

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Gordon M. Brown :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :

of a Determination or a Refund of

Personal Income Tax :

under Article 16 & 22 of the Tax Law

for the Years 1962 - 1964. :

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 30th day of January, 1981, he served the within notice of Decision by certified mail upon Gordon M. Brown, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gordon M. Brown
Griffen Road
RD #1
Warsaw, NY 14569

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
30th day of January, 1981.

Connie R. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

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for Redetermination of a Deficiency or a Revision :

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Personal Income Tax :

under Article 16 & 22 of the Tax Law

for the Years 1962 - 1964. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon David Sweet 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. David Sweet
237 Main St.
Buffalo, NY 14203

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
30th day of January, 1981.

Connie D. Hagelund

Jay Vredenburg

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

January 30, 1981

Gordon M. Brown
Griffen Road
RD #1
Warsaw, NY 14569

Dear Mr. Brown:

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) 375 and 722 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 90 days and 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
David Sweet
237 Main St.
Buffalo, NY 14203
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
GORDON M. BROWN : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Articles 16 and 22 of the Tax Law for :
the Years 1957 through 1965.

Petitioner, Gordon M. Brown, Griffen Road, RD #1, Warsaw, New York, filed a petition for redetermination of a deficiency or for refund of personal income tax under Articles 16 and 22 of the Tax Law for the years 1957 through 1965 (File No. 10753).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One W. Genesee Street, Buffalo, New York, on April 22, 1980 at 9:15 A.M. Petitioner, Gordon M. Brown, appeared with David Sweet, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioner can take as a deduction under Article 16 of the Tax Law for the year 1957, loss carried backs from 1959 and 1960, years in which Article 16 and 22 of the Tax Law were in effect respectively.

II. Whether a disallowance for 1957 of a loss carried back from 1959 and 1960 is unconstitutional.

III. Whether the statute of limitations had expired for the years 1962 through 1964.

IV. Whether petitioner is entitled to additional business expenses not included in Federal audit adjustments.

FINDINGS OF FACT

1. Petitioner filed a New York State Income Tax Resident Return for 1957 and 1959 under Article 16 of the Tax Law. Petitioner filed New York State income tax resident returns for 1960 through 1965 under Article 22 of the Tax Law.

2. On September 27, 1973, the Income Tax Bureau issued a Notice of Deficiency against petitioner imposing additional personal income tax of \$1,729.66 for the years 1962 through 1964 and crediting a refund due of \$316.82 for the years 1959 through 1961 and 1965 against the additional income tax due. The Notice of Deficiency was based on unreported Federal audit changes for 1957 through 1965.

3. Petitioner did not file a Report of Changes in Federal Taxable Income (IT-115) for New York State income tax purposes for the years at issue. Petitioner was requested on August 16, 1971, by letter from the Income Tax Bureau, that he was required to file form IT-115. Petitioner replied by letter that he would be unable to complete the form IT-115 with the type of audit the Internal Revenue Service had made. On February 1, 1972 petitioner presented the Income Tax Bureau with the adjustments made by the Federal government. He did not produce any information to the Income Tax Bureau regarding the aforesaid Federal adjustment prior to February 1, 1972.

4. An audit was conducted of petitioner's income by the Internal Revenue Service (hereinafter IRS) for the years 1957 through 1965, which resulted in various changes for each year. The IRS found net operating losses for the years 1959 through 1961. The IRS carried back the net operating loss for 1959 and part of the loss for 1960 back to 1957. A portion of the net operating

loss for 1960 was carried back to 1958. The remaining portion of the 1960 operating loss and the 1961 loss was carried forward to 1962. The Income Tax Bureau denied the net operating loss carryback for 1957. The question as to the net operating loss for 1958 is moot because for New York personal income tax purposes no return was required to be filed nor tax collected. For 1959 through 1961 the net operating losses were allowed by the Income Tax Bureau each year to the extent they resulted in no tax due. The net operating loss carried forward to 1962 was allowed pursuant to the Internal Revenue Service audit.

5. Petitioner contended all carryback credits of the IRS audits must be given to him or the IRS audit cannot be employed for New York State tax purposes, as this method would be confiscatory by creating profit that does not exist by virtue of the fact that the taxpayer is being deprived of a portion of his business expenditures and thus creating a false increase of income. Petitioner further contended that this approach to taxation would be depriving him of property without due process of law and therefore unconstitutional.

6. Petitioner maintained that the IRS did not take into account the cost of certain building lots in 1962 from his house construction business nor did the IRS take into consideration expenditures in the amount of \$8,400.00 which covered heating and plumbing labor for the home under construction. Petitioner submitted schedules and copies of adding machine tapes in support of his contention. Petitioner did not show that these amounts now claimed were not included in exhibit "D" and "E" of the IRS report.

CONCLUSIONS OF LAW

A. That the net operating loss carryback must be denied for 1957. Such a deduction is not granted in Article 16 of the Tax Law. Although such deductions can be taken under Article 22 because of the incorporation therein of

federal tax provisions, the adoption of Article 22 made no change in Article 16. This is made clear specifically with respect to loss carrybacks and carryovers in 20 NYCRR 116.6(b). Generally, the provisions of one Article of the Tax Law must be read independently of provisions of other Articles. The provisions for net operating losses found in Articles 9-A and 23 of the Tax Law do not affect either Article 22 or Article 16 of the Tax Law.

B. That the issue of constitutionality cannot be decided by administrative adjudication. Therefore, it must be presumed that Articles 16 and 22, New York State Tax Law are constitutional.

C. That petitioner, Gordon M. Brown, did not properly report the Federal changes to New York State for the years at issue. Therefore, there would be no expiration of the statute of limitations on assessments with respect to these years in accordance with the meaning and intent of section 683 of the Tax Law.

D. That petitioner, Gordon M. Brown, has failed to sustain the burden of proof required by section 689(e) of the Tax Law in establishing by the documents submitted that the Federal audit adjustments were improper, erroneous or inaccurate.


E. That the petition of Gordon M. Brown is denied and the Notice of Deficiency issued September 27, 1973 is sustained, together with such additional interest as may be lawfully owing.


DATED: Albany, New York

JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER