

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

WALTER R. BUTLER

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1976.

Petitioner, Walter R. Butler, Cedar Hills, Byfield, Massachusetts 01922, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1976 (File No. 53356).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 23, 1985 at 2:45 P.M., with all briefs to be submitted by November 25, 1985. Petitioner appeared by Pauline Butler. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

- I. Whether the Notice of Deficiency was properly issued to petitioner.
- II. Whether petitioner is entitled to a resident tax credit for income taxes purportedly paid to the State of Massachusetts during 1976.

FINDINGS OF FACT

1. Walter R. Butler (hereinafter "petitioner") and his wife, Pauline Butler timely filed a joint New York State Income Tax Resident Return for the year 1976 whereon they reported total income of \$22,788.19. Their address was listed on said return as 601 South Broadway, Nyack, New York 10960.

2. On February 27, 1980, the Audit Division issued a Statement of Audit

\$27,454.00, said amount representing the adjusted gross income reported on his 1976 Federal return. Accordingly, a Notice of Deficiency was issued against petitioner on March 20, 1980 asserting additional personal income tax of \$463.27, plus interest of \$115.43, for a total due of \$578.70. The Statement of Audit Changes and Notice of Deficiency were sent to petitioner at the aforestated New York address.

3. In 1977, petitioner and his wife moved to the State of Massachusetts. They did not notify the State Tax Commission of their change of address. Consequently, petitioner **did** not receive the Statement of Audit Changes and Notice of Deficiency. Said notice was returned to the Audit Division. The envelope was marked "Authorized time for forwarding expired."

4. On September 13, 1982, the Department of Taxation and Finance, Tax Compliance Section, notified petitioner of the balance due on his account for 1976 based on the previously issued Notice of Deficiency. Since petitioner was unaware of the deficiency or the adjustment leading to such deficiency, voluminous correspondence between petitioner and various Department employees followed.

5. In a letter dated February 17, 1983, the Audit Division notified petitioner of the nature of the deficiency at issue. Attached thereto were copies of the Statement of Audit Changes and Notice of Deficiency. Additionally, said letter informed petitioner that:

"Since you did not file a petition within 90 days of the date that our Notice of Deficiency was issued, the tax became assessed on the 91st day and you waived your right **to** any further review until such time as the assessment is fully paid.

Therefore, if you wish to pursue this matter further, the total due must first be paid and then you may file a claim for refund on Form IT-113X, at which time a conference may be granted."

6. Subsequently, correspondence was mailed to petitioner explaining the law with respect to mailing of the Notice of Deficiency. A copy of the envelope used to mail the Notice of Deficiency as well as proof of certified mailing of the same were also sent to petitioner.

7. During the hearing, the Audit Division submitted the original envelope used for mailing the Notice of Deficiency. Such envelope, which was returned to the Audit Division, bears a machine metered date of March 20, 1980 and a certified mailing number of 27251. Additionally, the Audit Division submitted an affidavit of mailing and a certified mailing list indicating that certified mail bearing the number 27251 was mailed to petitioner at his Nyack, New York address on March 20, 1980.

8. On July 25, 1983, the Tax Compliance Bureau sent a letter to petitioner advising him that payment of the balance due (tax plus updated interest) of \$829.95 must be made within 15 days. Said letter further explained that failure to make such payment would result in collection enforcement action.

9. On August 15, 1983, petitioner paid the stated balance due of \$829.95.

10. On January 14, 1984, petitioner filed a claim for credit or refund of his payment of \$829.95. His basis for such claim was essentially that the Notice of Deficiency was invalid in that it was improperly mailed and no effort was made to locate him until September, 1982.

11. On March 26, 1984, the Audit Division issued a formal notice of disallowance to petitioner notifying him that his claim for credit or refund had been disallowed in full.

12. With respect to the difference between his income reported for Federal and New York State purposes, petitioner alleged that such difference of \$4,665.81 represented income earned in the State of Massachusetts.

13. Petitioner claimed that he paid Massachusetts income tax on the income purportedly earned in said state. Accordingly, he contends that he is properly entitled to a resident tax credit for such taxes paid to Massachusetts.

14. Although a period of one month subsequent to the hearing was granted to allow petitioner to submit documentation to show that he filed a 1976 Massachusetts return and the amount of tax purportedly paid to Massachusetts, such documentation was not submitted.

15. Petitioner's 1976 personal income tax liability was incorrectly computed on the Statement of Audit Changes. Petitioner's Federal adjusted gross income included a New York State income tax refund of \$2.30.95 which should properly be subtracted from the "Corrected New York Income" as stated on the Statement of Audit Changes.

CONCLUSIONS OF LAW

A. That section 681(a) of the Tax Law provides, in pertinent part, that:

"A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state."

B. That section 691(b) of the Tax Law provides that:

"For purposes of this article, a taxpayer's last known address shall be the address given in the last return filed by him, unless subsequent to the filing of such return the taxpayer shall have notified the tax commission of a change of address."

C. That the Notice of Deficiency dated March 20, 1980 was properly issued pursuant to sections 681(a) and 691(b) of the Tax Law.

D. That petitioner has failed to sustain his burden of proof, imposed pursuant to section 689(e) of the Tax Law, to show that he is properly entitled to a resident tax credit. Accordingly, no such credit is allowable.

E. That the "Corrected New York Income" (Federal adjusted gross income)

Finding of Fact "15"). Accordingly, the tax asserted in the Notice of Deficiency issued March 20, 1980 is also overstated.

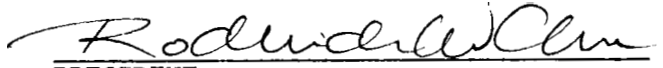
F. That the petition of Walter R. Butler is granted to the extent provided in Conclusion of Law "E", supra, and except as so granted, said petition is, in all other respects, denied.

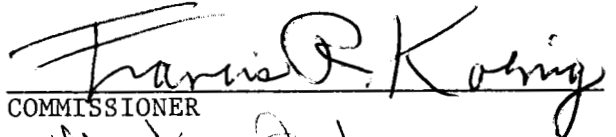
G. That the formal notice of disallowance dated March 26, 1984 is to be modified so as to reflect the adjustment required to be made resulting from the overstatement of petitioner's New York income on the Statement of Audit Changes and the Audit Division is hereby directed to authorize such refund as may be due therefrom.

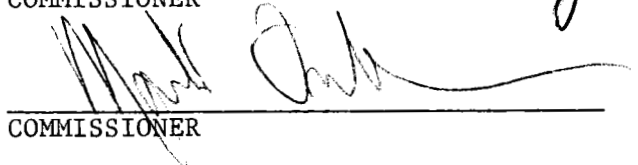
DATED: Albany, New York

STATE TAX COMMISSION

APR 04 7986


PRESIDENT


COMMISSIONER


COMMISSIONER