

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of :

JAY L. MCELWAIN and PHYLLIS A. MCELWAIN

DECISION

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

Petitioners, Jay L. and Phyllis A. McElwain, 46 Vernon Road, RD #3, Clay, New York 13041, 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 1980 (File No. 53933).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on April 3, 1986 at 9:15 A.M. Petitioner Jay L. McElwain appeared pro se and for his spouse. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division properly denied petitioners' claimed household credit and claimed disability income exclusion on petitioners' 1980 New York State personal income tax return.

FINDINGS OF FACT

1. On June 17, 1981 petitioners, Jay L. and Phyllis A. McElwain, filed separately on one return their 1980 New York State personal income tax returns. Petitioners claimed, in the aggregate, a household credit against tax of \$35.00 and petitioner Jay L. McElwain claimed \$5,200.00 as an adjustment to income

pursuant to the disability income exclusion provisions of section 105(d) of the Internal Revenue Code.

2. On January 5, 1983 the Audit Division issued to petitioners a Statement of Audit Changes with respect to petitioners' 1980 personal income tax return asserting a total of \$449.76 in additional tax due, plus interest. The adjustments were explained, in pertinent part, as follows:

"The starting point for computing the New York tax liability is federal adjusted gross income. Therefore, your tax liability has been recomputed as shown.

Adjustment is required because you subtracted only a portion of state and local taxes included in federal itemized deductions rather than the full amount.

Since the household gross income is \$25,000.00 or more, the household credit is not allowed.

* * *

Since the disability exclusion is not claimed on your federal return, it may not be claimed on your state return."

3. On February 9, 1983 petitioners filed separately on one return an amended 1980 New York State personal income tax return. On said amended return petitioners did not claim the household credit taken on their original return, nor did Mr. McElwain claim the disability income exclusion previously taken. Based upon the amended return petitioners calculated their additional 1980 personal income tax liability to be \$360.00. Petitioners remitted the \$360.00, together with \$79.00 in interest, with their amended return.

4. While petitioners claimed neither the household credit nor the disability income exclusion on their amended return, petitioners did take issue, both in their petition and at hearing, with the Audit Division's position that they were not entitled to the aforementioned tax benefits and therefore requested a

refund of the additional tax paid for the year 1980 based upon the exclusion of such tax benefits from the amended return.

5. On June 8, 1984 the Audit Division issued to petitioners two notices of deficiency with respect to said petitioners' 1980 personal income tax liability in amounts as follows:

<u>Taxpayer</u>	<u>Additional Tax Due</u>	<u>Interest</u>	<u>Total Amount Paid</u>	<u>Balance Due</u>
Jay L. McElwain	\$372.92	\$88.21	\$439.00	\$ 22.13
Phyllis A. McElwain	\$ 76.84	\$ 29.34	-0-	\$106.18

6. On May 31, 1985 petitioners paid the remaining additional tax asserted due in the notices of deficiency together with additional interest due thereon, remitting a total of \$143.74.

7. In its answer and at hearing, the Audit Division asserted that it accepted as correct petitioners' amended 1980 return except with respect to an alleged household credit taken by petitioners on said return. As discussed in Finding of Fact "3" supra, however, petitioners did not claim a household credit on their amended return.

8. Petitioners filed a joint federal income tax return for 1980 and did not claim a disability income exclusion on said return.

9. Petitioners contended that the Audit Division erroneously interpreted the instructions set forth in the Department of Taxation and Finance's "1980 Resident Income Tax Forms and Instruction Packet". Petitioners also contended, alternatively, that said instructions were inaccurate and misleading. Specifically Mr. McElwain took issue with the instructions in the instruction packet regarding line 45 of Form IT-201 (the form used by petitioners in filing both their original and amended 1980 returns) which provided the following:

"Line 45

Adjustments to Income

Enter the total adjustments to income reported on your federal return. If you are married and filing separately on one Form IT-201, you each must enter your own adjustments in columns A and B as if you each had filed a separate federal return." (Emphasis supplied.)

10. Mr. McElwain took the position that the above-quoted instruction authorized him to take the disability income exclusion on his New York return notwithstanding the fact that he had not taken this exclusion **on** his federal return. Mr. McElwain's inclusion of the disability income exclusion on his New York return reduced his and Mrs. McElwain's combined income to \$21,616.00. Mr. McElwain contended that he and his wife were therefore entitled to a household credit of \$35.00.

11. Petitioners' "household gross income" for the year at issue was \$26,816.00.

CONCLUSIONS OF LAW

A. That inasmuch as an individual's New York taxable income is premised upon that individual's federal adjusted gross income (Tax Law §§ 611, 612), the Audit Division properly denied Mr. McElwain's claimed disability income exclusion. Petitioners did not claim the disability income exclusion on their 1980 federal income tax return; it was therefore not part of petitioners' 1980 federal adjusted gross income. Consequently, pursuant **to** sections 611 and 612 of the Tax Law, Mr. McElwain may not claim said exclusion on his 1980 New York return. In addition, with respect to Mr. McElwain's contention that the Audit Division erroneously interpreted the instructions regarding petitioners' adjustments to income, or that such instructions were inaccurate, it is noted that had Mr. McElwain entered his adjustments to income "as if" he had filed a separate federal return (Finding of Fact "9") he would not have been entitled to the

claimed \$5,200.00 disability income exclusion because the relevant statute, section 105(d) of the Internal Revenue Code, requires married taxpayers claiming this exclusion to file joint returns. Consequently, had petitioners filed separate federal returns, Mr. McElwain would not have been entitled to the claimed exclusion. It is therefore clear that neither the instructions in question nor the Audit Division's interpretation of those instructions was erroneous; rather, Mr. McElwain was in error regarding his eligibility for the disability income exclusion.

B. That during the year at issue section 606(b)(2) of the Tax Law provided for a household credit against tax in the amount of \$35.00 if the household's gross income was less than \$25,000.00 but greater than \$7,000.00.

C. That inasmuch as petitioners' household **gross** income, properly computed for the year at issue, was greater than \$25,000.00, the Audit Division properly denied petitioners' claim for household tax credit.

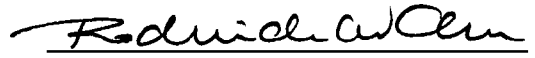
D. That in view of the Audit Division's acceptance of petitioners' amended return for the year at issue and the Audit Division's mistaken contention that petitioners claimed a household tax credit on said amended return, petitioners' personal income tax liability for the year at issue is limited to the amount of additional tax found due and owing on said return. The Audit Division is therefore directed to refund any amounts which may have been paid in excess of the amounts found lawfully due and owing herein.

E. That the petition of Jay L. and Phyllis A. McElwain is granted to the extent indicated in Conclusion of Law "D" and is in all other respects denied.

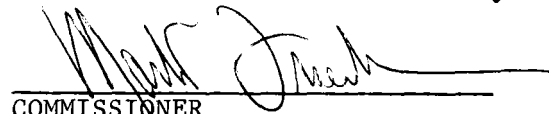
DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER