

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

IRVING AND MILDRED HERSHEY

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Year 1975.

Petitioners, Irving and Mildred Hershey, 955-D Circle Drive, Delray Beach, Florida 33445, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the year 1975 (File No. 51762).

On June 20, 1986, petitioners waived a hearing and agreed to submit this matter to the State Tax Commission for decision based upon the Department of Taxation and Finance file, with a brief to be filed by July 20, 1986. After due consideration the State Tax Commission hereby renders the following decision.

ISSUE

Whether petitioners made a timely request for refund of unincorporated business taxes paid for the year 1975.

FINDINGS OF FACT

1. On February 23, 1979, petitioner Irving Hershey was issued a Notice of Deficiency with respect to unincorporated business tax for the year 1974 in the amount of \$101.34 in tax plus penalty and interest of \$91.60. The Audit Division explained in a Statement of Audit Changes that said petitioner's income from activities as a "consultant" was subject to unincorporated business tax. This notice was timely protested by petitioner.

2. On August 7, 1980 a Notice of Deficiency was issued to petitioners, Irving and Mildred Hershey, for unincorporated business tax for 1975 in the amount of \$213.97 which included \$129.39 in tax, plus penalty and interest.

3. On September 9, 1980 petitioners paid the deficiency of \$213.97.

4. In a letter dated October 31, 1981, received by the Tax Appeals Bureau on November 2, 1981, petitioners requested assistance with respect to: a) resolving the 1974 deficiency; and b) obtaining a refund of the amount paid on the 1975 deficiency.

5. On March 11, 1983 the Audit Division cancelled the 1974 deficiency on the basis that Mr. Hershey was not conducting an unincorporated business, but was a professional in the field of social services.

6. On October 21, 1983 petitioners wrote to the Department of Taxation and Finance requesting a refund of the tax paid in 1975.

7. On October 28, 1983 the Audit Division responded, stating, in essence, that no claim for refund had been filed, and the letter of October 21, 1983 was not timely and thus could not be accepted as a claim for refund.

8. After further correspondence, a formal Notice of Disallowance was sent to petitioners on February 27, 1984.

9. The Audit Division concedes that the amount of \$213.97 was paid by petitioners on September 9, 1980 and that Mr. Hershey's receipts from his activities in 1975 were not subject to unincorporated business tax. The only issue remaining is the timeliness of the refund claim.

CONCLUSIONS OF LAW

A. That section 687(a) of the Tax Law (applicable to Article 23 by virtue of section 722) provides, in pertinent part, as follows:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid."

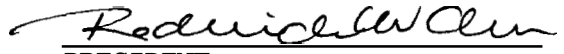
B. That the letter received by the Tax Appeals Bureau on November 2, 1981 (Finding of Fact "4") **was** received within two years of the time the payment was made, i.e. September 9, 1980, and thus constituted a timely claim for credit or refund under section 687(a) of the Tax Law.

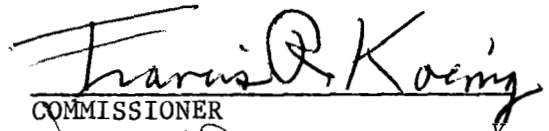
C. That the petition of Irving and Mildred Hershey **is** granted and the Audit Division is hereby directed to authorize a refund to petitioners in the amount of \$213.97 plus interest from September 9, 1980.

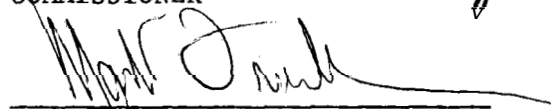
DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT


COMMISSIONER


COMMISSIONER