

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
F. Gordon & Marie E. Foster :
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 Years 1968 & 1969. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon F. Gordon & Marie E. Foster, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

F. Gordon & Marie E. Foster
P.O. Box 131
Intervale, NH 03845
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
7th day of July, 1980.

Rebecca A Bank

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

F. Gordon & Marie E. Foster :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

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Personal Income Tax :

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for the Years 1968 & 1969. :

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 7th day of July, 1980, he served the within notice of Decision by certified mail upon William M. Colby the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. William M. Colby
Wiser, Shaw, Freeman, Van Graafeiland, Harter & Secrest
700 Midtown Tower
Rochester, NY 14604

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
7th day of July, 1980.

Deborah A Bank

J. J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 7, 1980

F. Gordon & Marie E. Foster
P.O. Box 131
Intervale, NH 03845

Dear Mr. & Mrs. Foster:

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:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
William M. Colby
Wiser, Shaw, Freeman, Van Graafeiland, Harter & Secrest
700 Midtown Tower
Rochester, NY 14604
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

F. GORDON FOSTER and MARIE E. FOSTER :

DECISION

for Redetermination of a Deficiency or for :
Refund of Personal Income Tax under Article :
22 of the Tax Law for the Years 1968 and :
1969.

Petitioners, F. Gordon Foster and Marie E. Foster, P.O. Box 131, Intervale, New Hampshire 03845, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1968 and 1969 (File No. 20359).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York on October 24, 1978 at 3:00 P.M. Petitioners appeared by William M. Colby, Esq. The Audit Division appeared by Peter Crotty, Esq. (Barry Bressler, Esq., of counsel).

ISSUES

I. Whether income received by F. Gordon Foster in 1968 and 1969 was subject to New York State personal income tax.

II. Whether petitioner is entitled to an adjustment to income for employee business expenses.

FINDINGS OF FACT

1. Petitioners, F. Gordon Foster and Marie E. Foster, and the Audit Division stipulated to the following statements of facts:

(A) Petitioner F. Gordon Foster was employed by the Eastman Kodak Company in Rochester, New York, from June 1938 until March 1968.

(B) In March 1968, F. Gordon Foster suffered a stroke which left him substantially disabled, and which prevented him from resuming his regular duties with Eastman Kodak Company.

(C) In March 1968, petitioners moved from New York to Intervale, New Hampshire. Their home in Fairport, New York, was sold on July 19, 1968.

(D) Petitioner, F. Gordon Foster, continued to receive payments equal in amount to his previous salary from the Eastman Kodak Company until August 1969, which amounts were reported by Eastman Kodak Company as compensation subject to Federal, but not New York income tax withholding, and which totalled \$59,033 in 1968 and \$32,743 in 1969.

(E) During 1969, F. Gordon Foster received a lump sum distribution from the Eastman Kodak Company Savings and Investment Plan in the amount of \$60,924.00, of which \$9,208.00 was excluded by Eastman Kodak Company on Form IT-2102, in reporting the amount of the distribution taxable for New York State income tax purposes.

2. Petitioners timely filed both resident and nonresident income tax returns for 1968. The period of residency was listed as January 1, 1968 to March 21, 1968. The nonresident return excluded \$59,033.00 as "pension".

On September 25, 1969 the Income Tax Bureau issued a Statement of Audit Changes which stated that the pension was attributable to personal services performed within New York State; it imposed a tax in the amount of \$6,987.33, plus interest of \$186.14, for a total of \$7,173.47. The total amount shown as due, was paid.

3. Petitioners timely filed a nonresident return for 1969. The return listed \$32,743.00 as "pension" and \$30,462.00 as capital gain on a lump-sum distribution from the Kodak Employees' Savings and Investment Plan. The total amount of the lump-sum distribution was \$60,924.00. On October 2, 1972, the Income Tax Bureau issued a Statement of Audit Changes; said statement disallowed a modification of \$4,604.00 and asserted a tax of \$589.68, plus interest of \$87.15, for a total of \$676.83. This additional amount due, was paid.

4. In April 1971, petitioners filed a claim for refund of \$7,780.41 of a total amount of \$8,306.23 for 1968 taxes. They claimed that a change of domicile occurred on March 21, 1968 and that the pension benefits were received during the nonresident period and were not compensation for personal services arising out of a business, trade, profession or occupation carried on in New York. The refund claim was denied by the Income Tax Bureau on September 25, 1972.

5. In April 1971, petitioners filed a claim for refund of \$5,174.64 paid for 1969 taxes. This was done on the grounds of nonresidency; amounts referred to were pensions and not for personal services. The refund claim was denied by the Income Tax Bureau on September 25, 1972.

On January 29, 1973, petitioners filed an additional claim for \$676.83 for 1969 taxes which was paid on the disallowance of a modification to taxable income representing half of a portion of capital gain lump-sum distribution from Eastman Kodak Savings and Investment Fund. The refund claim was denied by the Income Tax Bureau on December 28, 1973. Petitioners conceded in their brief that \$51,716.31 of the lump-sum payment is subject to New York tax, leaving \$9,207.85 nontaxable as contributions made which were based on earnings made after leaving New York State.

6. Petitioners presently claim that the \$59,033.00 received in 1968 and \$32,743.00 in 1969 were wages, not pension payments as originally claimed. They also claim that of the \$32,743.00 paid in 1969, only \$3,262.50 was deferred compensation subject to tax, leaving a balance of \$29,480.00 as the amount contested for 1969.

7. Petitioners' Final Earnings Report indicates that \$22,461.52 was received in 1969 for extended sickness allowance and \$7,019.23 for vacation pay (total \$29,480.75). Earnings reported for 1968 indicates that the amount of \$50,819.25 consists of regular and extended sickness allowances and \$22,180.75 of regular earnings (total \$73,000.00). The Eastman Kodak Company Sickness Allowance Plan established that sickness allowance was based on length of service.

8. The distribution made to petitioner from the Kodak Savings and Investment Plan consisted of 1,102 shares of Eastman Kodak Common Stock and \$2.39 cash. The distribution was not made with regularity nor at a uniform rate for the life of petitioner or over a period not less than half petitioner's life expectancy.

9. Petitioner F. Gordon Foster offered no documentary or other substantial evidence that he continued to work or perform any services for Eastman Kodak, Co. after moving to New Hampshire in March 1968, or that any payments received were not for past performance with Eastman Kodak Company.

10. No proof was submitted to verify this petitioner's claimed adjustment of \$100.00 for employee business expenses.

CONCLUSIONS OF LAW

A. That the retirement benefit of a nonresident who was formerly employed in New York will not be taxable if it constitutes an annuity. To qualify as an annuity, the retirement benefit must meet the requirements of 20 NYCRR 131.4(d) which provides in pertinent part:

"(A) It must be paid in money only, not in securities of the employer or other property;

(B) It must be payable at regular intervals at least annually, for the life of the individual receiving it, or over a period not less than half his life expectancy, as of the date payments begin. An individual's life expectancy shall be the expected return multiple shown for the applicable age and sex in the table entitled "TABLE I--ORDINARY LIFE ANNUITIES--ONE LIFE--EXPECTED RETURN MULTIPLES" promulgated under Regulation 1.72-9 of the Federal Income Tax Regulations.

(C) It must be payable at a rate which remains uniform during such life or period or at a rate which varies only with the fluctuation in (i) the market value of the assets from which such benefits are payable, or (ii) a specified and generally recognized cost-of-living index; and

(D) The individual's right to receive it must be evidenced by a written instrument executed by his employer, or by a plan established and maintained by the employer in the form of a definite written program communicated to his employees."

Therefore, regarding the distribution in 1969 of \$60,924.00 from the Kodak Employees' Savings and Investment Plan which was reportable for Federal income tax purposes, of which petitioner concedes \$51,716.31 as being taxable, the remaining \$9,207.85 is also taxable since said amount is based on earnings derived from New York State.

B. That section 632(a) of the Tax Law provides, in part, as follows:

"(a) General - The New York adjusted gross income of a non-resident individual shall be the sum of the following:

(1) The net amount of items of income, gain, loss and deduction entering into his federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources,..."

Section 632(b) further provides in part that:

"(b) Income and deductions from New York sources.

(1) Items of income, gain, loss and deduction derived from or connected with New York sources shall be those items attributable to:

. . .

(B) a business, trade, profession or occupation carried on in this state."

Therefore, the "wage continuation" in 1968 and in 1969 which was derived from New York sources, is subject to tax.

C. That petitioner F. Gordon Foster has failed to sustain the burden of proof provisions of the Tax Law, imposed by section 689(e), to show that he incurred non-reimbursed employee business expenses.

D. That the petition of F. Gordon Foster and Marie E. Foster for refund dated July 3, 1974 is denied and the denial of the refunds dated September 25, 1972 and December 28, 1973 are sustained.

DATED: Albany, New York

JUL 07 1980

STATE TAX COMMISSION

James H. Tully
PRESIDENT

Arnold J. ...
COMMISSIONER

Francis R. Koenig
COMMISSIONER