

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------------------|
| In the Matter of the Petition | : | |
| of | : | |
| Paul A. & Letty Fund | : | |
| for Redetermination of a Deficiency or Revision | : | AFFIDAVIT OF MAILING |
| of a Determination or Refund of Personal Income | : | |
| Tax under Article 22 of the Tax Law for the Years | : | |
| 1965 & 1966. | : | |

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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Paul A. & Letty Fund, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul A. & Letty Fund
215 E. 68th St.
New York, NY 10021

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
31st day of December, 1984.

David Parchuck

Michael J. Williams
Authorized to administer oaths
pursuant to Tax Law section 174

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

December 31, 1984

Paul A. & Letty Fund
215 E. 68th St.
New York, NY 10021

Dear Mr. & Mrs. Fund:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|--|---|----------|
| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| PAUL A. FUND AND LETTY FUND | : | DECISION |
| | : | |
| for Redetermination of a Deficiency or for | : | |
| Refund of Personal Income Tax under Article 22 | : | |
| of the Tax Law for the Years 1965 and 1966. | : | |

Petitioners, Paul A. Fund and Letty Fund, 215 East 68th Street, New York, New York 10021, 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 1965 and 1966 (File No. 33542).

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 January 24, 1984 at 10:00 A.M., with all briefs to be submitted by April 2, 1984. Petitioner Paul A. Fund appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether the Notice of Deficiency was timely issued.
- II. Whether a Federal offer in compromise is binding on the State Tax Commission.

FINDINGS OF FACT

1. As the result of a Federal audit conducted for taxable years 1965 and 1966, substantial adjustments were made to petitioners' Federal returns on October 14, 1969. Such adjustments dealt primarily with the reclassification of certain items of income from capital gain to ordinary income.

2. As the result of an offer in compromise initiated by Paul A. Fund and accepted by the Internal Revenue Service on June 27, 1974, petitioners' Federal deficiencies for the years at issue, inclusive of statutory additions, were settled by payment of \$10,000.00. As additional consideration for the acceptance of said offer, petitioners executed a collateral agreement which provided, in part, that for the purpose of computing income taxes of petitioners for all tax years beginning after December 31, 1973, the basis for certain assets under the existing law for computing depreciation and gain or loss upon sale, exchange, or other disposition, would be "zero". Said collateral agreement also provided that any monies or payments received by petitioners after December 31, 1973, as the result of the ownership of certain subordinated debentures, would be paid over to the Internal Revenue Service.

3. The Federal adjustments which were in effect immediately prior to settlement on the basis of said offer in compromise totaled \$45,827.72 (1965) and \$41,105.87 (1966).

4. On May 7, 1975, the Audit Division issued a Statement of Audit Changes to petitioners wherein the aforestated Federal adjustments were held taxable for New York State purposes. Accordingly, a Notice of Deficiency was issued against petitioners on April 12, 1976 asserting additional personal income tax for 1965 and 1966 of \$8,693.36, plus interest of \$4,965.90, for a total due of \$13,659.26. On October 29, 1976, a Notice and Demand For Payment of Income Tax Due was issued to petitioners demanding payment of said deficiency.

5. On August 5, 1980, a stipulation was entered into between petitioners and the Attorney General of the State of New York, as attorney for the State Tax Commission. Said stipulation provided as follows:

"1. That defendants' (petitioners') motion for an order vacating the warrant filed against them (with respect to the aforesaid assessment) is withdrawn without prejudice to renewal, in order to provide defendants the opportunity to seek a reviewable administrative determination by plaintiff (New York State Tax Commission);

2. That during the pendency of defendants' application for an administrative determination, plaintiff will take no action to enforce the warrant filed against the defendants."

6. Said stipulation was entered into for the sole purpose of allowing petitioners to make a partial payment of \$2,000.00 so that they then could file a claim for refund and ultimately be entitled to an administrative hearing.

7. On August 8, 1980, petitioners filed a Claim for Credit or Refund of Personal Income Tax for each of the years 1965 and 1966. The refund claimed for 1965 was erroneously reported as \$4,582.77, which represents the unpaid tax deficiency for said year rather than an amount paid which petitioners were seeking to recover. For 1966, the refund claimed was erroneously reported as \$4,110.59. Again, such amount represents the unpaid tax deficiency for 1966 rather than an amount paid of which they were seeking recovery.

8. On December 29, 1980, the Audit Division issued a formal notice of disallowance to petitioners wherein it advised that their claims for refund for 1965 and 1966 in the amount of \$2,000.00 (the actual payment made) were disallowed in full.

9. On May 14, 1981, petitioners filed a petition for refund of the \$2,000.00 partial payment made.

10. Petitioner Paul A. Fund alleged that the Notice of Deficiency issued April 12, 1976 was untimely and accordingly should be cancelled. In his petition, he claimed that the assessment was based upon the disputed Internal Revenue Service audit report of September, 1971, and that petitioners and the Internal Revenue Service had reported the findings of said audit report to New York State

in 1971. He also claimed in said petition that "since 1971, taxpayers have not had the resources to pay the subject claim".

11. The September, 1971 Federal audit report referred to by petitioners is not part of the record herein.

12. The record indicates that the original Federal audit changes made October 14, 1969 were revised prior to the final changes in effect immediately prior to the offer in compromise (see Finding of Fact "3", supra).

13. Petitioner Paul A. Fund alleged that in January, 1975 he filed forms IT-115 with New York State, whereon he reported the Federal audit changes for 1965 and 1966. He submitted what he purported were copies of the IT-115's filed. The net adjustments reported on said copies were those which were in effect immediately prior to settlement with the Internal Revenue Service and were the same net adjustments used by the Audit Division in computing the New York deficiency. Petitioner Paul A. Fund stated that no payments were made when he filed said forms.

14. The hearing record shows no indication that said forms IT-115 were in fact ever filed by petitioners.

15. The offer in compromise (see Finding of Fact "2", supra) was initiated by petitioners and accepted by the Internal Revenue Service based on petitioners' inability to pay the deficiency rather than on the merits of the case. No change in Federal adjusted gross income or taxable income was made as the result of the offer in compromise.

16. Petitioners argued that the deficiency for the State should be predicated on the accepted Federal offer in compromise.

CONCLUSIONS OF LAW

A. That pursuant to section 659 of the Tax Law, petitioners were required to report to New York State the change in their Federal taxable income within ninety days after the final determination of such change.

B. That pursuant to section 683(c)(3) of the Tax Law, if petitioners had filed a report of Federal changes, as required by section 659 of the Tax Law, "the assessment may be made at any time within two years after such report...was filed".

C. That petitioners have failed to sustain their burden of proof, imposed by section 689(e) of the Tax Law, to show that they had reported the Federal audit changes to New York State.

D. That section 683(c)(1)(C) of the Tax Law provides that the tax may be assessed at any time if petitioners have failed to report the changes in Federal taxable income to New York State.

E. That the Notice of Deficiency issued April 12, 1976 and the Notice and Demand issued October 29, 1976 were timely issued within the meaning and intent of sections 659 and 683(c)(1)(C) of the Tax Law.

F. That even if petitioners had established that they filed reports of change in Federal taxable income in January, 1975 as claimed, the assessment issued October 29, 1976 would still be timely pursuant to section 683(c)(3) of the Tax Law.

G. 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, with certain modifications, none of which are applicable herein.

H. That there are no provisions in the Tax Law which bind the State Tax Commission to accept a Federal offer in compromise.

I. That the offer in compromise, which was accepted by the Internal Revenue Service based solely on petitioners' inability to pay, did not provide for a reduction in federal adjusted gross income or taxable income. Accordingly, petitioners' 1965 and 1966 New York adjusted gross income for each of said years is the same as their respective federal adjusted gross incomes as determined immediately prior to settlement with the Internal Revenue Service on the basis of the offer in compromise within the meaning and intent of section 612(a) of the Tax Law.

J. That petitioners are properly entitled to credit for the \$2,000.00 payment made against the Notice of Deficiency dated April 12, 1976.

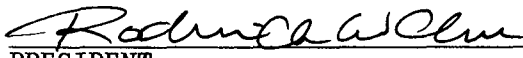
K. That the petition of Paul A. Fund and Letty Fund is granted to the extent provided in Conclusion of Law "J", supra, and except as so granted, said petition is, in all other respects, denied.


L. That the notice of disallowance, issued December 29, 1980, with respect to petitioners' claim for refund, is sustained.

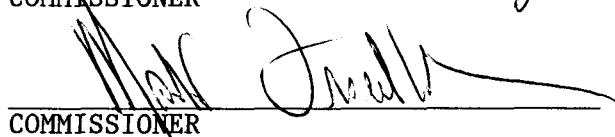
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER