

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert M. Counts : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 and 30 of :
the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1975 - 1977. :

State of New York
County of Albany

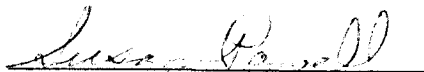
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Robert M. Counts, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert M. Counts
401 E. 81st St.
New York, NY 10028

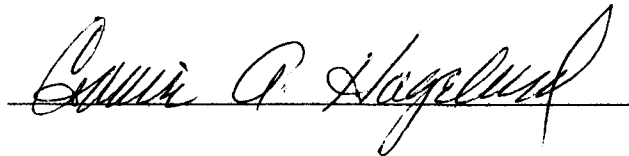
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

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
28th day of September, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert M. Counts : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or for Refund :
of Personal Income Taxes under Articles 22 and 30 :
of the Tax Law and Chapter 46, Title T of the :
Administrative Code of the City of New York for :
the Years 1975 - 1977. :

State of New York
County of Albany

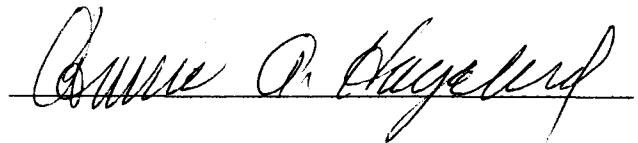
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 28th day of September, 1983, she served the within notice of Decision by certified mail upon Walter Grubman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Walter Grubman
Roland & Smith
271 North Ave.
New Rochelle, NY 10801

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
28th day of September, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

September 28, 1983

Robert M. Counts
401 E. 81st St.
New York, NY 10028

Dear Mr. Counts:

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 & 1312 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 Law 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
Building #9 State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Walter Grubman
Roland & Smith
271 North Ave.
New Rochelle, NY 10801
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROBERT M. COUNTS	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Taxes under Articles	:	
22 and 30 of the Tax Law and Chapter 46, Title	:	
T of the Administrative Code of the City of New	:	
York for the Years 1975, 1976 and 1977.	:	

Petitioner, Robert M. Counts, 401 East 81st Street, New York, New York 10028, filed a petition for redetermination of a deficiency or for refund of personal income taxes under Articles 22 and 30 of the Tax Law and Chapter 46, Title T of the Administrative Code of the City of New York for the years 1975, 1976 and 1977 (File No. 27339).

A small claims hearing was held before Carl P. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 5, 1981 at 1:15 P.M. Petitioner Robert M. Counts appeared with Walter Grubman, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether certain annual payments under an amended separation agreement are "periodic" payments in discharge of a legal obligation.

FINDINGS OF FACT

1. Petitioner, Robert M. Counts, filed a New York State Income Tax Nonresident Return for 1975 claiming an alimony deduction. Petitioner filed New York State resident returns incorporating New York City tax for 1976 and 1977 and claimed an alimony deduction each year.

2. On February 9, 1979, the Audit Division issued a Statement of Audit Changes disallowing the deduction claimed for alimony on the ground that payments made did not qualify as periodic payments for 1975 through 1977. It also made an adjustment for omission of the New York City unincorporated business tax modification for 1976 and 1977. Accordingly, two notices of deficiency were issued on April 5, 1979 against the petitioner. The first Notice of Deficiency imposed additional New York State tax for 1975 through 1977 and New York City tax for 1976 for a total of \$4,572.89, plus interest of \$679.33. The second Notice of Deficiency imposed additional New York City tax for 1977 of \$509.77, plus interest of \$42.14.

3. Petitioner timely filed a petition with respect to the aforementioned notices of deficiency. The petitioner is not contesting the adjustment for the New York City unincorporated business tax modification.

4. On June 20, 1975 the petitioner, Robert M. Counts, and his wife signed a separation agreement which provided for a settlement of all their property rights and claims, one against the other, growing out of their marital relationship. The agreement provided that petitioner make payments totaling \$10,000.00 per year for three years subject to no contingencies. In addition, for the fourth year, petitioner was required to pay weekly installments totaling \$10,000.00 if at the end of the third year the wife had not remarried. The fourth year payments would terminate immediately upon the wife's remarriage.

5. On January 29, 1979, an addendum to the separation agreement was made and signed. In the addendum, petitioner agreed to pay to wife the sum of \$10,000.00 per year for a period of four (4) years. Said sum was to be paid at \$200.00 per week for fifty (50) weeks each year commencing the week immediately following the execution of the Agreement. The first three (3) years, the

annual sum of \$10,000.00 was to be regarded as \$7,500.00 for alimony and the remaining \$2,500.00 was to be in payment for the wife's share of the equitable distribution of property acquired during the marriage. For the remaining year, the entire annual sum of \$10,000.00 was to be considered as alimony. According to the addendum, all payments for alimony were contingent upon the wife remaining unmarried and would terminate upon her remarriage. (This contingency was not part of the original separation agreement).

6. Petitioner's wife contended that she reported the following alimony income on her Federal income tax returns for 1975 through 1977.

<u>YEAR</u>	<u>AMOUNT</u>
1975	\$4,200.00
1976	7,500.00
1977	7,500.00

Said Federal income tax returns were not introduced in evidence.

7. On July 21, 1978, the Internal Revenue Service accepted petitioner Robert M. Counts' 1975 Federal tax return as filed. This acceptance of the return included an audit of alimony payments.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Article 30 of the Tax Law is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issues presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Article 30.

B. That the starting point for computing the adjusted gross income of a New York State and City resident individual is federal adjusted gross income as defined in the laws of the United States...within the meaning of section 612(a)

of Article 22 of the Tax Law and section T46-112.0 of Chapter 46, Title T of the New York City Administrative Code.

C. That the State Tax Commission is not required to accept as correct any change in federal taxable income but may conduct an independent audit or investigation in regard thereto (20 NYCRR 153.4).

D. That pursuant to Treasury Regulation §1.71-1(d)(3)(i) where payments under an agreement are to be paid over a period ending 10 years or less from the date of such agreement, such payments are not installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the agreement [and are considered periodic payments for the purposes of section 71(a)] only if such payments meet the following two conditions:

- (a) Such payments are subject to any one or more of the contingencies of death of either spouse, remarriage of wife, or change in the economic status of either spouse, and
- (b) Such payments are in the nature of alimony or an allowance for support.

As the original separation agreement was for a period of ten years or less and it was not subject to any contingencies for the years at issue, the payments made by Robert M. Counts do not qualify as "periodic" payments and thus are not deductible. The amendment to the original agreement, made in 1979 (after the filing of the returns for the years in issue), apparently was for the purpose of establishing a contingency in order to qualify the payments as being periodic. This is evident by the fact that the only difference between the original separation agreement in effect during the years in issue and the addendum was the remarriage clause.

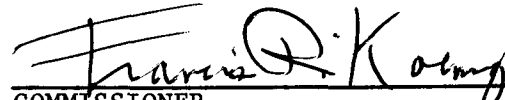
E. That the petition of Robert M. Counts is denied and the notices of deficiency issued on April 5, 1979 are sustained.


DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER