

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Walter & Gertrude Shutt :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
& UBT under Article 22 & 23 of the Tax Law for the :  
Years 1968 - 1970. :

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 4th day of June, 1982, he served the within notice of Decision by certified mail upon Walter & Gertrude Shutt, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter & Gertrude Shutt  
630 Magee Ave.  
Rochester, NY 14613

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  
4th day of June, 1982.

*Chunice A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Walter & Gertrude Shutt :  
AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of Personal Income :  
& UBT under Article 22 & 23 of the Tax Law for :  
the Years 1968 - 1970 :  
\_\_\_\_\_

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 4th day of June, 1982, he served the within notice of Decision by certified mail upon Sydney R. Rubin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sydney R. Rubin  
Harris, Beach, Wilcox, Rubin & Levey  
2 State St.  
Rochester, NY 14614

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  
4th day of June, 1982.

*Garnie A. Hupelund*

*J. Vredenburg*

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

June 4, 1982

Walter & Gertrude Shutt  
630 Magee Ave.  
Rochester, NY 14613

Dear Mr. & Mrs. Shutt:

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 & 722 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  
Sydney R. Rubin  
Harris, Beach, Wilcox, Rubin & Levey  
2 State St.  
Rochester, NY 14614  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
WALTER SHUTT and GERTRUDE SHUTT	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income and Unincorporated	:	
Business Taxes under Articles 22 and 23 of	:	
the Tax Law for the Years 1968 through 1970.	:	

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Petitioners, Walter Shutt and Gertrude Shutt, 630 Magee Avenue, Rochester, New York 14613, filed petitions for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1968 through 1970 (File Nos. 19550 and 19551).

A formal hearing was held before Julius Braun, Hearing Officer, at the offices of the State Tax Commission, 1 Marine Midland Plaza, Rochester, New York, on July 24, 1979 at 2:45 P.M. Petitioners appeared by Sydney R. Rubin, Esq. The Audit Division appeared by Peter Crotty, Esq. (Barry Bresler, Esq., of counsel).

ISSUES

- I. Whether the taxable income of petitioners was properly determined for the years in issue.
- II. Whether fraud penalties were properly asserted upon petitioners.
- III. Whether the notices of deficiency issued against petitioners were timely.

FINDINGS OF FACT

1. On April 11, 1977, pursuant to a Federal audit, the Audit Division issued a Notice of Deficiency against Walter Shutt wherein additional New York State unincorporated business tax was found to be due for the years 1968, 1969 and 1970 in the amounts of \$369.00, \$1,071.97 and \$1,213.89 respectively. In addition, penalties due to fraud for said years totaling \$1,327.44 and interest of \$1,062.84 were imposed.

2. On April 11, 1977, pursuant to a Federal audit, the Audit Division issued a Notice of Deficiency against Walter Shutt and Gertrude Shutt wherein additional personal income taxes were found to be due for the years 1968, 1969 and 1970 in the amounts of \$825.82, \$2,552.09 and \$1,798.56 respectively. In addition, penalties due to fraud for said years totaling \$2,588.24 and interest of \$1,789.57 were imposed.

3. The Federal audit resulted in the following additional income, less expenses and deductions allowed:

	<u>1968</u>	<u>1969</u>	<u>1970</u>
Unreported income (specific items)	\$ 7,338.45	\$22,512.48	\$31,083.14
Expenses paid to employees	490.00	1,575.00	1,380.00
Corrected unreported income	<u>6,848.45</u>	<u>20,937.48</u>	<u>29,703.14</u>
AGI per return	27,221.02	19,370.57	2,755.83
Corrected AGI	<u>34,069.47</u>	<u>40,308.05</u>	<u>32,458.97</u>
LESS: Itemized Deductions	2,829.56	4,835.76	4,966.59
BALANCE	<u>31,239.91</u>	<u>35,472.29</u>	<u>27,492.38</u>
LESS: Exemptions (adjusted for Sally & Children)	4,800.00	4,800.00	6,250.00
Corrected Taxable Income	<u>\$26,439.91</u>	<u>\$30,672.29</u>	<u>\$21,242.38</u>

4. Petitioners offered no documentary or other substantial evidence to show that the Federal audit computations were incorrect. They failed to file with the State Income Tax Bureau a report of change or correction in Federal taxable income.

5. In one of its answers to petitioners' perfected petitions the Department alleged in paragraph 2(d) that:

"the understatement of income by the petitioners was willful and fraudulent. The petitioners consented to the assertion by the Internal Revenue Service of its fraud penalty under IRC Section 6653(b). In addition, petitioner Walter Shutt has pleaded guilty to income tax evasion for the year 1969."

In response to this allegation, petitioners' representative stated in paragraph 2(d) of one of the replies of December 19, 1978:

"Admit that petitioner Walter Shutt pleaded guilty in federal proceedings with regard to the year 1969. Deny the remaining allegations of subparagraph d) of paragraph 2 of the Answer."

6. In the course of the hearing, petitioners' representative offered an affidavit by petitioner Walter Shutt which stated, "I pled guilty to one count of the indictment against me upon advice from my attorney." Thereafter, petitioners' representative offered a copy of an indictment encaptioned, in part, "The United States of America vs. Walter Shutt".

7. The first count of the indictment to which Mr. Shutt pled guilty alleged as follows:

"COUNT I

The Grand Jury charges:

On or about April 15, 1970, in the Western District of New York WALTER SHUTT of Rochester, New York, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America, for the calendar year 1969, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed in the Western District of New York, a false and fraudulent income tax return which was filed with the Internal Revenue Service, wherein he stated that his taxable income for the calendar year was the sum of \$10,012.11 and that the amount of tax due and owing thereon was the sum of \$2,542.69, whereas, as he then and there well knew his taxable income for the calendar year was the sum of approximately \$23,748.00, upon which said taxable income he owed to the United States of America, an income tax of approximately \$6,137.00, all in violation of Title 26, United States Code, Section 7201."

8. During the hearing, petitioners withdrew their contention that the statutory period of limitation on assessment had expired for the years in issue.

CONCLUSIONS OF LAW

A. That petitioners have not presented evidence to show that the notices of deficiency issued April 11, 1977 were incorrect, and thereby have failed to sustain their burden of proof imposed by sections 689(e) and 722 of the Tax Law.

B. That the New York taxable income of petitioners Walter Shutt and Gertrude Shutt was correctly determined for personal income tax purposes as was the taxable business income of Walter Shutt for the years 1968, 1969 and 1970.

C. That the burden of proof in any hearing under Articles 22 and 23 of the Tax Law is prescribed by section 689(e) of the Tax Law. That burden is on the taxpayer except in three instances in which the burden of proof is on the Tax Commission. One of those instances is "whether the petitioner has been guilty of fraud with intent to evade tax..." (section 689(e)(1)).

D. That evidence of a Federal determination relating to issues in a case before the Tax Commission is admissible under section 689(f) of the Tax Law.

E. That where a taxpayer against whom a New York State tax fraud penalty is asserted files a timely petition for redetermination, the State is put to its proof. The standard of proof necessary to support a finding of fraud by the Tax Commission requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts of omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing.

F. That Findings of Fact "5" and "6", in conjunction, constitute an admission that petitioner pled guilty to income tax evasion for 1969 based upon those acts set forth in Finding of Fact "7".

G. That the plea of guilty to tax evasion for the year 1969 collaterally estops petitioner from contesting the civil fraud penalty for the same year (See Plunkett v. Commissioner, 465 F.2d 299 [7th Cir. 1972]). The Audit Division has failed to sustain its burden of proof of fraud for the years 1968 and 1970.

H. That the petition of Walter Shutt and Gertrude Shutt is granted to the extent that the penalty asserted pursuant to section 685(e) of the Tax Law is cancelled for the years 1968 and 1970; that the Audit Division is hereby directed to accordingly modify the notices of the deficiency issued on April 11, 1977, and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

JUN 04 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER