STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Alice Tully :

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 1970. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department [redacted] over 18 years of age, and that on the [redacted] Decision by certified [redacted] securely sealed [redacted]

Alice Tully
150 Central Park South
New York, NY 10019

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
20th day of February, 1981.

Annie A Hagglund

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

February 20, 1981

Alice Tully
150 Central Park South
New York, NY 10019

Dear Ms. Tully:

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

In the Matter of the Petition	:	
of	:	
ALICE TULLY	:	DECISION
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1970.	:	

Petitioner, Alice Tully, 150 Central Park South, New York, New York 10019, 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 1970 (File No. 13736).

On April 15, 1980, petitioner advised the State Tax Commission, in writing, that she desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file.

ISSUE

I. Whether petitioner, for New York State income tax purposes, is allowed to take the full "unlimited charitable contribution deduction" and not claim New York income taxes as a deduction or whether she was compelled to take a smaller charitable deduction so as to also take the New York income taxes as a deduction.

II. Whether the Notice of Deficiency should be dismissed on the grounds of laches.

FINDINGS OF FACT

1. Petitioner, Alice Tully, timely filed a New York State Income Tax Resident Return for 1970. Said return showed a deduction for taxes of $40,823.71, (included therein $18,750.00 for state and local income taxes) and a deduction

for charitable contributions of $664,478.35. Petitioner filed with her income tax return a minimum income tax computation schedule. However, the modification for allocable expenses attributable to items of tax preference was not computed.

2. On January 17, 1972, petitioner filed an amended New York State Income Tax Resident Return for 1970. On said return petitioner eliminated the deduction of $18,750.00 for state and local income taxes, and increased the allowable amount of limited contributitions to $683,228.35. This left an itemized deduction for taxes of $22,073.71. The petitioner had deductions for interest of $13,602.67 and miscellaneous deductions of $49,440.73. The total of all these deductions constituted the maximum allowable Federal deduction. As in the original return, the modification for allocable expenses attributable to items of tax preference was not computed.

3. On March 9, 1972, petitioner filed a second amended New York State Income Tax Resident Return for 1970. On said return, the modification for allocable expenses attributable to items of tax preference was reported as $145,985.64 on which the petitioner paid an additional $17,454.39 in personal income tax and interest.

4. On April 17, 1972, petitioner filed a third amended New York State Income Tax Resident Return for 1970. On this return, the modification for allocable expenses attributable to items of tax preference was reduced from $145,985.64 to $136,554.00, thus resulting in a refund of $1,393.05.

5. On June 26, 1972, the Income Tax Bureau issued a Notice of Disallowance for the refund of $1,393.05. It then issued a Notice of Deficiency on June 26, 1972 imposing additional personal income tax of $782.05, plus interest of $56.15, for a total of $838.20. Both notices were issued on the grounds that under section 615 of the New York State Tax Law, the itemized deduction allowable

to a resident taxpayer is the total amount of his deductions from Federal adjusted gross income as provided in the laws of the United States for the taxable year. The amount of State and local income taxes paid during the year is a proper deduction under the Internal Revenue Code, irrespective of whether or not claimed on the Federal return. Accordingly, the deduction as reported on Schedule B, page 2 of the original form IT-201 filed for 1970, were correctly stated. The amount on line 6d, page 1, would be the modification for State and local income taxes includable in the deduction for taxes on Schedule B plus the modification for allocable expenses attributable to items of tax preference.

6. In years prior to 1970, petitioner had qualified for an "unlimited charitable contribution deduction" pursuant to section 170(b)(1)(C) of the Internal Revenue Code. Said section required that there would be no limitation on the amount of the deduction "if, in the taxable year and in 8 of the 10 preceding taxable years, the amount of the charitable contributions, plus the amount of income tax paid during such year in respect of such year or preceding taxable years, exceeds 90 percent of the taxpayer's taxable income for such year."

Under the Tax Reform Act of 1969, section 170(b)(1)(C) of the Internal Revenue Code was amended so that the "unlimited charitable contribution deduction" was phased out by graduated reductions over a period of five years, ultimately to disappear in 1975. The phase-out was accomplished by providing that the deduction was not to reduce the taxpayer's taxable income below stated percentages in each of the years up to 1975. Section 170(f)(6) of the Internal Revenue

Code set forth the following "traditional income percentages:"

1970 - 20%
1971 - 26%
1972 - 32%
1973 - 38%
1974 - 44%

As a result, petitioner determined in 1970 that her charitable contributions were such that if she took all of her other deductions, her usable charitable deduction would have been greatly reduced. After reviewing the matter and then filing an amended return, petitioner decided to take the full charitable deduction as allowed under the Internal Revenue Code and not claim New York income taxes as a deduction. There was nothing in the Internal Revenue Code which prohibited taxpayer from following this procedure. In fact, petitioner's amended 1970 Federal Income Tax Return was accepted as filed. By taking the maximum charitable deduction and not deducting New York income taxes on the Federal return, petitioner did not have to subtract income taxes on her New York income tax return, thus decreasing her New York taxable income.

7. Petitioner paid the Income Tax Bureau $62,886.34 for 1970.

8. In correspondence dated May 19, 1980 petitioner asserted that the State Tax Commission be barred from proceeding with this matter because of the inordinate amount of time which has lapsed since the filing of the return in question.

CONCLUSIONS OF LAW

A. That section 615 of the Tax Law provides, in pertinent parts, that:

> "(a)...The New York itemized deduction of a resident individual means the total amount of his deductions from federal adjusted gross income, ...with the modifications specified in this section."
>
> . . . "(c)The total amount of deductions from federal adjusted gross income shall be reduced by the amount of such federal deductions for:
>
> (1) Income taxes..." (Emphasis supplied.)

This section of the Tax Law clearly established that Federal deductions can be reduced only to the extent that there is a specific modification in the New York Tax Law and only to the extent that such a deduction was in fact taken on the Federal return. In this instant case the New York income taxes were not taken as Federal deductions; therefore, they can not be used to reduce the Federal deductions. Furthermore, there is no provision in the New York Tax Law for a modification of the charitable deduction from $683,228.35 to $664,479.35.

B. That there is no doubt that the procedure used by petitioner in the year at issue to decrease her tax liability is fully permissible. Many Federal cases have sanctioned methods to lawfully lessen a taxpayer's tax liabilities. For example, in Helvering v. Gregory, 69 F.2d 810(2 Cir., 1934), rev'd, 27 B.T.A. 223, Judge Learned Hand stated as follows:

> "We agree with the Board and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose, to evade, taxation. Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes..."

In that case on appeal, the United States Supreme Court at 293 U.S. 468-470 stated as follows:

> "...The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted."

This same principle has been recognized by the courts of the State of New York. (Heaton v. Heaton et al. 55 N.Y.S. 2d 154).

C. That to arrive at New York Itemized Deductions, a modification must be made for the allocable expenses attributable to the items of tax preference.

This modification was computed for 1970 in the following manner:

Contributions (per amended Federal return)	$ 683,228.35
Interest (per amended Federal return)	13,602.67
Taxes (per amended Federal return)	22,073.71
Total	$ 718,904.73
Less: state & local income taxes (per amended Federal return)	-0-
Net allocable expenses	$ 718,904.73
New York Adjusted Gross Income	$1,036,668.70
Items of Tax Preference	263,084.51
Specific Deduction	20,000.00

$$\$718{,}904.73 - \left(\frac{\$1{,}036{,}668.70}{(\$1{,}036{,}668.70 + \$263{,}084.51 - \$20{,}000.00} \times 718{,}904.73\right) \text{ equals}$$

a modification under section 615(c)(4) of the Tax Law of $136,553.23. Therefore, petitioner's New York itemized deduction is $631,792.23.

D. 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 institutiong action, therefore, the remedy of laches claimed by petitioner is unfounded.

E. That the Audit Division is hereby directed to recompute petitioner's tax so as to be consistent with the decision rendered herein. That the Notice of Deficiency issued June 26, 1972 is cancelled and the Notice of Disallowance issued June 26, 1972 is modified and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 20 1981

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER