

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Paul P. & Viola S. Bullion :

: 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 Years :
1975 - 1977

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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Paul P. & Viola S. Bullion, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul P. & Viola S. Bullion
RD #1, Salt Spring Rd.
Manlius, NY 13104

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
5th day of June, 1981.

Conrad A. Hagedorn

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
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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 5th day of June, 1981, he served the within notice of Decision by certified mail upon Robert E. Wagner 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. Robert E. Wagner
116 Richards Rd.
Camillus, NY 13031

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
5th day of June, 1981.

Conrad A. Haglund

J. Vredenburg

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

June 5, 1981

Paul P. & Viola S. Bullion
RD #1, Salt Springs Rd.
Manlius, NY 13104

Dear Mr. & Mrs. Bullion:

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
Robert E. Wagner
116 Richards Rd.
Camillus, NY 13031
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
PAUL P. BULLION and VIOLA S. BULLION
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Years 1975 through
1977.

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DECISION

Petitioners, Paul P. Bullion and Viola S. Bullion, Rd #1, Salt Springs Road, Manlius, New York 13104, 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 1975 through 1977 (File No. 26927).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on December 9, 1980 at 1:15 A.M. Petitioner Paul P. Bullion appeared with Robert Everett Wagner, P.A. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul Lefebvre, Esq., of counsel).

ISSUE

Whether retroactive retirement benefits are taxable in the year actually received or the years it applies to.

FINDINGS OF FACT

1. Petitioners, Paul P. Bullion and Viola S. Bullion, filed New York State income tax resident returns for 1975, 1976 and 1977. On said returns, petitioner Paul P. Bullion reported his pension earnings received in said years from Niagara Mohawk Power Corporation.

2. In March of 1977, petitioner Paul P. Bullion received a check from Niagara Mohawk Power Corporation in the amount of \$6,493.33. This money represented the net amount due for the retroactive period December 31, 1974 through February 28, 1977. Based on settlement of a legal case, the company increased petitioner's monthly retirement benefits. A breakdown of the retro-pension benefits is as follows:

<u>YEAR</u>	<u>GROSS AMOUNT</u>	<u>FED. WITHHOLDING</u>	<u>STATE WITHHOLDING</u>	<u>NET AMOUNT</u>
1975	\$3,995.90	\$799.20	\$199.80	\$2,996.90
1976	3,995.90	799.20	199.80	2,996.90
1977	665.98	133.16	33.29	499.53
				<u>\$6,493.33</u>

3. On August 21, 1978, petitioners filed amended New York State income tax returns for 1975 and 1976 on which petitioners increased their pension earnings and their state withholding taxes by the amounts shown above for each of those respective years. Petitioners also filed a New York State income tax return claiming those amounts which petitioners considered applicable to the taxable year 1977.

4. On April 5, 1979, the Audit Division issued a Statement of Audit Changes and a Notice of Deficiency against petitioners in the amount of \$9.06, plus interest of \$.13, for a net total due of \$9.19. This was done on the grounds that "all items of income are reportable in the year in which you actually or constructively receive them. Accordingly, the retroactive retirement benefits you received for 1975 and 1976 are taxable in 1977. Since this results in no change in income for 1975 and 1976, no further consideration is being given to the refund and credit claimed on your 1975 and 1976 amended returns". The Audit Division also changed petitioners election from itemized deductions to the standard deduction for 1977. This adjustment is not at issue.

5. Petitioners contended that the retroactive pension should be considered constructively received since Niagara Mohawk Power Corporation carried these monies on the corporation books as a liability in the respective years, but did not pay them until the legal case was resolved.

CONCLUSIONS OF LAW

A. That pursuant to Treasury Regulation section 1.451-2, in order to have constructive receipt, income must be credited without restriction and made available to the taxpayer, there must be no substantial limitation or condition of the taxpayer's right to bring the funds within his control, and funds credited on corporate books are taxable to a taxpayer in the year when the taxpayer may withdraw the funds at will.

B. That since petitioners' right to the retroactive retirement benefits was restricted until the outcome of litigation, petitioners did not constructively receive said benefits until 1977.

C. That the petition of Paul P. Bullion and Viola S. Bullion is denied and Notice of Deficiency issued April 5, 1979 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER