

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Emil C. & Ethel D. Lampe :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :
of Personal Income Tax under Article 22 of the Tax :
Law and New York City Personal Income Tax under :
Chapter 46, Title T of the Administrative Code of :
the City of New York for the Years 1978, 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 31st day of December, 1984, he served the within notice of Decision by certified mail upon Emil C. & Ethel D. Lampe, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Emil C. & Ethel D. Lampe
923 Artic St.
Lindenhurst, NY 11757

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

Nicola 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

Emil C. & Ethel D. Lampe
923 Artic St.
Lindenhurst, NY 11757

Dear Mr. & Mrs. Lampe:

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 T 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	:	
	:	
EMIL C. LAMPE AND ETHEL D. LAMPE	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and New York City Personal	:	
Income Tax under Chapter 46, Title T of the	:	
Administrative Code of the City of New York	:	
for the Years 1978, 1979 and 1980.	:	

Petitioners, Emil C. Lampe and Ethel D. Lampe, 923 Arctic Street, Lindenhurst, New York 11757, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the years 1978, 1979 and 1980 (File No. 40867).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 9, 1984 at 1:15 P.M., with all briefs to be submitted by July 30, 1984. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether wages earned by petitioners constituted "gross income" and, if so, whether the United States and New York State governments have the constitutional and statutory power to tax such income.

II. Whether the Audit Division correctly computed the amount of interest reflected as due on the Notice of Deficiency for the years 1979 and 1980.

FINDINGS OF FACT

1. On October 15, 1982, the Audit Division issued to petitioners, Emil C. Lampe and Ethel D. Lampe, a Notice of Deficiency asserting additional tax due in the amount of \$8,546.49, plus penalty and interest. Petitioners timely filed a petition in reference thereto on November 5, 1982.

2. A Statement of Audit Changes, previously issued to petitioners on August 2, 1982, explaining the basis for and computation of the above-asserted deficiency provided, in relevant part, as follows:

"Since you did not reply to our letter dated May 6, 1982 requesting copies of your New York State tax returns filed for the tax years 1978, 1979 and 1980, we have computed your personal income tax liability based on the wage statements submitted for the years 1979 and 1980.

Since you did not submit any wage statements for the year 1978 we have computed your tax liability using an average of the income shown on your 1979 and 1980 statements.

	<u>1978</u>	<u>1979</u>	<u>1980</u>
Total Income Per W-2's and Estimate	\$52,318.26	\$50,146.02	\$54,490.49
Standard Deduction	2,400.00	2,400.00	2,400.00
Balance	<u>\$49,918.26</u>	<u>\$47,746.02</u>	<u>\$52,090.49</u>
Exemptions	1,300.00	1,400.00	1,500.00
New York Taxable Income	<u>\$48,618.26</u>	<u>\$46,346.02</u>	<u>\$50,590.49</u>

	<u>1978</u>		<u>1979</u>		<u>1980</u>		
	<u>State</u>	<u>City</u>	<u>State</u>	<u>City</u>	<u>State</u>	<u>City</u>	
Tax on above	\$5,552.74	\$235.43	\$5,048.74	\$ 225.66	\$5,642.67	\$ 245.20	
Tax withheld	<u>-0-</u>	<u>-0-</u>	<u>3,306.89</u>	<u>693.01</u>	<u>3,643.40</u>	<u>760.35</u>	
Personal Income Tax Due	\$5,552.74	\$235.43	\$1,741.55	\$(467.35)	\$1,999.27	\$(515.15)	\$8,546.49
Penalty Under Section 685(a)(1) & 685(a)(2)							3,452.92"

3. Petitioners contest the asserted deficiency, maintaining that they received no "income" during the years in question, but rather received only "wages in equal exchange for their labor" which, according to petitioners, is not taxable by either the State or Federal governments.

4. On November 12, 1981, petitioners timely filed a separate form IT-113X (Claim For Credit or Refund of Personal Income Tax and/or Unincorporated Business Income Tax) for each of the years 1979 and 1980, seeking refunds in the amounts of \$3,306.89¹ and \$3,643.40,² respectively, upon grounds essentially the same as noted in Finding of Fact "3", supra. The amounts of refund sought are equal to the total amounts of New York State taxes withheld from petitioners' wages during 1979 and 1980. The record is not clear as to whether or not the Audit Division had mailed to petitioners a Notice of Disallowance of their claim.

5. By a letter dated May 6, 1982, the Audit Division advised petitioners that it had no record of any tax returns being filed by petitioners for the years 1978, 1979 and 1980, and that such returns had to be filed before any action could be taken on the aforementioned refund claims.

6. At the hearing, petitioners submitted completed New York State and New York City income tax returns for the years 1979 and 1980, each dated April 15, 1984. These returns reflect itemized deductions and claimed refunds due (excess of taxes withheld over tax due per the returns) in the amounts of \$422.69 for 1979 and \$332.53 for 1980. Petitioner Emil Lampe explained that the returns were not filed on the respective due dates or thereafter until the hearing because of a Federal court proceeding involving petitioners' Federal income tax liability for the subject years brought upon the same grounds as set forth in Finding of Fact "3", supra. According to Mr. Lampe, this action was dismissed at the District Court level and an appeal taken therefrom was subsequently withdrawn by petitioners in or about February or March of 1984. Mr. Lampe asserted that prior to the termination of the Federal action, it would have

¹⁻² The original petition and the amounts shown on the claims for refund on form IT-113X do not mention New York City taxes withheld.

been inconsistent for him to have filed returns indicating anything other than that a full refund of all taxes withheld was due. Mr. Lampe indicated that in view of the outcome of petitioners' Federal challenge, there was no point in pursuing the assertion set forth in Finding of Fact "3", supra, and thus petitioners filed the returns for 1979 and 1980, computing their tax and indicating the amount of refund based on overpayment.

7. With regard to 1978, petitioners asserted that separate returns were filed on form IT-208 and introduced a copy of a completed New York State and New York City income tax return for 1978, together with copies of wage and tax statements. The return indicated that petitioners elected to itemize their deductions and that a refund was due them (based on overpayment via withholding) in the amount of \$433.00. The return was dated November 15, 1979 and bore the signature of one Max Taub, but was not signed by either of the petitioners. Mr. Lampe asserted that the return was filed, that the signatures might not have been reproduced on the photocopy submitted because of the type of pen used to sign, that it would make no sense to pay Mr. Taub to prepare the return but then not file it, and finally, that petitioners have never received the refund of \$433.00 indicated as due on the return. Petitioners did not file a form IT-113X for the year 1978.

8. Petitioners did file a return for 1977, dated November 2, 1979 and stamped received by the Audit Division on November 15, 1979. A note from petitioners attached to this return stated the following:

"Enclosed is 1977 tax return which we discovered was inadvertently not filed when IRS audited 1977 return. This return already reflects the disallowance of \$1161 in contributions.

This is the first time such an oversight has occurred in all our years. We trust that you will understand."

9. Petitioners protested the amount of interest asserted on the Notice of Deficiency on the ground that the Audit Division did not use the correct rate of interest for tax years 1979 and 1980.

CONCLUSIONS OF LAW

A. That the New York State income tax resident returns with City of New York personal income tax for 1978, 1979 and 1980 are deemed to have been filed on July 9, 1984, the date of this hearing. Petitioners' assertions that their 1978 income tax return was filed sometime in November of 1979 and that their refund of \$433.00 was never received is unpersuasive. The photocopy introduced in evidence by petitioners was not signed by them, while their return for the previous year (1977) was not filed until the advent of an I.R.S. audit (see Findings of Fact "7" and "8"). Moreover, it is likely that petitioners would have inquired about their refund for 1978 had they not received it after a reasonable period of time.

B. That section 607(a) of the Tax Law and T46-107.0(a) of the Administrative Code of the City of New York provide:

"Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required."

C. That compensation received in exchange for services is clearly gross income. [I.R.C. Section 61(a)(1); Paul J. O'Connor, ¶83,004 P-H Memo TC; Lloyd B. Miller, ¶81,296 P-H Memo TC]. The United States and New York State governments have the constitutional and statutory power to tax wages. See Rolland A. Neve, ¶83,007 P-H Memo TC; Alan D. Amon, 514 F.Supp. 1293 (1981); Norman D. Jones, 551 F.Supp. 578 (1982). Therefore, wages received by petitioners constituted gross income and are subject to New York State and City income taxes.

D. That section 687, subdivision (f) of the Tax Law empowers the State Tax Commission to determine that an individual taxpayer has made an overpayment of income taxes, as follows:

"Effect of petition to tax commission. -- If a notice of deficiency for a taxable year has been mailed to the taxpayer under section six hundred eighty-one and if the taxpayer files a timely petition with the tax commission under section six hundred eighty-nine, it may determine that the taxpayer has made an overpayment for such year (whether or not it also determines a deficiency for such year). No separate claim for credit or refund for such year shall be filed, and no credit or refund for such year shall be allowed or made, except --

(1) as to overpayments determined by a decision of the tax commission which has become final;..."

Subdivision (g) of said section provides, in relevant part:

"Limit on amount of credit or refund. -- The amount of overpayment determined under subsection (f) shall, when the decision of the tax commission has become final, be credited or refunded in accordance with subsection (a) of section six hundred eighty-six and shall not exceed the amount of tax which the tax commission determines as part of its decision was paid --

* * *

(2) within the period which would be applicable under subsections (a), (b) or (c), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the tax commission finds that there is an overpayment."

Section T46-187.0(f) and (g) of the Administrative Code of the City of New York is substantially identical to sections 687(f) and (g) of the Tax Law.

E. That in response to the Notice of Deficiency, petitioners timely filed a petition, thereby suspending their right to file a claim for refund.³ This Commission, however, may determine that petitioners have made an overpayment for the years at issue, whether or not it also determines a deficiency for such years. [Tax Law section 687(f) and section T46-187.0(f)].

³ Petitioners timely filed claims for refund for tax years 1979 and 1980 (Finding of Fact "4", supra).

F. That sections 687(a) of the Tax Law and T46-187.0(a) of the Administrative Code of the City of New York provide as follows:

"Limitations on credit or refund. -- (a) General. -- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid."

That although petitioners' claims for refund (IT-113X) for years 1979 and 1980 preceded the filing of their income tax returns and the issuance of the Notice of Deficiency, said claims were timely filed within the two year period provided for, supra. However, since petitioners are deemed to have filed their returns on July 9, 1984, the amount of their refunds cannot exceed the portion of their tax paid during the two years immediately preceding the filing of their claims on November 12, 1981. Since the state and city income taxes withheld from petitioners' wages in the amounts of \$3,999.90⁴ for 1979 and \$4,403.75⁵ for 1980, respectively, are considered to have been paid on April 15, 1980 and April 15, 1981, respectively, the overpayments for said years are not in excess of the amount of taxes paid and therefore are within the period of limitations set forth in sections 687(a) of the Tax law and T46-187.0(a) of the Administrative Code of the City of New York.

G. That petitioners are not entitled to a refund for tax year 1978. Although petitioners timely filed their petition under section 689 of the Tax Law (Conclusion of Law "D" supra), thereby empowering the Tax Commission to determine whether or not petitioners made an overpayment of income tax, petitioners are not entitled to a refund because if they had filed a claim for refund on

4-5 Although the original petition did not mention New York City taxes withheld, sections 687(a) and T46-187.0(a) supra refer to all taxes paid during the two years preceding the filing of a claim.

the date the Notice of Deficiency was mailed [sections 687(g)(2) and T46-187.0(g)(2)], petitioners would not have been within either the three year or two year periods of limitation provided for in section 687(a) of the Tax Law and section T46-187.0(a) of the Administrative Code of the City of New York.

H. That petitioners are entitled to itemize their deductions for the years in issue based on their New York State income tax returns filed during the hearing held therein.

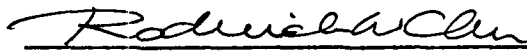
I. That Issue II is moot in view of the fact that the Audit Division must recompute the correct amount of refund and interest due to petitioners.

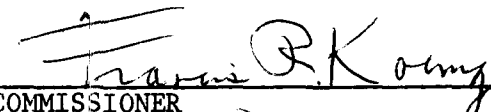
J. That the petition of Emil C. Lampe and Ethel D. Lampe is granted to the extent that they are entitled to a refund for the years 1979 and 1980. The Audit Division is directed to recompute the amount of tax due as shown on the Notice of Deficiency in accordance with Conclusion of Law "H" and to refund the amount due petitioners, together with interest lawfully due; and that, except as so granted, their petition is in all other respects denied.

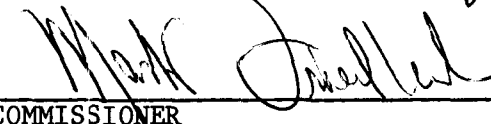
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER