

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Paul & Reinette Cunningham :  
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Personal Income :  
Tax under Article 22 of the Tax Law for the Years :  
1972 - 1974. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

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 Paul & Reinette Cunningham, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul & Reinette Cunningham  
2 Howard Dr.  
Muttontown, NY 11791

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 TAX COMMISSION

In the Matter of the Petition  
of  
Paul & Reinette Cunningham  
for Redetermination of a Deficiency or Revision  
of a Determination or Refund of Personal Income  
Tax under Article 22 of the Tax Law for the Years  
1972 - 1974.

State of New York }  
County of Albany } ss.:

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 Gerard W. Cunningham, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gerard W. Cunningham  
Cunningham & Lee  
40 Gold St.  
New York, NY 10038

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 representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
18th day of January, 1984.

Daniel Partridge

Carmen A. Stephens  
pursuant to Tax Law section 174

Authorized to administer oaths

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

January 18, 1984

Paul & Reinette Cunningham  
2 Howard Dr.  
Muttontown, NY 11791

Dear Mr. & Mrs. Cunningham:

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, 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: Petitioner's Representative  
Gerard W. Cunningham  
Cunningham & Lee  
40 Gold St.  
New York, NY 10038  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
PAUL AND REINETTE CUNNINGHAM	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income tax under Article 22	:	
of the Tax Law for the Years 1972 through 1974.	:	

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Petitioners, Paul and Reinette Cunningham, 2 Howard Drive, Muttontown, New York 11791, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1972 through 1974 (File No. 31994).

A formal hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 13, 1983 at 9:15 A.M. and concluded at the same offices on April 28, 1983, with all briefs to be submitted on or before July 11, 1983. Petitioners appeared by Cunningham & Lee (Gerard W. Cunningham, Esq., of counsel). The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel) at the hearing on January 13, 1983 and by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel) at the hearing on April 28, 1983.

#### ISSUES

I. Whether the Notice of Deficiency asserted deficiencies for the years 1973 and 1974.

II. Whether petitioners had sufficient notice of the basis of the Audit Division's asserted deficiencies for 1973 and 1974.

III. Whether the deficiencies asserted for the years 1973 and 1974 were barred by the Statute of Limitations.

IV. Whether, during the years 1972 through 1974, petitioners maintained a permanent place of abode in New York, maintained no permanent place of abode elsewhere, or spent in the aggregate more than 30 days in New York, and were thus resident individuals under section 605(a)(1) of the Tax Law.

FINDINGS OF FACT

1. On March 31, 1976, petitioners filed a joint New York State Income Tax Resident Return for 1972. On this return, petitioners reported that they were residents of New York from January 1, 1972 through January 15, 1972. Accordingly, petitioners prorated their income, standard deduction, and exemptions on the basis of the period of time they claimed they were residents of New York.

2. On December 14, 1976, the Audit Division issued a Statement of Audit Changes and IT-38 attachment to petitioners which explained that petitioners owed additional income tax plus interest for the year 1972. The attachment to the Statement of Audit Changes stated, in essence, that since petitioners did not change their domicile to a foreign country and since they did not meet the statutory criteria for taxation as nonresidents of New York, the income reported on their federal income tax return for 1972 was taxable by New York State.

3. Following the issuance of the Statement of Audit Changes, an informal conference took place between an auditor and an individual who represented petitioners prior to the current representative. At this time, the auditor opined that petitioners were subject to New York State personal income tax for the additional years of 1973 and 1974. Petitioners' representative disagreed with this conclusion but stated that petitioners would file returns for the years 1973 and 1974.

4. On December 15, 1978, petitioners executed a Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Tax for the year ended December 31, 1972 until on or before March 31, 1980.

5. On December 19, 1978, petitioners filed joint New York State income tax nonresident returns for the years 1973 and 1974. On each return, petitioners reported that they were nonresidents during these years. Consequently, they reported that they did not have any income subject to personal income tax.

6. On February 14, 1980, petitioners executed a second Consent Fixing Period of Limitation Upon Assessment of Personal Income and Unincorporated Business Tax for the year ended December 31, 1972 until on or before March 31, 1981.

7. On July 24, 1980, the Audit Division issued to petitioners a Notice of Deficiency accompanied by an explanatory Statement of Audit Changes, IT-38 attachment, and a Statement of Personal Income Tax Audit Changes. The Notice of Deficiency asserted a deficiency of personal income tax for the year 1972 in the amount of \$23,121.38, plus interest of \$10,719.14, for a total amount due of \$33,840.52. The Statement of Audit Changes and attachment were duplicative of the documents mentioned in Finding of Fact "2". The Statement of Personal Income Tax Audit Changes, however, computed petitioners' asserted personal income tax liability plus interest separately for the years 1972 through 1974. These computations, which equalled the same amounts stated in the Notice of Deficiency, were accompanied by an explanation that petitioners were deemed residents for income tax purposes and were taxable on the income earned within and without New York State.

8. Petitioners filed timely petitions and perfected petitions challenging asserted deficiencies of personal income tax for the years 1972 through 1974.

In each petition, petitioners asserted that they were not residents of New York during the periods in issue. The amount of tax challenged on the perfected petition for the year 1972 corresponds with the tax plus interest on the Notice of Deficiency. The amount of tax disputed on the perfected petition for the years 1973 and 1974 corresponds with the tax plus the total interest shown on separate notices and demand for payment issued for 1973 and 1974 on December 4, 1980. The notices were issued prematurely by the Audit Division.

9. Paul Cunningham was born in Brooklyn, New York and raised on Long Island.

10. Prior to the periods in issue, Paul Cunningham worked as a management consultant with the firm of Alexander Proudfoot Company. He resided in Muttontown, New York, with his wife and children. Neither his wife nor children were employed at that time.

11. On January 15, 1972, Paul Cunningham left New York for London, England. He went to London for an indefinite period of time in order to establish an international office for his firm.

12. When Paul Cunningham first went to London, he lived in hotels. Thereafter, he moved to an apartment. In September, 1972, Paul Cunningham's family joined him in London. When his family joined him, he rented a four-story brownstone house in London and remained at that residence until he and his family returned to New York State in January, 1975.

13. Prior to moving to London, Paul Cunningham made arrangements to rent his Muttontown home to his brother, Bert Cunningham. Under this arrangement, which was entered into without a lease, Bert Cunningham paid \$205.00 per month rent plus utilities for the use of the home. The rental amount represented a

fair rental value for this type of home in the area. Bert Cunningham would deposit the rental payment into a bank account located in New York. The bank account was held in the names of Gerald Cunningham and Paul Cunningham. Gerald Cunningham is also a brother of petitioner and is a practicing lawyer. Gerald Cunningham would use the rental receipts to pay the mortgage and to pay the maintenance expenses on the grounds of the home. The maintenance expenses on the interior of the home would initially be paid by Bert Cunningham. Bert Cunningham would then deduct this expense from the following month's rental payment. No rental income or loss was reported because the income equalled the expenses.

14. The agreement to rent the house to Bert Cunningham was entered into with the understanding that when petitioners returned from England they would reoccupy the house.

15. Paul Cunningham also sold his two automobiles before leaving New York. One automobile was sold to a neighbor and one automobile was sold to Gerald Cunningham. Paul Cunningham accepted payments for the automobile sold to the neighbor in installments. As was arranged with the rental payments on the home, the neighbor would make the payments directly to a bank account. Gerald Cunningham would monitor the activity of the account to insure that payments were made by the neighbor.

16. Petitioners' children attended school in London from September, 1972 through the conclusion of 1974.

17. During 1972, Paul Cunningham spent fifty-four days in New York. Paul Cunningham did not spend more than thirty days in New York during 1973 and 1974.

18. At the hearing, petitioners' representative acknowledged that petitioners remained domiciliaries of New York during the periods in issue. However, he argued that petitioners were taxable as nonresidents of New York.



CONCLUSIONS OF LAW

A. That although the Notice of Deficiency failed to list all of the years for which the Audit Division intended to assert a deficiency, the Statement of Audit Changes and documents attached thereto, which were enclosed with the Notice, clearly apprised petitioners of the years and amounts at issue. Accordingly, the Notice is not invalid as to the years 1973 and 1974 since petitioners should not have been misled by the failure to list all of the years (Matter of Fernandez et al. v. Comm., 39 TCM (CCH) 569 (1979); Matter of Allen C. Miller and Lucy C. Miller, State Tax Commission, February 29, 1980). Similarly, the Statement of Audit Changes clearly apprised petitioners of the basis of the asserted deficiency for each of the years at issue. Consequently, the Notice of Deficiency is not invalid for failure to provide proper notice.

B. That section 683(a) of the Tax Law provides:

"(a) General. -- Except as otherwise provided in this section, any tax under this article shall be assessed within three years after the return was filed (whether or not such return was filed on or after the date prescribed)."

C. That since petitioners' income tax returns for the years 1973 and 1974 were filed on December 19, 1978, the Notice of Deficiency issued to petitioners on July 24, 1980 was not barred by the Statute of Limitations [Tax Law §683(a)].

D. That during the periods in issue, section 605(a)(1) provided:

"§605. Resident and nonresident defined.

(a) Resident individual. A resident individual means an individual:

(1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state."

E. That since petitioners spent more than 30 days in New York during 1972, the Audit Division properly determined that petitioners were taxable as residents of New York during that year (Tax Law §605(a)(1)).

F. That petitioners spent less than thirty days in New York and maintained a permanent place of abode in London during 1973 and 1974.

G. That the rental of petitioners' home to Bert Cunningham created a tenancy which, in general, gave Bert Cunningham the sole and exclusive right to the use and enjoyment of the premises during each period of the tenancy (see generally 33 N.Y. Jur., Landlord and Tenant, §131). Therefore, petitioners did not maintain a permanent place of abode in New York during 1973 and 1974 (see Matter of Edward V. Hofler and Brenda Hofler, State Tax Commission, May 15, 1981).

H. That petitioners have satisfied all three requirements of Tax Law §605(a) and 20 NYCRR 102.2(b) to be considered nonresidents of New York during 1973 and 1974.

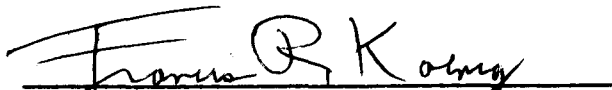
I. That the petition of Paul and Reinette Cunningham is granted only to the extent of Conclusion of Law "H" and the Audit Division is directed to modify the Notice of Deficiency accordingly. The petition of Paul and Reinette Cunningham is, in all other respects, denied.

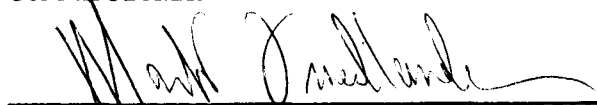
DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER