

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

LILIAN HSU

DETERMINATION

for Redetermination of a Deficiency or for
Refund of New York State Personal Income Tax :
under Article 22 of the Tax Law and New York
City Personal Income Tax under Chapter 46,
Title T of the Administrative Code of the City
of New York for the Year 1983.

Petitioner, Lilian Hsu, 8 Francis Drive #311, Randolph, Massachusetts 02368, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1983 (File No. 65167).

On April 22, 1987, petitioner waived a hearing in the Division of Tax Appeals and agreed to submit the matter for determination based upon the Division of Taxation file, as well as additional documents to be submitted by July 13, 1987. After due consideration of the record, Daniel J. Ranalli, Administrative Law Judge, hereby renders the following determination.

ISSUE

Whether petitioner may file a joint New York State and City income tax return, excluding her husband's income, where she was a resident for the entire year 1983 and her husband was a nonresident for the entire year 1983.

FINDINGS OF FACT

1. Lilian Hsu (hereinafter "petitioner") timely filed a New York State and City of New York Resident Income Tax Return, under filing status "Married

filing joint return," for the year 1983, whereon only her income was reported as being taxable for New York State and City purposes. Attached to said return was a sheet of paper containing the following statement:

"Spouse was a nonresident of New York State and New York City for entire year of 1983 and had no New York State or New York City taxable income."

2. Two exemptions were claimed on the aforesaid return.

3. On March 19, 1985, the Audit Division sent petitioner an inquiry letter with respect to her and her husband's residence during 1983 and a Federal adjustment to income of \$2,267.63.

4. On March 29, 1985, petitioner submitted a written response to the aforesaid letter. Said response stated that she and her husband were married in July 1983 and that she resided at 138-10 Franklin Avenue, Flushing, New York 11355 during the entire year 1983, while her husband resided at 2670 Lehmann Road #702D, Cincinnati, Ohio 45204 during the entire year 1983.

5. For Federal purposes, petitioner and her husband filed a joint 1983 U.S. Individual Income Tax Return whereon both petitioner's and her husband's incomes were reported. Said return shows that the adjustment to income of \$2,267.63 represents the Federal "deduction for a married couple when both work".

6. On May 15, 1985, the Audit Division issued a Statement of Audit Changes to petitioner wherein certain adjustments were made which were explained thereon as follows:

"As the Federal adjustment to income of \$2,267.63 pertains to the income of the spouse whose income is not reportable to New York State, the adjustment has been disallowed for New York purposes.

As one spouse was a full year New York State resident and the other spouse a full year nonresident each spouse must file a separate return, therefore you are entitled to claim only one exemption."

7. Based on the aforesaid statement, a Notice of Deficiency was issued against petitioner on October 8, 1985 asserting additional New York State personal income tax of \$130.59, additional New York City personal income tax of \$71.49, plus interest of \$32.22, for a total due of \$234.30.

8. According to her perfected petition, petitioner claims that she is properly entitled to the refund claimed on her return based on the following errors of the Department of Taxation and Finance:

"Page 4 of the '1983 Instructions for Form IT-201' states that 'The way you filed your federal income tax return determines the way you file your New York State income tax return.' It further states that 'If you filed a joint federal return...you can file a joint NY State return....'

Therefore, according to the instructions I filed a joint state reutrn [sic] because I filed a joint federal return.

Consequently, the federal adjustment to income of \$2,267.63 be [sic] allowed and I should be entitled to a refund of \$287.29."

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of New York is, by its own terms, tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22, shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

B. That Tax Law § 631(b)(3) provides that:

"If either husband or wife is a resident and the other is a nonresident, separate taxes shall be determined on their separate New York taxable incomes on such single or separate forms as may be required by the tax commission, unless both elect to determine their joint New York taxable income as if both were residents."

C. That 20 NYCRR 115.2(c) provides that:

"(1) Irrespective of the provisions of subdivision (b) of this section, if either the husband or the wife is a resident of New York

State and the other is a nonresident, they must each file a separate New York State personal income tax return (on separate forms, not on one form), unless they (i) file a joint Federal income tax return, and (ii) elect to file a joint New York State personal income tax return computing their joint New York taxable income as if both the husband and wife were residents of this State.

(2) The election described in paragraph (1) of this subdivision applies only in those cases where one spouse was a resident of New York State for the full taxable year and the other spouse was a nonresident for the full taxable year."

D. That page 4 of the 1983 Instructions for Form IT-201 provides, in the same column referred to by petitioner, that:

"If one spouse was a New York State resident for the entire taxable year and the other was a nonresident for the entire taxable year, each spouse must file a separate New York State return using resident Form IT-201 or nonresident Form IT-203, whichever applies. However, husband and wife may file a joint state return if they have filed a joint federal return and if they both file as New York residents for the entire taxable year."

E. That petitioner and her husband did not elect to file a joint return computing their joint income as if both were residents of New York State for the entire year. Therefore, the Audit Division properly recomputed petitioner's tax due as if she filed a separate return in accordance with Tax Law § 631(b)(3) and 20 NYCRR 115.2(c).

F. That the Federal "deduction for a married couple when both work" is a Federal deduction (or adjustment to income) which is inapplicable for New York State purposes since Article 22 makes no provision for such deduction.

G. That the petition of Lilian Hsu is denied and the Notice of Deficiency issued October 8, 1985 is sustained, together with such additional interest as may lawfully be owing.

DATED: Albany, New York

SEP 24 1987


ADMINISTRATIVE LAW JUDGE