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1967 Income Tax Determinations
BUREAU OF LAW

MEMORANDUM

A-2
Yost, Robert Frank

TO: Commissioners Murphy, MacDuff & Conlon
 FROM: Solomon Sles, Hearing Officer
 SUBJECT: Robert Frank Yost

Petition for Redetermination of a Deficiency or for Refund of Personal Income Taxes Under Article 22 of the Tax Law for the Year 1961.

A hearing in the above matter was held before me at the New York office on August 5, 1966.

The issue involved herein is whether the taxpayer is entitled to a refund of overpayment of New York withholding taxes for 1961 although he has failed to establish that he filed a return for said year prior to March 1, 1966. Determinative of the issue is whether the taxpayer filed a claim for refund within the required statutory time period.

Prior to 1959, the taxpayer was a domiciliary of the State of New York and maintained a permanent place of abode therein. He was and still is employed by Sperry Gyroscope Company of Great Neck, New York as an electronics engineer. Late in 1958 he was assigned by his employer to work temporarily overseas on defense projects for NATO and the defense commands of various European nations. On January 9, 1959, he removed to Europe where he worked and lived at various locations until September 23, 1961 when he returned to the United States. The taxpayer was married in January, 1961. His wife and daughter joined him in this country in November, 1961. The taxpayer and his family have resided in the State since December, 1961.

Upon his return to the United States, the taxpayer retained the services of an attorney who prepared and filed Federal returns on his behalf for the years 1959, 1960 and 1961 as well as the State returns for 1959 and 1960. The taxpayer claimed an exclusion of income earned abroad pursuant to Section 911 Internal Revenue Code. On his Federal return for 1961, the taxpayer reported gross wages in the amount of \$12,299.55 of which only \$3,311.42 was earned for services rendered within the United States. The Internal Revenue Service issued refunds to the taxpayer for the years 1959, 1960 and 1961. For 1961, the employer withheld from the wages paid to taxpayer, New York State withholding taxes in the amount of \$451.89.

On December 29, 1961 and April 5, 1962, the Income Tax Bureau issued assessments for the years 1959 and 1960, respectively, holding taxpayer subject to tax as a resident

for said years. He filed timely applications for revision or refund with respect thereto. Pending the applications for revision, there was quite an exchange of correspondence between the Income Tax Bureau and the taxpayer and his attorney. On August 7, 1965, the taxpayer wrote the Income Tax Bureau requesting a refund for 1961. He was advised that a search of the records failed to disclose that a return for said year had been filed. The taxpayer submitted an affidavit from his attorney to the effect that to the best of his recollection the taxpayer's return for 1961 had been filed in a separate envelope bearing his office address which was never returned to him. The attorney did not appear at the hearing. I am of the opinion that the taxpayer has failed to establish that he duly filed his 1961 New York State return prior to March 1, 1966 when a copy thereof was received by the Department.

The Income Tax Bureau issued a refund to the taxpayer for 1960 in accordance with Federal conformity but denied his application for refund for 1959 on the ground that he was considered to have been domiciled in the State and did not maintain a permanent place of abode outside the State. The taxpayer withdrew his application for revision or refund for the year 1959.

The attorney for the taxpayer wrote to the Income Tax Bureau a letter dated December 6, 1963, received December 16, 1963, with respect to the applications for revision or refund for 1959 and 1960 to which was attached Form IX-460-A (Statement as to Residence), Form 255 (United States Treasury Department Statement to Support Exclusion of Income Earned Abroad), and a typewritten statement (Tax Commission Exhibit H-2). The last sentence in the statement contains the following: "It is upon this ground that the taxpayer requests a refund of all income taxes paid by his employer for the years 1960 and 1961." Although the Income Tax Bureau wrote a letter to the attorney on December 20, 1963 (in reply to the above-mentioned letter), there was no mention made with respect to the request of the taxpayer for refund for 1961. I am of the opinion that the statements contained in the letter of December 16, 1963 constitute the filing of a claim for refund, as of that date.

Although Section 686 (a) of the Tax Law provides that any refund shall be made only upon the filing of a return, Section 687 (a) provides that a claim for credit or refund of an overpayment of tax shall be filed by the taxpayer within three years from the time the return was filed, or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed within two years from the time the tax was paid. (Emphasis supplied.)

It is therefore necessary to determine the date the tax is deemed to have been paid.

Section 673 provides that wages upon which tax is required to be withheld shall be taxable as if no withholding were required, but any amount of tax actually deducted and withheld in any calendar year shall be deemed to have been paid to the Tax Commission on behalf of the person from whom withheld, and such person shall be credited with having paid the amount of tax for the taxable year beginning in such calendar year.

Section 687 (1) provides that any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment.

I am therefore of the opinion that the taxpayer filed a timely claim for refund for the year 1961 on December 16, 1963, within two years from the time the tax was deemed to have been paid, namely, April 15, 1962.

For the reasons stated above, I recommend that the decision of the Tax Commission in the above matter granting the taxpayer's petition be substantially in the form submitted herewith.

OCT 16 1967

10-24-67

SOLOMON SIES
Hearing Officer

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

ROBERT FRANK YOST

**FOR A REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF PERSONAL INCOME TAXES
UNDER ARTICLE 22 OF THE TAX LAW FOR
THE YEAR 1961.**

The above-named taxpayer having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the year 1961, and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N. Y., on the 5th day of August, 1966, before Solomon Sies, Hearing Officer of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and testified in connection therewith, and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That prior to 1959 the taxpayer was a domiciliary of the State of New York and maintained a permanent place of abode therein; that the taxpayer was, and still is, employed by Sperry Gyroscope Company, Division of Sperry Rand Corporation, Great Neck, New York, as an electronics engineer; that the taxpayer was assigned by his employer to work overseas on defense projects for NATO and with defense commands for various Western European nations; that on January 9, 1959, the taxpayer removed to Europe, where he lived and worked at various locations in four countries until September 21, 1961, when he returned to the United States; that the taxpayer has continuously resided in the State of New York with his family since December, 1961.

2. That the taxpayer filed a Federal income tax return for the year 1961, in which he reported gross wages earned during said year in the amount of \$12,299.55, of which only \$3,311.42 was earned in the United States; that the taxpayer claimed an exclusion of earned income from sources without the United States pursuant to Section 911 of the Internal Revenue Code; that due to insufficient income earned within the United States during the year 1961, there was no New York State income tax due from the taxpayer; that the taxpayer has failed to establish that he duly filed a New York State income tax return for the year 1961 prior to March 1, 1966; that on May 4, 1966, the Department of Taxation and Finance denied taxpayer's claim for refund on the ground that taxpayer failed to file such claim within three years from the date the return was required to have been filed or within two years from the date the tax was paid.

3. That the taxpayer's employer, Sperry Gyroscope Company, Division of Sperry Rand Corporation, Great Neck, New York, during the year 1961, withheld New York State taxes from the wages paid to the taxpayer in the amount of \$451.89.

4. That on December 16, 1963, the taxpayer filed a claim for refund of overpayment of income tax withheld for the year 1961; that said claim for refund was filed within two years from the date the tax was deemed to have been paid, to wit, on April 15, 1962.

Based upon the foregoing findings and all of the evidence presented herein, the State Tax Commission hereby

DECIDES:

That, accordingly, the taxpayer's petition for redetermination of a deficiency or for refund of personal income taxes for the year 1961 is hereby granted; that there be refunded to the taxpayer the

amount of \$451.89, together with any lawful interest that may be due thereon.

DATED: Albany, New York, on the 27th day of November 1967.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

Commissioner

William Maclyn Borden
Commissioner