

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Francis M. & Olivia Z. Counihan : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of 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. :

State of New York }

ss.:

County of Albany }

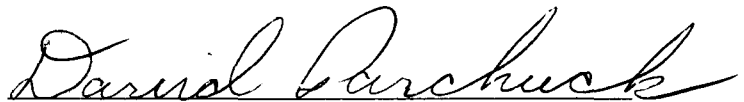
David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 18th day of January, 1984, he served the within notice of Decision by certified mail upon Francis M. & Olivia Z. Counihan, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

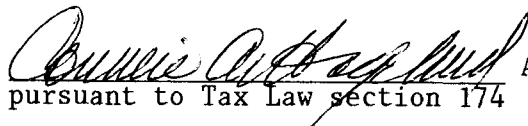
Francis M. & Olivia Z. Counihan
383 - 11th St.
Brooklyn, NY 11215

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
18th day of January, 1984.




pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Francis M. & Olivia Z. Counihan
383 - 11th St.
Brooklyn, NY 11215

Dear Mr. & Mrs. Counihan:

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, 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	:	
FRANCIS M. COUNIHAN and OLIVIA Z. COUNIHAN	:	DECISION
for Redetermination of a Deficiency or for	:	
Refund of 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.	:	

Petitioners, Francis M. Counihan and Olivia Z. Counihan, 383 11th Street, Brooklyn, New York 11215, filed a petition for redetermination of a deficiency or for refund of 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. 36876).

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 May 12, 1983 at 9:15 A.M. Petitioners, Francis M. Counihan and Olivia Z. Counihan, appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether capital gain income, derived from the sale of property located in the State of Louisiana, is subject to New York City personal income tax.

FINDINGS OF FACT

1. Francis M. Counihan and Olivia Z. Counihan (hereinafter petitioners) timely filed a joint New York State Income Tax Resident Return (with City of New York Personal Income Tax) for the year 1978 whereon they reported total income of \$25,940.00.

2. On April 22, 1981, the Audit Division issued a Statement of Audit Changes to petitioners wherein an adjustment was made increasing their total New York income to \$33,914.00, said amount being petitioners' adjusted gross income reported for Federal purposes. The recomputation incorporated therein resulted in amounts due to New York State and New York City as follows:

	<u>NEW YORK STATE</u>	<u>NEW YORK CITY</u>	<u>TOTAL</u>
Personal income tax due	\$1,069.40	\$316.23	\$1,385.63
Interest	183.54	54.27	237.81
Total due	<u>\$1,252.94</u>	<u>\$370.50</u>	<u>\$1,623.44</u>

3. On May 12, 1981, petitioners consented to the adjustment for New York State purposes and paid the total due of \$1,252.94. No payment was made toward the New York City tax determined to be due.

4. On March 30, 1982, the Audit Division issued a Notice of Deficiency against petitioners asserting New York State and New York City personal income tax of \$1,385.63, plus updated interest of \$258.41, for an amount due of \$1,644.04. Said amount due was then properly reduced by petitioners' payment of \$1,252.94, yielding a net balance due of \$391.10.

5. The difference between petitioners' reported total New York income and their Federal adjusted gross income was \$7,974.00. Such amount represented capital gain income derived from the 1978 sale of real property located in the State of Louisiana.

6. The Louisiana property at issue was acquired by petitioners in July, 1957 while they were residents of said state. Subsequently, in September, 1966 they became residents of New York.

7. Petitioners argued that the New York City personal income tax became effective July 1, 1966 and accordingly, for New York City purposes, the amount

of gain derived from the sale of said property should be determined using fair market value as of July 1, 1966 as its basis.

8. Petitioners had no definitive amount which they contended to be the proper basis for New York City purposes. When questioned with respect to the basis, Mr. Counihan stated that for New York City purposes, his basis as of July 1, 1966 "would be twice as high as that reported".

9. The record herein contains no information with respect to the 1978 sales transaction. Accordingly, the basis which petitioners used in determining the gain for Federal purposes is not known.

10. On October 5, 1982, the Audit Division applied petitioners' 1981 refund due of \$233.00 against the outstanding deficiency at issue herein.

11. During the hearing held herein, both petitioners and the Audit Division alleged that the treatment of the gain for New York City purposes should be based upon interpretation of section 1303, Article 30 of the Tax Law.

CONCLUSIONS OF LAW

A. That a New York City personal income tax controversy must be resolved based on the law in effect during the year at issue. For taxable year 1978, the law applicable herein is Chapter 46, Title T of the Administrative Code of the City of New York, rather than Article 30 of the Tax Law.

B. That section 612(a) of the Tax Law provides that the New York adjusted gross income of a resident individual means his federal adjusted gross income as defined in the laws of the United States for the taxable year, with certain modifications, none of which are applicable herein.

C. That section T46-112.0(a) of Chapter 46, Title T of the Administrative Code of the City of New York is identical to section 612(a) of the Tax Law in its definition of adjusted gross income for New York City purposes. Accordingly,


petitioners' New York City adjusted gross income must be the same as that reported or determined for Federal and New York State purposes.

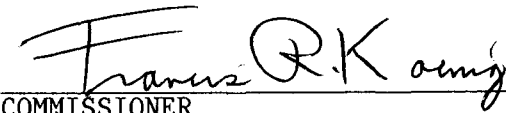
D. That the petition of Francis M. Counihan and Olivia Z. Counihan is denied and, other than a reduction based on the 1981 refund applied of \$233.00, the Notice of Deficiency is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER