 683(d) is patterned after section 6501(e) (1) of the Internal Revenue Code. 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 US 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, the question of whether the tax return is sufficient to apprise the Commissioner of the nature and amount of the transaction is essentially a factual inquiry (see, Estate of Fry, 88 TC 1020).

As stated previously, questions of fact are not susceptible of determination in an Advisory Opinion. Therefore, since the question arose within the context of an audit, the determination of whether, pursuant to section 683(d) of the Tax Law, the time for issuing an assessment with respect to Petitioners 1987 personal income tax return is extended to within six years from the time the return was filed will be made within such context. However, as previously noted,

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in making such a determination the amount included in the federal amount column of Petitioner's non resident return cannot be taken into account as omitted New York adjusted gross income.

DATED: July 14, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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