

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Carroll C. & Jennifer L. Haston : AFFIDAVIT OF MAILING

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 Year :
1978.

State of New York
County of Albany

Kathy Pfaffenbach, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of January, 1983, she served the within notice of Decision by certified mail upon Carroll C. & Jennifer L. Haston, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Carroll C. & Jennifer L. Haston
Route 2, Box 708A
Conroe, TX 77303

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
24th day of January, 1983.

Kathy Pfaffenbach

Carrie A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

January 24, 1983

Carroll C. & Jennifer L. Haston
Route 2, Box 708A
Conroe, TX 77303

Dear Mr. & Mrs. Haston:

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

In the Matter of the Petition	:	
	:	
of	:	
	:	
CARROLL C. HASTON AND JENNIFER L. HASTON	:	DECISION
	:	
for Redetermination of a Deficiency or Refund	:	
of Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 1978.	:	

Petitioners, Carroll C. Haston and Jennifer L. Haston, Route 2, Box 708A, Conroe, Texas 77303, filed a petition for redetermination of a deficiency or refund of personal income taxes under Article 22 of the Tax Law for the year 1978 (File No. 34212).

On March 20, 1982, petitioners advised the State Tax Commission, in writing, that they desired to waive a small claims hearing and to submit the case to the State Tax Commission, based on the entire record contained in the file. After due consideration of said record, the Commission renders the following decision.

ISSUES

I. Whether petitioners may use the actual cost basis rather than the adjusted basis in determining the gain realized on the sale of their personal residence in New York.

II. Whether it is unconstitutional for the Audit Division to use the adjusted basis for the personal residence that was sold in New York.

III. Whether a settlement offer was made by petitioners and accepted by the State of New York, and if so, whether it can be repudiated at the state's pleasure.

FINDINGS OF FACT

1. Petitioners, Carroll C. Haston and Jennifer L. Haston, timely filed a New York State Income Tax Resident Return and a New York State Income Tax Nonresident Return for 1978 on which they stated their period of residency was from January 1, 1978 to August 24, 1978. Attached to said returns was a Nonresident Earnings Tax Return for The City of New York for 1978, a Schedule for Change of Residence Status, a schedule of combined returns, New York State Maximum Tax on Personal Service Income form, and two Federal schedules D, Capital Gains and Losses. One Schedule D showed a capital gain of \$25,000.00 while the other schedule D showed a capital gain of \$31,414.00. The \$6,414.00 was the difference between the actual cost basis and the adjusted cost basis of the residence purchased in New York State.

2. Prior to petitioners becoming residents of New York, they had owned homes in North Carolina and Texas. The cost basis of their New York residence was adjusted to show the prior gains deferred for those homes. Therefore, the adjusted cost basis was \$69,586.00. Petitioners had purchased the personal residence in New York on August 16, 1976 for \$76,000.00. It was sold after petitioners had become residents of Louisiana for \$101,000.00. Petitioners purchased a home in Louisiana for \$67,500.00. For federal tax purposes petitioner reported a gain of \$31,414.00 and for New York tax purposes they reported a gain of \$25,000.00.

3. On March 21, 1980, the Audit Division issued a Statement of Audit Changes which reflected the following adjustments:

Sale or exchange of capital assets corrected for Federal correction shown on taxpayers' Federal Form 4084.

Gain on the sale or exchange of New York property in your nonresident period must be the same as your Federal gain.

Net long term capital gains are taxed by New York at 60 percent rather than 50 percent. Accordingly, 20 percent of the capital gains deduction should be added to income.

Your New York State maximum tax on personal service income has been properly computed as shown below.

The portion of long term capital gains not subject to New York personal income tax is an item of tax preference and subject to New York minimum income tax.

Based on the adjustments stated above, the Audit Division imposed additional New York State personal income tax of \$1,946.04, plus the balance due of \$115.09 for New York City nonresidence earnings tax, as computed by petitioners, for total taxes due of \$2,061.13. Accordingly, it issued on August 8, 1980, a follow up notice to the Statement of Audit Changes against petitioners for tax year 1978 in the amount of \$2,061.13 plus interest in the amount of \$230.20 for a total due of \$2,291.33.

4. On October 16, 1980, the Audit Division cancelled the New York State minimum income tax of \$70.43 included in the follow up notice issued on August 8, 1980 and the Statement of Audit Changes.

5. On December 17, 1980, the Audit Division issued a Notice of Deficiency against petitioners for 1978. The Notice showed a tax deficiency due of \$115.09, plus interest of \$16.17, for a total due of \$131.26. The \$115.09 represented the balance due of the New York City nonresident earnings tax as computed by petitioners and as shown on the Statement of Audit Changes issued March 21, 1980. This Notice was issued as a result of Mr. Haston's letter of December 5, 1980 which stated: "If any tax is owed other than what I have paid excluding this tax on capital gains, I will immediately pay such amount."

On December 24, 1980, petitioners paid the Notice of Deficiency issued on December 17, 1980 by check. On the face of the check petitioners wrote "Full Payment - 1978 NYS income taxes of Jennifer and Carroll Haston". The Audit Division deposited said check.

6. On April 8, 1981, the Audit Division issued a Notice of Deficiency to petitioners for 1978 in the amount of \$1,875.61 plus interest of \$311.94 for a total due of \$2,187.55. This Notice represented the New York State personal income tax portion of the Statement of Audit Changes issued March 21, 1980 excluding the minimum income tax portion.

7. Petitioners argued that it is unconstitutional for the Audit Division to attempt to tax income earned outside of New York prior to the taxpayers becoming residents of New York and that the \$6,414.00 represented monies earned prior to becoming a resident of New York from the sale of previously owned homes in North Carolina and Texas.

8. Petitioners further argued that "a valid accord and satisfaction may result from an offer of payment of money upon an unliquidated demand conditioned upon its being received in full satisfaction of the indebtedness and the acceptance thereof..." 1 Am. Jur. 2d, E 14, Accord and Satisfaction. Section 18, 1 Am. Jur. 2d, Accord and Satisfaction, further states that "thus, acceptance and use of a check purporting to be 'in full', or employing words of similar import, or accompanied by a letter to that effect, amounts to an accord and satisfaction of the larger claim of the creditor if the claim is unliquidated or disposed."

Petitioners state that clearly our offer to settle, receipt of a Notice of Deficiency for a lesser amount than originally alledged, and the paying with a check reciting "Full Payment - 1978 NYS income taxes for Jennifer and Carroll

Haston" constitutes as clear a case of accord and satisfaction that can be found; that New York accepts the law principle that the use of a remittance by check purporting to be in full, or employing the words of similar import, amounts to an accord and satisfaction of the larger claim; that a recent New York case makes it very clear what the law of New York is, and the acceptance of a check marked payment in full constitutes an accord and satisfaction (Blottner, Derrico, Weiss and Hoffman v. Fier, 420 NYS 2d 999, 1001); that the Audit Division cannot accept a taxpayers' check in settlement and still demand more as it is attempting to do.

CONCLUSIONS OF LAW

A. That the adjusted cost basis of \$69,586.00 which represents the adjusted basis of the New York residence for federal tax purposes is the amount required to be used in determining the long term capital gain for New York State purposes (see section 632(a)(1) of the Tax Law). That New York State Tax Law does not provide for a difference in the adjusted cost basis other than that shown on the Federal return. Therefore, the Audit Division properly determined the long term capital gain on the sale of the residence.

B. That the constitutionality of the laws of the State of New York is presumed at the administrative level of the New York State Tax Commission. There is no jurisdiction at the administrative level to declare such laws unconstitutional. Therefore, it must be presumed that the Tax Law is constitutional to the extent that it relates to the imposition of income tax liability on the petitioners.

C. That payment of \$131.26, the amount stated in the Notice of Deficiency dated December 17, 1980 does not constitute an accord and satisfaction of the liability asserted in the Notice of Deficiency dated April 8, 1981 in the

amount of \$2,187.55. That the Notice of Deficiency issued on April 8, 1981 is still owing together with such lawful interest due thereon. That the petition of Carroll C. Haston and Jennifer L. Haston is in all respects denied.

DATED: Albany, New York

JAN 24 1983

STATE TAX COMMISSION

Robert A. Bauland
ACTING PRESIDENT

Francis R. Koeng
COMMISSIONER

Mark J. [Signature]
COMMISSIONER