

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

William C. & Claire M. Layton : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or for Refund :  
of Personal Income Tax under Article 22 of the Tax :  
Law, Unincorporated Business Tax under Article 23 :  
of the Tax Law and Nonresident Earnings Tax under :  
Chapter 46, Title U of the Administrative Code of :  
the City of New York for the Year 1976.

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 5th day of October, 1984, he served the within notice of Decision by certified mail upon William C. & Claire M. Layton the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William C. & Claire M. Layton  
Minebrook Rd. Box 216  
Far Hills, NJ 07931

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  
5th day of October, 1984.

David Parchuck

William C. Layton  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition  
of

William C. & Claire M. Layton : 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 for the years 1976 :  
through 1978 and New York City Personal Income  
Tax under Article 30 of the Tax Law for the Year :  
1976 and under Chapter 46, Title T of the Admin-  
istrative Code of the City of NEW York for the :  
Years 1977 and 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 5th day of October, 1984, he served the within notice of Decision by certified mail upon Seymour L. Baldash the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seymour L. Baldash  
49 W. 45th St.  
New York, NY 10036

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  
5th day of October, 1984.

David Parchuck

James J. O'Donnell  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

October 5, 1984

William C. & Claire M. Layton  
Minebrook Rd. Box 216  
Far Hills, NJ 07931

Dear Mr. & Mrs. Layton:

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, 722 & 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: Petitioner's Representative  
Seymour L. Baldash  
49 W. 45th St.  
New York, NY 10036  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM C. AND CLAIRE M. LAYTON	:	DECISION
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law, Unincorporated Business Tax	:	
under Article 23 of the Tax Law and Nonresident	:	
Earnings Tax under Chapter 46, Title U of the	:	
Administrative Code of the City of New York for	:	
the Year 1976.	:	

---

Petitioners, William C. and Claire M. Layton, Minebrook Road, Box 216, Far Hills, New Jersey 07931, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law, unincorporated business tax under Article 23 of the Tax Law and nonresident earnings tax under Chapter 46, Title U of the Administrative Code of the City of New York for the year 1976 (File Nos. 33572, 34149 and 34150).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 1, 1983 at 1:15 P.M. with all briefs to be filed on or before January 24, 1984. Petitioners appeared by Seymour L. Baldash, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

#### ISSUES

I. Whether the Statute of Limitations bars the Audit Division from asserting deficiencies of personal income tax, unincorporated business tax and nonresident earnings tax for the year 1976.

II. Whether the income which Mr. Layton derived from trading in cotton and sugar commodities constituted income subject to New York State personal income tax, unincorporated business tax and New York City nonresident earnings tax.

III. Whether petitioners are entitled to a refund of New York State personal income tax arising from the alleged erroneous reporting of certain transactions as subject to capital gains treatment.

FINDINGS OF FACT

1. Petitioners filed a joint New York State Income Tax Nonresident Return for the year 1976 on December 14, 1977. Mr. Layton described his occupation as a cotton broker. On this return, Mr. Layton reported his wage income and certain capital transactions. Mr. Layton also filed a New York City Nonresident Earnings Tax Return for the year 1976 on which he reported wage income and again listed his occupation as a cotton broker. Mr. Layton did not file a New York State Unincorporated Business Tax Return.

2. Petitioners filed a joint U.S. Individual Income Tax Return for the year 1976. Mr. Layton listed his occupation as a cotton broker on this return. A copy of a federal Schedule C "Profit or (Loss) From Business or Profession" for Mr. Layton was attached to this return. Mr. Layton's principal business activity was described as cotton and sugar trading and his product was described as services.

3. On February 17, 1981, the Audit Division issued three notices of deficiency to petitioners for the year 1976. One Notice of Deficiency asserted a deficiency of personal income tax in the amount of \$16,734.58, plus penalty and interest of \$6,840.36, for a total amount due of \$23,574.94. The penalty was asserted pursuant to section 685(b) of the Tax Law for negligence. The alleged deficiency of personal income tax was calculated, in part, by including

as ordinary income the net gain derived from petitioner's cotton and sugar transactions in the amount of \$93,189.36. The Audit Division also increased the amount of income subject to capital gains treatment and applied the twenty percent modification which was in effect during the period in issue.

4. The second Notice of Deficiency issued to petitioners asserted a deficiency of New York State unincorporated business tax for the year 1976 in the amount of \$4,197.61, plus penalty and interest in the amount of \$3,583.73, for a balance due of \$7,781.34. The alleged deficiency was premised upon including as unincorporated business gross income Mr. Layton's net gains derived from his sugar and cotton transactions of \$93,189.36 and subtracting his net loss as reported on his federal Schedule C. The penalties were asserted for failure to file an unincorporated business tax return and failure to pay the tax shown due on said return, pursuant to, respectively, sections 685(a)(1) and (a)(2) of the Tax Law, and for negligence pursuant to section 685(b) of the Tax Law.

5. The third Notice of Deficiency asserted a deficiency of New York City nonresident earnings tax for the year 1976 in the amount of \$614.08, plus penalty and interest of \$251.01, for a balance due of \$865.09. To the extent in issue herein, the alleged deficiency of tax and penalty, asserted pursuant to section 685(b) of the Tax Law, were based upon the same considerations on which the alleged deficiency of New York State unincorporated business tax were based.

6. Mr. and Mrs. Layton were residents of New Jersey during the year in issue.

7. During 1976, Mr. Layton owned a seat on the Commodities Exchange in New York City. Mr. Layton had an arrangement with four or five brokerage firms wherein he would execute orders on behalf of the firms in exchange for a \$3.00

fee per transaction. Mr. Layton had to be physically present in New York City in order to execute a transaction and earn the \$3.00 fee. All of the income reported by Mr. Layton on his federal Schedule C was derived from his executing orders on behalf of the brokerage firms.

8. Mr. Layton was listed in the telephone directory as having an office in New York City at 4 World Trade Center. This was the address of the Commodities Exchange in New York City. Mr. Layton did not have his own office at the Commodities Exchange. However, there was a desk and telephone which he was permitted to use. If someone called Mr. Layton at his listed number at the Commodities Exchange and he was not present in New York City at the time the call was placed, a clerk at the Commodities Exchange would take a message and call Mr. Layton at home.

9. During the year in issue, Mr. Layton traded for his own account. When Mr. Layton traded for his own account, he would do so by contacting a brokerage firm from an office in his home in New Jersey. This office had a computer and a telephone with which Mr. Layton would contact the Commodities Exchange and brokerage firms.

#### CONCLUSIONS OF LAW

A. That, with certain exceptions, an assessment of New York State personal income tax, unincorporated business tax and New York City nonresident earnings tax must be made within three years after a return is filed [Tax Law §§683(a); 722; Administrative Code of the City of New York §U46-33.0(a)].

B. That one of the exceptions to Conclusion of Law "A" arises when no return is filed. Under such circumstances, tax may be assessed at any time (Tax Law §§683(c)(1)(A); 722). Since Mr. Layton did not file a New York State

Unincorporated Business Tax Return for 1976, the Notice of Deficiency which asserted a deficiency of New York State unincorporated business tax was timely.

C. That the trading which Mr. Layton conducted from his home for his own account in cotton and sugar commodities was not derived from or connected with a New York State or New York City source. Accordingly, the Audit Division improperly included the sum of \$93,189.36 in determining the income subject to New York State personal income tax, unincorporated business tax and New York City nonresident earnings tax [Tax Law §632(d), 703(d) and Administrative Code of the City of New York §U46-1.0(f)].

D. That Tax Law §683(d) provides, in pertinent part, that:

"The tax may be assessed at any time within six years after the return was filed if --

"(1) an individual omits from his New York adjusted gross income or the sum of his items of tax preference an amount properly includible therein which is in excess of twenty-five per cent of the amount of New York adjusted gross income or the sum of the items of tax preference stated in the return...

\* \* \*

For purposes of this subsection there shall not be taken into account any amount which is omitted in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the tax commission of the nature and amount of the item of income or tax preference."<sup>1</sup>

Mr. Layton has established that, based on Conclusion of Law "C", supra, he did not omit twenty-five percent of his New York adjusted gross income or New York City nonresident earnings. Therefore, the deficiency of New York State personal income tax and New York City nonresident earnings tax was untimely [Tax Law §683(a); Administrative Code of the City of New York §U46-33.0(a)].

---

<sup>1</sup> A similar provision appears in the Administrative Code of the City of New York §U46-33.0(c).



E. That section 687(f) of the Tax Law provides, in part:

"(f) 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;"

F. That in accordance with section 687(f) of the Tax Law, the New York State Tax Commission may determine that petitioners made an overpayment of tax; however, in accordance with section 687(g)(2) of the Tax Law, said overpayment shall not exceed the amount of tax paid within the period which would be applicable under subsections (a), (b) or (c) of section 687 of the Tax Law 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 an overpayment is found.


G. That since the Notice of Deficiency of New York State personal income tax was untimely (see Conclusion of Law "D", supra), petitioners claim for a refund based upon the alleged erroneous reporting of transactions subject to capital gains treatment is also barred by the Statute of Limitations (Tax Law §§687(a) and (g)).


H. That the petition of William C. and Claire M. Layton is granted to the extent that the notices of deficiency are cancelled.

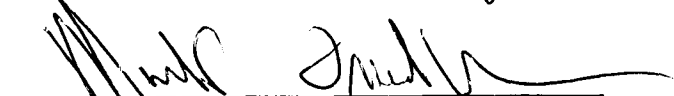
DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER