

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Theodore A. & Hazel G. Peck :

: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income
& UBT under Article 22 & 23 of the Tax Law for the :
Years 1974, 1975 _____

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 Theodore A. & Hazel G. Peck, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Theodore A. & Hazel G. Peck
9834 Old Lake Shore Rd.
Angola, NY 14006

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.

Carmie A. Hagelund

J. Vredenburg

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

June 5, 1981

Theodore A. & Hazel G. Peck
9834 Old Lake Shore Rd.
Angola, NY 14006

Dear Mr. & Mrs. Peck:

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

In the Matter of the Petition :
of :
THEODORE A. PECK and HAZEL G. PECK : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income and :
Unincorporated Business Taxes under :
Articles 22 and 23 of the Tax Law for :
the Years 1974 and 1975. :

Petitioners, Theodore A. Peck and Hazel G. Peck, 9834 Old Lake Shore Road, Angola, New York 14006, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1974 and 1975 (File No. 21501).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Genesee Building, One West Genesee Street, Buffalo, New York, on July 9, 1980 at 2:45 P.M. Petitioners, Theodore A. Peck and Hazel G. Peck, appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether petitioners are entitled to claim the exemption for their granddaughter.

II. Whether purchases withdrawn for personal use were overstated.

FINDINGS OF FACT

1. Petitioners, Theodore A. Peck and Hazel G. Peck, timely filed New York State income tax and unincorporated business tax returns for 1974 and 1975.

2. On June 21, 1977, based on a field audit, the Audit Division issued a Statement of Audit Changes against petitioner Theodore A. Peck on which additional personal income and unincorporated business taxes were asserted for 1974 and 1975, based on the following adjustments which increased taxable income:

| | 1974 | | 1975 | |
|---|--------------------|-------------------|--------------------|--------------------|
| | <u>Personal</u> | <u>U.B.T.</u> | <u>Personal</u> | <u>U.B.T.</u> |
| Purchases Withdrawn for Personal Use | \$ 1,500.00 | \$1,500.00 | \$ 1,500.00 | \$ 1,500.00 |
| Unreported Interest Income - mtg. (Jeffers) | 270.00 | | | |
| Unincorporated Business tax Modification | | | 342.06 | |
| Capital Gain Modification | 62.98 | | 59.60 | |
| Exemption Disallowed (Tami Joe) | 650.00 | | | |
| Medical Adjustment | | | 51.72 | |
| Allowance for Services | | (300.00) | | (300.00) |
| | <u>\$ 2,482.98</u> | <u>\$1,200.00</u> | <u>\$ 1,953.38</u> | <u>\$ 1,200.00</u> |
| Taxable Balance | <u>13,111.77</u> | <u>6,975.49</u> | <u>15,655.93</u> | <u>10,718.80</u> |
| Per Return | \$15,594.75 | \$8,175.49 | \$17,609.31 | \$11,918.80 |

The field examination of petitioners' business books and records produced no understatement of income or overstatement of expenses. The liabilities for personal income tax and unincorporated business tax shown to be due on the Statement of Audit Changes were determined on an estimate that petitioners had to have withdrawn inventory for personal use. Other adjustments to personal income tax were for unreported interest income and for the disallowance of the petitioners' granddaughter as an exemption for 1974 only.

3. On July 26, 1977, petitioners paid the Statement of Audit Changes in full. The amount paid was \$701.07 of which \$435.90 and \$148.50 were personal income and unincorporated business taxes, respectively, plus penalty of \$35.72 and interest of \$80.95.

4. On September 19, 1977, petitioners filed a claim for refund which petitioners received a Notice of Disallowance in full on February 27, 1978.

5. Petitioners were sole support for both their daughter and her child. Petitioner paid all expenses other than the hospital bill which was paid by Medicaid. Petitioners' daughter did not claim her child as a dependent on her tax returns.

Petitioners were allowed the exemption for the granddaughter in 1975; however, there was no explanation in the record as to why they were not allowed the exemption in 1974.

6. The Audit Division contended that petitioners had withdrawn from purchases \$1,500.00 a year out of their grocery business. No evidence was adduced at the hearing to document or explain how the above amounts were determined.

7. Petitioners argued that the estimate of purchases withdrawn for personal use of \$1,500.00 a year was overstated. During the years at issue, petitioners did practically all their eating in restaurants. That at the time petitioner Theodore A. Peck left A&P, they had purchased a large quantity of food and other grocery products in cartons and that their large home freezer was full of meat. Petitioner Hazel G. Peck testified that it had been her custom to purchase by the case. That when her husband decided to go into business for himself and leave A&P, they purchased even larger quantities of food so they would have a stockpile if the new business had failed, and this was the food they were eating on the few occasions they ate at home during the years at issue.

CONCLUSIONS OF LAW

A. That petitioner Theodore A. Peck properly claimed exemption for his grandchild on his New York State Personal Income Tax Return for 1974 in accordance with the meaning and intent of section 152 of the Internal Revenue Code.

B. That the field audit substantiated the amounts contained in petitioners' books and records as correct since there was no finding of additional income. That the law imposes much less of a burden upon a taxpayer who is called upon to prove a negative - for example, that he did not withdraw inventory for personal use which the Audit Division claims - than it imposes upon a taxpayer who is attempting to sustain a deduction on his return (Weir v. Commissioner, 283 F.2d 675). That there is no evidence to support the Audit Division's estimate that the purchases withdrawn for personal use was \$1,500.00 a year. Therefore, the estimate by the Audit Division is without foundation and is arbitrary and capricious.

C. That the petition of Theodore A. Peck and Hazel G. Peck is granted to the extent shown in Conclusions of Law "A" and "B"; and that, except as so granted, the petition is in all other respects denied.

D. That the Audit Division is hereby directed to modify the Notice of Disallowance dated February 27, 1978 to be consistent with the decision rendered herein.

DATED: Albany, New York

JUN 05 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER