

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Ann M. Branca and Stephen W. Mulvey :  
Trustees under Will of James A. Mulvey :  
For the Benefit of Ann M. Branca : 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 :  
1975. :  
\_\_\_\_\_

State of New York  
County of Albany

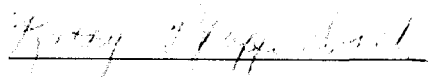
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of December, 1982, he served the within notice of Decision by certified mail upon Ann M. Branca and Stephen W. Mulvey, Trustees under Will of James A. Mulvey for the Benefit of Ann M. Branca, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ann M. Branca and Stephen W. Mulvey  
Trustees under Will of James A. Mulvey  
For the Benefit of Ann M. Branca  
312 Danbury Rd.  
New Milford, CT 06776

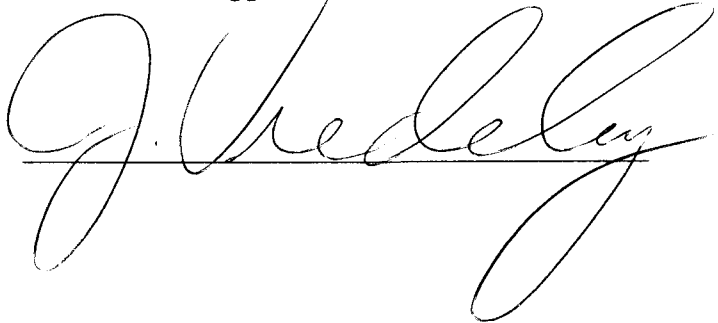
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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  
29th day of December, 1982.



AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Ann M. Branca and Stephen W. Mulvey :  
Trustees under Will of James A. Mulvey :  
For the Benefit of Ann M. Branca : 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 :  
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 29th day of December, 1982, he served the within notice of Decision by certified mail upon Robert F. Welch the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert F. Welch  
Olvany, Eisner & Donnelly  
645 Madison Ave.  
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 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  
29th day of December, 1982.

Kathy B. [Signature]

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

[Signature]

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

December 29, 1982

Ann M. Branca and Stephen W. Mulvey  
Trustees under Will of James A. Mulvey  
For the Benefit of Ann M. Branca  
312 Danbury Rd.  
New Milford, CT 06776

To the Trustees:

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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Robert F. Welch  
Olvany, Eisner & Donnelly  
645 Madison Ave.  
New York, NY 10022  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
ANN M. BRANCA AND STEPHEN W. MULVEY	:	
TRUSTEES UNDER WILL OF JAMES A. MULVEY	:	DECISION
FOR THE BENEFIT OF ANN M. BRANCA	:	
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article	:	
22 of the Tax Law for the Year 1975.	:	

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Ann M. Branca and Stephen W. Mulvey, Trustees under will of James A. Mulvey for the benefit of Ann M. Branca, c/o Robert F. Welch, Esq., 645 Madison Avenue, New York, New York 10022, 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 1975 (File Nos. 25905, 25906, 25907).

The petitioners have stipulated that this matter be decided by the State Tax Commission without hearing based upon stipulation signed by the representative of the petitioners and the representative of the Audit Division.

The Tax Commission renders the following decision.

ISSUES

I. Whether the Audit Division erroneously computed interest on the overpayment due petitioners.

II. Whether petitioners timely filed a notice of change in Federal taxable income with respect to the disallowance of part of a claim for refund.

III. What was the correct date of the final Federal determination.

FINDINGS OF FACT

1. Petitioners are the Trustees of a Testamentary Trust for the benefit of petitioner Ann M. Branca, created under the Last Will and Testament of James A. Mulvey, who died on December 3, 1973, a resident of the State of New York.

2. On January 6, 1976, petitioners filed a New York State Income Tax Fiduciary Return for the year 1975, wherein they reported taxable income of fiduciary of \$429,654.00 on which petitioners paid taxes in the amount \$77,800.30. Said amount included a surcharge and a minimum income tax.

3. The determination of the correct amount of Federal and State income taxes by the petitioners for the year 1975 was dependent upon the final determination, for Federal estate tax purposes, of the December 3, 1973 value of certain shares of common and two classes of preferred stock of a closely held corporation owned by the trustees (such shares being herein referred to as the "corporate interest").

4. On September 15, 1976, petitioners, prior to the final determination of the value of the "corporate interest", filed with the Internal Revenue Service on Form 843, a protective claim for refund, wherein they asserted that they had correctly reported in their 1975 tax return the amount of gain that the Estate of James A. Mulvey had derived on March 10, 1975 from the sale of the "corporate interest", and wherein they requested a conditional refund of some portion of such taxes if it should eventually be determined that the value of such "corporate interest" was in excess of the \$952,498.00 value that had been used in computing the 1975 gain realized from the disposition of the "corporate interest".

5. The petitioners did not notify the Department of the filing of the above mentioned protective claim for refund within 90 days after September 15, 1976.

6. As a result of a compromise between the Estate of James A. Mulvey and the Internal Revenue Service, the value of the "corporate interest" was, on December 28, 1977, finally determined to be \$2,504,845.00.

7. On March 30, 1978, a report of income tax changes was made with respect to petitioners' claim for refund with the Internal Revenue Service which provided, in part, that:

"On September 15, 1976, you filed a timely claim on Form 843 for a refund of \$196,483.15 for the year ending December 31, 1975. The issues raised by your claim have been considered and allowed in this report to the extent determined to be correct. This report supercedes that dated March 7, 1978."

The consent to this report was signed by Stephen W. Mulvey, Trustee, on April 4, 1978. Said consent contained a statement to the effect that, "It is understood that this report is subject to acceptance by the District Director." A photostatic copy of this report and the consent is contained in the file.

8. On May 26, 1978, the District Director of Internal Revenue notified the petitioners by letter that it had decided:

- (i) To adjust the petitioners' income tax liability for the year 1975 from \$196,483.15 as reported to \$13,193.58;
- (ii) To partially disallow their claim for refund to the extent of \$13,193.58;
- (iii) To allow the \$183,289.57 balance of the claim for refund.

9. On or about July 14, 1978, the Internal Revenue Service mailed to the petitioners a check for \$211,007.72 (of which \$183,289.57 represented a partial

refund of 1975 taxes, and the balance of \$27,718.15 represented statutory interest thereon).

10. The petitioners filed a Form IT-115 for 1975 (Report of Change In Federal Taxable Income, Items of Tax Preference or Disallowance of Claim For Credit or Refund) and accompanying letter and documents with the Audit Division (bearing the in-stamp of the mail room dated October 3, 1978 - which is the date said form and documents were actually received). The adjustment of their 1975 income tax liability by the Internal Revenue Service resulted in the allowance of the claim for refund of New York taxes of \$57,599.80 with interest. Among the papers in the file was a copy of a notice from the Internal Revenue Service to petitioners dated May 26, 1978 stating that it had accepted the report of its examiner which had partially disallowed its claim for credit or refund.

11. The petitioners overpaid their New York income taxes for the year 1975 in the amount of \$57,599.80.

12. On or about November 10, 1978, the Department forwarded to the petitioners a check for \$60,872.62 of which \$57,599.80 represented the overpayment of taxes for 1975 and \$3,272.82 represented limited statutory interest from April 15, 1976 to December 15, 1976.

13. Petitioners timely filed a petition contending that they were entitled to statutory interest for the period from April 15, 1976 to October 11, 1978.

14. Petitioners' request for proposed Findings of Fact numbered "1" through "6" are granted. Proposed Findings of Fact "7", "8", "10" and "11" are substantially granted. Proposed Finding of Fact "9", is not entirely in

accordance with the facts contained in Findings of Fact "10". The modifications of the findings of fact are based upon the documents in the Tax Appeals file. Petitioners' proposed Finding of Fact "12" is rejected since it is based on conjecture and is therefore irrelevant.

CONCLUSIONS OF LAW

A. That section 659 of the Tax Law provides, in part, that if a taxpayer's Federal taxable income is changed or if a taxpayer's claim for credit or refund is disallowed in whole or in part, such taxpayer shall report such change within ninety (90) days after the final determination of such change, correction or disallowance.

B. That section 687(c) of the Tax Law provides, in part, that if the report required to be filed within the 90-day period therein specified is not filed within such time period, interest on any resulting refund or credit shall cease to accrue after such ninetieth day.

C. That May 26, 1978 is the date the Internal Revenue Service accepted the report of its examiner which had been previously consented to by petitioner Stephen W. Mulvey. The date of May 26, 1978 is therefore deemed to be the date of final determination; therefore, petitioner did not timely file a notice of change in Federal taxable income.

D. That the limitation of interest by the Audit Division to December 15, 1976 was erroneous.

E. That the Audit Division is directed to recompute the interest due petitioners from April 15, 1976 to August 24, 1978, less any interest already paid.



F. That the petition of the petitioners is hereby granted to the extent indicated in Conclusions of Law "D" and "E" and is in all other respects denied.

DATED: Albany, New York

DEC 29 1982

STATE TAX COMMISSION

*Robert J. Kunkel*  
ACTING PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*William J. Smith*  
COMMISSIONER