

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

of

Dore & Miriam Schary :

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 1961 - 1963. :

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 February, 1981, he served the within notice of Decision by certified mail upon Dore & Miriam Schary, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Dore & Miriam Schary
50 Sutton Pl. S.
New York, NY 10022

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 February, 1981.

Cornie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :

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Dore & Miriam Schary :

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for Redetermination of a Deficiency or a Revision :

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Personal Income Tax :

under Article 22 of the Tax Law

for the Years 1961 - 1963. :

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 February, 1981, he served the within notice of Decision by certified mail upon Nathan H. Mitchell 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. Nathan H. Mitchell
230 Park Ave.
New York, 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 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 February, 1981.

Connie A. Hagelund

J. Vredenburg

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

February 5, 1981

Dore & Miriam Schary
50 Sutton Pl. S.
New York, NY 10022

Dear Mr. & Mrs. Schary:

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
Nathan H. Mitchell
230 Park Ave.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
DORE and MIRIAM SCHARY	:	DECISION
for Redetermination of Deficiencies or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Years 1961 and 1963.	:	

Petitioners, Dore and Miriam Schary, 50 Sutton Place South, New York, New York 10022, filed petitions for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the years 1961 and 1963 (File No. 11433).

A formal hearing was held before Edward L. Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 11, 1977 at 1:15 P.M. Petitioners appeared by Nathan H. Mitchell CPA. The Audit Division appeared by by Peter Crotty, Esq. (Richard Kaufman, Esq., of counsel).

ISSUES

I. Whether a deficiency based upon Federal changes can be made at any time when the petitioners have not notified the Tax Commission of said changes.

II. Whether a credit against New York tax can be taken for California taxes paid on income from a contract, executed in California prior to petitioners' move to New York, but calling for services of petitioner Dore Schary after petitioners became residents of New York.

FINDINGS OF FACT

1. (a) A Notice of Deficiency for the year 1961 was issued against petitioners on September 27, 1971 in the amount of \$6,047.84, plus interest of \$3,428.94, for a total of \$9,476.78.

(b) The deficiency for 1961 was based upon the findings of the Appellate Division of the Internal Revenue Service finding additional taxable income of \$60,478.40. The petitioners failed to report (under section 659 of the Tax Law) to the State Tax Commission any changes in their Federal taxable income for 1961.

(c) Petitioners filed a claim for refund of \$83.03 of their 1961 personal income tax. This was made as part of their petition to the Commission on October 26, 1971, apparently under the authority of section 687(f) of the Tax Law.

(d) The claim for refund for 1961 is based upon the payment of income taxes paid to the State of California for the year 1961. The payment was made on April 8, 1963 pursuant to a notice from the California Franchise Tax Board dated October 31, 1962.

2. (a) A Notice of Deficiency for the year 1963 was issued against petitioners on September 7, 1971 in the amount of \$8,900.00, plus interest of \$3,978.03, for a total of \$12,878.03.

(b) On July 18, 1966 (prior to the expiration of the three year limitation period for 1963) petitioners had signed a consent fixing the limitation period for 1963 as "any time on or before one year following the close of proceedings now pending for the tax years 1959 through 1961." The proceedings referred to from 1959 through 1961 were concluded on December 29, 1970 by a determination of the State Tax Commission for the year 1959 pursuant to section 374 of the Tax Law and a decision of the State Tax Commission for the years 1960 and 1961 pursuant to section 689 of the Tax Law.

(c) The petitioners contested the deficiency for 1963 solely to the extent of claiming a credit of \$3,640.53 for income taxes paid to California

on salary income from the Metro-Goldwyn-Mayer division of Loew's Incorporated ("MGM").

3. The deficiency for 1961 is based upon the denial in part of charitable deductions claimed for the donation of personal papers to a university.

4. (a) The deficiency for 1963 was computed on income paid by MGM of \$89,000.00. The petitioners excluded this from their return on the ground that it was salary income earned and accruable in California prior to petitioners' change of residence to New York in 1958.

(b) In a decision dated December 29, 1970, the State Tax Commission decided that M.G.M. salary income received in 1960 and 1961 was not accruable under section 654(c)(2) of the Tax Law prior to petitioners' change of residence.

5. (a) The taxes for which petitioners claim credit in both 1961 and 1963 were taxes paid to the State of California with respect to the years 1961 and 1963. These were computed on an amount of income Mr. Schary received from MGM pursuant to a contract as last modified on November 27, 1956.

(b) The contract with MGM provided that after a period of active employment, Mr. Schary was to receive from 1957 to 1967 "additional contingent compensation" and was to "render such services as may be required by Loew's in a consulting and/or advisory capacity".

(c) Petitioners changed their residence from California to New York as of January 1, 1959.

(d) The Tax Commission has found that "at least some small amount of services were rendered under the advisory contract". This was found in a decision of the Commission dated December 29, 1970 with respect to the years 1960 and 1961. The petitioners have not in this proceeding either argued or offered any evidence contrary to the earlier finding nor have they indicated in any way what proportion of services under the contract was performed prior

to their change of residence to New York. Additionally it appears undisputable that Mr. Schary, even if he performed no actual services in New York, did in fact at all times hold himself available to perform actual services, which was all that the contract required.

CONCLUSIONS OF LAW

A. That the Notice of Deficiency for 1961 was timely issued under section 683(c)(1)(C) of the Tax Law which provides that when a taxpayer does not notify the State of Federal audit changes, the State may assess at any time.

B. That the Notice of Deficiency for 1963 was timely issued under section 683(c)(2) of the Tax Law providing for an extension of time pursuant to a signed agreement.

C. That credits claimed by petitioners for both 1961 and 1963 for taxes paid to California with respect to those years must be entirely denied. These taxes were paid on income received by petitioners while they were residents of New York. The income on which the taxes were paid, however, must be deemed to be derived from New York and not from California. This income was received in each year under a consulting contract and presumably reflects the consulting services performed or offered by petitioners to be performed in each year under that contract. No evidence or argument to the contrary has been offered by petitioners and no way has been suggested by them of otherwise apportioning between New York and California the total amount received by petitioners in all years under the contract on any other basis than the actual payments made.

D. That the issue as to the timeliness of the refund claims for 1961 or as to whether the failure of petitioners to present their claim for 1961 in the previous proceeding before the Commission (decided on December 29, 1970)

should bar them from prosecuting their claim in this later proceeding for the same year is rendered moot by virtue of Conclusion of Law "C" supra.

E. That the petitions of Dore and Miriam Schary are denied and the notices of deficiency issued September 27, 1971 for both 1961 and 1963 are sustained.

DATED: Albany, New York

FEB 05 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER