

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Lott Manufacturing Company :  
and Parker M. Lott and Helen C. Lott :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision  
of a Determination or a Refund of Personal Income :  
and UBT under Article 22 & 23 of the Tax Law for  
the F.Y.E. 8/31/74 and 1972 & 1974.

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State of New York  
County of Albany

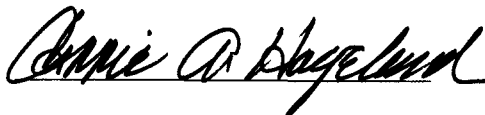
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of November, 1981, he served the within notice of Decision by certified mail upon Lott Manufacturing Company, and Parker M. Lott and Helen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

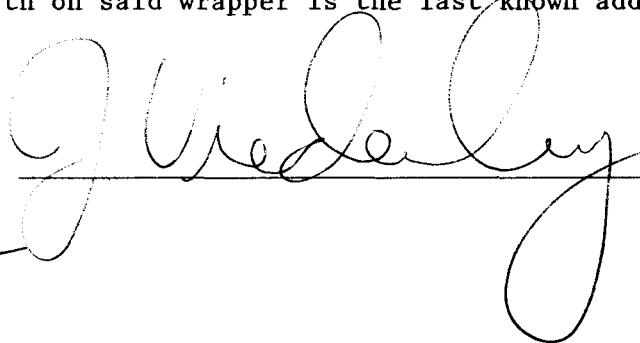
Lott Manufacturing Company  
and Parker M. Lott and Helen C. Lott  
Box 24  
Stow, NY 14785

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

Lott Manufacturing Company  
and Parker M. Lott and Helen C. Lott  
Box 24  
Stow, NY 14785

Gentlemen:

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 & 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 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  
LOTT MANUFACTURING COMPANY  
for Redetermination of a Deficiency or for  
Refund of Unincorporated Business Tax under  
Article 23 of the Tax Law for the Fiscal Year  
Ended August 31, 1974.

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DECISION

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In the Matter of the Petition  
of  
PARKER M. LOTT and HELEN C. LOTT  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1972 and 1974.

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Petitioners, Parker M. Lott, Helen C. Lott and Lott Manufacturing Company, Box 24, Stow, New York 14785, filed petitions for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1972, 1974 and fiscal year ended August 31, 1974 respectively (File Nos. 15825 and 16881).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on January 29, 1981 at 9:15 A.M. Petitioner, Parker M. Lott, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the notices of deficiency should be dismissed on the grounds that the case was not transferred to the Law Bureau within 120 days after

service in accordance with section 601.7(f) of the State Tax Commission Rules of Practice and Procedure effective January 1, 1976.

II. Whether the notices of deficiency should be dismissed on the grounds of laches.

III. Whether the Audit Division properly allocated the condemnation award thereby subjecting that portion to New York State unincorporated business tax.

IV. Whether the petitioners, Parker M. Lott and Helen C. Lott, are entitled to a \$100,000.00 capital gain exclusion.

#### FINDINGS OF FACT

1. Petitioners, Parker M. Lott and Helen C. Lott, filed New York State income tax resident returns for 1971 through 1974. Petitioners also filed two amended New York State income tax resident returns for 1971.

2. Petitioner, Lott Manufacturing Company, filed New York State partnership returns for fiscal years ending August 1, 1971 through August 1, 1974.

3. On April 12, 1976, the Audit Division issued a Notice of Deficiency against petitioners, Parker M. Lott and Helen C. Lott, for 1971 through 1974, asserting personal income tax of \$836.64, plus interest of \$140.43, less overpayment and interest of \$611.05, for a balance due of \$366.03.

4. On April 12, 1976, the Audit Division issued a Notice of Deficiency against petitioner Lott Manufacturing Company for fiscal year ending August 1, 1974, asserting unincorporated business tax of \$415.54, plus interest of \$43.97, for a total of \$459.51.

5. The notices of deficiency were issued as the result of a field audit on the grounds that the partnership income was not properly reported. On July 19, 1976, the petitioners filed a petition for redetermination of the notices of deficiency.

6. Petitioner Parker M. Lott and petitioner Helen C. Lott are partners of Lott Manufacturing Company sharing the profits 60 percent and 40 percent respectively. The principal business activity of the company was manufacturing metal products. Petitioners Parker M. Lott and Helen C. Lott converted the first floor of their personal residence into a restaurant. Petitioners Parker M. Lott and Helen C. Lott depreciated their personal residence, the improvement to the residence and the equipment for both the building and restaurant on the books of Lott Manufacturing Company. Lott Manufacturing Company was not located on the property with the petitioners Parker M. Lott and Helen C. Lott personal residence.

7. On August 26, 1971 and August 25, 1973 the petitioners received part payment from a condemnation award which took their personal residence, which included the restaurant, a four car garage, a utility house, eight acres of land and miscellaneous structures. The Audit Division assigned fifty percent of the condemnation award to the partnership based on the value of the business property (restaurant) over the total property condemned.

The petitioners argued that the allocation of the award to the business was too high, but presented no evidence to support their contention.

8. Petitioners, Parker M. Lott and Helen C. Lott, further argued that they should be allowed to exclude from gross income up to \$100,000.00 of gain on their personal return in accordance with section 121 of the Internal Revenue Code which allows a one-time exclusion of gain from the sale of a principal residence.

9. The petitioners further asserted that the State Tax Commission be barred from proceeding with this matter because section 601.7(f) of the State Tax Commission Rules of Practice and Procedure was not followed. Petitioners

raised the issue of laches on the grounds that an inordinate amount of time had lapsed since the filing of their petitions.

CONCLUSIONS OF LAW

A. That section 601.7(f) of the State Tax Commission Rules of Practice effective January 1, 1976 provides as follows:

"f. If no disposition can be had with the petition review and conference unit within 120 days after service, the case file will be transferred to the law bureau."

That section 601.26 of the State Tax Commission Rules of Practice effective January 1, 1976 provided in pertinent part:

"Effective Date and Transition Provisions: These rules shall be effective January 1, 1976, on a temporary basis and shall become permanent on July 1, 1976 unless amended or revoked by the Commisison after public hearings and further review by the Commission prior to the date...." (Emphasis supplied)

That section 601.7(f) of the State Tax Commission Rules of Practice effective January 1, 1976 was repealed and new rules were filed on July 2, 1976. Moreover the Rules of Practice should not be regarded as mandatory but are directory only, (Matter of Santoro v. State Tax Commission, Albany County Special Term, Conway, J., January 4, 1979) it therefore holds that the remedy claimed by petitioners is unfounded.

B. That the State Tax Commission is not estopped from making a claim against petitioner. A state agency or body cannot be estopped from asserting its governmental power regarding acts within its governmental capacity. That the record in the instant case shows no undue delay by the State Tax Commission in instituting action, therefore, the remedy of laches claimed by petitioners is unfounded.

C. That petitioners did not sustain the burden of proof imposed by section 689(e) of the Tax Law, to show that the method of allocating between

business and personal used by the Audit Division did not properly reflect their tax liability for years at issue. They have further failed to submit such evidence to show wherein the notices of deficiency dated April 12, 1976 were otherwise incorrect.

D. That petitioners, Parker M. Lott and Helen C. Lott, are not entitled to a \$100,000.00 capital gain exclusion in accordance with section 121 of the Internal Revenue Code since the condemnation award was before July 26, 1978.

E. That the petitions of Lott Manufacturing Company, Parker M. Lott and Helen C. Lott are denied and the notices of deficiency issued April 26, 1976 are sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

NOV 27 1981,

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER