

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Peter W. Liu :  
and Lydia W. Liu :  
: 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 :  
1974. :

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State of New York  
County of Albany

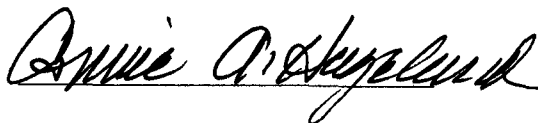
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Peter W. Liu and Lydia W. Liu the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

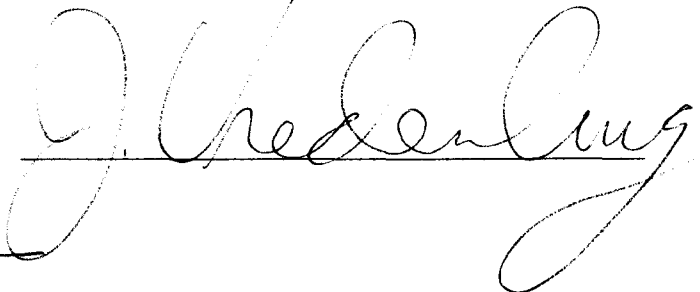
Peter W. Liu  
and Lydia W. Liu  
70 Spencer Dr.  
Short Hills, NJ 07078

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  
27th day of November, 1981.





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

November 27, 1981

Peter W. Liu  
and Lydia W. Liu  
70 Spencer Dr.  
Short Hills, NJ 07078

Dear Mr. & Mrs. Liu:

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

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In the Matter of the Petition	:	
of	:	
PETER W. LIU and LYDIA W. LIU	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1974.	:	

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Petitioners, Peter W. Liu and Lydia W. Liu, 70 Spencer Drive, Short Hills, New Jersey 07078, 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 1974 (File No. 23419).

The petitioners waived a hearing with respect to the above matter and consented to the issuance of a decision based upon the record as it is presently constituted.

ISSUE

Whether petitioners, who timely filed a petition with respect to a Notice of Deficiency together with an amended return claiming a refund by changing their filing status from joint to separate returns, are entitled to such refund even though said claim was made more than three years after the original return was deemed filed.

FINDINGS OF FACT

1. The petitioners filed a joint resident return for the year 1974.
2. On January 20, 1978, the Audit Division issued a Statement of Audit Changes against the petitioners imposing additional income tax in the amount of \$623.99 plus interest. The Statement of Audit Changes provided, in part:

"UNDER AUTHORIZATION OF THE FEDERAL LAW (SECTION 6103(B) OF THE INTERNAL REVENUE CODE), WE HAVE RECEIVED NOTIFICATION OF FEDERAL AUDIT CHANGES AND THE FOLLOWING DEFICIENCY IS BASED ON FAILURE TO REPORT SUCH CHANGES.

A MODIFICATION REDUCING FEDERAL ITEMIZED DEDUCTIONS MUST BE MADE FOR STATE AND LOCAL INCOME TAXES INCLUDED IN FEDERAL ITEMIZED DEDUCTIONS."

On April 4, 1978, a Notice of Deficiency was issued against petitioners in the amount of \$623.99, plus interest of \$157.52, for a total of \$781.51.

3. On June 23, 1978, petitioners filed a petition which stated, in part:

"Upon consulting with our accountant, we have re-calculated our 1974 state income tax based on a separate return filing status. The amended tax return is attached which is based on figures adjusted after our Federal tax audit. A refund of \$280.21 is requested." (emphasis in original).

4. The petitioners are not protesting the Notice of Deficiency based on unreported Federal changes increasing their Federal adjusted gross income.

#### CONCLUSIONS OF LAW

A. That section 651(b) of the Tax Law provides, in part, that a husband and wife who filed a joint Federal return may elect to file a separate New York State income tax return on a single form.

B. That section 660 of the Tax Law provides that any election authorized by Article 22 of the Tax Law may be changed on such terms or conditions as the tax commission may prescribe by regulation.

C. That section 154 of the income tax regulations (20 NYCRR 154) establishes conditions with respect to elections under the Internal Revenue Code and conditions with respect to elections under Article 22 of the New York State Tax Law. This section permits a husband and wife who have filed an original joint return to elect to change their return by filing amended separate returns on a single form. The Internal Revenue Service permits a change in filing from a separate return to a joint return but does not permit a change from joint to separate returns.

D. That 20 NYCRR 154.4(c) provides, in part, "Where the change of election results in an overpayment of tax, the return or amended return...will be deemed a claim for refund for 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...."

E. That section 687(f) provides, in part, that if a Notice of Deficiency for a taxable year is mailed to the taxpayer under section 681 and if the taxpayer files a timely petition with the Tax Commission, it may determine that the taxpayer has made an overpayment for such year (whether or not it also determines a deficiency for such year). Further, Tax Law section 687(g) in establishing limitations on the amount of credit or refund under section 687(f) of the Tax Law states, in pertinent part, that the overpayment determined shall not exceed the amount of tax which was paid within the period which would be applicable under subsections (a), (b) and (c), if on the date of the mailing of the notice of deficiency a claim had been filed....

F. That an amended return claiming an overpayment, filed with a timely petition for redetermination of a deficiency, will be deemed a claim for refund as of the date of mailing of the Notice of Deficiency (Tax Law section 687(g)(2)). That on the date of mailing of the Notice of Deficiency, petitioners were entitled to change their filing status election from joint to separate and to receive a refund of tax in the amount of \$280.21.


G. That the claim for refund for 1974 is granted together with such interest as may be lawfully due.

DATED: Albany, New York

NOV 27 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER