

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Joseph & Grace Garofalo :  
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 :  
1973, 1975 & 1976. :  
\_\_\_\_\_

AFFIDAVIT OF MAILING

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 Joseph & Grace Garofalo, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Joseph & Grace Garofalo  
2310 East 65th St.  
Brooklyn, NY 11234

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.

Susan P. [Signature]

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

Connie Hagelund

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Leonard Bailin  
299 Broadway  
New York, NY 10007

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.

Comie Nkagula

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

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

September 28, 1983

Joseph & Grace Garofalo  
2310 East 65th St.  
Brooklyn, NY 11234

Dear Mr. & Mrs. Garofalo:

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  
Leonard Bailin  
299 Broadway  
New York, NY 10007  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JOSEPH AND GRACE GAROFALO	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1973, 1975 and	:	
1976.	:	

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Petitioners, Joseph and Grace Garofalo, 2310 East 65th Street, Brooklyn, New York 11234, filed a petition<sup>1</sup> for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1973, 1975 and 1976 (File No. 32481).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 13, 1982 at 9:15 A.M. Petitioners, appeared by Leonard Bailin, Esq., 299 Broadway, New York, New York 10007. The Audit Division appeared by Paul B. Coburn, Esq. (Alfred Rubinstein, Esq., of counsel).

ISSUE

Whether petitioners filed a timely petition protesting a Notice of Deficiency issued February 23, 1979.

FINDINGS OF FACT

1. On February 23, 1979, the Audit Division issued a Notice of Deficiency against the petitioners, Joseph and Grace Garofalo.

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<sup>1</sup> The petitioners actually filed a petition captioned as follows: "Petition for Redetermination of Timeliness of Original Petition." Such petition also included Anthony and Mary Mancuso as petitioners, who were given a separate File No. 32482, and a decision concerning these petitioners is separately rendered.

2. The Notice of Deficiency issued against petitioners was for the years 1973, 1975 and 1976<sup>2</sup> as follows:

Additional Tax Due or Tax Deficiencies	\$5,330.73
Total Penalty and/or Interest	<u>3,979.05</u>
Amount Due	\$9,309.78

3. Petitioners' representative, Leonard Bailin, Esq., testified that on April 11, 1979, he dictated a petition for a redetermination of the Notice of Deficiency herein, to his secretary, Beverly Gallack, and that after it had been typed, he assembled the petition, signed it, and placed it in an envelope.

4. Mrs. Gallack testified that on April 11, 1979, she placed the "envelope with postage on it in a letter box to New York State in Albany".

5. The petition alleged to have been mailed on April 11, 1979 was never received by the State Tax Commission.

6. Assessments were issued against the petitioners in July, 1979, and Mr. Bailin wrote to the New York State Income Tax Bureau requesting information on why assessments were made against petitioners when he filed a petition for redetermination of deficiency for the years in issue on April 11, 1979.

7. Leonard Bailin and Beverly Gallack were credible witnesses. However, there is no postmark or registration receipt that indicates timely mailing of the petition.

8. The only issue to be resolved in this proceeding is whether petitioners filed a timely petition protesting the Notice of Deficiency issued February 23, 1979.

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<sup>2</sup> The Notice of Deficiency describes the period at issue as 1973, 1975, 1976 and 1976, repeating the year 1976 twice; however, the Statement of Audit Changes states that the years are 1973, 1974 and 1976.

CONCLUSIONS OF LAW

A. That Tax Law §689(b) provides as follows:

"(b) Petition for redetermination of a deficiency. -- Within ninety days... after the mailing of the notice of deficiency... the taxpayer may file a petition with the tax commission for a redetermination of the deficiency."

Therefore, a petition for redetermination of a deficiency protesting the Notice of Deficiency would be timely if filed within ninety days of February 23, 1979.

B. That 20 NYCRR 601.3 "Commencement of Proceeding" provides as follows:

"(a) Filing of petition. All proceedings before the Commission must be commenced by the filing of a petition...

\* \* \* \*

(c) Time limitations. The petition must be filed within the time limitations prescribed by the applicable statutory sections and there can be no extension of that time limitation. If the petition is filed by mail, it must be addressed to the particular operating bureau in Albany, New York. When mailed, the petition will be deemed filed on the date of the United States postmark stamped on the envelope."

C. That Tax Law §691(a) provides in part as follows:

"Timely mailing. - If any return, declaration of estimated tax, claim, statement, notice, petition, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of this article is, after such period or such date delivered by United States mail to the Tax Commission, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery... If any document or payment is sent by United States registered mail, such registration shall be prima facie evidence that such document or payment was delivered to the Tax Commission, bureau, office, officer or person to which or to whom addressed. To the extent that the Tax Commission shall prescribe by regulation, certified mail may be used in lieu of registered mail under this section."

D. That Tax Law §691(a) is patterned after I.R.C. §7502, "Timely Mailing Treated As Timely Filing and Paying".

E. That Treas. Reg. §301.7502-1(d)(1) provides as follows:

"Section 7502 is not applicable unless the document is delivered by U.S. mail to the agency, officer or office with which it is required to be filed. However, if the document is sent by registered mail or certified mail, proof that the document was properly registered or that a postmark certified mail sender's receipt was properly issued therefor, and that the envelope or wrapper was properly addressed to such agency, officer or office shall constitute prima facie evidence that the document was delivered to such agency, officer, or office."

F. That to be timely, a petition must be actually delivered to the Tax Commission within ninety days after a deficiency notice is mailed, or it must be delivered in an envelope which bears a United States postmark of a date within the ninety-day period. The petitioners have not shouldered their burden of proof under Tax Law §689(e) to show that the petition was delivered to the Tax Commission. Proof of mailing by registered or certified mail was not shown. Proof of mailing by ordinary mail does not satisfy the requirement of proving delivery of the petition to the Tax Commission. See Deutsch v. C.I.R., 599 F.2d 44 (2d Cir.), Cert. denied, 444 U.S. 1015.


G. That, further, we note that the petitioners are not without redress. After paying the deficiency, they may file a claim for refund and, if that claim is denied, they may file a petition with the Tax Commission.


H. That the petition herein is denied, and the Notice of Deficiency issued on February 23, 1979 is sustained.

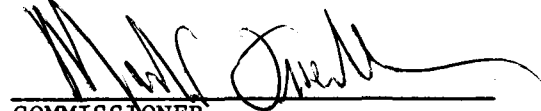
DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER