

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Lamonte Kennedy :
and Valerie Kennedy : 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 9th day of January, 1981, he served the within notice of Decision by certified mail upon Lamonte Kennedy, and Valerie Kennedy, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Lamonte Kennedy
and Valerie Kennedy
7A Shirley Lane
Jamestown, NY

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
9th day of January, 1981.

Connie R. Hagelund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

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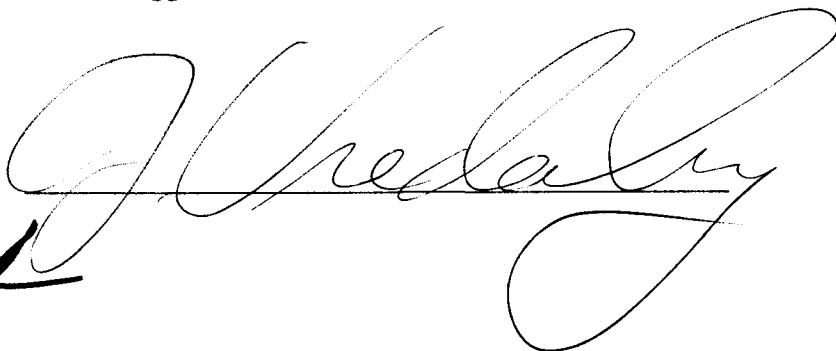
Lamonte Kennedy
and Valerie Kennedy
31 Teddy Ave.
Lakewood, NY 14750

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Sworn to before me this
9th day of January, 1981.





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

January 9, 1981

Lamonte Kennedy
and Valerie Kennedy
7A Shirley Lane
Jamestown, NY

Dear Mr. & Mrs. Kennedy:

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
ALBANY, NEW YORK 12227

January 9, 1981

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and Valerie Kennedy
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STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
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of	:	
	:	
LAMONTE KENNEDY and VALERIE KENNEDY	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Years	:	
1973.	:	

Petitioners, Lamonte Kennedy, 7A Shirley Lane, Jamestown, New York and Valerie Kennedy, 31 Teddy Avenue, Lakewood, New York 14750, 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. 12165).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Bldg., One West Genesee Street, Buffalo, New York, on November 1, 1979 at 1:15 P.M. Petitioner Lamonte Kennedy appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioners may change their filing status election for 1973 from filing jointly to filing separately.

II. Whether petitioner Lamonte Kennedy is entitled to a credit against New York State personal income tax for 1973 for income taxes paid to the Commonwealth of Pennsylvania and the City of Erie, Pennsylvania.

III. Whether the petitioners are entitled to an adjustment that was shown as a modification on their original New York State income tax return.

IV. Whether petitioner Valerie Kennedy is entitled to a credit against New York State personal income tax for 1973, for income taxes paid to New York State.

FINDINGS OF FACT

1. Petitioners, Lamonte Kennedy and Valerie Kennedy, timely filed a New York State joint personal income tax return for 1973, on which they reported total wages of \$11,228.62. Of this amount, \$2,925.98 and \$5,620.30 were wages paid by New York and Pennsylvania employers to petitioner Lamonte Kennedy, respectively. The remaining \$2,682.34 were wages paid to petitioner Valerie Kennedy by a New York employer. Petitioner Valerie Kennedy's withholding tax statement was not attached to the New York State return nor was her New York withholding taxes claimed on said return. On said return, a subtraction of \$2,418.27 was incorrectly taken as a modification to New York adjusted gross income. It was made up of two items, of which \$662.43 was a New York jointly owned rental loss, the remaining \$1,755.84 was employee business expense of petitioner Lamonte Kennedy while working in Pennsylvania during 1973. This return also reported a modification of \$84.95 for State and local income taxes included in Federal itemized deductions, a credit of \$129.26 for taxes withheld by Pennsylvania and New York State withholding taxes of \$84.95.

2. On November 22, 1974, the Income Tax Bureau issued a Statement of Audit Changes stating that since petitioners failed to reply to the Bureau letter of August 21, 1974, the Line 4, subtraction (\$2,418.27) and resident credit (\$129.26) claimed on their return have been disallowed. Accordingly, on May 19, 1975, the Income Tax Bureau issued a Notice of Deficiency against petitioners, imposing personal income tax of \$243.11, plus interest of \$19.93, less overpayment shown on return of \$82.56, for total of \$180.48.

3. On July 3, 1975, petitioners' amended New York State Income Tax Resident Return was received by the Income Tax Bureau. On this return, a subtraction of \$5,620.00 was taken for income earned by petitioner Lamonte Kennedy while working in Pennsylvania in 1973. This return also prorated the

New York itemized deduction and exemptions and increased the New York State withholding to \$147.12, which included the New York withholding taxes of \$62.17 for Valerie Kennedy, not included on their original return.

4. At the hearing, the Audit Division presented an Internal Revenue Service report of Individual Income Tax audit changes for Lamonte and Valerie Kennedy which showed the following adjustments:

<u>Items Changed</u>	<u>Amount Shown</u>	<u>Corrected</u>	<u>Adjustment</u>
Employee Business Expense	\$1,755.84	\$1,404.67	\$351.17
Child Care	400.00	419.00	(19.00)
Medical Expenses	902.00	891.47	10.53
Sales Tax	122.00	214.00	(92.00)
Total Adjustments			<u>\$250.70</u>

The petitioners agreed that the Federal audit changes were correct and that they had not been reported to New York State as required by section 659 of the Tax Law.

5. At the hearing, petitioner Lamonte Kennedy presented a copy of Commonwealth of Pennsylvania Individual Income Tax Return and a wage and tax statement for income earned in Pennsylvania. The withholding tax statement showed city income tax paid of \$56.21 to the City of Erie, Pennsylvania for which no return was required to be filed. The Commonwealth of Pennsylvania income tax return showed total tax due of \$129.26. The Audit Division agreed that the petitioners were entitled to credits in accordance with section 620 of the Tax Law.

6. The State and local income taxes reported on the Federal return were \$255.35. Therefore, including the Federal audit adjustments, the corrected New York itemized deduction is \$2,499.18.

7. At the hearing, petitioners requested a change in filing status election from filing jointly to filing separately, in order to more accurately represent their personal income tax liability.

CONCLUSIONS OF LAW

A. (1) That section 660 of the Tax Law provides that:

"Change of election. Any election authorized by this article may be changed on such terms and conditions as the tax commission may prescribe by regulation."

(2) That New York State personal income tax regulation 20 NYCRR 154.4(c) states:

"(c) Where the change of election results in an overpayment of tax, the return or amended return required by subdivision (a) above will be deemed a claim for refund for the purposes of section 687 of the Tax Law, but refund will be allowable only if such return or amended return is filed within the time prescribed by that section -- 3 years from the filing of the return in which the original election was made, or 2 years from payment of the tax, whichever period expires later.

To the extent that a change of election serves or operates, as an offset, to reduce a deficiency of tax under section 681 of the Tax Law for the same taxable year, such change of election is not deemed to result in an overpayment and such offset will be allowed without regard to the time limitation mentioned above. Likewise, such time limitation will not apply to a change of election which, considered independently of any other adjustment for the taxable year, would have resulted in a deficiency or underpayment of tax for such taxable years."

(3) That section 687(f) of the Tax Law provides:

"(f) Effect of petition to tax commission. If a notice of deficiency for a taxable year has been mailed to the taxpayer under section six hundred eighty-one and if the taxpayer files a timely petition with the tax commission under section six hundred eighty-nine, it may determine that the taxpayer has made an overpayment for such year (whether or not it also determines a deficiency for such year). No separate claim for credit or refund for such year shall be filed, and no credit or refund for such year shall be allowed or made, except --

(1) as to overpayments determined by a decision of the tax commission which has become final;"

B. That in accordance with section 687(f), the Tax Commission may determine that the taxpayer has made an overpayment; however, pursuant to section 687(g)(2) of the Tax Law, said overpayment shall not exceed the amount of tax paid within the period which would be applicable under subsections (a), (b) or (c), if on the date of the mailing of the Notice of Deficiency, a claim had been

filed (whether or not filed) stating the grounds upon which an overpayment is found (emphasis added).

C. That the Notice of Deficiency in the instant case was mailed on May 19, 1975 and, therefore, a claim filed on this date (whether or not filed) is within the statute of limitations provided for in section 687(a) of the Tax Law and 20 NYCRR 154.4(c). Consequently, the petitioners' change of election may result in a refund for the same taxable year greater than the deficiency determined under section 681 of the Tax Law, but shall not exceed the amount of taxes which the Tax Commission determines was paid (i.e. withholding and estimated taxes) pursuant to section 687(g) of the Tax Law. Said overpayment in the instant case may not exceed an amount greater than \$147.12.

D. That petitioner Lamonte Kennedy is entitled to credits against New York State personal income tax for 1973 for income taxes paid to Commonwealth of Pennsylvania and City of Erie, Pennsylvania in accordance with section 620 of the Tax Law, but not greater than \$185.47.

E. That petitioners are entitled to one-half each of \$662.43 New York rental loss, and petitioner Lamonte Kennedy is entitled to a corrected employee business expense of \$1,404.67.

F. That petitioner Valerie Kennedy is entitled to a credit for New York State taxes withheld of \$62.17.

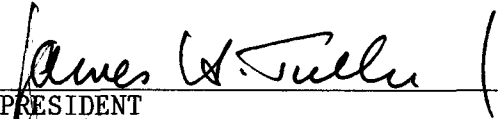
G. That the Audit Division is hereby directed to recompute the Notice of Deficiency issued May 19, 1975 in accordance with Conclusions of Law "C" through "F" and allowing petitioner Valerie Kennedy one exemption and corrected New York itemized deductions of \$1,701.13. The remaining two exemptions and corrected New York itemized deductions shall be used to recompute petitioner Lamonte Kennedy's New York personal income tax; and that, except as so granted,

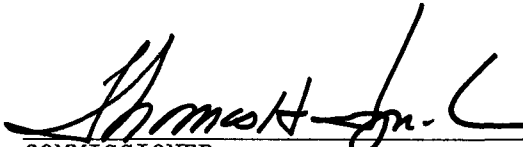
the petition of Lamonte Kennedy and Valerie Kennedy is in all other respects denied.


DATED: Albany, New York

JAN 09 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER