

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Gilbert E. & Theresa M. McCormack :  
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 Year :  
1976. :  
\_\_\_\_\_ :

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 25th day of May, 1984, he served the within notice of Decision by certified mail upon Gilbert E. & Theresa M. McCormack, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Gilbert E. & Theresa M. McCormack  
394 N. Little Tor Rd.  
New City, NY 10956

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  
25th day of May, 1984.

David Parchuck

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Authorized to administer oaths  
pursuant to Tax Law section 174

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

May 25, 1984

Gilbert E. & Theresa M. McCormack  
394 N. Little Tor Rd.  
New City, NY 10956

Dear Mr. & Mrs. McCormack:

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

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In the Matter of the Petition  
of  
GILBERT E. AND THERESA M. McCORMACK  
for Redetermination of a Deficiency or for  
Refund of Personal Income Tax under Article 22  
of the Tax Law for the Year 1976.

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DECISION

Petitioners, Gilbert E. and Theresa M. McCormack, 394 North Little Tor Road, New City, New York 10956, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1976 (File No. 37532).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 26, 1983 at 1:45 P.M., with all briefs to be submitted by September 8, 1983. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined that petitioners paid only \$12,400.00 on 1976 estimated taxes.

FINDINGS OF FACT

1. On October 18, 1979, the Audit Division issued a Notice and Demand for Payment of Income Tax Due against petitioners, Gilbert and Theresa McCormack, assessing 1976 personal income tax due of \$10,000.00 plus interest because "estimated tax payments and/or credits do not agree with your estimated tax account".

2. Petitioners made an overpayment of \$7,606.00 on their 1980 New York personal income tax return which they elected to have refunded. However, the Processing Division applied such overpayment against the 1976 personal income tax plus interest claimed due.

3. Petitioners timely filed a Claim for Credit or Refund of Personal Income Tax in the amount of \$7,606.00 which petitioners claimed was improperly applied against the 1976 tax claimed due by the Audit Division as noted in Finding of Fact "1", supra.

4. On March 29, 1982, the Audit Division disallowed petitioner's refund claim.

5. Petitioners timely filed a 1976 New York income tax return on which they claimed "State Estimated Tax Paid" of \$22,400.00. They applied such amount against tax reported due of \$9,032.00 and \$725.00 for petitioner Gilbert McCormack and Theresa McCormack, respectively, and also claimed an overpayment of \$12,735.00.<sup>1</sup> They directed on the return that the overpayment be credited on 1977 estimated tax.

6. The Audit Division alleges that, according to its records, petitioners paid only \$12,400.00 on 1976 estimated tax. Abram J. Cuttler, Director of the Processing Division, wrote to petitioner Theresa McCormack in his letter dated November 5, 1981, Exhibit "I", herein, the following:

"The record of your 1976 estimated tax account is consistent with a declaration of \$12,400. Your overpayment from 1975 of \$5,926, plus your second installment payment of \$274 totalled \$6,200 which corresponds to fifty percent of the declared amount, which was payable as of June 15. Your third and fourth installments of \$3,100 each are also consistent with the payments due to complete the declared total of \$12,400."

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<sup>1</sup> The income of petitioner Gilbert McCormack is derived from a substantial law practice in Rockland County, New York. His wife, petitioner Theresa McCormack, is employed by the law practice as an office manager.

7. Petitioners' 1976 federal income tax return was audited and, according to petitioners' accountant, Morris Danzger, "Evidence of 1976 New York State estimates in the amount of \$22,400 was requested (by the Internal Revenue Service) and substantiated". Mr. Danzger explained that the Internal Revenue Service "carefully examined all items of deductions". Mr. Danzger also testified that since 1972, petitioners have "consistently made substantial payments at the end of the year".

8. Petitioner Theresa McCormack testified that she presented all of the taxpayers' records concerning the 1976 tax year to the federal auditor who conducted the audit noted in Finding of Fact "7", supra. When the federal audit was completed, she was advised by the Internal Revenue Service auditor that retention of the 1976 tax records was no longer necessary. Mrs. McCormack also testified that she was unable to produce a cancelled check showing payment on 1976 estimated tax of \$10,000.00 because she probably made such payment by a bank check after cashing in a six month certificate of deposit. She did business with several banks and testified that she was unable to obtain documentation from any bank to substantiate such payment. However, no evidence was introduced showing a specific certificate of deposit account that was the source for the \$10,000.00 payment at issue.

9. It is unclear from the record herein whether petitioners' position is that the contested payment of \$10,000.00 on 1976 estimated tax was made in December, 1975 or December, 1976. Petitioner Theresa M. McCormack was asked the following question on direct examination at the hearing herein: "In 19-- for the 1976 New York State income tax, did you make a payment on account of

the estimated tax in December of either '75 or '76?". She responded, "To the best of my knowledge, yes.". In their brief, petitioners argue that the contested \$10,000.00 payment was made in December, 1975.

10. The petitioners further argue that laches bars the Audit Division from demanding additional 1976 personal income tax because it was not until October 18, 1979 that the Audit Division questioned the amount of 1976 estimated taxes which they reported on their tax return as having been actually paid. By then, petitioners contend it was too late for them to substantiate their payments on estimated tax.

11. On or about December 31, 1982, petitioners paid an additional \$6,304.67 under protest towards the 1976 income tax plus interest claimed due by the Audit Division which added to the overpayment of \$7,606.00 on their 1980 tax return (which was applied by the Processing Division to the tax at issue as noted in Finding of Fact "2", supra) equals the tax and interest alleged to be due herein. It was not until May 3, 1983 that petitioners were advised by Alexander Weiss, the Audit Division's representative, that there was an outstanding balance due of \$1,177.62. It appears that this alleged balance is, in fact, for penalty under Tax Law §685(a)(3).

#### CONCLUSIONS OF LAW

A. That pursuant to Tax Law §689(e), the burden of proof is imposed upon petitioners to prove that they made the \$10,000.00 payment on 1976 estimated taxes which is at issue.

B. That Tax Law §656(a) and 20 NYCRR 150.1 provide for a four installment payment procedure for the payment of estimated tax which adds to the petitioners' burden to show that a fifth payment was made in December, 1975 or December, 1976. This burden is further compounded because the estimated tax payments

recorded by the Processing Division apparently correspond with the total amount reported on petitioners' declaration which was filed with their first payment on estimated taxes as noted in Finding of Fact "6", supra.

C. That the simplest way for petitioners to sustain their burden would have been to present a cancelled check or receipt (if payment was made by a bank check after liquidating a certificate of deposit account) showing the \$10,000.00 payment. However, petitioners were unable to produce such evidence.

Petitioners sought instead to sustain their burden by the introduction of the following evidence: (1) the testimony of their accountant who explained that petitioners made substantial payments on New York estimated tax in December of every year; (2) the testimony of petitioner Theresa McCormack who similarly testified that petitioners made substantial payments on estimated tax in December of every year; and (3) testimonial evidence that the Internal Revenue Service audited petitioners' 1976 federal income tax return and their deduction for payments of New York income taxes (which would include payments made in 1976 on estimated tax) was allowed.

Little weight can be given to the fact that the Internal Revenue Service audited petitioners' 1976 federal income tax return because petitioners' basic argument, as set forth in their brief herein, is that the \$10,000.00 payment on 1976 estimated tax in dispute was made in December, 1975. If so, a deduction for such payment would have been properly claimed, under Internal Revenue Code §164, on their 1975 federal income tax return since the payment was made in 1975 (albeit towards a 1976 tax liability). Therefore, the fact that the Internal Revenue Service allowed petitioners' deduction for New York income tax paid in 1976 is irrelevant.

Furthermore, the apparent inability of petitioners to clearly specify whether the \$10,000.00 payment at issue was made in December, 1975 or December, 1976, as noted in Finding of Fact "9", supra, thwarts the testimony of petitioners' accountant and petitioner Theresa McCormack. Finally, the fact that petitioners made a substantial December payment on estimated tax for years prior and subsequent to 1976 is only minimally relevant in establishing whether a December payment was actually made for the tax year at issue.

D. That we note that the state cannot be estopped from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority. G.H. Walker & Co. v. State Tax Commission, 403 N.Y.S.2d 811. Furthermore, the Notice and Demand noted in Finding of Fact "1", supra, was issued on October 18, 1979 (approximately two and one-half years after the filing of the return) which is within the three year period of limitation on assessment generally prescribed by Tax Law §683(a). In addition, petitioners were required under Tax Law §658(a) and 20 NYCRR 152.8 to retain records for at least three years after the filing of their 1976 return. Therefore, we cannot fault the Audit Division because petitioners apparently relied on the advice of an Internal Revenue Service auditor that it was no longer necessary for them to retain 1976 tax records.

E. That petitioners acted in good faith in asserting their defense to the tax claimed due and their failure to pay such tax within ten days of the date of the Notice and Demand was the result of their honest belief that they had paid such tax (although they have not sustained their burden of proving such payment). Accordingly, reasonable cause did exist for such failure and the Audit Division is directed to cancel the penalty asserted pursuant to section 685(a)(3) of the Tax Law.




F. That the petition of Gilbert E. and Theresa M. McCormack is granted to the extent noted in Conclusion of Law "E", but, in all other respects, is denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 25 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER