

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1972. :
_____:

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Walter E. Warner, Jr., Trustee of the Lloyd P. Wells Trust, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

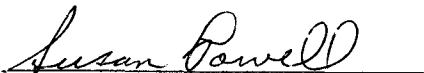
Walter E. Warner, Jr.
Trustee of the Lloyd P. Wells Trust
c/o Fiduciary Trust Co.
Two World Trade Center
New York, NY 10048

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
7th day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 124

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

October 7, 1983

Walter E. Warner, Jr.
Trustee of the Lloyd P. Wells Trust
c/o Fiduciary Trust Co.
Two World Trade Center
New York, NY 10048

Dear Mr. Warner:

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 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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
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Law for the Year 1972. :
_____ :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon United States Trust Company of New York, Trustee, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

United States Trust Company of New York, Trustee
ATTN: Richard J. Bushelon, V.P.
45 Wall St.
New York, NY 10005

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
7th day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

United States Trust Company of New York, Trustee
ATTN: Richard J. Bushelon, V.P.
45 Wall St.
New York, NY 10005

Gentlemen:

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 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.

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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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1972. :
:

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Manufacturers Hanover Trust Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Manufacturers Hanover Trust Co.
ATTN: James Schneider
600 Fifth Ave.
New York, NY 10020

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
7th day of October, 1983.

Susan Powell

Connie Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Manufacturers Hanover Trust Co.
ATTN: James Schneider
600 Fifth Ave.
New York, NY 10020

Gentlemen:

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 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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1972. :
_____ :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Thomas J. Sands, Trustee of the Louis Vernon Ledoux Trust, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas J. Sands, Trustee
of the Louis Vernon Ledoux Trust
c/o Fiduciary Trust Co.
Two World Trade Center
New York, NY 10048

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
7th day of October, 1983.

Susan Powell

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Thomas J. Sands, Trustee
of the Louis Vernon Ledoux Trust
c/o Fiduciary Trust Co.
Two World Trade Center
New York, NY 10048

Dear Mr. Sands:

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 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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
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State of New York
County of Albany

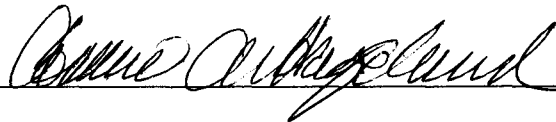
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 7th day of October, 1983, she served the within notice of Decision by certified mail upon Wayne Johnson, Jr., Trustee of the Gladys R. Johnson Trust, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wayne Johnson, Jr., Trustee
of the Gladys R. Johnson Trust
c/o Fiduciary Trust Co.
Two World Trade Center
New York, NY 10048

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
7th day of October, 1983.





AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Wayne Johnson, Jr., Trustee
of the Gladys R. Johnson Trust
c/o Fiduciary Trust Co.
Two World Trade Center
New York, NY 10048

Dear Mr. Johnson:

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 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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1972. :
_____ :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Thomas M. Bancroft, Jr., Executor of the Estate of Edith W. Bancroft, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas M. Bancroft, Jr., Executor
of the Estate of Edith W. Bancroft
c/o Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005

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
7th day of October, 1983.

Susan Powell

Connie Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Thomas M. Bancroft, Jr., Executor
of the Estate of Edith W. Bancroft
c/o Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005

Dear Mr. Bancroft:

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 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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
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_____ :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Morgan Guaranty Trust Co. of New York, Trustee, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Morgan Guaranty Trust Co. of New York, Trustee
ATTN: Robert Neuburger, V.P.
9 W. 57th St.
New York, NY 10019

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
7th day of October, 1983.

Susan Powell

Connie R. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Morgan Guaranty Trust Co. of New York, Trustee
ATTN: Robert Neuburger, V.P.
9 W. 57th St.
New York, NY 10019

Gentlemen:

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 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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1972. :
_____ :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Citibank N.A., Trustee, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Citibank N.A., Trustee
ATTN: Charles A. Cappicille, Asst. V.P.
20 Exchange Place
New York, NY 10043

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
7th day of October, 1983.

Susan Powell

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Citibank N.A., Trustee
ATTN: Charles A. Cappicille, Asst. V.P.
20 Exchange Place
New York, NY 10043

Gentlemen:

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 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.

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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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds :
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1972. :
:

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Fiduciary Trust Co. of New York, Trustee, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Fiduciary Trust Co. of New York, Trustee
ATTN: Thomas F. Gorman, V.P.
Two World Trade Center
New York, NY 10048

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
7th day of October, 1983.

Lusan Powell

Connie R. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
Fiduciary Trust Company of New York :
and Thomas M. Bancroft, Executor :
: AFFIDAVIT OF MAILING
for Redetermination of Deficiencies or for Refunds
of Personal Income Tax under Article 22 of the Tax :
Law for the Year 1972. :
_____ :

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Richard B. Covey the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005

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
7th day of October, 1983.

Susan Powell

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Fiduciary Trust Co. of New York, Trustee
ATTN: Thomas F. Gorman, V.P.
Two World Trade Center
New York, NY 10048

Gentlemen:

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 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.

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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
Richard B. Covey
Carter, Ledyard & Milburn
2 Wall St.
New York, NY 10005
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
FIDUCIARY TRUST COMPANY OF NEW YORK	:	DECISION
and THOMAS M. BANCROFT, EXECUTOR	:	
for Redetermination of Deficiencies or for	:	
Refunds of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1972.	:	

Petitioners, Fiduciary Trust Company of New York, 2 World Trade Center, New York, New York 10048 and Thomas M. Bancroft, c/o Carter, Ledyard & Milburn, 2 Wall Street, New York, New York 10005, filed petitions for redetermination of deficiencies or for refunds of personal income tax under Article 22 of the Tax Law for the year 1972 (File Nos. 27280 through 27288).

The petitioners waived a hearing with respect to the above matter and consented to the issuance of a decision based upon the record as it is presently constituted.

ISSUE

Whether petitioners' claims for refund are allowable under Tax Law section 697(d) although the refund claims were filed more than three years after the filing of the income tax returns.

FINDINGS OF FACT

The petitioners and the Department of Taxation and Finance stipulated to the following facts:

1. Petitioners are the trustees and/or executors of the trusts and estates more particularly identified in Schedules A and B, attached hereto (hereinafter the trusts and estates identified in Schedules A and B are referred to as the "Taxpayers").

2. Each of the Taxpayers realized long-term capital gains for federal income tax purposes for its 1972 fiscal year.

3. Each of the Taxpayers was required to file Form IT-205, New York State Income Tax Fiduciary Return, for the fiscal year 1972. These returns were duly filed by Fiduciary Trust Company of New York on or about April 16, 1973, and by Thomas M. Bancroft on or about September 10, 1973, and the tax paid without protest.

4. The instructions for Line 6 of Schedule 2 on the Form IT-205 for 1972 required the Taxpayers to make several modifications relating to amounts allocated to principal. Instruction "C" provided that taxpayers should "Add 20% of the net long-term capital gain deduction on Schedule 5, Line 20 to the extent allocable to principal". This had the effect of increasing the amount of such net long-term capital gain taxable for New York purposes.

5. The Taxpayers complied with such instructions and made the 20 percent modification, thus increasing the amount of tax paid to New York for 1977¹ by the amounts shown on Schedules A and B.

6. Section 2 of Chapter 718 of the Laws of New York for 1973, enacted June 11, 1973, provided for the 20 percent modification which was required by the instructions to the 1972 Form IT-205. Section 4 of said Chapter 718 provided "This act shall take effect immediately and shall apply to all taxable years beginning on or after January first, nineteen hundred seventy-two."

7. The petitioners filed requests for refunds, on behalf of the Taxpayers, for the taxes paid pursuant to the instructions to the 1972 Form IT-205. Said refund requests were received by the Department of Taxation and Finance from

¹ In fact, the taxes were paid to New York for the 1972 taxable year.

Fiduciary Trust Company of New York on April 16, 1979, and from Thomas M. Bancroft on May 3, 1979, and both were denied on May 21, 1979.

8. Following the denials of the refund requests, the petitioners filed Petitions dated June 20, 1979 on behalf of the Taxpayers protesting said denials. On September 18, 1979 the Petitions were accepted as Perfected Petitions, and on November 16, 1979 the Department of Taxation and Finance served its Answers to the Perfected Petitions.

CONCLUSIONS OF LAW

A. That prior to 1972, neither Tax Law section 612, "New York adjusted gross income of a resident individual," or section 618, "New York taxable income of a resident estate or trust," required any modification increasing federal adjusted gross income with respect to long-term capital gains.

B. That L. 1972, c. 1, section 9 amended Tax Law section 612 by adding a new paragraph, section 612(b)(11), so that 60 percent of a taxpayer's long-term capital gains would be taxable by New York State in the case of individuals modifying the 50 percent taxable on the federal level. However, no corresponding amendment was made to Tax Law section 618 with regard to trusts and estates.

C. That L. 1973, c. 718, sections 2 and 4 amended Tax Law section 618(4) so that 60 percent of a taxpayer's long-term capital gains would also be taxable by New York in the case of trusts and estates. This 1973 amendment applied to all tax years beginning on or after January 1, 1972.

D. That the New York Court of Appeals in Holly S. Clarendon Trust v. State Tax Commission, 43 N.Y.2d 933 (1978), held that the retroactive application of the 1973 amendment to a calendar year trust for its 1972 tax year was unconstitutional.

E. That pursuant to Tax Law section 687(a), the statute of limitations for claiming refunds of 1972 taxes by petitioners had expired when Clarendon, supra, was decided.

F. That Tax Law section 697(d) provides as follows:

"Special refund authority. -- Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue its certificates to the comptroller."

G. That Tax Law section 697(d) was derived from Tax Law section 373.3 in Article 16 of the Tax Law which was applicable to taxable years prior to 1960. Article 573 of personal income tax regulations promulgated under Article 16 provided, in pertinent part, as follows:

"Where no questions of law or fact are involved, and it appears from the records of the tax commission that moneys have been erroneously or illegally collected under a mistake of the facts, the commission may, at any time, refund such moneys (section 373, subdivision 3). However, such power is ordinarily limited to cases where arithmetical or other errors of computation are clearly shown upon the face of the return filed."

No regulations have been promulgated under Article 22 addressing this issue.

H. That grants of refunds under Tax Law sections 697(d) and 373.3 have been restricted generally to cases involving errors in computation on the return, or inclusion of income in the tax base on the return, which income is clearly exempt or excludible without further investigation or explanation. Two matters recently decided by the Commission involving claims for refund of unincorporated business taxes under Tax Law section 722, which incorporates Tax

Law section 697(d) into Article 23 of the Tax Law (the Unincorporated Business Income Tax Article), illustrate when the Commission will ordinarily apply Tax Law section 697(d).

In Matter of Sarkis Atlas and Vahide Atlas, State Tax Commission, June 5, 1981, a refund of unincorporated business taxes was allowed, without regard to the period of limitations for filing refund claims, for unincorporated business taxes paid by petitioner on income generated from his practice of dentistry. Since dentistry is a profession, it is not deemed an unincorporated business, the income from which is subject to the unincorporated business tax. The Commission allowed the refund since there were no questions of fact or law. The Audit Division had stipulated that petitioner was engaged in a profession which was not subject to unincorporated business tax.

However, in Matter of Lloyd H. Bailer and Marvelyne Bailer, State Tax Commission, April 30, 1982, the Commission did not allow a refund of unincorporated business taxes under Tax Law section 697(d). In Bailer, petitioner was a "labor arbitrator" and the Commission determined that there were questions of fact and law involved with respect to whether petitioner is entitled to an exemption from unincorporated business tax under Tax Law section 703(c). Since section 703(c) specifically states that "the practice of...dentistry...shall not be deemed an unincorporated business" (subject to the unincorporated business tax), a refund was allowed in Atlas. However, no specific exemption is provided for a "labor arbitrator" who, rather, must show that his business activity is "the practice of (a profession)...in which capital is not a material income-producing factor and in which more than eighty per centum of the unincorporated business gross income for the taxable year is derived from personal services actually rendered by the individual...".

I. That the limitation as to the type of errors and the restriction to the face of the return in the regulation under Article 16 are qualified by the word "ordinarily". Therefore, the regulation has allowed exceptions. One exception is reflected in a line of cases² involving the collection of a tax on exempt pension income which taxpayers have reported on their returns as annuity income. E.g., Matter of Isaac and Lilyan Zimmet, State Tax Commission, October 14, 1968 and Matter of Irving and Lillian Miller, State Tax Commission, June 25, 1974. In these matters, the Commission looked beyond the face of the return to determine that moneys had been paid by the respective taxpayers under a mistake of facts. There was no question that the Tax Law exempted pension income from tax. However, in the matter at hand, a question of law, whether the retroactive application of the 1973 amendment was constitutional, was not resolved until after the running of the statute of limitations. Therefore, it is inappropriate for the Commission to apply Tax Law section 697(d) to allow a refund in the matter at hand.

J. That the petitions of Fiduciary Trust Company of New York and Thomas M. Bancroft, Executor are denied and the denials of the refund requests by the Audit Division are sustained.

DATED: Albany, New York

OCT 07 1983

STATE TAX COMMISSION

Raduica Arden
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

² Cases under Tax Law, Article 16 are not cited herein by name and date because of the secrecy requirements imposed by Tax Law §384.

SCHEDULE A

Fiduciary Trust Company of New York, Trustee
No. 27280

<u>Trust</u>	<u>EIN</u>	<u>Co-Trustee</u>	<u>Tax Refund Claimed</u>
Delancey K. Jay Trust U/A 7/5/35	13-6033328		123.41
Mary Clark Dimond Trust U/A 12/31/31	13-6033345		217.51
Mary Clark Dimond Trust U/A 8/12/35	13-6033347	John K. Schemmer	451.88
Alfred H. Swayne Trust U/A 2/6/37	13-6033387		30.28
Frederick B. Lee Trust U/A 12/31/40	13-6033416		36.16
Lynn A. Weyand Ins Trust #1 U/A 12/23/41	13-6033430		81.75
Lynn A. Weyand Ins Trust #2 U/A 12/23/41	13-6033431		47.01
Arthur S. Evans Ins Trust U/A 12/23/41	13-6033432		465.08
John W. Morgan Trust U/A 12/23/46	13-6033475	George F. Morgan	117.28
Wanden M. Kane Trust U/A 1/21/29	13-6033486	Alexander F. Kane	777.18
Percy A. Seibert Trust U/A 12/16/52	13-6033544		84.83
Frank J. Humphrey, Jr. Trust U/A 6/2/55	13-6033575		213.67
Louis C. Clark Trust U/I 7/15/31	13-6033589		132.89

Fiduciary Trust Company
of New York, Trustee

Schedule A, Page 2

<u>Trust</u>	<u>EIN</u>	<u>Co-Trustee</u>	<u>Tax Refund Claimed</u>
Louis C. Clark Trust U/I 7/15/31	13-6033588		42.88
Ruth B. Gouverneur Trust U/A 12/29/55	13-6033597	Leo Gottlieb	198.62
George E. Haines Trust U/A 2/4/57	13-6033621		30.07
Alissa Carolyn Guyer Trust U/A 5/27/59	13-6033664		112.49
Shelly Diane Guyer Trust U/A 6/10/60	13-6033689		91.16
Marion Leslie Guyer Trust U/A 9/6/62	13-6033749		84.00
John Middleton Trust U/A 7/6/42	13-6170574		32.53
Leigh Jonathan Guyer Trust U/A 1/26/65	13-6170576		38.00
James Scharps Baumann Trust U/A 12/22/69	13-6327259	Jay S. Baumann	213.17
Trusts U/W Silas W. Howland Trust for Mary Howland Reed	13-6033755		331.45
Trusts U/W Silas W. Howland Trust for Silas W. Howland, Jr.	13-6033756		328.68
John O. Crane Trust U/W Charles R. Crane	13-6033759		744.59

Fiduciary Trust Company
of New York, Trustee

Schedule A, Page 3

<u>Trust</u>	<u>EIN</u>	<u>Co-Trustee</u>	<u>Tax Refund Claimed</u>
Ruth M. Fort Trust U/W Ruth B. Mitchell	13-6033762	Ruth M. Fort	46.90
Lois M. Hammer Trust U/W Ruth B. Mitchell	13-6033765		86.79
Morgan D. Wheelock Trust U/W W H Wheelock	13-6033774		353.71
Trust U/W Guido Pantaleoni, Jr.	13-6033782		795.77
Trust U/W Margery R. Billings	13-6033841	Herbert E. Genert, Jr.	354.13
Trust U/W Irving T. Bennett	13-6033853		147.64
Residuary Trust U/W Hughes Dallas	13-6033889		66.49
Appointed Trust U/Art 2 W/O F P Kinnicutt	13-6103963	A. Pennington Whitehead	122.65
Marital Trust U/W Samuel C. Johnson	13-6208423		70.36
Trust U/W Thomas H. Beardsley	13-6226861		45.01
Residuary Trust U/W Robert K. Clark, Jr.	13-6349124		46.48
Wallace Tood Trust U/W Miriam Gilman Todd	13-6033779		34.67
Richard Shields Children's Trust f/b/o Cassandra Dickson	13-6370150	Richard T. Shields	359.81
Richard Shields Children's Trust f/b/o Caroline Dickson	13-6370148	Richard T. Shields	359.81

Fiduciary Trust Company
of New York, Trustee

Schedule A, Page 4

<u>Trust</u>	<u>EIN</u>	<u>Co-Trustee</u>	<u>Tax Refund Claimed</u>
Caroline S. Walker Children's Trust f/b/o Cassandra Dickson	13-6370149	Richard T. Shields	146.42
Caroline S. Walker Children's Trust f/b/o Caroline Dickson	13-6370151	Richard T. Shields	146.42
Helen Shaw Ellsworth Trust U/W Jane H. Ellsworth	13-6271256		678.41
Anne Waters Ellsworth Trust U/W Jane H. Ellsworth	13-6271257		628.98

SCHEDULE B

<u>Estate</u>	<u>EIN</u>	<u>Tax Refund Claimed</u>
Estate of Edith W. Bancroft, Thomas M. Bancroft, Executor No. 27285	13-6359078	\$657.17