

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Raymond F. & Ruth Winters :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the Year 1974. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 31st day of August, 1979, he served the within notice of Decision by certified mail upon Raymond F. & Ruth Winters, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Raymond F. & Ruth Winters
29 Hakes Rd.
Troy, NY 12180

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
31st day of August, 1979.

JAMES H. TULLY JR., PRESIDENT
MILTON KOERNER
THOMAS H. LYNCH

JOHN J. SOLLECITO
DIRECTOR

Telephone: (518) 457-1723

August 31, 1979

Raymond F. & Ruth Winters
29 Hakes Rd.
Troy, NY 12180

Dear Mr. Winters:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to the Deputy Commissioner and Counsel to the New York State Department of Taxation and Finance, Albany, New York 12227. Said inquiries will be referred to the proper authority for reply.

Sincerely,



cc: Petitioner's Representative
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

RAYMOND F. WINTERS AND RUTH J. WINTERS :

DECISION

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

Petitioners, Raymond F. and Ruth J. Winters, 29 Hakes Road, Troy, New York 12180, 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. 16686).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on December 15, 1978 at 10:45 A.M. Petitioner Raymond F. Winters appeared pro se and for his wife, petitioner Ruth J. Winters. The Income Tax Bureau appeared by Peter Crotty, Esq. (Barry M. Bresler, Esq. and Kathy L. Sanderson, Esq., of counsel).

ISSUES

I. Whether a military pension received by petitioner Raymond F. Winters is taxable for New York State purposes, if during the time of military service, said petitioner was domiciled in the State of Pennsylvania.

II. Whether petitioners were residents of New York State.

III. Whether New York State has the constitutional right to tax the military pension received by petitioner Raymond F. Winters in 1974.

IV. Whether the Income Tax Bureau is estopped from issuing a Notice of Deficiency, since it had previously audited the return and authorized a refund to petitioners for the year in question.

FINDINGS OF FACT

1. Petitioners, Raymond F. and Ruth J. Winters, timely filed a New York State Income Tax Resident Return for 1974, on which the amount of United States Air Force retirement pension received for such year was subtracted from Federal adjusted gross income, in arriving at New York adjusted gross income.

2. The Income Tax Bureau authorized a refund in the amount originally requested by petitioner, and the refund was issued.

3. On June 28, 1976, the Income Tax Bureau issued a Statement of Audit Changes stating the following:

Based on the decision of the State Tax Commission dated November 26, 1975 for the tax year 1971, your United States Air Force retirement income is subject to New York State Tax.

Accordingly, on June 28, 1976, the Income Tax Bureau issued a Notice of Deficiency for \$144.38 in income tax, plus interest of \$62.39, for a total due of \$206.77.

4. On July 8, 1976, the Income Tax Bureau received an amended 1974 New York State Combined Income Tax Return, changing petitioner's election from joint to separate, with payment of \$19.35. On this amended return, the above-mentioned pension was subtracted from Federal adjusted gross income in arriving at petitioner Raymond F. Winter's New York adjusted gross income.

5. Petitioner Raymond F. Winters enlisted in the United States Air Force on July 26, 1950 from Altoona, Pennsylvania. On July 31, 1970, petitioner Raymond F. Winters was released from active duty with the United States Air Force. During the time said petitioner was in the service, he was domiciled within the State of Pennsylvania.

6. Petitioner contended that his retirement pension was earned at the rate of 2 1/2 percent per year during the time that he was domiciled in Pennsylvania and, therefore, it was not taxable by New York State.

7. In July of 1970, petitioners, Raymond F. and Ruth J. Winters, rented a house in Troy, New York. Petitioners moved their furniture and all other belongings into the house and resided there. Petitioners were still residing there at the time of the hearing. Petitioners, Raymond F. and Ruth J. Winters, do not own or rent any property outside New York State.

8. Petitioners contended that they were domiciliaries of Pennsylvania during 1974 and at the time of the hearing.

CONCLUSIONS OF LAW

A. That under section 451 of the Internal Revenue Code, petitioner Raymond F. Winters' military pension was taxable in the year in which it was received and not, as petitioners contend, in the year it was earned.

B. That petitioners were residents of New York within the meaning and intent of section 605 of the Tax Law.

C. That the retirement pay was properly includable in Federal adjusted gross income for the year in question. Therefore, since a resident's New York adjusted gross income means his Federal adjusted gross income for the taxable year (as defined in the laws of the United States), plus or minus specific modifications, and since section 612(c) of the Tax Law does not provide for a modification to reduce Federal adjusted gross income by amounts received as a military retirement pension, the subtraction modification which was claimed is not allowed.

D. That the constitutionality of the laws of the State of New York is presumed by the Tax Commission. There is no jurisdiction at the administrative

level to declare such laws unconstitutional; therefore, it must be presumed that the relevant sections of the law are constitutional to the extent that they relate to the imposition of the income tax liability on petitioners.

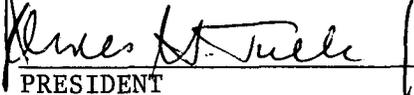
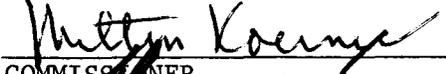
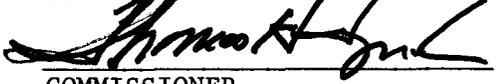
E. That the State Tax Commission is not estopped from making a claim against petitioners based on the fact that they had received a refund from the Income Tax Bureau in the year in question.

F. That since petitioners elected to file separate state returns by filing an amended return and by making payment of \$19.35 with such return, the Income Tax Bureau is directed to recompute the Notice of Deficiency issued June 28, 1976, to allow for the change of election and credit for tax previously paid.

G. That the petition of Raymond F. and Ruth J. Winters is granted to the extent indicated in Conclusion of Law "F" and that, except as so granted, is in all other respects denied.

DATED: Albany, New York

AUG 31 1979

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER