

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CHARLES R. ANDREWS, JR.

DECISION

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22 :
of the Tax Law for the Year 1974.

Petitioner, Charles R. Andrews, Jr., 77 Park Terrace East, New York, New York 10034, 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 1974 (File No. 56423).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 20, 1986 at 9:15 A.M., with all briefs to be submitted by April 1, 1986. **Petitioner appeared pro se.** The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed petitioner's refund claim for the year 1974.

FINDINGS OF FACT

1. Petitioner, Charles R. Andrews, Jr., timely filed a joint New York State Income Tax Resident Return for 1974 with his former wife, Claire E. Andrews. Said return indicated that a refund was due in the amount of \$173.00.

2. On April 22, 1977, the Audit Division issued a Notice of Additional Tax Due to petitioner and Claire E. Andrews asserting tax due of \$130.68, plus

change. The Federal audit change consisted of a reduction to claimed itemized deductions.

3. Petitioner's refund of \$167.84 claimed on his 1978 income tax return, filed as a single individual, was applied to the assessment for 1974. After this payment, the balance due on the 1974 assessment was \$22.87.

4. Petitioner's income tax return for 1981, also filed as a single individual, claimed a refund of \$397.00. The Audit Division applied \$22.87 of the refund to the balance due on the 1974 assessment. With the payment of \$22.87, the 1974 liability was paid in full.

5. On May 24, 1982, petitioner wrote to the Audit Division questioning the propriety of applying refunds from his 1978 and 1981 tax returns filed as a single individual to the 1974 joint assessment. Petitioner argued that his former spouse should be liable for payment of one-half of the 1974 assessment inasmuch as a joint return was filed for 1974. Pursuant to a letter dated June 22, 1982, petitioner was advised that "[U]nder Section 651(b)(2)(A) of the New York Tax Law each spouse may be held responsible for the total tax liability where a joint return is filed." Said letter further advised petitioner that his letter dated May 24, 1982 would be:

"...regarded as a claim for refund with respect to the portions of the applied overpayments which you feel should not have been **so** applied. In order that your procedural rights may be protected, our Audit Division will send you a formal notice of disallowance **of** your claim shortly..."

6. On July 26, 1982, the Audit Division issued a notice of disallowance to petitioner regarding his claim for refund for the year 1974. The amount disallowed, i.e., \$95.36, represented one-half of the 1974 assessment paid by petitioner (\$167.84 + \$22.87) which he argued should have been paid by his former spouse.

7. On July 25, 1984, petitioner timely filed a petition for refund for 1974 in the amount of \$173.00. In said petition, Mr. Andrews asserted, for the first time, that he never received the \$173.00 refund as requested on his 1974 return. Petitioner no longer argues that his former spouse should be held liable for payment of one-half of the assessment for 1974, but instead takes the position that he never received the \$173.00 refund claimed on the 1974 joint return.

8. The records of the Division of the Treasury of the Department of Taxation and Finance disclose that a refund check for \$173.00 was issued on May 21, 1975 and was cashed. A copy of the check was not produced at the hearing because cancelled checks are destroyed by the Division of the Treasury after six years from the date of issue. The check was made payable to petitioner and his former wife since they filed a joint return, and was sent to 59 Huntington Road, Garden City, New York, the address shown on the 1974 return.

9. At the time the refund check was mailed to the aforementioned address, petitioner no longer lived with his wife. Petitioner's former wife refused to respond to his inquiries about receipt of the 1974 refund check.

CONCLUSIONS OF LAW

A. That the Audit Division properly disallowed petitioner's refund claim for 1974 in accordance with the provisions of section 651(b)(2)(A) of the Tax Law.

B. That the Division of the Treasury of the Department of Taxation and Finance issued a refund check payable to petitioner and his then spouse on May 21, 1975. The check was properly mailed to the address shown on their 1974 joint income tax return. The Department's records establish that the check was cashed. The responsibility of the Department with respect to said check is

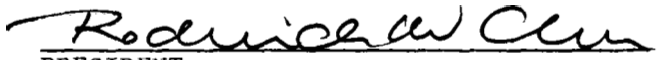
after it was endorsed and cashed. Petitioner's delay in alleging that the check was not received and cashed fraudulently prohibited the Department from producing a copy of the check. While petitioner **may** have or have had a remedy to pursue with the financial institution that cashed the check, the relief now sought by petitioner **is** not within the jurisdiction of the State Tax Commission.

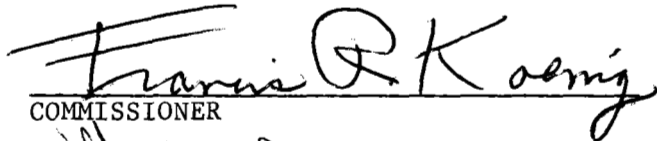
C. That the petition of Charles R. Andrews, Jr. is denied and the notice of refund disallowance issued July 26, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER