

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter *of* the Petition

of

HAROLD GONZER AND ANITA GONZER

DECISION

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 1981.

Petitioners, Harold Gonzer and Anita Gonzer, 11666 Montana Avenue, Apt.
108, Los Angeles, California 90049, 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 1981 (File No.
71922).

A hearing was held before James Hoefer, Hearing Officer, at the offices of
the State Tax Commission, Two World Trade Center, New York, New York on March 11,
1987 at 9:15 A.M., with all briefs to be submitted by July 7, 1987. Petitioners
appeared by Ernst & Whinney (Timothy F. Tierney, C.P.A.). The Audit Division
appeared by John P. Dugan, **Esq.** (Patricia L. Brumbaugh, **Esq.**, of counsel).

ISSUES

I. Whether the Notice of Deficiency dated April 5, 1985 was mailed by the
Audit Division to petitioners' last known address, as required by Tax Law §§
681(a) and 691(b), thus giving them proper notice that there was a deficiency
of income tax for 1981.

II. Whether petitioners, if properly notified of a deficiency of income tax for 1981, timely filed a petition for redetermination of the Notice of Deficiency issued April 5, 1985.

III. Whether petitioner Harold Gonzer properly excluded wages and other compensation of \$77,845.00 from total New York income.

FINDINGS OF FACT

1. Petitioners herein, Harold Gonzer and Anita Gonzer, timely filed a New York State and City of New York Resident Income Tax Return for 1981 indicating a filing status of "Married filing separately on one return". On said return petitioners reported their home address as "45 West 60th Street, New York, New York 10023" and pursuant to schedules appended to their return claimed that they became residents of the State and City of New York on April 4, 1981.

2. During all of 1981, petitioner Harold Gonzer was employed by Ohrbachs Incorporated ("Ohrbachs") or Mondial Services Ltd. ("Mondial"), a foreign company affiliated with Ohrbachs. Mr. Gonzer received wages and other compensation from Ohrbachs and Mondial which totalled \$117,285.00. On his return petitioner Harold Gonzer reported that \$39,440.00 of his total wages and other compensation were taxable to New York during the period of his New York residence and that the balance, \$77,845.00, was attributable to his period of nonresidence and was not taxable to New York since said wages and other compensation were not derived from or connected with New York sources.

3. On August 30, 1984, the Audit Division corresponded with petitioners requesting information concerning their 1981 New York State and City tax return. Pursuant to a letter dated September 11, 1984, petitioners' representative provided the Audit Division with the information requested. After a review of the information provided in petitioners' representative's letter of

September 11, 1984, the Audit Division required additional documents and so advised petitioners by a letter dated October 3, 1984. Petitioners did not respond to the letter of October 3, 1984.

4. On February 27, 1985, the Audit Division issued a Statement of Audit Changes to petitioners for 1981 which contained the following explanation and computation:

"Since you did not reply to our letter of October 3, 1984, we have recomputed your return. Without the existence of an agreement with Ohrbachs regarding your foreign assignment, all of the income earned is deemed to be taxable to New York State.

The starting point for computing New York State tax liability is Federal adjusted gross income.

All State and local income taxes must be deducted in determining the New York State allowable itemized deductions. Since the standard deduction *is* more than the allowable itemized, we have allowed the standard deduction.

| | <u>HUSBAND</u> | | <u>WIFE</u> | | |
|-------------------------------------|---------------------|--------------|----------------------|----------------|---------------------|
| Total New York income | \$108,897.00 | | \$2,715.00 | | |
| Less: Standard deduction | 2,500.00 | | -0- | | |
| Less: exemption | 750.00 | | 750.00 | | |
| New York taxable income | <u>\$105,647.00</u> | | <u>\$1,965.00</u> | | |
| New York State tax | \$ 13,350.58 | | \$ 48.95 | | |
| Less: Maximum tax benefit | 3,408.55 | | 0 | | |
| Total New York State tax | <u>\$ 9,942.03</u> | | <u>\$ 48.95</u> | | |
| New York City tax | 4,142.82 | | 22.51 | | |
| | | | | | |
| | <u>STATE</u> | | <u>CITY</u> | | |
| | <u>HUSBAND</u> | <u>WIFE</u> | <u>H U S B A N D</u> | <u>W I F E</u> | |
| Total New York State/City tax | \$9,942.03 | \$48.95 | \$4,142.82 | \$22.51 | |
| Less: tax previously stated | <u>1,948.00</u> | <u>53.00</u> | <u>706.00</u> | <u>24.00</u> | |
| BALANCE DUE PERSONAL INCOME TAX | \$7,994.03 | \$(4.05) | \$3,436.82 | \$(1.49) | <u>\$11,425.31"</u> |

5. Based on the aforementioned Statement of Audit Changes, the Audit Division, on April 5, 1985, issued a Notice of Deficiency to petitioners for 1981. Said notice was sent via certified mail and was addressed to "Gonzer, Harold & Anita, 45-W 60 St., #5E, New York, N.Y. 10023." Although the Notice

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of Deficiency was sent via certified mail, the Audit Division, as a matter of office practice, does not request, demand or retain return receipts from certified mailings. The record herein contains no evidence to indicate that the Notice of Deficiency was ever returned to the Audit Division by the United States Postal Service as undeliverable.

6. In March of 1985 petitioners moved from their apartment in New York City to **Los** Angeles, California. Petitioners' 1984 New York State and City of New York Resident Income Tax Return listed their mailing address as "11666 Montana Avenue, Los Angeles, California 90049" and said return was signed by Mr. and Mrs. Gonzer on April 3, 1985. Petitioners sent their return to the Department of Taxation and Finance via regular mail, postage prepaid **on** or about April 3, 1985.

7. Pursuant to paragraphs 10 and 11 of their affidavit sworn to on May 7, 1987, petitioners stated that:

"We do not recall whether we received any notices from New York in April 1985 after moving from New York to California.

We did start to receive correspondence regarding our 1981 New York return at some point after our move to California in 1985, and this correspondence culminated in the early fall of 1986 when we were dunned by CT Services Corp. Since September 1986 the New York City Office **of** Ernst & Whinney has been handling the matter."

8. On September 25, 1986, the Tax Appeals Bureau received a petition from Harold Gonzer and Anita Gonzer seeking a redetermination of the Notice of Deficiency dated April 5, 1985. On page 2 of said petition, opposite Mr. and Mrs. Gonzer's signature, was inserted the typewritten date of "September 1985". The record herein contains no evidence or explanation as to why the petition was dated "September 1985", but was not received by the Tax Appeals Bureau until September 25, 1986, a period approximately one year later.

9. The Audit Division maintains that the petition filed by Mr. and Mrs. Gonzer and received by the Tax Appeals Bureau on September 25, 1986 was not timely filed within 90 days of the Notice of Deficiency dated April 5, 1985, and that the State Tax Commission therefore has no jurisdiction in this matter. Petitioners assert that the Audit Division failed to give them proper notice of a deficiency of income tax for 1981 since the Notice of Deficiency dated April 5, 1985, which was addressed to their former residence in New York City, was not mailed to their last known address. It is petitioners' belief that their 1984 New York return, which was mailed on or about April 3, 1985, properly notified the Audit Division of their new address in California. Petitioners alternatively argue that if it is found that they were properly notified of an income tax deficiency for 1981, that their representative's letter dated September 11, 1984 be deemed a timely petition to the Notice of Deficiency subsequently issued on April 5, 1985.

10. Effective on or about March 14, 1977, petitioners relocated from California to Kowloon, Hong Kong. Petitioners left Hong Kong on March 13, 1981 and, after a short vacation, established a residence in New York City at 45 West 60th Street on April 1, 1981. Harold Gonzer was at all times during the aforementioned period employed by Ohrbachs.

11. Wages and other compensation of \$117,285.04 received by Harold Gonzer in 1981 from Ohrbach's and Mondial consisted of the following four component parts:

| <u>Item</u> | <u>Amount</u> |
|---------------------------|---------------|
| Salary from Ohrbachs | \$ 49,576.00 |
| Group term life insurance | 1,818.00 |

| | |
|--|---------------------|
| Reimbursement from Ohrbachs for additional income tax liability caused by assignment to foreign country | 35,804.00 |
| Reimbursement from Mondial for housing allowance, miscellaneous, tax reimbursement, moving expense and automobile expense | <u>30,087.00</u> |
| Total | <u>\$117,285.00</u> |

12. Of the \$49,576.00 salary received by Harold Gonzer from Ohrbachs in 1981, \$11,499.00 was earned from January 1, 1981 through March 13, 1981 when he was living and working in Hong Kong, while the balance, \$38,077.00, was earned during the period he was living and working in New York City. The income attributable to the group term life insurance was allocated 3/12 to Hong Kong and 9/12 to New York. Petitioner, Harold Gonzer, considered the \$35,804.00 tax equalization payment received from Ohrbachs and the \$30,087.00 reimbursement received from Mondial as attributable to his period of nonresidence and not taxable to New York since neither payment was derived from **or** connected with New York sources. The evidence adduced at the hearing held herein fails to clearly establish the date of payment **of** the \$35,804.00 received from Ohrbachs or the \$30,087.00 received from Mondial nor does the evidence establish that the two payments, if made in the resident period, are accruable to the nonresident period.

CONCLUSIONS OF LAW

A. That Tax Law § 681(a) provides 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." Tax Law § 691(b) provides that:

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

B. That the Notice of Deficiency dated April 5, 1985 which was addressed to petitioners at their former residence in New York City was properly mailed to them at the last known address as required by Tax Law §§ 681(a) and 691(b). The Los Angeles, California address shown on petitioners' 1984 return, which was mailed on or about April 3, 1985, did not become their last known address prior to the Audit Division's issuance of the Notice of Deficiency dated April 5, 1985. (Singer v. Commissioner of Internal Revenue Service, 51 TCM 1007.) It is entirely conceivable that the Audit Division's Notice of Deficiency dated April 5, 1985 and petitioners' 1984 return mailed on or about April 3, 1985 crossed in the mail. Since the Notice of Deficiency in the instant matter was properly mailed by certified mail to petitioners at their last known address, the fact that they may not have received said notice is immaterial. (Kenning v. Department of Taxation and Finance, 72 Misc2d 929, affd 43 AD2d 815, ~~tr~~ denied 34 NY2d 653.)

C. That petitioners' representative's letter dated September 11, 1984 cannot be considered a timely petition to the Notice of Deficiency which was issued almost 7 months after said letter. (See Matter of West Mountain Corporation v. State of New York Department of Taxation and Finance, 105 AD2d 989, affd 64 NY2d 991.)

D. That petitioners failed to file a petition within 90 days of the Notice of Deficiency **as** required by Tax Law § 689(b) and, therefore, the Tax Commission is without jurisdiction to pass on the substantive issues raised in said petition. Accordingly, Issue III is rendered moot. It should be noted that petitioners can still obtain a hearing if they pay the tax and interest now due, file a claim for refund within two years from the time of payment (Tax Law § 687[a]) and thereafter file a petition for refund pursuant to Tax Law § 689(c).

E. That the petition of Harold Gonzer and Anita Gonzer is denied and the Notice of Deficiency dated April 5, 1985 is sustained in full, together with such additional interest as may be lawfully due and owing.

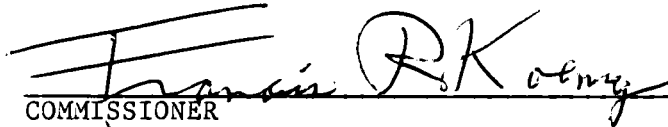
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1987.



PRESIDENT



COMMISSIONER



COMMISSIONER