

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Frederick A. & Margaret J. Olita :  
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 :  
1972 & 1973. :  
\_\_\_\_\_:

AFFIDAVIT OF MAILING

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 6th day of October, 1982, he served the within notice of Decision by certified mail upon Frederick A. & Margaret J. Olita, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

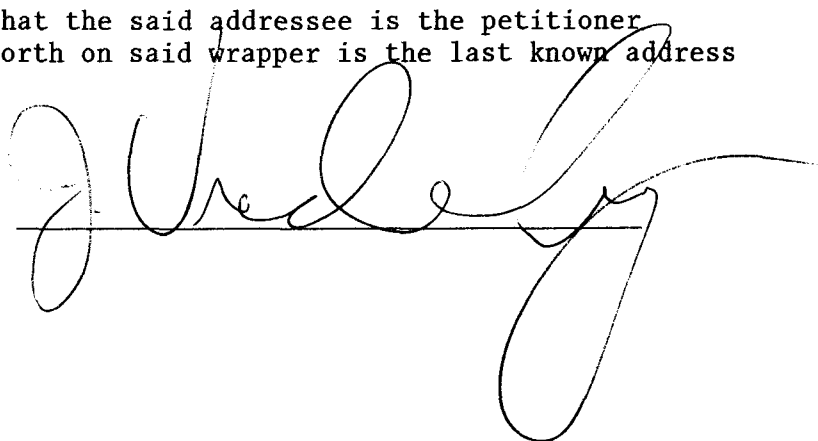
Frederick A. & Margaret J. Olita  
22 North Timberbrook Road  
Northport, NY 11768

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  
6th day of October, 1982.

  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO THE LAW  
SECTION 174



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

October 6, 1982

Frederick A. & Margaret J. Olita  
22 North Timberbrook Road  
Northport, NY 11768

Dear Mr. & Mrs. Olita:

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

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In the Matter of the Petition  
of  
FREDERICK A. OLITA and MARGARET J. OLITA  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Years 1972 and 1973.

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DECISION

Petitioners, Frederick A. Olita and Margaret J. Olita, 22 North Timberbrook Road, Northport, New York 11768, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972 and 1973 (File Nos. 18757 and 16680).

A small claims hearing was held before William Valcarcel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1981 at 9:15 A.M. Petitioners Frederick A. Olita and Margaret J. Olita appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUE

Whether petitioners were resident individuals of New York State during the years 1972 and 1973.

FINDINGS OF FACT

1. Petitioners, Frederick A. Olita and Margaret J. Olita, timely filed joint New York State income tax resident returns for the years 1972 and 1973, on which they reported wage income of \$2,444.20 and \$2,694.96, respectively. No other income was shown on the returns.

2. For 1972 petitioners reported Federal adjusted gross income of \$22,518.90. Accordingly, on June 28, 1976 the Audit Division issued a Notice of Deficiency

for \$1,190.11 plus interest for the year 1972, along with an explanatory Statement of Audit Changes on which petitioners' personal income tax liability was recomputed based on total Federal adjusted gross income reported.

3. For 1973 petitioners reported Federal adjusted gross income of \$26,330.57. Accordingly, on February 28, 1977 the Audit Division issued a Notice of Deficiency for \$1,614.97 plus interest for the year 1973, along with an explanatory Statement of Audit Changes on which petitioners' personal income tax liability was recomputed based on total Federal adjusted gross income reported.

4. Petitioner Frederick A. Olita was a resident of, and was employed in, the State of New York, when in January, 1972 he accepted a position with the Indiana Convention Center in Indianapolis, Indiana. Upon petitioner's arrival in Indiana, he resided at a private club paid for by his new employer for a period of six weeks. Subsequently, petitioner rented an apartment on an annual basis.

5. Petitioner Margaret J. Olita remained in New York State until their son completed the school term in late June, 1972, when they both joined petitioner Frederick A. Olita in Indiana. Petitioner's home in New York State was not sold since it was occupied by his father.

6. In July, 1972, petitioners went house hunting in Indiana until August, 1972 when they found a house and remitted a \$100.00 deposit. However, petitioner Margaret J. Olita "resisted" the relocation to Indiana, separated from her husband, and returned to their home in New York State with their son in September, 1972. Accordingly, petitioner Frederick A. Olita did not purchase the aforementioned house and continued to reside at the rented apartment.

7. While in Indiana, petitioner Frederick A. Olita obtained an Indiana liquor license, which he contended was only granted to bona fide residents of

that State. He registered his automobile in Indiana, but continued to maintain his New York driver's license. Indiana personal income taxes were withheld from his salary, but petitioner did not file Indiana tax returns. Although petitioner offered (and was granted the opportunity) to submit completed models of the Indiana tax returns for 1972 and 1973 which he contended should have been filed, no such tax returns were submitted.

8. Late in 1973, petitioner and his wife reconciled and he agreed to return to New York State. Accordingly, petitioner attempted to resign his position in Indiana, but was promoted with an opportunity to establish a branch office in New York State. Late in December, 1973 petitioner Frederick A. Olita returned to his home in New York State.

9. Petitioners submitted additional material which indicated their desire to claim a resident tax credit in the event it was found that they were resident individuals during the years 1972 and 1973. In addition, they indicated their desire to deduct expenses for meals and lodging, as well as perhaps itemized deductions. However, no documentary evidence was submitted establishing the aforementioned deductions.

#### CONCLUSIONS OF LAW

A. That generally any tax under this Article shall be assessed within three years after the return was filed (section 683(a) of the Tax Law). However, the tax may be assessed at any time within six years after the return was filed if an individual omits from his New York adjusted gross income an amount properly includible therein which is in excess of twenty-five percent of the amount of New York adjusted gross income (section 683(d)(1) of the Tax Law). Petitioners for 1972 omitted an amount includible in their New York adjusted gross income which was in excess of twenty-five percent. Therefore,

the Notice of Deficiency dated June 28, 1976 was timely issued within the meaning and intent of section 683(d)(1) of the Tax Law.

B. That to change one's domicile requires an intent to give up the old and take up the new, coupled with an actual acquisition of a residence in the new locality (Matter of Newcomb, 192 N.Y. 238, 250-251, 84 N.E. 950, 954-955). Although petitioners intent may have been sincere, the facts are clear that petitioners Frederick A. Olita and Margaret J. Olita did not effectuate an actual acquisition of a residence in the new locality.

C. That petitioners, Frederick A. Olita and Margaret J. Olita, were resident individuals of New York State during the years 1972 and 1973 in accordance with the meaning and intent of section 605(a) of the Tax Law and 20 NYCRR 102.2.

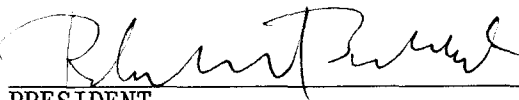
D. That petitioners have failed to sustain the burden of proof as required by section 689(e) of the Tax Law in establishing expenses for meals and lodging, itemized deductions and the "tax payable" to the State of Indiana (within the purview of 20 NYCRR 121.2) for the years 1972 and 1973.

E. That the petition of Frederick A. Olita and Margaret J. Olita is denied and the notices of deficiency issued June 26, 1976 and February 28, 1977 are sustained, together with such additional interest as may be lawfully owing.

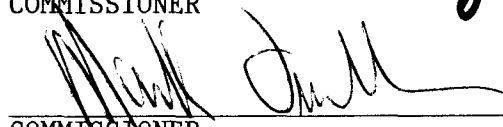
DATED: Albany, New York

SEP 06 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER