

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

Robert W. Smith

AFFIDAVIT OF MAILING

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 1973. :

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 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Robert W. Smith, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert W. Smith
1010 Sherman Ave.
Bronx, NY 10456

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
23rd day of May, 1980.

Janne Knapp



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

May 23, 1980

Robert W. Smith
1010 Sherman Ave.
Bronx, NY 10456

Dear Mr. Smith:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT W. SMITH	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1973.	:	

Petitioner, Robert W. Smith, 1010 Sherman Avenue, Bronx, New York 10456, 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 1973 (File No. 17721).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 25, 1979 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by Peter Crotty, Esq. (A. Schwartz, Esq., of counsel).

ISSUE

Whether petitioner properly deducted interest expense, auto expense and a casualty loss.

FINDINGS OF FACT

1. Petitioner, Robert W. Smith, timely filed a New York State Income Tax Resident Return for the year 1973, on which he deducted contributions of \$525.00, interest expense of \$1,436.00, miscellaneous deductions of \$3,451.50, a casualty loss of \$650.00 and exemptions for three dependent children.

2. On December 20, 1976, the Audit Division issued a Notice of Deficiency against the petitioner imposing additional personal income tax due of \$276.38

for 1973. Said Notice was issued along with an explanatory Statement of Audit Changes, on which contributions were reduced to \$150.00, interest expense was reduced to \$472.88, miscellaneous deductions were reduced to \$2,152.80, the casualty loss was reduced to \$400.00 and the exemptions for three dependent children were allowed. The adjustment to contributions was conceded and is not at issue.

3. Petitioner, Robert W. Smith, was divorced in May, 1973 and was required, in accordance with a divorce decree, to pay \$27.40 per week for the support and maintenance of his former wife and \$82.20 per week for the support and maintenance of his three children.

4. Petitioner's former wife and three children continued to reside in a cooperative apartment, whose stock was in petitioner's name until July 19, 1977 when it was reissued to his former wife.

5. The divorce decree does not address itself to the disposition and occupancy of the cooperative apartment or the terms and conditions of its subsequent transfer of ownership. However, it does provide that a separation agreement dated September 17, 1972,

"be deemed to survive this judgement and not be merged therein and be controlling with regard to counsel fees, visitation rights, any escalation of support and maintenance for the wife or infant issue, and other matters contained in said agreement".

Petitioner did not desire the aforementioned separation agreement to be submitted into evidence and did not submit any information pertaining to the "other matters" mentioned in the divorce decree.

6. Petitioner, Robert W. Smith, testified that his former wife paid the monthly carrying charges on the cooperative apartment, which included the interest of \$956.16 at issue, from alimony and child support payments made by him. These payments represented her sole source of support during the year 1973.

7. The Audit Division contended that title to the cooperative stock was required to be transferred to petitioner's former wife by the separation agreement of September 17, 1972.

8. Petitioner deducted, and the Audit Division allowed, miscellaneous deductions as follows:

<u>Miscellaneous Deductions</u>	<u>Claimed</u>	<u>Allowed</u>
Alimony	\$1,462.50	\$1,424.80
Union dues	104.00	104.00
Army N.G. dues	15.00	15.00
Uniform expense	120.00	120.00
Auto expenses	1,400.00	489.00
Auto damage	350.00	-0-
TOTALS	<u>\$3,451.50</u>	<u>\$2,152.80</u>

The sole issue raised by petitioner regarding the miscellaneous deductions was the adjustment to auto expense. All other items in miscellaneous deductions were conceded by petitioner.

9. Petitioner was a reservist in the New York Army National Guard during the year 1973 and, as such, used his automobile to report to his assignments located outside the city of New York. Petitioner deducted, as an auto expense, what he considered to be "reasonable travel costs". As a basis for the auto expense, he used 10,000 miles per year, plus tolls which he contended were incurred on assignments for the National Guard. Petitioner did not maintain a log, diary or other record of the actual mileage or costs incurred for the use of his automobile.

10. Petitioner's personal residence was burglarized on March 8, 1973 and reported to the New York City Police Department. Petitioner reported a burglary loss of \$750.00, minus a \$100.00 limitation, resulting in a casualty loss of \$650.00.

11. The Audit Division examined a bill of sale submitted for a television set purchased on August 29, 1972 for \$329.00. Since this item was stolen on March 8, 1973, the Audit Division allowed a depreciated fair market value of \$200.00. The Audit Division also allowed \$100.00 for stolen cash and an additional \$200.00 for "other items" stolen, which resulted in a burglary loss of \$500.00, minus a \$100.00 limitation, or a net casualty loss allowed of \$400.00.

12. Petitioner did not submit additional documentary evidence in support of the casualty loss claimed.

CONCLUSIONS OF LAW

A. That section 216 of the Internal Revenue Code provides for the deduction of interest included in the monthly carrying charges of a cooperative apartment paid by a "tenant-stockholder".

B. That petitioner, Robert W. Smith, has failed to sustain the burden of proof in establishing that he was a "tenant-stockholder" during the year 1973 as defined in section 216(b) (2) of the Internal Revenue Code; and that although the interest at issue was paid from funds provided by petitioner for the broad purpose of "support and maintenance", it cannot be considered that the interest was paid by petitioner since he no longer had possession, title or control of these funds.

C. That petitioner, Robert W. Smith, has failed to sustain the burden of proof required by section 689(e) of the Tax Law in establishing that he was entitled to a greater amount in his auto expense and casualty loss deductions than that allowed by the Audit Division.

D. That the petition of Robert W. Smith is denied and the Notice of Deficiency issued December 20, 1976 is sustained, together with such additional interest as may be lawfully due.

DATED: Albany, New York

MAY 23 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER