

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
Isaac & Harriet Luban	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Personal Income	:	
Tax under Article 22 of the Tax Law for the Year	:	
1973.	:	

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Isaac & Harriet Luban, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Isaac & Harriet Luban
247-37 87th Dr.
Bellerose, NY 11426

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
11th day of June, 1982.

The block contains two handwritten signatures. The first signature, on the left, is written over a horizontal line and appears to be 'Danie A. [unclear]'. The second signature, on the right, is written over a horizontal line and is a large, stylized cursive signature, likely of the deponent Jay Vredenburg.

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

June 11, 1982

Isaac & Harriet Luban
247-37 87th Dr.
Bellerose, NY 11426

Dear Mr. & Mrs. Luban:

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ISAAC AND HARRIET LUBAN
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article
22 of the Tax Law for the Year 1973.

DECISION

Petitioners, Isaac and Harriet Luban, 247-37 87th Drive, Bellerose, New York, 11426, 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 1973 (File No. 25903).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on September 22, 1981 at 1:15 P.M. Petitioners appeared pro se. The Audit Division appeared by Ralph Vecchio, Esq. (Samuel Freund, Esq. of counsel).

ISSUE

Whether petitioners filed a New York State income tax return and paid New York State personal income tax for 1973.

FINDINGS OF FACT

1. On March 16, 1979, the Audit Division issued a Notice of Deficiency accompanied by an explanatory Statement of Audit Changes asserting a deficiency of personal income tax and minimum income tax for the year 1973 of \$6,665.00 plus penalties and interest of \$4,025.68 less the minimum income tax paid of \$1,224.00 for a balance due of \$9,466.68. The penalties asserted were pursuant

to section 685(a)(1) of the Tax Law for failure to file a tax return, section 685(a)(2) for failure to pay the amount shown as tax on a return required to be filed, and 685(c) for failure to file a declaration of estimated tax and make the required payments.

2. The action of the Audit Division was premised upon the conclusion that petitioners had failed to file a 1973 New York State income tax return, minimum income tax computation schedule, and declaration of estimated tax, or pay any New York personal income tax or minimum income tax for 1973.

3. The Audit Division based its computations of additional tax due on a copy of petitioner's 1973 personal income tax return which was provided by petitioners on November 9, 1976 upon the Audit Division's advising petitioners that it could not locate petitioners' return.

4. In a letter dated January 31, 1977 petitioners submitted a check in the amount of \$1,224.00 in payment of the principle amount of minimum income tax due.

5. Mr. Luban retired in 1973. In a check dated March 7, 1973 Mr. Luban received \$52,428.73 from the pension fund of Sears, Roebuck and Co. employees.

6. Petitioners testified that they timely filed a New York State income tax return for the year 1973 and paid the amount due by a bank check. Mrs. Luban prepared this return with the assistance of another individual. Petitioners had a receipt for the bank check. However, this receipt was destroyed when the room in which the receipt was kept was damaged by water. It is hereby found that petitioners' testimony was credible.

7. The bank upon which the bank check was drawn is no longer in operation and the successor bank did not locate the check.

8. Petitioners filed a Federal income tax return for 1973. The Internal Revenue Service has not assessed a deficiency for this year.

9. In the past, petitioners have not had a problem as a result of an income tax return being lost by the Federal government or New York State.

CONCLUSIONS OF LAW

A. That in view of the demeanor of the petitioners while testifying, the ability of petitioners to produce a copy of the return they maintained they filed, the petitioners' explanation of why they could not produce a receipt of the bank check, the fact that petitioners filed a Federal income tax return for the year in issue, and the fact that petitioners have not had a problem arising from an income tax return being lost in the past, it is hereby found that petitioners' testimony was credible and that petitioners have sustained the burden of proof imposed by section 689(e) of the Tax Law in demonstrating that a 1973 New York State income tax return had been timely filed, and that taxes had been paid in accordance therewith (see Matter of William P. Rowen, State Tax Commission, March 14, 1980; see also Matter of Thomas C. McGill and Delores McGill, State Tax Commission, January 29, 1982). Therefore, the deficiency of personal income tax and the penalties computed on this deficiency pursuant to sections 685(a)(1) and 685(a)(2) which were asserted in the notice of deficiency dated March 16, 1979 are hereby cancelled.

B. That petitioners have not sustained their burden of proof of establishing that they filed and paid estimated tax for the year 1973. Accordingly, the penalty imposed under section 685(c) of the Tax Law was proper.

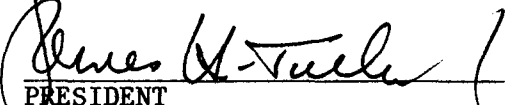
C. That the petition of Isaac and Harriet Luban is granted to the extent of Conclusion of Law "A"; that the Audit Division is hereby directed to modify

the Notice of Deficiency issued March 16, 1979 accordingly; and that except as so granted, the petition is in all other respects denied.

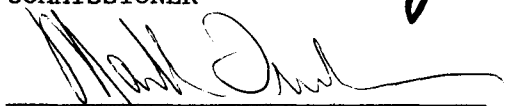
DATED: Albany, New York

JUN 11 1982

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER