

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Benjamin Wexler : 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 :
1975.

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 7th day of October, 1983, she served the within notice of Decision by certified mail upon Benjamin Wexler, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Benjamin Wexler
970 E. 78th St.
Brooklyn, NY 11236

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
7th day of October, 1983.

Susan Powell

Connie A. Hagelund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

October 7, 1983

Benjamin Wexler
970 E. 78th St.
Brooklyn, NY 11236

Dear Mr. Wexler:

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

In the Matter of the Petition	:	
	:	
of	:	
	:	
BENJAMIN WEXLER	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Year 1975.	:	

Petitioner, Benjamin Wexler, 970 East 78th Street, Brooklyn, New York 11236, 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 1975 (File No. 32009).

A small claims hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 8, 1982 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by Paul B. Coburn, Esq. (Angelo Scopellito and Michael Gitter, Esqs., of counsel).

ISSUES

I. Whether the Audit Division's assessment of additional personal income tax due for the year 1975 on October 21, 1980 was issued within the statute of limitations for assessment.

II. Whether petitioner should be charged penalty and interest if the tax due referred to in the foregoing issue is found to be assessed within the statute of limitations.

FINDINGS OF FACT

1. Petitioner herein, Benjamin Wexler, filed a New York State Income Tax Resident Return for the year 1975 wherein he reported total New York income of

\$29,392.22. Petitioner signed and mailed the aforementioned return on April 9, 1976, however, it was returned to petitioner by the United States Postal Service marked "Returned For Postage". Across the face of the returned envelope petitioner wrote "I did put a stamp on...". The returned envelope containing petitioner's aforementioned remark and his 1975 New York State income tax return were remailed in a second envelope postmarked April 26, 1976.

2. On January 11, 1980, the Audit Division issued a Statement of Audit Changes to petitioner for the year 1975, imposing personal income tax due of \$2,950.51. Said tax due was computed based on an estimated total income figure of \$33,107.00. An estimated total income figure was utilized by the Audit Division since:

"A search of our files fails to show a New York State income tax return filed under your name or social security number."

3. On September 23, 1980, the Audit Division issued a Notice of Additional Tax Due to petitioner for the year 1975, imposing additional personal income tax due of \$562.26, plus penalty under section 685(a)(1) of the Tax Law of \$28.11 and interest of \$211.20, for a total due of \$801.57. The explanation contained in the aforementioned notice was as follows:

"Under authorization of Federal Law (section 6103(d) of the Internal Revenue Code), we have received notification of Federal audit changes and the following deficiency is based on failure to report such changes.

This statement supercedes our statement dated January 11, 1980... which has been cancelled.

Your income tax liability has been recomputed to conform with the Federal Report dated January 2, 1978, indicating the disclosure of unreported interest income in the amount of \$3,715.00."

4. Based on the aforementioned Notice of Additional Tax Due, the Audit Division, on October 21, 1980, issued a Notice and Demand for Payment of Income Tax Due to petitioner for the year 1975. The tax, penalty and interest assessed pursuant to the Notice and Demand for Payment of Income Tax Due, to wit \$813.73, was paid by petitioner via his personal check dated November 2, 1980. Petitioner filed a petition requesting that the \$813.73 be refunded.

5. On January 2, 1978, the Internal Revenue Service notified petitioner that it proposed to increase the Federal adjusted gross income reported on his 1975 Federal income tax return by \$3,715.00, from \$29,392.00 to \$33,107.00, based on unreported interest income. Petitioner agreed to the \$3,715.00 increase in income as proposed by the Internal Revenue Service, however, the exact date of his agreement is not contained in the record. The change in petitioner's Federal taxable income for the year 1975 was not reported by petitioner to the Audit Division.

6. Petitioner argued that in the Statement of Audit Changes dated January 11, 1980, the Audit Division asserted that he had not filed a New York State income tax return for 1975. Petitioner further argued that it was not possible to report the change in his 1975 Federal taxable income, to wit to amend his return, since one cannot amend something which the Audit Division claimed was allegedly never filed.

7. Petitioner's New York State income tax returns for years prior to and subsequent to the year at issue were filed in a timely fashion.

CONCLUSIONS OF LAW

A. That petitioner failed to properly report the change made by the Internal Revenue Service in his Federal taxable income for the year 1975 in accordance with section 659 of the Tax Law and 20 NYCRR 153.1 .

B. That section 683(c)(1)(C) of the Tax Law provides that the tax may be assessed at any time if "the taxpayer or employer fails to comply with section six hundred fifty-nine in not reporting a change or correction increasing his federal taxable income...". That the Notice and Demand for Payment of Income Tax Due dated October 21, 1980 was timely issued within the meaning and intent of section 683(c)(1)(C) of the Tax Law.

C. That petitioner's 1975 New York State income tax return was timely prepared and mailed. Petitioner's testimony to the effect that the stamp placed on the mailing envelope apparently became detached is found believable. Accordingly, it is deemed that petitioner timely filed his 1975 New York State income tax return and, therefore, the penalty asserted pursuant to section 685(a)(1) of the Tax Law for failure to file a return on time is cancelled.


D. That there is no provision in Article 22 of the Tax Law which provides for the waiver of interest. Accordingly, petitioner's request to have interest waived must be denied.

E. That the petition of Benjamin Wexler for refund is granted to the extent indicated in Conclusion of Law "C", supra; that the Audit Division is directed to refund to petitioner the sum of \$28.11 plus interest; and that, except as so granted, the petition is in all other respects denied.

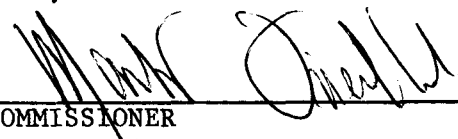
DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1983


PRESIDENT


COMMISSIONER


COMMISSIONER