

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

Paul Kissinger

:

:

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Personal Income
Tax under Article 16 and 22 of the Tax Law for the :
Years 1959, 1965-1967 & 1970.

State of New York
County of Albany

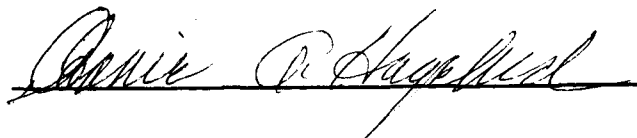
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 24th day of June, 1983, she served the within notice of Decision by certified mail upon Paul Kissinger, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul Kissinger
30 Elliot Road
Great Neck, NY 11021

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 June, 1983.



AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

June 24, 1983

Paul Kissinger
30 Elliot Road
Great Neck, NY 11021

Dear Mr. Kissinger:

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) 375 & 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 90 days for the Article 16 matter (tax year 1959) and within 4 months for the Article 22 matter. The time to commence an appeal starts with the filing 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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PAUL KISSINGER	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Articles	:	
16 and 22 of the Tax Law for the Years 1959,	:	
1965, 1966, 1967 and 1970.	:	

Petitioner, Paul Kissinger, 30 Elliot Road, Great Neck, New York 11021, filed a petition for redetermination of a deficiency or refund of personal income tax under Articles 16 and 22 of the Tax Law for the years 1959, 1965, 1966, 1967 and 1970 (File No. 32124).

A small claims hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 9, 1982 at 10:00 A.M., with all briefs to be submitted by November 23, 1982. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether petitioner is properly entitled to a refund or credit of personal income tax for each of the years 1959, 1965, 1966, 1967 and 1970.

FINDINGS OF FACT

1. On December 18, 1973, Paul Kissinger (hereinafter petitioner), late filed New York State personal income tax returns for the years 1957, 1959, 1960, 1961, 1964, 1965, 1966 and 1967. Such returns, which were filed on multiple year forms, reported balances due or overpayments computed as follows:

<u>YEAR</u>	<u>TAX</u>	<u>PAYMENTS</u>	<u>BALANCE DUE</u>	<u>OVERPAYMENT</u>
1957 ¹	\$ 14.06	-0-	\$14.06	
1959	126.81	\$112.80	14.01	
1960 ¹	52.84	66.70		\$13.86
1961 ¹	16.43	24.80		8.37
1964 ¹	79.84	80.84		1.00
1965	93.55	87.01	6.54	
1966	87.72	111.27		23.55
1967	208.55	185.53	23.02	

Payments credited above represent taxes withheld by petitioner's employers.

2. In conjunction with the above returns petitioner submitted payment of \$10.85 and a letter wherein he explained the computation of such payment.

Pursuant to said letter his payment was computed by offsetting overpayments against balances due as follows:

<u>YEAR</u>	<u>BALANCE DUE</u>	<u>OVERPAYMENT</u>
1957	\$14.06	
1959	14.01	
1960		\$13.86
1961		8.37
1964		1.00
1965	6.54	
1966		23.55
1967	23.02	
	<u>\$57.63</u>	<u>\$46.78</u>
NET BALANCE DUE		<u>\$10.85</u>

3. On June 1, 1973 petitioner filed a New York State Income Tax Resident Return for the year 1970. On such return his computed tax of \$314.79 was reduced by reported prepayments of \$307.19, yielding a balance due of \$7.60. Said prepayments were comprised of tax withheld of \$276.01 plus a purported estimated tax payment of \$31.18.

4. On February 4, 1974 the Income Tax Bureau issued a Notice and Demand For Payment of Income Tax Due for the year 1970 wherein tax of \$31.18 was assessed plus penalty and interest.

¹ These years are not at issue herein.

5. On February 13, 1974 the Income Tax Bureau issued an Assessment of Unpaid Income Tax for the years 1957 and 1959 wherein the balances due for said years, as stated on petitioner's returns, were assessed together with penalty and interest. Petitioner was given credit for his payment of \$10.85 against his 1957 liability.

6. On February 13, 1974 the Income Tax Bureau issued a Notice and Demand For Payment of Income Tax Due for the years 1965 and 1967 wherein the balances due for said years, as stated on petitioner's returns, were assessed together with penalty and interest.

7. On February 13, 1974 the Income Tax Bureau issued a statement to petitioner with respect to his reported overpayment computed on his 1966 return. Said statement indicated:

"I am sorry, but the law does not permit us to allow the refund or credit you claimed. There is a deadline for filing for a refund or credit and that date, shown above, (April 15, 1970) had expired before you filed. You should have filed your claim within three years from the date your original return was filed."

8. On March 21, 1975 petitioner filed a petition with respect to taxable years 1957, 1959, 1965, 1967 and 1970. In response to said petition the Income Tax Bureau issued a letter to petitioner on July 30, 1975 wherein it stated that:

"The petition which you filed is not proper.

After notices and demands for payment of income tax are issued, for further review, these notices must be paid and formal claims for refund, Forms IT-113X, must be filed within two years from the date of payment. However, in order to resolve the matter, your file is being forwarded to the Mineola District Office for an informal conference."

9. On October 28, 1977 the Income Tax Bureau issued a Statement to petitioner wherein it advised that his refund for 1976 has been applied to prior year tax liabilities as follows:

<u>Year</u>	<u>Amount Outstanding</u>	<u>Less Refund Applied</u>	<u>Current Balance Including Penalty And Interest</u>
1959	\$58.62	\$58.62	Paid
1965-1967	65.42	65.42	Paid
1970	80.26	26.46	<u>\$53.80</u>
TOTAL NOW DUE			<u>\$53.80</u>

10. On November 26, 1979, petitioner filed three (3) forms IT-113X, claims for credit or refund of personal income tax. Pursuant to said claims, refunds were requested as follows:

<u>Year</u>	<u>Amount of Refund or Credit Claimed</u>
1959	\$58.62
1965-1967	65.42
1970	66.76

The refunds claimed for 1959 and 1965-1967 appear to represent the payments credited from application of petitioner's 1976 refund to the liabilities outstanding for said years. With respect to 1970, the record does not disclose how the amount of refund claimed was determined.

11. Petitioner's basis for his refund claims for 1959 and 1965-1967 is explained on such claims as follows:

"Tax returns for the years 1957 thru 1967 were voluntarily filed and paid on my own initiative. Overpayments on returns for the years 1960, 1961, 1964 and 1966, were not allowed as a credit against the tax due for the other years. These claims for credit were timely filed in accordance with section 687(a) of the Tax Law, that is, "within three years from the time the return was filed..." More than the amount of the claims for credit was paid "within the three years immediately preceding the filing of the claims..." actually on 12/14/73."²

His basis for his refund claim filed for 1970 is similar in nature.

² This is the date petitioner signed all returns filed as specified in Finding of Fact "1".

12. On August 25, 1980 the Income Tax Bureau issued a formal notice of disallowance wherein petitioner's claims for refund for the years 1959, 1965-1967 and 1970 were disallowed in full.

13. Petitioner contended that the returns filed for the years at issue herein properly constitute claims for credit or refund.

CONCLUSIONS OF LAW

A. That petitioner's returns filed December 18, 1973 for the years 1959, 1965 and 1967, as well as his return filed June 1, 1973 for the year 1970, do not constitute claims for credit or refund since each of said returns showed a balance due rather than an overpayment.

B. That section 374 of Article 16 of the Tax Law provides in pertinent part that:

"If an application for revision or refund, in a form prescribed by the tax commission, be filed with it by a taxpayer within two years from the time of the filing of the return or the payment of tax, whichever is earlier,.... the tax commission may grant or deny such application in whole or in part and may allow a credit or refund...."

C. That section 374 of Article 16 of the Tax Law further provides that:

"For purposes of this section a return filed or a tax paid before the last day prescribed for the filing of the taxpayer's return shall be considered as filed or paid on such last day, and any tax actually deducted and withheld from an employee pursuant to section three hundred sixty-six of this Chapter shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit."

D. That with respect to taxable year 1959 petitioner's claim for credit or refund is time barred since such claim, filed on November 26, 1979, was so

filed more than two years from the filing of the return (December 18, 1973), and more than two years from the payment of tax.³

E. That section 687(a) of Article 22 of the Tax Law provides in pertinent part that:

"Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return."

F. That section 687(i) of the Tax Law provides in pertinent part that:

"Any income tax withheld from the taxpayer during any calendar year.... shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment."

G. That with respect to taxable years 1965, 1967 and 1970, petitioner's claims for credit or refund are time barred since such claims, filed on November 26, 1979, were so filed more than three years from the time the respective returns were filed (December 18, 1973 for the 1965 and 1967 returns, and June 1, 1973 for the 1970 return), and more than two years from the time the tax was paid.⁴

³ 1959 withholding tax deemed paid April 15, 1960 pursuant to section 374 of Article 16 of the Tax Law. Balance of tax due for 1959 is considered paid on October 28, 1977, when petitioner's 1976 refund was applied to 1959 liability.

⁴ 1965 withholding tax deemed paid April 15, 1966.
1967 withholding tax deemed paid April 15, 1968
1970 withholding tax deemed paid April 15, 1971

Balances of tax due for 1965 and 1967, and portion of tax due from 1970 are considered paid on October 28, 1977, when petitioner's 1976 refund was applied to the outstanding liabilities for said years.

H. That petitioners 1966 return, filed on December 18, 1973, may be treated as a claim for credit or refund since such return showed an overpayment of petitioner's tax liability.

I. That pursuant to section 687(a) of the Tax Law the amount of the credit or refund allowable for 1966 shall not exceed the portion of the tax paid within the three years immediately preceeding the filing of the claim (return).

J. That since no taxes were paid by petitioner for taxable year 1966 within the three years immediately preceeding the filing of his claim (return), no refund or credit is allowable for 1966.

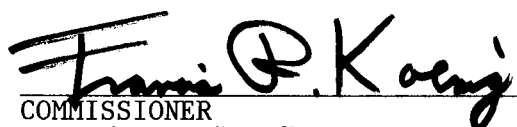
K. That the petition of Paul Kissinger is denied and the formal notice of disallowance issued August 25, 1980, with respect to the years 1959, 1965-1967 and 1970, is hereby sustained.

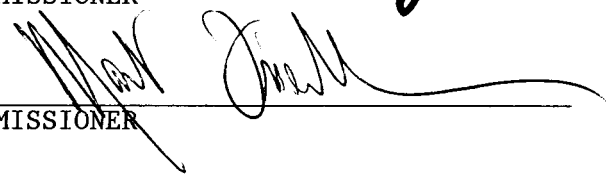
DATED: Albany, New York

STATE TAX COMMISSION

JUN 21 1983


PRESIDENT


COMMISSIONER


COMMISSIONER