

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

THOMAS M. DIAL and WENDY DIAL

DECISION

for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1980 and 1981.

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Petitioners, Thomas and Wendy Dial, 301 Vanida Drive, Camillus, New York 13031, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1980 and 1981 (File Nos. 53556 and 59660).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on December 4, 1985 at 9:15 A.M. Petitioners appeared by Thomas M. Dial, pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUE

Whether petitioner *is* entitled to utilize income averaging to determine his New York State taxable income.

#### FINDINGS OF FACT

1. Petitioners, Thomas M. Dial and Wendy Dial, filed a joint New York State Income Tax Resident Return for the year 1980. On this return, petitioners reported that the federal amount of their wages and interest income totalled \$33,035.08. However, utilizing Federal Schedule G (Income Averaging), petitioners claimed an adjustment to income and reported that their total New York income was \$19,224.00. They computed their tax due accordingly. On the

basis of this return, petitioners received a refund of New York State personal income tax.

2. Petitioners filed a joint New York State Resident Income Tax Return for the year 1981. On this return, petitioners reported that the federal amount of their wages was \$40,434.90. However, utilizing Federal Schedule G (Income Averaging), petitioners claimed an adjustment to income and reported that their total New York income was \$18,513.28. On the basis of this return petitioners received a refund of New York State personal income tax.

3. On May 18, 1984, the Audit Division issued a Notice of Deficiency to petitioners asserting a deficiency of personal income tax for the year 1980 in the amount of \$1,526.71 plus interest of \$571.03 for a total amount due of \$2,097.74. On March 25, 1985 the Audit Division issued a Notice of Deficiency to petitioners asserting a deficiency of personal income tax for the year 1981 in the amount of \$2,214.73 plus interest in the amount of \$784.25 for a total amount due of \$2,998.98. To the extent at issue herein, the notices of deficiency were premised upon the Audit Division's position that there is no provision in the New York State Tax Law which permits income averaging and that the starting point for computing New York State tax liability is federal adjusted gross income.

4. In 1979 petitioner came to New York State from Georgia. His first experience in preparing a state income tax return was in 1980 because Georgia did not have an income tax at the time he left. Since petitioner prepared his own tax returns, he went to the Syracuse office of the New York State Department of Taxation and Finance to inquire whether income averaging was permissible. Mr. Dial was advised that there was a New York State adjustment for income averaging. He then followed the instructions given to him in preparing his income tax returns for 1980 and 1981.

5. At the hearing, **Mr.** Dial argued that the asserted deficiency of personal income tax should be cancelled because: Department of Taxation and Finance employees are not aware that income averaging is not permissible for New York State income tax purposes; because New York State does not provide literature stating that income averaging is not available; and because New York State accepted the return as filed and mailed a refund. Mr. Dial also argued that the income tax returns should have been returned to him as incomplete and that interest should not have been included in the proposed deficiency.

CONCLUSIONS OF LAW

A. That Tax Law §612(a) provides that the New York State adjusted gross income of a resident individual is his federal adjusted gross income with certain modifications not relevant herein.

B. That the New York State Tax Law does not contain a provision authorizing the use of income averaging in computing the personal income tax due.


C. That petitioner has not presented any basis to cancel or modify the notices of deficiency dated May 18, 1984 and March 25, 1985.

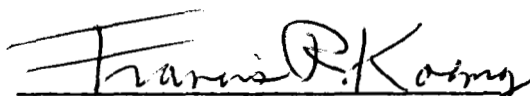
D. That the petition of Thomas **M.** Dial and Wendy Dial is denied and the notices of deficiency are sustained.


DATED: Albany, New York

STATE **TAX** COMMISSION

**APR 28 1986**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER