

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
John H. & Beatrice Beer :

AFFIDAVIT OF MAILING

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 Nonresident :
Earnings Tax under Chapter 46, Title U of the :
Administrative Code of the City of New York for :
the Years 1979 and 1980. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of November, 1984, he served the within notice of Decision by certified mail upon John H. & Beatrice Beer, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John H. & Beatrice Beer
941 Iron Bark Dr.
Port Richey, FL 33568

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of November, 1984.

David Parchuck

James P. Haggerty
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

John H. & Beatrice Beer
941 Iron Bark Dr.
Port Richey, FL 33568

Dear Mr. & Mrs. Beer:

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 & 1312 of the Tax Law and Chapter 46, Title U of the Administrative Code of the City of New York, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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	:	
JOHN H. AND BEATRICE BEER	:	DECISION
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 Nonresident Earnings Tax under Chapter 46,	:	
Title U of the Administrative Code of the City	:	
of New York for the Years 1979 and 1980.	:	

Petitioners, John H. and Beatrice Beer, 941 Iron Bark Drive, Port Richey, Florida 33568, 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 nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the years 1979 and 1980 (File No. 41946).

On May 29, 1984, petitioners waived a small claims hearing and consented to submission of this matter to the State Tax Commission based on the entire record contained in the file, with all briefs to be submitted by August 14, 1984. The following decision is rendered upon the file as presently constituted.

ISSUES

I. Whether petitioners can elect to file as New York State residents for the entire year 1979 even though they moved to Florida on December 7, 1979.

II. Whether the Audit Division correctly determined the amount of capital loss for the resident period.

III. Whether the Audit Division properly disallowed moving expenses.

IV. Whether interest and dividend income were properly reported.

V. Whether petitioners had income from New York State sources during 1980.

VI. Whether petitioners overstated the amount of pension income shown on their Federal income tax return for 1980.

VII. Whether petitioners are entitled to an adjustment of their New York tax liability based on a foreign tax credit claimed on their Federal income tax return.

VIII. Whether the limitation percentage is affected by the conclusions reached in Issues "VI" and "VII".

FINDINGS OF FACT

1. Petitioners, John H. and Beatrice Beer, timely filed joint New York State income tax resident and nonresident returns for 1979 wherein they indicated that they changed their residence from New York to Florida. Attached to said returns was Form CR-60.1, Schedule for Change of Resident Status, on which petitioners indicated the following:

	Total Income All Sources	Resident Period	Total Income During Nonresident Period	Nonresident Period Income From NYS Sources
Wages	\$31,011.72	\$28,777.15	\$2,234.57	\$2,234.57
Interest Income	3,089.13	2,831.58	257.55	
Dividends	2,253.41	2,065.25	188.16	
State & Local Refunds	183.09	183.09		
Capital Gain/Loss	(837.80) ¹	(767.98)	(69.82)	
Moving Expense	(1,450.00)	(1,329.16)	(120.84)	(120.84)
Total Income	\$34,249.55	\$31,759.93	\$2,489.62	\$2,113.73

Said schedule also indicated petitioners' resident period to be January 1, 1979 to December 6, 1979.

¹ On the basis of petitioners' 1979 U.S. Individual Income Tax Return the net capital loss should be \$450.07, and not \$837.80 resulting in Federal adjusted gross income as shown on their return of \$34,637.28. See Finding of Fact "4" infra.

2. On October 1, 1982, the Audit Division issued to petitioners a Statement of Audit Changes imposing New York State and City income taxes of \$377.27, plus interest of \$94.94, for a total due of \$472.21. The statement was issued on the grounds that "[w]hen filing as a full year resident for 1979 the income shown must be the income shown on your Federal Return. The charge to your account of \$375.00 was in 1980 therefore it cannot be used to reduce your 1979 income." On November 18, 1982, the Audit Division reduced the amount of personal income tax due for the year 1979 to \$136.38, said reduction being attributable to a decrease in dividend and interest income, an increase in capital losses, and a decrease in the amount of taxable income subject to the maximum tax. For 1980, a reduction in tax to \$41.27 was attributable to the allowance of the minimum standard deduction in lieu of a pro rata share of itemized deductions. Accordingly, a Notice of Deficiency² was issued on January 12, 1983, but did not consider the adjustment(s) made on November 18, 1982.

3. The Audit Division, in reply to petitioners' inquiry as to the status of the refund claimed on their 1979 income tax return, advised petitioners on July 28, 1980, that "[a] review of your tax return by the computer indicates a tax is due". On July 31, 1980, the Audit Division issued a Notice of Tax Due for the year 1979 wherein petitioners' tax liability was determined by computer, resulting in a balance due of \$92.48. The amounts shown on said notice were the same amounts as shown on Form IT-201-X, amended New York State Resident Income Tax Return; however, the date appearing on the amended return is July 23,

² The Notice of Deficiency issued on January 12, 1983, asserted New York State tax for 1979 and 1980 of \$354.31. New York City nonresident earnings tax was not asserted on said notice although it was imposed on the Statement of Audit Changes for 1980.

1982 which is subsequent to the notice of tax due. The file contains no information as to how said amounts were derived. Petitioners returned the notice of tax due and inserted into the appropriate columns the amounts that were shown on their original income tax returns filed on or about March 17, 1980. On March 18, 1981, the Audit Division advised petitioners that the balance shown due on the notice of tax due was correct because "[w]hen two returns are filed do (sic) to a change of residence, taxable balances must be combined before computing the tax from the tax rate schedule." Petitioner John Beer contended that "[i]f I have to pay tax on my full year's earnings, why don't I get the full year's exemptions . . . I have been informed that I have been credited with \$854.49 of interest which I never received". In September of 1981, the Audit Division again sustained the amount shown due on its notice and petitioners again protested the tax shown due.

4. On November 4, 1981, petitioners filed an amended 1979 New York State income tax return (Form IT-201) on which they reported the following:

Wages	\$31,011.72
Interest Income	1,954.00
Dividends	2,145.00
State Income Tax Refund	183.09
Capital Loss	(837.00)
Moving Expense	(1,329.00)
Total Income	\$33,127.00
Less: State Income Tax Refund	183.09 ³
Total New York Income	\$32,944.09 ³

In reference to said return, the Audit Division requested that petitioners submit information as to their capital loss, adjustments to income, itemized deductions, and nonresident status. On June 2, 1982, petitioners submitted a copy of their 1979 U.S. Individual Income Tax Return with schedules A and B, D,

³ Petitioners made errors in addition and subtraction in arriving at total New York income. The correct amount is \$32,944.72.

and a separate schedule of capital gains and losses showing a description of the asset, the date acquired, the date sold, cost price, sales price, and whether the gain or loss was short or long-term. Said schedule indicated that all assets were sold during the resident period. The capital gains and losses schedule showed the following total amounts:

Short-term Gains	\$2,896.45
Short-term Losses	(1,130.41)
Net Short-term Gain	<u>\$1,766.04</u>
Long-term Gains	\$1,129.32
Long-term Losses	(3,795.50)
Net Long-term Loss	<u>(2,666.18)</u>
Net Loss	\$ 900.14
Capital Loss @ 50%	\$ 450.07

On July 23, 1982, petitioners filed another amended return on Form IT-201-X showing a refund due of \$42.89.

5. On November 18, 1982, the Audit Division sent petitioners a letter advising them that based on information which they previously provided the following adjustment(s) would be made to the tax shown due on the Statement of Audit Changes:

"The dividend and interest income reported for 1979 in the resident period has been reduced by the \$1,057.80 (per your amended return) you indicate was either returned or not received. Your dividend and interest income for the resident period is recomputed as follows:

	<u>RESIDENT</u>	<u>NONRESIDENT</u>
Interest originally reported	\$2831.58	\$257.55
Dividends originally reported	2065.25	188.16
Total reported	<u>\$4896.83</u>	<u>\$445.71</u>
Less: Amount returned or not received	1057.80	
Net interest and dividends	<u>\$3839.03</u>	<u>\$445.71</u>

When a taxpayer changes his status from a resident to nonresident capital gains and losses must be accrued up to the date of the change of resident status. As such your net capital losses is (sic) deductible during the resident period.

In order to deduct moving expenses the expenses must be connected with starting work at a new job location, either as an employee or self-employed. A retiree may only deduct moving expenses if they (sic) retire while living and working overseas and returning to the United States. Since you do not meet any of the conditions you are not entitled to deduct your moving expenses. As such, they are disallowed as not properly deductible.

In computing the limitation percentage for the nonresident period only that income for the nonresident period should be used.

The amount of tax due for the entire year shall not be less than would be payable if the total taxable income shown by the two returns were included on a single return. As such the taxable income for the resident and nonresident periods must be combined prior to computing the New York State tax or maximum tax."

In reply to said letter, petitioners advised the Audit Division that dividend and interest income for the resident period should be \$3,252.15 and not \$3,839.03. Petitioners did not submit any information to support their contention that the amount returned or not received was more than that allowed by the Audit Division.

6. Petitioners asserted that the Audit Division should not have disallowed their deduction for moving expenses of \$1,450.00 as they moved 1200 miles away and petitioner John Beer was self-employed for a two month period⁴ after relocating to Florida. Petitioner John Beer submitted a copy of a Certificate of Enrollment in Belsaw Institute which showed a tuition payment made of \$532.40 for courses taken in locksmithing. Said certificate was marked paid in full and dated July 8, 1981. He also submitted a copy of his Pasco County Occupational License for 1982 to 1983 and a copy of his business card which showed him to be a certified locksmith. Petitioners did not submit any receipts or documentary evidence to show when the moving expense liability was incurred.

⁴ It should be noted that the record herein contains no information as to whether petitioner John Beer, as a self-employed person, satisfied the requirements of the 39-week test during the 12-month period and the 78-week test during the 24-month period following his arrival in Florida [see Treas. Reg. §1.217-2(c)].

7. Petitioners timely filed a New York State Income Tax Nonresident Return for 1980 wherein they indicated they had no income from New York State sources. Attached to said return was a withholding statement issued to John Beer from New York Telephone Company showing income of \$5,105.72 and New York taxes withheld of \$39.28. Said income represented compensation for accrued vacation time.

8. Petitioners asserted that the limitation percentage for 1980 was incorrect since pension income on their Federal tax return was overstated by \$2,170.00 and a foreign tax credit of \$114.50, which was claimed on their Federal income tax return, was not allowed for New York State income tax purposes.

CONCLUSIONS OF LAW

A. That section 654(a) of the Tax Law provides:

"If an individual changes his status during his taxable year from resident to nonresident..., he shall file one return as a resident for the portion of the year during which he is a resident, and one return as a nonresident for the portion of the year during which he is a nonresident...".

Therefore, as petitioners had New York income during both periods they may not elect to file as New York State residents for the entire year 1979.

B. That the Audit Division correctly determined the amount of net capital loss of \$450.07 for the year 1979 since all assets were sold during the resident period.

C. That for the year 1979, section 217 of the Internal Revenue Code provided that moving expenses were allowed as a deduction when paid or incurred "in connection with the commencement of work" by the taxpayer "at a new principal place of work". Moving expenses of \$1,450.00 incurred by petitioners in connection with the commencement of work at petitioner John Beer's new principal

place of work in Florida, do not constitute a deduction derived from or connected with a business, trade, profession or occupation carried on in New York State in accordance with the meaning and intent of section 632(b) of the Tax Law and 20 NYCRR 131.2; therefore, the deduction for moving expenses was properly disallowed by the Audit Division.

D. That petitioners failed to sustain their burden of proof imposed by section 689(e) of the Tax Law to show that the amount of interest and dividend income was less than the amount allowed by the Audit Division (see Finding of Fact "5", supra); therefore, the amount of \$3,839.03 is considered to be correct.

E. That compensation received by John Beer in the year 1980 from New York Telephone Company, in the amount of \$5,105.72 for accrued vacation time, constituted income derived for past services performed in New York State and represents income from New York sources within the meaning and intent of section 632(b) of the Tax Law.

F. That petitioners have failed to sustain their burden of proof imposed by section 689(e) of the Tax Law to show that the amount of pension income shown on their Federal tax return was overstated by \$2,170.00. Petitioners could have sustained their burden by submitting a copy of their amended 1980 Federal income tax return or a copy of the appropriate federal document notifying them of their overpayment.

G. That a foreign tax credit is not allowable for New York State income tax purposes (20 NYCRR 103.3).

H. That Issue "VIII" is moot in view of Conclusions of Law "F" and "G" supra.

I. That New York City nonresident earnings tax is not due for tax year 1980 since said tax was not asserted on the Notice of Deficiency issued on January 12, 1983 (see footnote #2); therefore, since there are no city taxes due for the years 1979 and 1980, no conclusions are being made regarding the nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York.

J. That the petition of John H. and Beatrice Beer is granted to the extent of reducing interest and dividend income as shown in Finding of Fact "5" supra.

K. The Audit Division is directed to recompute petitioners' income tax liability for the year 1979 based on the following adjusted gross income and section 654(d) of the Tax Law.

	Total Income All Sources	Resident Period	Nonresident Period Total Income During Nonresident Period	Income From NYS Sources
Wages	\$31,011.72	\$28,777.15	\$2,234.57	\$2,234.57
Interest and Dividend Income	4,284.74	3,839.03	445.71	
State & Local Refunds	183.09	183.09		
Capital Gain/Loss	(450.07)	(450.07)		
Moving Expense	(1,450.00)		(1,450.00)	
Total Income	\$33,579.48	\$32,349.20	\$1,230.28	\$2,234.57
Less: State & Local Refund		183.09		
Adjusted Gross Income	\$33,579.48	\$32,166.11	\$1,230.28	\$2,234.57

Petitioners' New York State income tax liability for the year 1980 is to be recomputed using New York income of \$5,105.72 and Federal adjusted gross income of \$22,745.00.

DATED: Albany, New York

NOV 09 1984

STATE TAX COMMISSION

Rodriguez Chen
PRESIDENT

Francis R. Komy
COMMISSIONER

John J. [Signature]
COMMISSIONER