

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. J. Longley : 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 :
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 28th day of September, 1983, she served the within notice of Decision by certified mail upon J. J. Longley, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. J. Longley
P.O. Box 698
426 Springfield Ave.
Summit, NJ 07901

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
ALBANY, NEW YORK 12227

September 28, 1983

J. J. Longley
P.O. Box 698
426 Springfield Ave.
Summit, NJ 07901

Dear Mr. Longley:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| J. J. LONGLEY | : | DECISION |
| | : | |
| for Redetermination of a Deficiency or | : | |
| for Refund of Personal Income Tax under | : | |
| Article 22 of the Tax Law for the Year | : | |
| 1972. | : | |

Petitioner, J. J. Longley, P.O. Box 698, 426 Springfield Avenue, Summit, New Jersey 07901, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1972 (File No. 19640).

On October 6, 1980, petitioner advised the State Tax Commission, in writing, that he 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.

ISSUES

- I. Whether the Notice of Deficiency issued against petitioner for the year 1972 was timely.
- II. Whether petitioner may properly allocate his wages to sources without New York State for those days worked at his personal residence.

FINDINGS OF FACT

1. Petitioner, J. J. Longley, filed a New York State Income Tax Nonresident Return for the year 1972 wherein he allocated his wage income to sources within and without New York State. Said return claimed a refund in the amount of \$879.00.

2. On September 16, 1976, the Audit Division issued a Statement of Audit Changes to petitioner wherein his claimed allocation was adjusted by reducing the number of days claimed as having been worked without New York State by the number of days worked at petitioner's home in New Jersey. Accordingly, on February 28, 1977, a Notice of Deficiency was issued against petitioner asserting additional personal income tax of \$415.60, plus interest of \$120.75, for a total due of \$536.35.

3. Petitioner signed his 1972 New York State income tax return on March 30, 1973. Petitioner submitted copies of his 1972 Federal and New York City income tax returns. The Federal return bore the date of May 26, 1973 and the New York City return was dated March 30, 1973. Petitioner contended that his New York State return was timely filed on March 30, 1973 and that the period for assessment had expired on April 15, 1976.

4. Petitioner's return bears a date stamp which shows that the return was received by the Income Tax Bureau on March 12, 1974. On April 12, 1974, the Audit Division issued petitioner a refund in the amount requested on his return of \$879.00. There is no indication in the record that petitioner inquired about his claimed refund between the date he alleges to have filed his return, March 30, 1973, and the date the refund was issued, April 12, 1974.

5. The Audit Division contended that said return was untimely filed on March 12, 1974 and that the period for assessment did not expire until March 12, 1977.

6. The envelope in which petitioner's 1972 New York State return was mailed is not part of the record contained in the file.

7. Petitioner was employed by Weis, Voisin & Co., Inc. ("Weis") during the year in issue. Sometime during 1972, Weis began terminating petitioner's

department. On November 1, 1972, as a cost saving measure, Weis eliminated the New York office space previously used by petitioner and his department and reallocated the office space to other company uses. During the period November 1 through December 31, 1972, petitioner worked a total of 34 days at his New Jersey residence completing the work-in-progress of his department.

8. It is petitioner's contention that there was no office space available to him at the New York office of Weis after November 1, 1972 and that he was ordered by his employer to complete the work-in-progress at his New Jersey home. However, during the period November 1 through December 31, 1972, it was customary for petitioner to work Mondays at the New York office of Weis. The record does not describe the work place provided by Weis during such period.

CONCLUSIONS OF LAW

A. That section 691(a) of the Tax Law, which is patterned after section 7502(a) of the Internal Revenue Code, provides, in pertinent part, that 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 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.

B. That since the envelope in which the return was mailed is not part of the record herein, the return is treated as if the postmark were missing and the burden of proving the presumed date of the postmark is on petitioner.

Jacobson v. C.I.R., 73 T.C. 610, 616.

C. That petitioner has not presented sufficient evidence to establish that he mailed his 1972 New York State income tax return prior to or on the date the return was required to be filed (April 15, 1973). The signing and dating of the return prior to the due date is not sufficient to show timely mailing.

D. That since petitioner has failed to prove timely mailing, the date of receipt by the Income Tax Bureau, March 12, 1974, is held as the filing date.

E. That the Notice of Deficiency dated February 28, 1977 was issued within three years from the date the return was filed and therefore was timely issued in accordance with section 683 of the Tax Law.

F. That when a nonresident employee works both within and without this State, any allowance claimed for days worked outside of New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer. 20 NYCRR 131.16.


G. That the services performed for Weis, Voisin & Co., Inc. by petitioner at his New Jersey residence during 1972 were performed there for his convenience and not out of necessity of his employer. Petitioner has not shown that the services performed at his home could not have been performed in New York. Petitioner's contention that no office space was available for him at his employer's New York place of business during the period November 1 through December 31, 1972 is without merit in light of the fact that petitioner usually worked at the New York office on Mondays during said period.


H. That the petition of J. J. Longley is denied and the Notice of Deficiency dated February 28, 1977 is sustained.

DATED: Albany, New York

SEP 28 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

 
COMMISSIONER