L 9 (8-68)

BUREAU OF LAW Income Tax Determin. A-Z

MEMORANDUM Burke, Edwin

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: EDWIN BURKE

1952 Assessment No. AA-982617
1955 Assessment No. B-547351

ELEANOR J. BURKE

1952 Assessment No. AA-982618
1955 Assessment No. B-547352

Article 16

Combined Formal Hearing

Since similar questions of fact and law are involved in both cases, a combined hearing was held with the consent of the taxpayers and their attorney.

The primary issue involved herein is the timeliness in filing of the applications for revision or refund by each of the taxpayers, who are husband and wife, with respect to the separate assessments issued against each of them for the respective years 1952 and 1955.

Edwin Burke and Eleanor J. Burke filed separate nonresident returns for each of the years 1952 and 1955 in which they claimed an allocation of salary income attributable to sources both within and without the State of New York. The taxpayers were requested to submit information to substantiate their claim to an allocation. They failed to do so. On March 8, 1956 assessments were issued against Edwin Burke and Eleanor J. Burke for 1952 (Assessment Nos. AA-982617 and AA-982618, respectively) imposing additional taxes in the amount of $315.47 against Edwin Burke and in the amount of $293.58 against Eleanor J. Burke on the ground that they had failed to establish the basis for an allocation of salary income.

Similar assessments for the year 1955 were issued on February 10, 1959 against the taxpayers (Assessment No. B-547351 against Edwin Burke for $181.14 and Assessment No. B-547352 against Eleanor J. Burke).

Separate letters each dated March 8, 1956 were mailed to each of the taxpayers indicating a balance due from Edwin Burke in the amount of $340.70 and from Eleanor J. Burke in the amount

of $317.06 on the assessments issued against them for the year 1952. It is claimed that the accountant for the taxpayers, in response to the aforementioned letters, mailed separate letters to the Department each dated September 20, 1956, one with respect to Edwin Burke and the other with respect to Eleanor J. Burke indicating that applications for revision of the assessments for the year 1956 made against the aforementioned taxpayers would be prepared and filed with the Department in the near future. Purported copies of such letters were submitted in evidence by the attorney for the taxpayers. The accountant did not appear to testify at the hearing. No such letters were ever received by the Income Tax Bureau.

It is claimed that applications for revision with respect to the assessments issued against each of the taxpayers for the year 1952 were filed on November 29, 1956. To support such contention, the representative for the taxpayers submitted an affidavit of their accountant, Jacob H. Schiller, sworn to on the first day of February, 1961 in which he stated (1) that the applications for revision with respect to the 1952 tax assessments against the taxpayers, Edwin Burke and Eleanor J. Burke were executed and signed by said taxpayers on November 29, 1956, (2) that said applications were mailed by him on said date in an envelope addressed to the Revision and Refund Section of the Income Tax Bureau, Department of Taxation and Finance, Albany, New York with proper postage and (3) deposited in a U. S. mail chute maintained at 1440 Broadway, New York City on said date. The original applications for revision of the aforementioned taxpayers for the year 1952 alleged to have been filed on November 29, 1956 were never received by the Income Tax Bureau. Copies thereof were received for the first time on December 29, 1960. It is also claimed that applications for revision with respect to the assessments for the year 1955 were filed by each of the taxpayers, Edwin Burke and Eleanor J. Burke on February 5, 1960. The attorney for the taxpayers testified (1) that separate applications for revision on Form IT-113 were executed and notarized by each of the taxpayers on February 5, 1960, and (2) that he personally mailed such applications on said date in an envelope properly addressed with proper postage thereon to the Income Tax Bureau in Albany. The alleged original applications for revision for the year 1955 were never received by the Income Tax Bureau. Copies thereof were received for the first time on December 29, 1960.

The file indicates that the taxpayers filed applications for revision or refund for the years 1951, 1953, 1954 and 1956, all of which involved allocation of earnings by the taxpayer for

work alleged to have been performed outside the State of New York. It further appears that the assessment for the year 1951 was issued against the taxpayer, Edwin Burke disallowing allocation of earnings alleged to have been performed at his home in New Jersey. A formal hearing was held before Edward J. Pigeon on July 9, 1959 and a determination was issued on the 1951 assessment of the Commission sustaining the assessment. In the meantime, the other applications for revision of the assessments against the taxpayers for years 1953, 1954 and 1956 were held in abeyance. Edwin Burke instituted a proceeding under Article 78 with respect to the 1951 assessment. The Appellate Division sustained the determination of the Commission, Burke v. Bragalini, 10 A D 2d 654, 197 N.Y.S. 2d 524. Subsequent to this decision, the Income Tax Bureau cancelled the assessments against the taxpayers for the years 1953, 1954 and 1956. There appears to be some merit as to the contention of the taxpayer, Edwin Burke that he may have been entitled to an allocation of salary income for the years 1952 and 1955.

It is the usual procedure of the Revision and Refund Section of the Income Tax Bureau to acknowledge the filing of an application for revision on Form IT-113. No letters of acknowledgement with respect to any applications for revision for the years 1952 and 1955 were ever sent to the taxpayers. It is incredible that the letters and the two applications for revision claimed to have been mailed on three different dates by two different people were ever mailed. The instant case is to be distinguished from the case where an application for revision is filed at the height of the tax season and is stamped or received a day or two after its actual receipt because of the heavy mail load.

It has been held that failure to receive an article through the mail raises a presumption that it was not mailed. Where formal proof of mailing is submitted, the presumption disappears since it is not really evidence in itself and where conflicting evidence is submitted, a jury must decide, free of any presumption, whether the article was in fact mailed. Employers' Liability Assurance Corp. v. Maes, 235 F. 2d 918, 921.

In the case of Crude Oil Corp. of America v. Commissioner of Internal Revenue, 161 F. 2d 809, 10 C.C.A. reversing 5 T.C. 648, petitioner submitted proof that it duly mailed a return and election within the statutory time period. The Commissioner testified that the return and election could not be found and introduced evidence from which it could have been inferred that the return and election were not received by the Collector's Office. The Tax Court did not find that the return was not filed within the statutory time period; it merely held that the presumption of delivery was insufficient to overcome the presumption of correctness of the Commissioner's determination that the return and election were not filed within the statutory time period. The Court held that the Tax Court fell into

an error of law; that the presumption of the correctness of the Commissioner's finding is one of law; that it disappears when evidence sufficient to sustain a contrary finding has been introduced; that proof of due mailing is prima facie evidence of receipt; that the presumption of receipt is a strong one and that a finding in opposition to such inference of fact, absent evidence of nonreceipt, is against the weight of the evidence. However, the Federal Court remanded the cause to the Tax Court with instructions to determine the issue of fact and to give no weight to the correctness of the Commissioner's finding.

There is no definition of the words "file" or "filing" in the Tax Law or the Regulations. Prior to the enactment of Section 691, Article 22, there was no provision contained in the Tax Law for the mailing of returns or applications for revision or refund. Section 374 of the Tax Law provides that the applications for revision or refund must be "filed" by the taxpayer within the statutory time limit.

In the case of U.S. v. Aaron, 117 F. Supp. 952, 954, it was held that the mailing of an Income Tax Return is not a filing under Section 53(b) (1,2) Internal Revenue Code 1939 (see: Wampler v. Snyder, 66 F. 2d 195 and U.S. v. Lafkoff, 113 F. Supp. 551). The Court held that the word "file" means to deliver to the office and not send through the mail; that a paper is filed when it is delivered to the proper official and by him received and filed citing U.S. v. Lombardo, 241 U.S. 73, 36 S. Ct. 508, 60 L. Ed. 897.

In the case of the U.S. v. Lombardo, supra, Mr. Justice McKenna writing for the Court quoted from the opinion of the Court below:

> "The word 'file' is not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word 'file' is derived from the Latin word 'filum' and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the U.S. mails. Gates v. State, 128 N.Y. Ct. of Appeals 221. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier Law

Dictionary; White v. Stark, 134 Cal. 178; Westcott v. Eccles, 3 Utah 258; In re Van Varcke, 94 Fed. Rep. 352; Mutual Life Insurance Co. v. Pinney, 78 Fed. Rep. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."

In Cheesman v. Cheesman, 236 N.Y. 47, the Court stated on Page 49: "The claimant, 19 years old, was injured on November 15, 1918. A claim for compensation was mailed to the commission within a year but was not received. This was not such a filing as is required by Section 28 of the Workmen's Compensation Law. (Cons. Laws ch. 67) Sweeney v. State, 225 N.Y. 271)."

I am of the opinion that the applications for revision or refund of each of the taxpayers herein for the years 1952 and 1955 were not filed within two years from the time of the filing of the returns or within one year from the mailing of the assessments in accordance with the provisions of Section 374 of the Tax Law.

For the reasons stated above, I recommend that the determination of the Tax Commission in the above matter be substantially in form submitted herewith.

SOLOMON SIES
Hearing Officer

November 25, 1968
SS:nn

Enc.

12-12-68

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE APPLICATIONS OF EDWIN BURKE FOR REVISION OR REFUND OF PERSONAL INCOME TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR THE YEARS 1952 AND 1955

The above named taxpayer, Edwin Burke, having filed applications for revision or refund of personal income taxes under Article 16 of the Tax Law for the years 1952 and 1955, and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, New York, on December 10, 1953 before Solomon Sies, Hearing Officer, of the Department of Taxation and Finance, at which hearing the taxpayer appeared personally and was represented by Philip Kranzbaum, Esq., testimony having been taken and the record having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer, Edwin Burke, filed a New York State income tax nonresident return for the year 1952, in which he reported wages as an employee of Marine Engine Specialties Corp., a corporation organized under the laws of the State of New York and having its principal office located in the City of New York; that the taxpayer indicated that the total wages received from the said firm during the year 1952 amounted to the sum of $16,600; that he performed services for said employer and spent days both within and without the State of New York;

that the total number of days spent outside the State of New York amounted to a total of 88 days; that he claimed an allocation of income and reported the amount of $10,154.98 attributable to income earned within the State of New York; that on March 8, 1956 the Department of Taxation and Finance made an additional assessment against the taxpayer (Assessment No. AA-882617) for the year 1952 in the amount of $215.47 disallowing the allocation claimed by him upon the ground that he had failed to establish the basis for such allocation upon the services alleged to have been rendered both within and without the State of New York.

(2) That the taxpayer, Edwin Burke, filed a New York State Income Tax Nonresident Return for the year 1955, in which he reported wages as an employee of Marine Engine Specialties Corp., a corporation organized under the laws of the State of New York and having its principal office located in the City of New York; that the taxpayer indicated that the total wages received from said firm during the year 1955 amounted to the sum of $15,600; that he performed services for said employer and spent days both within and without the State of New York; that 58 days were spent outside the State of New York; that he claimed an allocation of income and reported the amount of $12,773.70 attributable to income earned within the State of New York; that on February 10, 1959, the Department of Taxation and Finance made an additional assessment against the taxpayer (Assessment No. B-547351) for the year 1955 in the amount of $181.14 disallowing the allocation claimed upon the ground that the same had not been substantiated.

(3) That on August 7, 1958 a letter was mailed to the taxpayer, Edwin Burke, stating that there was a balance due of

$340.70 on the assessment for the year 1952; that the taxpayer claims that his accountant mailed a letter to the Department of Taxation and Finance, Albany, New York on September 29, 1958 stating in effect that an application for revision of the assessment for the year 1952 would be prepared and filed in the near future; that the accountant did not appear at the hearing herein and no testimony was offered as to the actual mailing of said letter; that no such letter was ever received by the Department of Taxation and Finance.

(4) That the taxpayer claims that he executed an application for revision on Form IT-113 with respect to the assessment for the year 1952; that said application for revision was signed and notarized by him on November 29, 1956 and mailed by his accountant, Jacob H. Schiller on said date; that at the hearing there was submitted an affidavit of Jacob H. Schiller, sworn to on the first day of February 1961 to the effect that he duly mailed the aforementioned application for revision on November 29, 1956 in an envelope addressed to the Department of Taxation and Finance with proper postage and deposited the same in a U. S. mail chute maintained at 1440 Broadway, New York; that the copy of the aforementioned IT-113 (Application for Revision or Refund) was received by the Department of Taxation and Finance for the first time on December 29, 1960; that the alleged original application for revision or refund claimed to have been mailed on November 29, 1956 was never received by the Department of Taxation and Finance.

(5) That the attorney for the taxpayer testified at the hearing that he prepared on behalf of the taxpayer an application for revision on Form IT-113 with respect to the assessment for 1955; that said application was signed and notarized

by the taxpayer on February 5, 1960; that on February 5, 1960, he mailed said application for revision in an envelope addressed to the Department of Taxation and Finance with proper postage thereon by depositing the same in a U. S. mail chute maintained at 545 Fifth Avenue, New York City; that a copy of the aforementioned application for revision was received by the Department of Taxation and Finance for the first time on December 29, 1960; that the alleged original application for revision with respect to the assessments for 1955 claimed to have been mailed on February 5, 1960 was never received by the Department of Taxation and Finance.

(5) That applications for revision or refund with respect to the assessments for the years 1952 and 1955 were not filed within two years from the date of the filing of the returns for said years or within one year from the date of the mailing of the assessments with respect to said years.

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

DETERMINES:

(A) That the taxpayer failed to file timely applications for revision or refund with respect to the assessments for the years 1952 and 1955 within two years from the date of the filing of said returns or within one year from the date of mailing of said assessments in accordance with the provisions of Section 374 of the Tax Law, then in effect.

(B) That accordingly, the taxpayer's applications for revision or refund with respect to the assessments for the years 1952 and 1955 (Assessment Nos. AA-982817 and B-547381, respectively)

be and the same are hereby dismissed.

DATED: Albany, New York, the 16th day of December , 1968.

STATE TAX COMMISSION

/s/ JOSEPH H. MURPHY
PRESIDENT

/s/ A. BRUCE MANLEY
COMMISSIONER

COMMISSIONER