

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Kenneth J. & Ellen M. Stuart :
for Redetermination of a Deficiency or for Refund :
of New York State and New York City Personal Income :
Taxes under Article 22 of the Tax Law and Chapter :
46, Title T of the Administrative Code of the City :
of New York for the Year 1978. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 27th day of April, 1983, he served the within notice of Decision by certified mail upon Kenneth J. & Ellen M. Stuart, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Kenneth J. & Ellen M. Stuart
2400 Arco Tower
707 17th St.
Denver, CO 80202

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
27th day of April, 1983.

David Parchuck

William A. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 27, 1983

Kenneth J. & Ellen M. Stuart
2400 Arco Tower
707 17th St.
Denver, CO 80202

Dear Mr. & Mrs. Stuart:

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	:	
KENNETH J. STUART and ELLEN M. STUART	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of New York State and New York City	:	
Personal Income Taxes under Article 22 of the	:	
Tax Law and Chapter 46, Title T of the	:	
Administrative Code of the City of New York for	:	
the Year 1978.	:	

Petitioners, Kenneth J. Stuart and Ellen M. Stuart, 2383 Pebble Beach Drive, Evergreen, Colorado 80439, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1978 (File No. 31765).

On November 19, 1982, petitioner Kenneth J. Stuart advised the State Tax Commission that he waived his right to a small claims hearing and wished the State Tax Commission to issue a decision on the basis of the entire file. Time was allowed for briefs and the date the last brief was due was January 14, 1983. After due consideration, the State Tax Commission renders the following decision.

ISSUE

Whether money paid to a former employee is taxable as consideration for prior services rendered or exempt from taxation because it was a gift.

FINDINGS OF FACT

1. Petitioners timely filed both a joint New York State Income Tax Resident Return and a joint New York State Income Tax Nonresident Return for tax year 1978. Petitioners also filed Form CR-60.1, Schedule for Change of Resident Status indicating they were residents of New York State and New York City from January 1, 1978 to July 14, 1978.

2. On December 26, 1979 the Audit Division issued to petitioners a Statement of Audit Changes which, in effect, added to petitioners' total New York income \$14,960.00 which was excluded by petitioners in filing their New York returns. The Statement explained the Audit Division's action as follows:

"The \$14,960.00 payment made by your employer Cahill, Gordon and Reindel is considered income derived in consideration of prior services and is not excludable in computing total New York income."

Subsequently, on August 21, 1980, based on the adjustment made per the above Statement, a Notice of Deficiency was issued for tax due of \$289.96, plus interest of \$32.78, for a total of \$322.74. The total tax effect of this adjustment, however, was \$2,169.10 as petitioners had, by the filing of their resident New York State return, computed an overpayment of \$1,879.14 which was never refunded. These tax figures include both New York State personal income tax and New York City personal income tax.

On February 2, 1982, the Audit Division asserted a greater deficiency under section 689(d)(1) of the Tax Law for additional New York State income tax of \$170.00 and additional New York City income tax of \$76.50 plus interest. This taxed petitioners' ordinary income portion of lump-sum distribution per Form IT-230 Separate Tax on Lump-Sum Distributions attached to their resident return. Although petitioners included the computation with their original

return, it was not included in the computation of the Notice of Deficiency dated August 21, 1980.

3. Petitioner Kenneth J. Stuart (hereinafter petitioner) is, by profession, an attorney. He was employed by the law firm of Cahill, Gordon and Reindel for approximately ten (10) years until his voluntary departure in 1978 at which time he accepted a "better" (per petitioner's own description) position in a different state.

4. For tax year 1978, the law firm of Cahill, Gordon and Reindel (hereinafter "the firm") issued to petitioner a Wage and Tax Statement (Federal Form W-2) indicating wages, tips and other compensation in the amount of \$54,537.43. Petitioner reported wages, salaries, tips and other employee compensation of \$39,577.43 on his resident New York State income tax return, or a difference of \$14,960.00. The Federal Form W-2 also reflected that New York State and New York City wages, tips, etc. were \$54,537.43.

5. Petitioners alleged that of the \$54,537.43, \$14,960.00 was given to him upon his termination as a gift because of the firm's high personal regard for him and an expression of their goodwill. Petitioner stated that a financial award of this type was not usually or even frequently awarded to persons departing from the firm, even to those departing after lengthy service. It was claimed that the award was made to those persons who, for one reason or another, were not admitted to partnership but who, had partnership circumstances been otherwise, would have been admitted; that the award was made as an expression of the firm's personal esteem for petitioner and to retain petitioner's goodwill despite the firm's inability to admit petitioner to the partnership; that it was in no sense compensatory for any services rendered prior in time to the date of the award and should not be treated as income.

6. The Audit Division alleges that the \$14,960.00 in question was paid to petitioner solely due to the fact that he performed services for the firm, that the tax cases cited by petitioners did not support their contention and that petitioners failed to sustain their burden of proof that the firm made payment of the \$14,960.00 with the intention of making a gift to petitioner.

7. Petitioners submitted a rider which they attached to their federal income tax return and which indicated the following:

"The amount reported on line 8 for wages, etc., differs from that shown in the attached Copy B of Form W-2. The latter included \$15,000 which is the amount of a check I received from the firm of Cahill, Gordon & Reindel when I left to become a partner in the firm of Rutak Rock & Huie."

8. Petitioners submitted no evidence or documentation from the firm to indicate what the \$15,000.00 check represented. Petitioners claimed that the burden of proof is upon the "Department" to show that the payment in question was not a gift and that they do not have the burden to prove that it was a gift.

CONCLUSIONS OF LAW

A. That the personal income tax imposed by Chapter 46, Title T of the Administrative Code of the City of the New York is by its own terms tied into and contains essentially the same provisions as Article 22 of the Tax Law. Therefore, in addressing the issue presented herein, unless otherwise specified, all references to particular sections of Article 22 shall be deemed references (though uncited) to the corresponding sections of Chapter 46, Title T.

B. That section 689(e) of the Tax Law imposes the burden of proof in any case before the Tax Commission under Article 22 of the Tax Law upon the petitioner except for three issues, one of which appears in the instant case infra.

C. That petitioners have not sustained their burden of proof to show that a payment from the firm to petitioner in the amount of \$14,960.00 was, in fact, a gift as opposed to consideration for his services; that the case is void, with the exception of petitioner's own statement, of any evidence reflecting that said payment was a gift (see Findings of Fact "7" and "8", supra). (See Edward A. Ruestaw, 37 TCM 639, aff'd 79-1 USTC 9173.)

D. That section 689(e)(3) of the Tax Law imposes the burden of proof upon the Audit Division as to whether the petitioner is liable for any increase in a deficiency where such increase is asserted initially after a Notice of Deficiency was mailed and a petition under this section was filed.

E. That the Audit Division has met its burden of proof for the Notice of Claim dated February 2, 1982 in that the tax imposed by said Notice was a self-imposed tax computed by petitioners and the amount of tax is deemed assessed on the date of filing of the return in accordance with section 682 of the Tax Law.

F. That the petition of Kenneth J. Stuart and Ellen M. Stuart is denied. That the disallowance of petitioner's refund per their resident return, the Notice of Deficiency dated August 21, 1980 and the Notice of Claim which asserted a greater deficiency dated February 2, 1982 are sustained, along with the computation of any additional interest accruing, by law, to the date of payment.

DATED: Albany, New York

APR 27 1983

STATE TAX COMMISSION

Redmond W. Olson
PRESIDENT

Francis R. Koenig
COMMISSIONER

Michael J. M.
COMMISSIONER